IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CHRISTIAN PINEDA,
Appellant,

v.

ARIZONA DEPARTMENT OF
CORRECTIONS; GAIL RITTENHOUSE;
ARIZONA STATE PERSONNEL BOARD;
JOSEPH SMITH; JIM THOMPSON; MARK ZISKA,
Appellees.

CARLOS NIETO,
Appellant,

v.

ARIZONA DEPARTMENT OF
CORRECTIONS, GAIL RITTENHOUSE;
ARIZONA STATE PERSONNEL BOARD;
JOSEPH SMITH; JIM THOMPSON; MARK ZISKA,
Appellees.

No. 1 CA-CV 15-0235
1 CA-CV 15-0236
(Consolidated)
FILED 5-24-2016

Appeal from the Superior Court in Maricopa County
No. LC2014-000165-001
LC2014-000166-001
The Honorable Crane McClennen, Judge

AFFIRMED

COUNSEL

Bihn & McDaniel, PLC, Phoenix
By Martin A. Bihn, Donna M. McDaniel
Counsel for Appellants

Arizona Attorney General's Office, Phoenix
By Michelle Kunzman
Counsel for Appellee DOC

Jackson Lewis, PC, Phoenix
By Jeffrey A. Bernick
Counsel for Appellee Board

MEMORANDUM DECISION

Presiding Judge Diane M. Johnsen delivered the decision of the Court, in which Judge Patricia A. Orozco and Judge Kenton D. Jones joined.

J O H N S E N, Judge:

¶1 Christian Pineda and Carlos Nieto appeal the superior court's order affirming decisions by the Arizona Department of Corrections ("DOC") and the Arizona State Personnel Board (the "Board") to terminate their employment. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Pineda and Nieto worked as correctional officers in the Lewis prison. In July 2013, Nieto suspected an inmate waiting for transport to another prison possessed contraband, and asked him to submit to a strip search. After the inmate refused, Nieto tried to contact a supervisor, but was unsuccessful. Before Nieto was able to contact the shift commander, three canine officers, including Pineda and a supervisor sergeant, arrived. Accompanied by Pineda and Pineda's service dog, Nieto took the inmate into a holding cell to conduct the search. Nieto began to remove the inmate's leg irons and belly chain so that he could undress. As soon as the inmate's belly chain was removed, the inmate lunged at Nieto. Nieto pinned the inmate against the wall as the inmate continued to try to strike Nieto with his elbow. Pineda and Nieto tried to physically control the

inmate, with the inmate ending up on the ground and Nieto on top of him. During the struggle, without any command from Pineda, the service dog jumped on the inmate and scratched and muzzle-punched him. As Nieto remained atop the inmate, the sergeant pulled the inmate out of the cell by his legs, and officers eventually restrained the inmate. None of the officers involved reported the incident.

¶3 Following an internal investigation, DOC sent letters to Pineda and Nieto on October 4, 2013, informing them they were charged with incompetence for failure to perform required duties, Class 3; neglect of duty for disregarding directives, policies, guidelines or procedures, Class 4; failure to report incidents of misconduct, Class 4; disregarding directives, policies, guidelines, or procedures, Class 4; and using or permitting the use of unnecessary force toward an inmate, Class 7. Pineda and Nieto each responded to their respective notice of charges on October 9. On October 10, DOC sent notices to Pineda and Nieto informing them of their dismissals. Of the seven Lewis employees who were involved in the incident with the inmate, Pineda, Nieto and the sergeant supervisor were dismissed, and the other four individuals received 40-hour suspensions.

¶4 Pineda and Nieto appealed their dismissals to the Board. After a hearing, the hearing officer made findings of fact and conclusions of law and recommended the dismissals be reduced to 80-hour suspensions. DOC filed a timely objection to the hearing officer's proposed findings and conclusions, and Pineda and Nieto moved to strike the objection. The Board adopted the hearing officer's findings of fact, but rejected her conclusions of law, concluding DOC had proven by a preponderance of the evidence the material facts on which the dismissals were based and that the dismissals were not arbitrary and capricious. The Board denied Pineda and Nieto's appeals and found their motion to strike was moot. Pineda and Nieto appealed to the superior court, which affirmed the dismissals. Pineda and Nieto timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-2101(A)(1) (2016) and -913 (2016).[1]

DISCUSSION

¶5 We review *de novo* a superior court order affirming a decision by the Board. *Carlson v. Ariz. State Pers. Bd.*, 214 Ariz. 426, 430, ¶ 13 (App. 2007). "The superior court may reverse an agency's decision only if the

[1] Absent material revision after the relevant date, we cite a statute's current version.

court finds the decision illegal, arbitrary, or an abuse of the agency's discretion." *Siler v. Ariz. Dep't of Real Estate*, 193 Ariz. 374, 378, ¶ 13 (App. 1998).

A. Alleged Denial of Due Process.

¶6 Pineda and Nieto first argue they were denied due process because of a variation between the grounds for discipline stated in the initial notice of charges and the actual basis for their terminations. We review *de novo* questions of law, including alleged constitutional violations. *Carlson*, 214 Ariz. at 430, ¶ 13. Public employees who can be dismissed only for cause have a constitutionally protected property interest in their employment and are entitled to due process before they can be terminated. *Id.* at 430, ¶ 14. Due process requires notice and an opportunity to be heard, meaning the employee must have notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges. *Id.* at 430, ¶ 15.

¶7 Pineda and Nieto argue that although the notices of charges accused them of using unnecessary force in executing a strip-search to which the inmate had agreed, the theory underlying DOC's ultimate decision to affirm their dismissals was that they created an unnecessarily dangerous situation by engaging with the inmate in the holding cell before he had agreed to be searched. As Pineda and Nieto argue, a substantial variance between the stated grounds for termination and the actual grounds on which discipline is imposed can constitute a denial of due process. *See id.* at 432-33, ¶¶ 21-22. But in cases in which a substantial variance has been found to amount to a due-process violation, the discrepancy is so great that it undermines the employee's ability to present an adequate defense to the charge. *See id.* at 431-32, ¶¶ 19-20 (notice of charges alleged employee had violated sexual harassment policy; termination was based on lying, giving preferential treatment, and conflict of interest). Here, the stated grounds for discipline and the eventual basis for termination centered on the same incident, which was described in great detail in both the notices of charges and the notices of dismissal. Because Pineda and Nieto were not deprived of a meaningful opportunity to present a defense to those charges, their due-process rights were not violated.

¶8 The notices of charges made clear that discipline was based on use of force that occurred after the officers entered the holding cell and the inmate "lunged" at Nieto. At that point, whether the inmate may have consented to a search moments before was of no consequence. As Pineda testified, the consent to search that the inmate gave after talking to the

sergeant was tenuous: "But even though he agreed, it seemed like he was going to comply with the strip, but he was still cussing at several officers. So even though he said he would strip out, his behavior and his demeanor didn't match that he wanted to strip out." The warden testified that to prevent an altercation in the event the inmate was "feigning compliance," under the circumstances, the officers should have handcuffed the inmate through a port in the door before entering the holding cell. The warden testified that although there is a progression of force to be used in such circumstances, the officers skipped over lesser steps to use force that was unreasonable, given the circumstances. Relevant DOC policy states, "Staff shall ensure they have used every reasonable effort possible to resolve the situation prior to resorting to the application of physical force." The warden testified the officers failed to follow that policy: "There was absolutely no reason for us to engage in the physical activity as the reports indicate at that time. We tried nothing of a lesser amount to try and gain compliance with that individual."

¶9 A DOC investigator testified the inmate said an officer in the cell with him (Nieto) repeatedly "knocked" his head against the cell wall, then slammed him down to the floor and shoved his face into the face of the service dog. As the sergeant dragged the inmate, face down, out of the cell by his feet, Nieto was on top of the inmate. Although Pineda did not order his service dog to contact the inmate, he let go of the dog's leash and did not promptly order the dog to stop muzzle-punching the inmate.

¶10 Although Pineda and Nieto dispute whether the inmate complied with the search, as the notices of charges, the testimony at the hearing and the notices of dismissal made clear, the issue of the inmate's consent was ancillary to the reasonableness of the physical force Pineda and Nieto used. Pineda and Nieto were sufficiently apprised of the grounds for the discipline; as a result, their due-process rights were not violated.

B. Alleged Disparate Treatment.

¶11 Pineda and Nieto argue DOC acted arbitrarily and capriciously when it punished them more severely than the other correctional employees who were involved. "This court will not substitute its judgment for that of the Personnel Board on whether suspension or dismissal is a more appropriate response to specific employee misconduct." *Johns v. Ariz. Dep't of Econ. Sec.*, 169 Ariz. 75, 81 (App. 1991).

¶12 Pineda and Nieto point to another correctional officer who came into physical contact with the inmate as he was being dragged out of

the holding cell and yet was given only a 40-hour suspension. As the warden testified, however, the employees involved were disciplined according to their respective levels of involvement in the incident. Because the other officer was responding to the situation created by Pineda and Nieto and was not involved in the initiation or the escalation of force, he was not disciplined as severely. "A disciplinary action is not arbitrary if it falls within the range of permissible discipline." *Ariz. Dep't of Corr. v. State Pers. Bd.*, 202 Ariz. 598, 600, ¶ 10 (App. 2002). Pineda and Nieto were charged with a Class 7 violation, which carries a discipline range from an 80-hour suspension to dismissal. Because dismissal was within the permissible range of punishment for the charges against them, we cannot say the decisions to terminate them were arbitrary or capricious.

C. Alleged Failure to Find Just Cause for Termination.

¶13 Pineda and Nieto argue DOC failed to comply with A.R.S. § 38-1101 *et seq.*, which mandates that law enforcement officers may be disciplined only for just cause. *See* A.R.S. § 38-1103(A) (2016).[2] Just cause means that "[t]he discipline is not excessive and is reasonably related to the seriousness of the offense and the officer's service record." A.R.S. § 38-1101(7)(d) (2016).[3] Pineda and Nieto argue that because the hearing officer found that "[t]he warden did not really consider past discipline in determining the level of discipline, dismissal," DOC failed to comply with the statute.

¶14 Pineda and Nieto correctly point out that as correctional officers, they fall within the definition of "law enforcement officers" and are entitled to the protections of Title 38. *See Berndt v. Ariz. Dep't of Corr.*, 238 Ariz. 524, 528, ¶ 12 (App. 2015). Contrary to Pineda's and Nieto's contention, however, the warden testified he did review their service records in determining the discipline to impose. Other evidence in the record also indicated that the correctional officers' service records were taken into account. In both the notices of charges and the notices of dismissal, DOC referenced Pineda's and Nieto's prior disciplinary

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[2] At the time of the disciplinary actions affecting Pineda and Nieto, the statute requiring a finding of just cause was contained in A.R.S. § 38-1104(A); it has since been moved to A.R.S. § 38-1103(A).

[3] At the time of the disciplinary actions, the statute was contained in A.R.S. § 38-1107(C)(2)(d) and defined "just cause" to mean: "The discipline is not excessive and is reasonably related to the seriousness of the offense, the probation officer's service record or any other relevant factor."

incidents. Pineda's and Nieto's performance evaluations for the preceding years also were included in administrative investigation disciplinary worksheets the warden completed and signed in late September 2013.

D. Timing of Decision to Terminate Nieto.

¶15 Nieto further argues he was denied due process because the warden decided to dismiss him before giving him an opportunity to respond to the notice of charges. In support of this contention, Nieto points to a complaint worksheet disciplinary recommendation form that contains three sections, each bearing the signature of the warden and a date. Although two signature blocks bear the date of October 10, 2013, one of the signature blocks is dated September 19, 2013. Nieto contends this shows the warden had decided to dismiss him before he was given an opportunity to respond to the charges. Due process entitles an employee to a meaningful opportunity to be heard. *See Carlson*, 214 Ariz. at 431, ¶ 17. But here, Nieto was given a meaningful opportunity to be heard before his dismissal. Although the September 19 date appears to be in error, even if the worksheet had been partially completed on September 19, the discipline decision was not effective until the warden issued it, and that did not happen until October 10.

E. DOC's Objection to the Hearing Officer's Findings.

¶16 Pineda and Nieto finally argue the Board erred by allowing DOC to file an objection to the hearing officer's findings of fact and conclusions of law. Although they concede that Arizona Administrative Code ("A.A.C.") R2-5.1-103(Q) allows a party to object to a hearing officer's proposed findings, they contend that the DOC's objection went beyond what is permitted, by including improper legal argument and an alternate set of facts. A.A.C. R2-5.1-103(Q) states, "The appellant or respondent may file written objections, but not post-hearing evidence, to the hearing officer's proposed findings of fact or conclusions of law with the Board[.]"

¶17 Contrary to Pineda's and Nieto's contentions, however, DOC's three-page objection did not contain any new evidence, but merely recounted testimony and evidence that had been presented to the hearing officer. As such, the Board did not err by allowing DOC to file a written objection to the hearing officer's findings and declining to address the motion to strike.

CONCLUSION

¶18 For the foregoing reasons, we affirm the superior court's judgment affirming the terminations.