SONOMA COUNTY SHERIFF'S OFFICE

MARK ESSICK
Sheriff-Coroner

JAMES NAUGLE
Assistant Sheriff
Law Enforcement Division

EDDIE ENGRAM
Assistant Sheriff
Detention Division

HEIDI KEITH
Chief of Financial and
Administrative Services

INTEROFFICE MEMORANDUM

DATE: AUGUST 25, 2020

TO: DAVE BERGES

FROM: CAPTAIN MIKE MERCHEN

SUBJECT: SKELLY HEARING 19-IA-0005

On August 18, 2020, we met to conduct a Skelly Conference regarding your Notice of Intended Disciplinary Action related to 19-PP-0005. Your appointing authority, Sheriff Mark Essick, proposed disciplinary action against you consisting of termination of your employment with the Sonoma County Sheriff's Office.

The proposed disciplinary action, in the opinion of your appointing authority constitutes grounds for disciplinary action pursuant to the Rules of the Civil Service Commission, County of Sonoma, and/or pursuant to the General Rules and Regulations of the Sonoma County Sheriff's Office, as listed below.

Rules of the Civil Service Commission

Rule 10.3: **Dismissals**

1. **Dismissal of Permanent Employee**

Any employee who has attained permanent status may be dismissed for reasonable cause including, but not limited to:

(3) Conduct which brings discredit to the County;

(11) neglect of duty;

(14) Failure to meet reasonable work performance standards and requirements;

(16) Hostile and discourteous treatment of the public or other employee;

(22) Sexual harassment of or unlawful discrimination against another employee or applicant for employment.

The following Sonoma County Sheriff's Office Office-Wide Policies and Procedures:

Rules and Regulations Regarding Conduct

5. PROCEDURES

B. DUTIES CONDUCT AND RESPONSIBILITY

3. Obey Policies and Procedures: Members shall obey and carry out all lawful Sheriff's Office and County policies, procedures, and other orders whether written or oral. Specifically:

Discrimination and Harassment, Specifically:

Discrimination and harassment are defined under this policy as verbal, visual, or physical conduct that ridicules, insults, intimidates, or shows hostility or aversion toward an individual because of his **race, religion, color, gender, sexual orientation, disability, medical condition, marital status, age, military status, national origin or ancestry.**

11. Conduct Toward Other Members: All members shall treat superior officers, subordinates and associates with respect. They shall be courteous and civil at all times in their relationships with one another.

17. Insubordination: Failure or deliberate refusal of any member to obey a lawful order given by a supervisor is insubordination. Giving false or misleading statements, misrepresenting or omitting material information to a supervisor or other person in a position of authority in connection with any investigation or in the reporting of Sheriff's Office related business. Ridiculing a supervisor or his order is also insubordination.

C. ADDITIONAL DUTIES OF SHERIFF'S OFFICE MANAGERS AND SUPERVISORS

1. Supervise and/or manage subordinates, so as to improve their efficiency and quality of performance by:

c. Provide effective leadership, guidance and control conducive to effective performance and high morale.

e. Assume responsibility for the proper conduct and discipline of subordinates.

The alleged conduct also constitutes a violation of the County of Sonoma Equal Employment Opportunity Policy and Complaint Procedure, including, but not limited to Section III, subsections:

A: The County of Sonoma is committed to the principle that equal employment opportunity in the public service of the County must be afforded to all persons regardless of race, color, ancestry (including language use), national origin, citizenship, ... sex (which is defined to include gender (including sex stereotyping), and also including a person's gender identity (i.e. a person's identification as male, female, a gender different from the person's sex at birth, or transgender); gender expression (i.e. a person's gender-related appearance or behavior, whether or not stereo-typically associated with the person's sex at birth); transgender (i.e. a person whose gender identity differs from the person's sex at birth); pregnancy or medical conditions related to pregnancy; childbirth or medical conditions related to childbirth; breastfeeding or medical conditions related to breastfeeding; and sexual orientation), marital or domestic partner status... or any other legally protected category, as required by applicable federal and state laws. No person shall suffer discrimination, harassment, or retaliation in his or her employment or with respect to any term or condition of employment by any County employee, manager or supervisor or by any volunteer, vendor, contractor or other third party who may be in the workplace by reason of such person's status in one or more of the protected classifications as enumerated above.

C. It is the policy of the County of Sonoma to provide for a work environment free from unwelcome harassment resulting from an individual's status in one or more of the protected classes enumerated in Paragraph A above. This policy includes, but is not limited to, ensuring that the workplace is free from behavior constituting sexual harassment as defined below. This anti-harassment policy applies to all employees, including permanent, probationary, extra help, part-time and temporary employees and volunteers and paid and unpaid interns. Harassment of an individual because of their status in a protected class, including but not limited to sexual harassment, is an unlawful employment practice prohibited by state and federal law. It is also unapproved and unacceptable work behavior that will not be tolerated by the County. County employees, managers, supervisors, contractors, vendors, volunteers, interns and all other third parties who may be in the workplace are expected to adhere to a standard of conduct while on the job or on County property that consists of respect and courtesy towards other employees and persons. All such persons shall under no circumstances engage in behavior which constitutes harassment of an individual because of their status in a protected classification, including but not limited to, sexual harassment. County officials and employees who are found to committed workplace harassment will be subject to firm disciplinary action up to and including termination of employment. Anyone who engages in unlawful workplace harassment may be personally liable for such conduct and will not be entitled to indemnification and defense in those cases in which the Board of Supervisors determines that such conduct falls outside the scope of employment.

E. Prohibited Conduct: Under no circumstances shall employees engage in behavior which constitutes discrimination or harassment (including, but not limited to sexual harassment) of an individual because of their membership in a protected category or retaliation against an employee who, in good faith, makes a complaint, raises a concern, provides information, or otherwise assists in an EEO investigation, complaint or proceeding related to any alleged violation of this policy. Employees who engage in such conduct may be subject to disciplinary action, up to and including termination of employment.

Section IV defines "sexual harassment" and "other unlawful harassment" to include: Where unlawful conduct unreasonably interferes with an employee's work performance or creates an intimidating, hostile or otherwise offensive working environment. The type of conduct that may constitute sexual harassment when it occurs under the foregoing circumstances includes making unsolicited written or oral communications and physical or visual contact with sexual overtones (e.g. making, sending, or displaying sexually

suggestive or obscene letters, notes, invitations, slurs, jokes, gestures, objects, pictures, cartoons or posters). Note that conduct may constitute sexual harassment even when the harassing conduct was not motivated by sexual desire. Unlawful harassment is unwelcome or offensive conduct with the purpose or effect of unreasonably interfering with an individual's work performance, or which creates an intimidating, hostile or offensive working environment that is motivated by or directed to an employee on the basis of the employee's race, color, ancestry, national origin, religious creed, belief or grooming, sex (including sexual orientation, gender identity, gender expression, transgender, pregnancy, childbirth, medical conditions related to pregnancy, childbirth or breast feeding), marital status, age, medical condition, physical or mental disability, genetic information, military or veteran status, or any other legally protected category.

Prior to your Skelly Conference, I reviewed the following reference materials:

- Investigation 19-PP-0005, which included all of the attached documents, memorandums, audio recordings, NOIDA and related Office and County policies and procedures.

During your hearing, your representative, Attorney Sean Currin (Mastagni and Holstedt) challenged the timeliness of the investigation as related to the Peace Officer Bill of Rights, Government Code section 3304 (d)

> Except as provided in this subdivision and subdivision (g), no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. This one-year limitation period shall apply only if the act, omission, or other misconduct occurred on or after January 1, 1998. In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed disciplinary action within that year, except in any of the following circumstances:

Mr. Currin also argued that the proposed discipline is disproportionate to the alleged violations and requested the discipline be reduced.

Following your Skelly Conference, I reviewed the information you emailed to me on August 19, 2020 which included performance evaluations, letters of appreciation, emails and hand written notes you received over the course of your career.

I also reviewed information your attorney, Sean Currin emailed to me on August 21, 2020 which consisted of legal definitions of unavailable from the California Code of Civil Procedure, California Evidence Code and Rules of Federal Evidence.

I consulted with County Counsel regarding Government Code 3304. I reviewed the entire case file again to weigh the evidence presented against the violations cited, as well as to evaluate the level of discipline related to the alleged violation.

I took into consideration the verbal presentation made by you and Mr. Currin. I also considered the following mitigating circumstances when making my final decision: your overall length of service (tenure), your performance since being employed by this Office, and the fact you do not have any previous record of any disciplinary action imposed against you.

Based on the evidence presented in the investigation, I concluded that you engaged in conduct which brings discredit to the County through the use of inappropriate and offensive language including the words "gay," "fag," and "porch monkey." During your Skelly conference, you denied using the words "porch monkey," however during your interview with Sergeant [redacted] you stated, "is it possible that I said porch monkey? I, I guess it's very possible 'cause I was pissed off." Additionally, witnesses reported hearing you use those terms.

I concluded that your actions constitute a significant neglect of duty. Neglect of duty references the neglect or failure on the part of a public officer to do and perform some duty or duties laid on him / her as such by virtue of his office or which is required of him by law. In this case, your neglect of duty includes insubordination, failure to supervise subordinates so as to improve their efficiency and quality of performance, harassment and other improper conduct toward other members.

Despite your history of exemplary performance evaluations and commendations, it is evident that you failed to meet reasonable work performance standards and requirements for a County of Sonoma employee, as well as those for a member of the Sonoma County Sheriff's Office.

I concluded that you engaged in behavior that constitutes hostile and discourteous treatment through the use of the language indicated above.

I concluded that you engaged in behavior that constitutes sexual harassment against another employee through the use of the language indicated above.

The investigation has proven that you are in violation of the Sheriff's Office policies cited, including to obey policies and procedures, discrimination and harassment, conduct toward other members and insubordination. The investigation has also proven that you are in violation of Sheriff's Office policy related to additional duties of managers and supervisors, specifically to provide effective leadership conducive to effective performance and high morale. There is also sufficient evidence to sustain a violation of the County of Sonoma Equal Employment Opportunity Policy.

In consideration of the likelihood of this type behavior recurring, my review of this case file shows a pattern of you expressing frustration and anger that leads to insubordinate language when you

disagree with management decisions or you perceive to be slighted by management. During your interview with Sergeant Doherty you stated that the words "gay" and "fag" are common for you to use. You also indicated that you use the terms "monkey" or "fucking monkey." During that interview you explained "what I meant by that is you're being stupid." During your Skelly conference you told me it means "you're being an idiot." Neither meaning is acceptable for a Sheriff's Office employee to use at any time, and when directed toward a supervisor is most certainly insubordination. When used in an audience that includes peers and subordinates, most certainly demonstrates a failure to perform adequately as a supervisor. There is nothing to indicate that this behavior will change, as it seems to be normal for you.

I have reviewed the timelines of this investigation with regard to the Peace Officer Bill of Rights, Government Code section 3304 (d).

The one-year limitations period under Government Code section 3304, subdivision (d) (1) begins to run when a person authorized to initiate an investigation discovers, or through the use of reasonable diligence should have discovered, the allegation of misconduct. The date that Lieutenant Murphy discovered the allegation of misconduct was when the anonymous letter was received, April 23, 2019. You were served with the Notice of Intended Disciplinary Action on July 21, 2020.

As Mr. Currin discussed, on March 30, 2020 Governor Newsom issued Executive Order N-40-20 extending various statutory deadlines due to the State of Emergency in California relating to the COVID-19 pandemic. Among those extensions,

> 15. The deadline specified in Government Code section 3304(d) for opening and completing investigations of alleged misconduct by public safety officers is extended by 60 days.

This 60 day extension ran through June 22, 2020.

On June 20, 2020 Governor Newsom issued Executive Order N-71-20 further extending various statutory deadlines due to the State of Emergency in California relating to the COVID-19 pandemic. Among those extensions,

> 16. Paragraph 18 of Executive Order N-66-20, is withdrawn and superseded by the following text: The timeframe set forth in Executive Order N-40-20, Paragraph 15, is hereby extended by 30 days.

This additional 30 day extension ran through July 21, 2020.

You were served with the Notice of Intended Disciplinary Action on July 20, 2020 and signed that notice on July 21, 2020. Therefore, the discipline has been completed in a timely manner.

Further, Government Code section 3304 (2) (E) states the one year limitation may toll

If the investigation involves an employee who is incapacitated or otherwise unavailable.

I reviewed the Supervisor's report of occupational injury submitted by Captain Darin Dougherty, as well as several medical notes submitted by Dr. Iverson Eicken.

Several of the medical notes submitted following the conduct which serves as the basis for the current disciplinary action document your incapacity and unavailability and include statements such as,

"Mr. Berges continues to experience incapacitating symptoms due to a work-related stress injury."

The notes that I reviewed cover approximately one year and all indicate continuing "incapacitating symptoms" so as to make you incapacitated and / or unavailable for that time period in accordance with Government Code 3304(2) (E).

Accordingly, the time period during which you submitted medical notes that indicated you were incapacitated and unavailable to work served to make you incapacitated and unavailable within the context of Government Code 3304(d) and served to toll the statute of limitations during this time period.

I have also reviewed the proposed discipline in relation to the allegations. Sonoma County Civil Service Rules, section 10.3 defines causes for dismissal of any employee who has attained permanent status. As previously noted, I have concluded that I concur with the findings that your actions meet the criteria of conduct which brings discredit to the County, neglect of duty, failure to meet reasonable work performance standards and requirements, hostile and discourteous treatment of the public or other employee and sexual harassment of or unlawful discrimination against another employee or applicant for employment.

Despite your impressive performance evaluations throughout your career and your many commendations, the egregious nature of your behavior and the multiple reasonable causes for dismissal lead me to determine that the proposed discipline is appropriate.

After taking into consideration all of the above information and material, I concur with the investigative findings of "Sustained" and with the proposed level of discipline of termination of your employment with the Sonoma County Sheriff's Office.

Submitted,

Michael Merchen

Mike Merchen
Captain
(707) 565-1607

Cc: Sheriff-Coroner Mark Essick
Assistant Sheriff James Naugle
Debbie Latham, County Counsel
Sean Currin, Attorney at Law