

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEON LEWIS,)
)
Petitioner,)
and)
)
METROPOLITAN DADE COUNTY,)
)
Intervenor,)
)
vs.) CASE No. 88-6432
)
)
FLORIDA DEPARTMENT OF LAW)
ENFORCEMENT, CRIMINAL)
JUSTICE STANDARDS AND)
TRAINING COMMISSION,)
)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William J. Kendrick, held a formal hearing in the above-styled case on April 7, 1989, in Miami, Florida.

APPEARANCES

For Petitioner: Denis A. Dean, Esquire
Dean and Hartman, P.A.
10680 Northwest 25th Street
Suite 200
Miami, Florida 33172

For Respondent: Joseph S. White, Esquire
Florida Department of Law
Enforcement
Post Office Box 1489
Tallahassee, Florida 32302

For Intervenor: Lee Kraftchick, Esquire
Assistant County Attorney
Metro Dade Center
111 Northwest 1st Street
Suite 2810
Miami, Florida 33128

STATEMENT OF THE ISSUES

At issue in this proceeding is whether petitioner possesses the requisite good moral character for certification as a correctional officer.

PRELIMINARY STATEMENT

The record in the instant case consists of the testimony and exhibits offered at the hearing held on April 7, 1989, as well as the generic record developed during the course of hearing on April 3-4, 1989. At the hearing held on April 7, 1989, petitioner testified on his own behalf. Petitioner's exhibit 1 was received into evidence. Respondent called no witnesses, but its exhibit 1 was received into evidence. The generic record developed during the course of hearing on April 3-4, 1989, consists of the testimony of Fred Crawford, Sandra Milton, Danny Quick, Louviena Lee and Kevin Hickey, as well as Hearing Officer exhibits 1-38, petitioners' exhibit 1, respondent's exhibit 1, and intervenor's exhibit 1. 1/

At the parties' request, a deadline was established for filing proposed findings of fact or other post hearing submissions that was more than ten days after the filing of the transcript in May 1989. Consequently, the parties waived the requirement that a recommended order be rendered within thirty days after the transcript is filed. Rule 22I-6.31, Florida Administrative Code. The parties' proposed findings have been addressed in the appendix to this recommended order.

FINDINGS OF FACT

Background

1. In June 1988, respondent, Florida Department of Law Enforcement, Criminal Justice Standards and Training Commission (Commission), acting on a tip from the local media that intervenor, Metropolitan Dade County, Department of Corrections and Rehabilitation (County), had in its employ a number of corrections officers who were not certified, undertook a review of the County's employment records. Following a comparison of the County's records and those of the Commission, the Commission identified 363 individuals, including the petitioner, who were employed by the County as correctional officers but who had not been certified by the Commission.

2. On August 10-11, 1988, Commission personnel visited the County's personnel office, and audited the personnel file of each of the 363 individuals in question. The audit demonstrated that the files were disorganized, lacking documentation required by Rule 11B-27.002, Florida Administrative Code, to apply for certification, and that the County had failed to apply for certification on behalf of the 363 officers. 2/

3. Over the course of their two-day visit, the Commission's personnel set up an "assembly line" and, together with the County's staff, attempted to complete the documentation on each file. Various registration forms and affidavits of compliance were prepared, and birth certificates, fingerprint cards and other missing documentation was assembled.

4. On August 12, 1988, the Commission's personnel returned to Tallahassee with the subject registration forms and affidavits of compliance. Over the course of time, these applications were processed and the vast majority of the individuals were certified; however, the Commission declined, for reasons hereinafter discussed, to certify petitioner.

The pending application

5. Petitioner, Leon Lewis (Lewis), has been employed by the County as a correctional officer since September 1985 without benefit of certification.

6. On August 10, 1988, as a consequence of the aforementioned audit, the County, as the employing agency, applied for certification on behalf of Lewis. 3/ Accompanying the application (registration) was an affidavit of compliance, dated August 10, 1988, signed by Fred Crawford, Director of Metropolitan Dade County, Department of Corrections and Rehabilitation, which comported with existing law and which certified that such employing agency had collected, verified, and was maintaining on file evidence that Lewis had met the provisions of Section 943.13(1)-(8), and Section 943.131, Florida Statutes, or any rules adopted pursuant thereto. Among the provision of Section 943.13 is the requirement that the applicant be of good moral character.

7. By letter dated November 7, 1988, the Commission notified Lewis and the County that his application for certification as a correctional officer was denied for lack of good moral character because:

You actually and intentionally struck Edward Thornton against the will of the said Edward Thornton.
You have unlawfully and knowingly possessed and introduced into your body cannabis.

8. Following receipt of the Commission's letter of denial, Lewis filed a timely request for a formal hearing pursuant to Section 120.57(1), Florida Statutes. In his request for hearing, Lewis denied that he failed to possess the requisite good moral character necessary for certification.

Good moral character

9. Pursuant to Rule 11B-27.0011, Florida Administrative Code, the County, as the employing agency, is responsible for conducting a thorough background investigation to determine the moral character of an applicant. Consistent with such mandate, the County routinely uses previous employment data, law enforcement records, credit agency records, inquiries of the applicant's neighbors and associates, and a pre-employment interview, at which a polygraph examination is administered, to assess an applicant's moral character.

10. In assessing an applicant's character, the County is bound by the provisions of Rule 11B-27.0011(2), Florida Administrative Code, which provides:

The unlawful use of any of the controlled substances enumerated in Rule 11B-27.00225 by an applicant for certification, employment, or appointment at any time proximate to such application for certification, employment, or appointment conclusively establishes that the applicant is not of good moral character as required by Section 943.13(7). The unlawful use of any of the controlled substances enumerated in Rule 11B-27.00225 by an applicant at any time remote from and not proximate to such application may or may not conclusively

establish that the applicant is not of good moral character, as required by Section 943.13(7), depending upon the type of controlled substance used, the frequency of use, and the age of the applicant at the time of use. Nothing herein is intended, however, to restrict the construction of Section 943.13(7), only to such controlled substance use.

The substances enumerated in Rule 11B-27.00225 are amphetamines, barbiturates, cannabis (marijuana), opiates, cocaine, phencyclidine, benzodiazepines, and methaqualone.

11. Pertinent to an assessment of Lewis' moral character, the proof demonstrates that the County undertook a pre-employment interview of Lewis on April 20, 1984, at which time he admitted to having "tried marijuana one time, four years ago." At the time of use, Lewis was 17 years of age and a high school student; he has not otherwise experimented with controlled substances. The proof also demonstrates that in October 1982, Lewis struck one Edward Thornton on the head with an umbrella. The circumstances surrounding such blow being struck demonstrate that, following a high school football game, Thornton was harassing Lewis' girlfriend when she, crying, sought Lewis out. At that time, Thornton and a number of his friends confronted Lewis and his girlfriend. Reasonably fearing an attack, Lewis grabbed an umbrella and exclaimed "Before you hit me, I'm going to have to get one of you," and struck Thornton on the head. Other than a cut to the head, there is no proof that Thornton suffered any significant injury. While Lewis was arrested as a consequence of the incident, the matter was subsequently dismissed and the record expunged.

12. Notwithstanding the County's conclusion, based on its investigation and analysis of Lewis' background, that Lewis possessed the requisite good moral character for employment and certification, the Commission proposed to deny certification based on the two isolated incidents, heretofore discussed, in Lewis' life. The Commission's action is unwarranted.

13. Here, Lewis, born February 25, 1963, used marijuana one time, nine years ago, when he was 17 years of age. Such isolated and dated usage can hardly be termed proximate or frequent within the meaning of Rule 11B-27.0011(2), or persuasive evidence of bad moral character. Likewise, the isolated incident of striking Thornton over the head with an umbrella when Lewis was 19 years of age was hardly proximate to his employment, or this consideration of his application for certification, and does not, under the circumstances presented, evidence bad moral character. 4/

14. To date, Lewis has been employed by the County as a correctional officer, a position of trust and confidence, for over three and one-half years. There is no suggestion that he has committed any act or offense that would reflect adversely on his moral character during the term of such employment.

15. Overall, Lewis has demonstrated that he possessed the requisite good moral character when he was employed by the County as a correctional officer, and has demonstrated in this de novo proceeding that he currently possesses the requisite good moral character for certification.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

17. The ultimate burden of persuasion as to whether an application for certification as a correctional officer should be approved rests with the applicant. See Rule 28-6.08(3), Florida Administrative Code, and Florida Department of Transportation v. J.W.C., Co., 396 So.2d 778 (Fla. 1st DCA 1981).

18. Section 943.13, Florida Statutes, establishes the minimum qualifications for certification, employment or appointment of a correctional officer. Pertinent to this case, that section provides:

(7) Have a good moral character...

19. For purposes of assessing an applicant's good moral character, the Commission has adopted Rule 11B-27.0011, Florida Administrative Code, which provides:

(2) The unlawful use of any of the controlled substances enumerated in Rule 11B-27.00225 by an applicant for certification, employment, or appointment at any time proximate to such application for certification, employment, or appointment conclusively establishes that the applicant is not of good moral character as required by Section 943.13(7). The unlawful use of any of the controlled substances enumerated in Rule 11B-27.00225 by an applicant at any time remote from and not proximate to such application may or may not conclusively establish that the applicant is not of good moral character, as required by Section 943.13(7), depending upon the type of controlled substance used, the frequency of use, and the age of the applicant at the time of use. Nothing herein is intended, however, to restrict the construction of Section 943.13(7) only to such controlled substance use.

The substances enumerated in Rule 11B-27.00225 are amphetamines, barbiturates, cannabis (marijuana), opiates, cocaine, phencyclidine, benzodiazepines, and methaqualone.

20. Apart from Rule 11B-27.0011, the Commission has adopted no rule that establishes the standards by which the good moral character of an applicant are to be assessed. Existent case law does, however, provide some guidance.

21. Where, as here, the offending conduct is not of itself a disqualifier to licensure, the courts have long recognized that what constitutes good moral character is a matter to be developed by the facts. 5/ *Zemour, Inc. v. Division of Beverage*, 347 So.2d 1102 (Fla. 1st DCA 1977) and *White v. Beary*, 237 So.2d 263 (Fla. 1st DCA 1970). In *Zemour, Inc. v. Division of Beverages*, supra, at page 1105, the court concluded:

Moral character... means not only the ability to distinguish between right and wrong, but the character to observe the difference; the observance of the rules of right conduct, and conduct which indicates and establishes the qualities generally acceptable to the populace for positions of trust and confidence. An isolated unlawful act [that does not by statute or rule specifically disqualify a person from licensure] or acts of indiscretion wherever committed do not necessarily establish bad moral character. But...repeated acts in violation of law wherever committed and generally condemned by law abiding people, over a long period of time, evinces the sort of mind and establishes the sort of character that...should not be entrusted with a...license.

And, in *Florida Board of Bar Examiners v. G.W.L.*, 364 So.2d 454, 458 (Fla. 1987), the court concluded:

...a finding of a lack of "good moral character" should not be restricted to those acts that reflect moral turpitude. A more appropriate definition of the phrase requires an inclusion of acts and conduct which would cause a reasonable man to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws of the state and nation.

22. Here, Lewis has demonstrated, as required by law, that he possesses the requisite good moral character for employment and certification as a correctional officer, and the isolated events that occurred during his youth do not detract from such showing.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the application of petitioner, Leon Lewis, for certification as a correctional officer be approved.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 20th day of June 1989.

WILLIAM J. KENDRICK
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of June, 1989.

ENDNOTES

1/ The application of petitioner for certification as a correctional officer was but one of thirty-seven applications that were scheduled to be heard commencing on April 3, 1989. At that time, perceiving that the testimony of certain witnesses would be common to most applicants, the parties agreed to develop a generic record that would, pertinent to this case, be utilized in addition to the proof offered individually on behalf of the petitioner.

2/ Variously, some files contained the original registration and original affidavit of compliance that must be submitted to the Commission for certification, some files were totally missing registrations and affidavits of compliance, and some files were missing birth certificates, fingerprint cards and other documentation required for certification. Overall, none of the files contained the documentation required by law for certification.

3/ When the personnel file of Lewis was audited on August 10, 1988, a copy of an affidavit of compliance executed by Fred Crawford on October 23, 1985, as well as an affidavit of applicant bearing the same date, was located. Due to the passage of time since the first affidavit of compliance had been executed, the Commission insisted that a new affidavit of compliance be prepared to accompany the application. At hearing, Lewis contended that the existence of such documentation in his file supported the conclusion that an earlier application had been submitted to the Commission which, because of inaction, had been approved pursuant to Section 120.60(2), Florida Statutes. The proof fails, however, to support the conclusion that any application, other than that of August 10, 1988, was submitted to the Commission on behalf of Lewis. Notable to this conclusion is the disorganization of the County's records, and the lack of reliability in its personnel practices. Here, the Commission provided the County with semi-annual reports from 1985 through 1988, which listed each officer its records showed employed by the County. The County, under existing law, was charged with the responsibility of reviewing such reports and advising the Commission of any changes that had occurred. The County failed to do so at any time between 1985 and 1988.

As additional support for his contention that an earlier application was submitted to the Commission, petitioner contended that the County routinely mailed applications in bulk upon completion of each academy class, and that such routine practice supports the conclusion that petitioner's application was previously submitted. Such contention is rejected in this case since the

County's personnel practices do not possess the necessary reliability to render such proof persuasive and because there was no showing that any member of petitioner's class had been certified.

4/ Under the provisions of Rule 11B-27.0011(2), the use of a controlled substance does not conclusively establish that an applicant lacks the good moral character necessary for certification unless such use was "proximate" to his application. The Commission has not defined the term "proximate," and offered no proof at hearing as to what it considers "proximate" usage within the meaning of Rule 11B-27.0011(2). Variously, the law enforcement agencies of the state have been left with no definitive guideline from the Commission, and have adopted various standards. Pertinent to this case, Dade County has adopted a term of one year as the standard by which it gauges the "proximate" use of a controlled substance to an application for employment. Under such policy, an applicant who has refrained from such use for at least one year preceding application will not be automatically rejected as lacking good moral character. Rather, the applicant's entire background will be evaluated to determine whether he currently possesses the requisite moral character for employment.

Commission of offenses, unless they result in a felony conviction or a misdemeanor conviction involving perjury or false statement, do not bar employment or certification as a correctional officer, unless they demonstrate bad moral character. Section 943.13, Florida Statutes. Consistent with existent law, and the past practices of the Commission, the County does not automatically reject an applicant who has been convicted of a misdemeanor that does not involve perjury or false statement, or who has committed an offense that did not result in a felony conviction, but evaluates the applicant's entire background to determine whether the applicant currently possesses the requisite moral character for employment.

5/ Pertinent to this case, the only specified disqualifier to licensure is Section 943.13, Florida Statutes, which provides:

On or after October 1, 1984, any person employed or appointed as a...correctional officer...shall:

* * *

(4) Not have been convicted of any felony or of a misdemeanor involving perjury or a false statement...Any person who, after July 1, 1981, pleads guilty or nolo contendere to or is found guilty of any felony or of a misdemeanor involving perjury or a false statement is not eligible for employment or appointment as an officer, notwithstanding suspension of sentence or withholding of adjudication.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 88-6432

The proposed findings of fact submitted on behalf of petitioner, individually, are addressed as follows:

1. Addressed in paragraph 6 and footnote 3.
2. Addressed in paragraph 7.
3. Addressed in paragraph 8.
4. Rejected as not necessary to the result reached.

- 5-6. Addressed in paragraph 11.
- 7. Addressed in paragraphs 11 and 14.

The proposed findings of fact submitted for petitioner on the generic record are addressed as follows:

- 1-14. Rejected as recitation of witness testimony, and not findings of fact. The matters have, however, been addressed in paragraphs 9-11, and footnote 4.
- 15, 16, 18-20. Addressed in paragraphs 1-4 and footnotes 2 and 3.
- 17, 29, and 30. Addressed in footnote 3.
- 21. Addressed in paragraph 6, otherwise rejected as unnecessary to the result reached or a legal conclusion.
- 22-27. Addressed in paragraphs 2-4, and footnote 3. Otherwise rejected as subordinate to the conclusion reached.
- 28. Rejected as misleading and not supported by competent proof. The Commission does verify at the employing agency that the documentation required by Section 943.13(1)-(8) and Section 943.131, Florida Statutes, is being maintained. However, such inspection does not occur until an application for certification has been filed with the Commission. Where, as here, no application has been filed, the Commission has no knowledge of an individual's employment and, therefore, no opportunity or responsibility to verify any documentation. It is the employing agency's responsibility to apprise the Commission of any change of employment so that it can properly verify documentation. Dade County failed to discharge its responsibilities.
- 31-36. Addressed in paragraph 2 and footnote 3, otherwise rejected as subordinate.

The proposed findings of fact filed on behalf of respondent are addressed as follows:

- 1-2. Addressed in paragraphs 6 and 7.
- 3-4. Addressed in paragraphs 1, 2, 5, 6 and footnote 3.
- 5-6. and 8-12. Addressed in paragraph 11.
- 7. Addressed in paragraph 13.
- 13. Addressed in paragraphs 5.

Intervenor did not submit proposed findings of fact but did submit a post hearing brief. Accordingly, while intervenor's brief has been considered, there are no proposed findings of fact to address on behalf of intervenor.

COPIES FURNISHED:

Denis A. Dean, Esquire
Dean and Hartman, P.A.
10680 Northwest 25th Street
Suite 200
Miami, Florida 33172

Joseph S. White, Esquire
Florida Department of Law
Enforcement
Post Office Box 1489
Tallahassee, Florida 32302

Lee Kraftchick, Esquire
Assistant County Attorney
Metro Dade Center
111 Northwest 1st Street
Suite 2810
Miami, Florida 33128

Jeffrey Long, Director
Criminal Justice Standards
and Training Commission
Post Office Box 1489
Tallahassee, Florida 32302

Daryl McLaughlin
Executive Director
Florida Department of Law
Enforcement
Post Office Box 1489
Tallahassee, Florida 32302