STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM RICHARDSON, Petitioner, and METROPOLITAN DADE COUNTY, Intervenor, vs. FLORIDA DEPARTMENT OF LAW ENFORCEMENT, CRIMINAL JUSTICE STANDARDS AND TRAINING COMMISSION, Respondent.	)	CASE NO. 88-6443

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Claude B. Arrington, held a formal hearing in the above-styled case on April 10, 1989, in Miami, Florida.

APPEARANCES

For Petitioner: Donald D. Slesnick, III, Esquire
10680 N. W. 25 Street
Miami, Florida 33172

For Respondent: Joseph S. White, Esquire
Assistant General Counsel
Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 33202

For Intervenor: Lee Kraftchick, Esquire
Assistant County Attorney, Dade County
Metro Dade Center
111 N.W. 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 10, 1989, as well as the generic record developed during the course of hearing on April 3-4, 1989. At the hearing held April 10, 1989, Petitioner testified on his own behalf and called three additional witnesses. Petitioner introduced eleven documentary exhibits which were accepted into evidence. Respondent called no witnesses and offered one documentary exhibit which was received into evidence pursuant to stipulation of the parties.

A generic record was developed because this case is one of a series of formal hearings heard on a docket which began April 3, 1989. Certain evidence, which pertains to this case as well as almost all of the other cases on the docket, was heard by Hearing Officer William J. Kendrick on April 3 and 4, 1989. This generic evidence will be considered as part of the record of this case by stipulation of the parties and by order of Hearing Officer Kendrick. The generic record consisted of the testimony of two witnesses called by the Intervenor, the testimony of one witness called by Respondent, and the testimony of two witnesses called by Petitioner. Documentary evidence was received into evidence as follows: Hearing Officer's Exhibits 1-38; Respondent's Composite Exhibit 1, and Petitioner's Exhibit 1. The only documentary exhibit not accepted into evidence was marked for identification purposes as Intervenor's Exhibit 1.

Metropolitan Dade County, Intervenor, participated in the presentation of the generic evidence on April 3 and 4, 1989, and submitted a post hearing brief in this case, but did not otherwise participate or appear at the formal hearing on April 10, 1989.

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. Consequently, the parties waived the requirement that a recommended order be rendered within thirty days after the transcript is filed. Rule 22I-6.031, 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, acting on a tip from local media that intervenor, Metropolitan Dade County, Department of Corrections and Rehabilitation (Metro Dade Corrections), had in its employ a number of correctional officers who were not certified, undertook a review of the employment records of Metro Dade Corrections. As a result of this review, Respondent identified 363 individuals, including Petitioner, who were employed by Metro Dade Corrections as correctional officers but who had not been certified by Respondent.

2. On August 10-11, 1988, personnel employed by Respondent visited the Metro Dade Corrections personnel office and audited the personnel file maintained by Metro Dade Corrections of each of the 363 individuals in question, including Petitioner's personnel file. 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 Metro Dade Corrections had failed to apply for certification on behalf of the 363 officers.

3. Over the course of their two-day visit, employees of Respondent worked with employees of Metro Dade Corrections to complete the documentation on each file. Variously, they prepared registration forms and affidavits of compliance and assembled other missing documentation, such as birth certificate and fingerprint cards.

4. The 363 completed applications for certification were returned to Tallahassee by Respondent for processing. The vast majority of the individuals were certified; however, Respondent declined, for reasons hereinafter discussed, to certify Petitioner.

The pending application

5. Petitioner has been employed by the Metropolitan Dade County Department of Corrections and Rehabilitation (hereinafter called Metro Dade corrections) as a correctional officer since March 1, 1985, without benefit of certification.

6. As part of the pre-employment process, Petitioner submitted to Metro Dade Corrections an affidavit dated March 1, 1985, which provides in pertinent part:

> I fully understand that, in order to qualify as a law enforcement or correctional officer, I must fully comply with the provisions of Section 943.13, Florida Statutes, as follows:
>
> * * *
>
> 7. Be of good moral character.
> I further understand that by executing this document I am attesting that I have met the qualifications as specified.

7. Metro Dade Corrections, as the employing agency, is responsible for conducting a thorough background investigation to determine the moral character of an applicant. Consistent with such mandate, Metro Dade Corrections 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. At the time Petitioner began employment on March 1, 1985, Metro Dade Corrections had completed its investigation into Petitioner's background and had concluded that Petitioner possessed the good moral character required for certification.

8. Fred Crawford, the Metro Dade Corrections director, executed an affidavit of compliance on March 1, 1985, that contained the following sworn statement:

> I hereby certify that I have collected, verified, and am maintaining on file evidence that the applicant has met the provisions of Section 943.13(1)-(8) and Section 943.131, Florida Statutes, or any rules adopted pursuant thereto.

9. There is no evidence that a complete application package for Petitioner's certification was prepared before August 11, 1988. Respondent did not receive a complete application for certification on Petitioner's behalf until August 11, 1988, when Metro Dade Corrections, as the employing agency, submitted to Respondent a complete application package for certification of Petitioner as a correctional officer. This was the first application for certification submitted on Petitioner's behalf.

10. By letter dated November 1, 1988, Respondent notified Petitioner that his application for certification was denied because Petitioner did not possess the requisite good moral character for certification as a correctional officer. Respondent gave the following as its reasons for concluding that Petitioner lacked good moral character:

> You have unlawfully and knowingly possessed and introduced into you body cannabis.

11. During the course of the polygraph examination administered on February 8, 1985, the polygraph examiner misunderstood Petitioner to say that Petitioner had used marijuana between 60-70 times, with the last date of usage being at least four years before the date of the polygraph examination. Petitioner's truthful statement to the polygraph examiner was that he had used marijuana between 6-7 times with the last date of usage being at least four years before the date of the polygraph examination. Petitioner made no attempt to conceal the truth as to his prior use of marijuana. He had not used any controlled substance for at least four years before the date of the polygraph examination.

12. At the time of the hearing, Petitioner was 33 years of age and had worked as a correctional officer since March 1985. Prior to that, he served in U.S. Air Force for eight years as a security police officer. His job performance evaluations with Metro Dade Corrections have ranged between above satisfactory to outstanding. Petitioner has been promoted and has received several commendations for his service. Petitioner is a valued and trusted employee.

13. Petitioner's reputation is that he is a dependable, reliable, and trustworthy individual who possesses high moral character.

14. Following the denial of his request for certification as a correctional on November 1, 1988, Petitioner timely requested a formal hearing by the election of rights form he filed with Respondent.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.57(1), Florida Statutes.

16. It is Petitioner's burden to prove that he is entitled to be certified by Respondent as a correctional officer. Florida Department of Transportation v. J.W.C. Company, 396 So.2d 778 (Fla. 1st DCA 1981), Irvine v. Duval County Planning Commission, 466 So.2d 357 (Fla. 1st DCA 1985), Astral Liquors, Inc. v. Florida Department of Business Regulation, 432 So.2d 93 (Fla. 3rd DCA 1983).

17. Petitioner is not entitled to automatic certification under Section 120.60(2), Florida Statutes, because there was no proof that a completed

application for certification was submitted on Petitioner's behalf before August 11, 1988. Respondent's letter dated November 1, 1988, denying Petitioner's application for certification was within the time parameters set by Section 120.60(2), Florida Statutes.

18. Section 943.13(7), Florida Statutes requires that a correctional officer possess good moral character:

> 7) Have a good moral character as determined by a background investigation under procedures established by the commission.

19. Rule 11B-27.0011(2), Florida Administrative Code, is as follows:

> (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, Florida Administrative Code, are amphetamines, barbiturates, cannabis (marijuana), opiates, cocaine, phencyclidine, benzodiazepines, and methaqualone.

20. In Zemour, Inc. v. Division of Beverage, 347 So.2d 1102, 1105, (Fla. 1st DCA 1977) the court discussed the meaning of moral character as follows:

> 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.

21. In Florida Board of Bar Examiners v. G.W.L., 364 So.2d 454, 458, (Fla. 1987), the court discussed the meaning of good moral character as follows:

> In our view, 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. The only evidence that suggests a flaw in Petitioner's moral character is his admitted use of marijuana on 6 or 7 occasions four years before he began his employment as a correctional officer in 1985..

23. Under Rule 11B-27.0011(2), Florida Administrative Code, unlawful use of drugs conclusively establishes that an applicant is not of good moral character if the unlawful use of drugs is "at a time proximate to" the application for certification or appointment. "Proximate" is defined as immediate, nearest or direct in relationship. Black's Law Dictionary, Fifth Edition, 1979, page 1103. The use of marijuana over 4 years prior to his employment was not at a time proximate to the employment or the application for certification and does not conclusively establish that Petitioner is not of good moral character.

24. The unlawful use of drugs at a time remote from and not proximate to the application or employment may or may not conclusively establish a lack of good moral character under Rule 11B-27.0011(2), Florida Administrative Code, depending on the type of drug used, the frequency of the use, and the age of the applicant at the time of the use. The use of marijuana on 6 or 7 occasions over 4 years before employment is too isolated and too remote to base a conclusion that the Petitioner does not have good moral character.

25. The overwhelming evidence presented by this record is that Petitioner possesses all the qualifications for certification as a correctional officer, including the qualification of good moral character.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is:

RECOMMENDED that the Florida Department of Law Enforcement, Division of Criminal Justice standards and Training issue a Final Order which approves Petitioner's application for certification as a correctional officer.

DONE and ENTERED this 7th day of July, 1989, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
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 7th day of July, 1989.

APPENDIX

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

1.	Addressed in part in paragraph 13. Rejected in part as unnecessary to the result reached.
2.	Rejected as unnecessary to the result reached.
3-6.	Addressed in paragraph 12.
7.	Addressed in paragraph 6.
8-9.	Rejected as being unnecessary to the result reached.
10-13.	Addressed in paragraph 13.
14-22.	Rejected as being recitation of testimony and as being subordinate to the conclusions reached.

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 7 so far as deemed necessary to the result reached.
15,16,18-20.	Addressed in paragraphs 1-4.
17.	Rejected as unnecessary to the result reached.
21.	Addressed in paragraph 7, otherwise rejected as unnecessary to the result reached in a legal conclusion.
22-27.	Rejected as subordinate to the conclusion reached.
28.	Rejected as misleading and not supported by competent proof.
29-36.	Rejected as being subordinate to the conclusion reached or not supported by competent evidence.

The proposed findings of fact submitted on behalf of Respondent are addressed as follows:

1-2.	Addressed in paragraphs 10-11.
3.	Addressed in paragraph 10.
4.	Rejected as being unnecessary to the result reached.
5-6.	Addressed in paragraph 12.
7-8.	Addressed in paragraph 13.
9.	Addressed in paragraph 5.

COPIES FURNISHED:

Donald D. Slesnick, II
Attorney at Law
Law Offices of
Slesnick and Lober
10680 Northwest 25th Street
Suite 202
Miami, Florida 33172

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

Lee Kraftchick, Esquire
Assistant County Attorney
in and for Dade County
Metro Dade Center
111 N.W. First Street, Suite 2810
Miami, Florida 33128

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

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

Rodney Gaddy, Esquire
General Counsel
Florida Department of Law
Enforcement
Post Office Box 1489
Tallahassee, Florida 32302