

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ESTEBAN TABOADO,)	
)	
Petitioner,)	
)	
and)	
)	
METROPOLITAN DADE COUNTY,)	
)	
Intervenor,)	
)	
vs.)	CASE NO. 88-6446
)	
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 4, 1989, in Miami, Florida.

APPEARANCES

For Petitioner: James C. Casey, Esquire
Dade County Police
Benevolent Association
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Miami, Florida 33172

For Respondent: Joseph S. White, Esquire
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For Intervenor: Lee Kraftchick, Esquire
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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 4, 1989, as well as the generic record developed during the course of hearing on April 3-4, 1989. At the hearing held on April 4, 1989, petitioner called Hector Rocafort, Lois Spears, Sheila Dixon, Mitchell Spears, Nita Thomas, Olfuine Taboado, and Kevin Hickey as witnesses. Petitioner's exhibits 1-15 were received into evidence. Respondent called Hector Rocafort, Lois Spears, Ervie Wright, and Louviena Lee as witnesses, but offered no exhibits. 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/ Intervenor's exhibit 1 was not, however, received into evidence.

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 221-6.031, 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 (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. Variousy, 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, but not with those of petitioner. 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, Esteban Tabaoado (Tabaoado), has been employed by the County as a correctional officer periodically since September 11, 1984, without benefit of certification.

6. On or about September 9, 1988, as a consequence of the aforementioned audit, the County, as the employing agency, applied for certification on behalf of Tabaoado. 3/ Accompanying the application (registration) was an affidavit of compliance, dated September 9, 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 Tabaoado 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 1, 1988, the Commission notified Tabaoado and the County that his application for certification as a correctional officer was denied for lack of good moral character because:

You have unlawfully and knowingly possessed
and introduced into your body cocaine.

8. Following receipt of the Commission's letter of denial, Tabaoado filed a timely request for a formal hearing pursuant to Section 120.57(1), Florida Statutes. In his request for hearing, Tabaoado 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. 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). Various, 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. 4/

12. Pertinent to this case, the County undertook a pre-employment interview of Taboado on January 31, 1984, at which time he admitted to having used cocaine approximately eight times, the last time being in 1980, and to having used marijuana a few times, the last time being in June of 1983. Thereafter, on September 11, 1984, Taboado was employed by the County as a correctional officer, and served satisfactorily until 1986.

13. On December 14, 1986, evidence that Taboado had a substance abuse problem surfaced. On that date, Taboado telephoned his former supervisor, Lieutenant Lois Spears, a confidante, and advised her that he had been using drugs and did not think he could work that night. Lt. Spears advised Taboado not to report for work that evening, but to report the next morning to the administrative offices. The following day, Taboado met with Lt. Spears and Ervie Wright, the director of the Department's program services, which include employee counseling. At that time, Taboado conceded that he had been abusing cocaine, and Mr. Wright recommended that he seek assistance for his problem.

14. On January 5, 1987, the County terminated Taboado's employment as a correctional officer for failure to maintain a drug-free life-style.

15. On October 19, 1987, following Taboado's attendance at a drug rehabilitation program, the County re-employed him as a correctional officer. To date, Taboado has been so employed for approximately one and one-half years without incident, and his performance has been above satisfactory. By those who know of him, he is considered an excellent employee, observant of the rules, and of good moral character.

16. Recently, on January 20, 1989, Taboado married Olfuine Taboado, who has been a correctional officer with the County for almost three years. According to Ms. Taboado, she has never known him to use drugs during the one-

year period that she has known him, and Tabaoado has proven to be a good father to her son from a previous marriage.

17. While Tabaoado may have abstained from the use of drugs since his re-employment with the County, or even since January of 1987, the proof is not compelling in this regard. Rather, the proof demonstrates that Tabaoado's use of drugs, at least of cocaine, was frequent and protracted. Here, Tabaoado, born September 2, 1960, to the extent that he would admit it, used cocaine 8 times until 1980 and marijuana a "few times" until 1983. Thereafter, following his initial employment by the County as a correctional officer, he used cocaine to such an extent that by December 14, 1986, he was unable to perform his job and was in need of professional help to address his drug abuse. Such frequent and protracted use on his part does not evidence the requisite good moral character necessary for certification as a correctional officer.

18. Here, Tabaoado chose not to testify at hearing, and there is no competent or persuasive proof to demonstrate that he successfully completed the drug rehabilitation program; when, if ever, he ceased using cocaine; whether he now has an appreciation of the impropriety of his conduct; or whether he can reasonably be expected to avoid such conduct in the future. Notably, on October 5, 1987, prior to his re-employment, Tabaoado underwent another pre-employment interview. At that time, Tabaoado told the interviewer, who had also conducted his first interview, that he had not used any drugs since his last interview on January 31, 1984. Such response was patently false, since he had abused cocaine at least as recently as December 1986.

19. Considering the totality of the circumstances, it is concluded that Tabaoado has failed to demonstrate that he currently possesses the requisite good moral character for certification as a correctional officer.

CONCLUSIONS OF LAW

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

21. 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).

22. 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....

23. 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.

24. 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.

25. 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.

26. Here, Taboado has failed to demonstrate, as required by law, that he possesses the requisite good moral character for employment and certification as a correctional officer.

RECOMMENDATION

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

RECOMMENDED that the application of petitioner, Esteban Taboado, for certification as a correctional officer be DENIED.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 28th 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 28th 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/ Variouslly, 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/ At hearing, petitioner produced two affidavits of compliance executed by Fred Crawford, one dated September 2, 1988, and one dated September 9, 1988, as well as an affidavit of applicant dated August 18, 1988. There was no proof

that any other affidavits had previously been executed and no persuasive proof that any application had previously been filed on behalf of Tabaoado.

4/ 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

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

- 1-2. Addressed in paragraph 6 and footnote 3.
- 3-4. Addressed in paragraphs 7 and 8 to the extent pertinent.
- 5-7. Addressed in paragraph 12.
- 8. Addressed in paragraph 17.
- 9-10. Addressed in paragraph 12, otherwise rejected as subordinate.
- 11. Addressed in paragraph 15, otherwise rejected as subordinate.
- 12-17. Addressed in paragraph 13. Otherwise rejected as subordinate.
- 18. Addressed in paragraph 15, otherwise rejected as subordinate.
- 19. Not shown to be relevant to petitioner's use of drugs or otherwise to his moral character.
- 20. Not relevant.
- 21-22. Addressed in paragraph 15, otherwise rejected as subordinate.
- 23-27. To the extent pertinent, addressed in paragraph 13, otherwise rejected as subordinate.
- 28-32. To the extent pertinent, addressed in paragraph 14, otherwise rejected as irrelevant or subordinate.
- 33-41. Addressed in paragraph 15, otherwise rejected as subordinate.
- 42-44. Addressed in paragraph 16.
- 45-47. Addressed in paragraph 15, otherwise rejected as subordinate.

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.
5-7. Addressed in paragraph 12.
8-13. Addressed in paragraph 13.
14. Not relevant.
15-16. Addressed in paragraph 14.
17. Addressed in paragraph 15.
18. Addressed in paragraph 17.

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:

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