STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA DEPARTMENT OF LAW ENFORCEMENT, CRIMINAL JUSTICE STANDARDS AND TRAINING COMMISSION,	)	
Petitioner,	)	
vs.	)	CASE NO. 94-5886
REYES P. RAMOS,	)	
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 January 11, 1995, in Miami, Florida.

APPEARANCES

For Petitioner: Karen D. Simmons
Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302

For Respondent: James C. Casey, Esquire
10680 Northwest 25th Street, Suite 202
Miami, Florida 33172-2108

STATEMENT OF THE ISSUE

At issue is whether respondent committed the offense alleged in the amended administrative complaint and, if so, what disciplinary action should be taken.

PRELIMINARY STATEMENT

By amended administrative complaint dated January 20, 1994, petitioner charged that respondent, a certified law enforcement officer, violated the provisions of Section 943.1395(6) and (7), Florida Statutes, and Rule 11B-27.0011(4)(c) and (d), Florida Administrative Code, by failing "to maintain the qualifications established by Section 943.13(7), Florida Statutes, which require that an officer in the State of Florida have good moral character." The gravamen of petitioner's charge is its contention that "[o]n or about January 30, 1990, Respondent, Reyes P. Ramos, did unlawfully and knowingly be in actual or constructive possession of a controlled substance named or described in Section 893.03, Florida Statutes, to-wit: cocaine and did introduce said substance into his body."

Respondent filed an election of rights disputing the allegations set forth in the amended administrative complaint, and on October 18, 1994, the matter was referred to the Division of Administrative Hearings for the assignment of a Hearing Officer to conduct a formal hearing pursuant to Section 120.57(1), Florida Statutes.

At hearing, petitioner called Peter Anta, Edward Moore, and Terry Hall, Ph.D., as witnesses, and its exhibits 1-6 were received into evidence. Respondent testified on his own behalf and also called Kathryn Estevez, Christina Royo, Alejandro Suarez, Pedro Villa, and Rene Saldines as witnesses. Respondent's exhibits 1-4, 7, 15 and 16 were received into evidence.

The transcript of the hearing was filed February 20, 1995, and the parties were initially accorded until March 2, 1995, to file proposed recommended orders; however, at respondent's request, that deadline was subsequently extended. The parties' proposed findings of fact, contained within their proposed recommended orders, are addressed in the appendix to this recommended order.

FINDINGS OF FACT

1. At all times material hereto, respondent, Reyes P. Ramos, was employed as a law enforcement officer by the City of Opa-Locka Police Department, and was duly certified by petitioner, Florida Department of Law Enforcement, Criminal Justice Standards and Training Commission (Department), having been issued certificate number 19-83-002-05 on October 29, 1983.

2. On January 30, 1990, respondent, as part of his annual physical examination for the Opa-Locka Police Department, reported to Toxicology Testing Services (TTS) and provided a urine sample to be analyzed for the presence of controlled substances. Upon analysis, the sample taken from respondent proved positive for the presence of the cocaine metabolite, benzoylecgonine, in a concentration of 55 nanograms per milliliter. Such finding is consistent with the ingestion of cocaine, as cocaine is the only drug commonly available that, when ingested into the human body, produces the cocaine metabolite, benzoylecgonine.

3. On February 5, 1990, the Opa-Locka Police Department notified respondent that the analysis of his urine sample had proved positive for the presence of cocaine, a controlled substance. In response, respondent offered to provide another sample for further analysis.

4. Later that day, February 5, 1990, respondent provided a second sample of urine to TTS to be analyzed for the presence of controlled substances. Upon analysis, the second sample also proved positive for the presence of the cocaine metabolite, benzoylecgonine, but this time at a concentration of 9.2 nanograms per milliliter. Such reduced concentration is consistent with the initial concentration of 55 nanograms per milliliter disclosed by the first sample, assuming abstinence during the intervening period.

5. In concluding that the urine samples respondent gave proved positive for the presence of cocaine metabolite, careful consideration has been given to the collection, storage and handling procedures adopted by TTS, as well as its testing methods. In this regard, the procedures and methods employed by TTS were shown to provide reliable safeguards against contamination, a reliable chain-of-custody, and produce, through Gas Chromograph/Mass Spectrometry (GCMS), a reliable measure of the concentration of cocaine metabolite in the body. 1/

6. While the testing demonstrates the presence of cocaine metabolite in respondent's system, and therefore the presence of cocaine, it does not establish how ingestion occurred. 2/ It may be reasonably inferred, however, that such ingestion was proscribed by law, absent proof that the subject drug was possessed or administered under the authority of a prescription issued by a physician or that the presence of cocaine metabolite could otherwise be lawfully explained.

7. In response to the testing which revealed the presence of cocaine metabolite in his urine, respondent credibly denied the use of cocaine, and offered the testimony of a number of witnesses who know him well to lend credence to his denial. Those witnesses, who also testified credibly, observed that respondent is a person of good moral character who, among other qualities has the ability to differentiate between right and wrong and the character to observe the difference, has respect for the rights of others, has respect for the law, and could be relied upon in a position of trust and confidence. Moreover, from the testimony of those witnesses who have known respondent for an extended period of time, commencing well prior to the incident in question, it may be concluded that, in their opinions, it is the antithesis of respondent's character to have ingested or used cocaine.

8. Apart from his denial, respondent offered two possible explanations for the presence of cocaine in his system: (1) that, during the week of January 18, 1990, he had been in contact with four to five K-9 training aids, which contained pseudo-cocaine, while cleaning out his dog's possessions, and (2) that he had been in contact with 10 bags of rock cocaine, during the course of duty, in the early part of January 1990.

9. As to the first explanation, the proof demonstrates that respondent was, and had been for some time, a canine officer with the City of Opa-Locka Police Department, and had a dog named "Eagle" as his partner. "Eagle" was a cross-trained drug and work dog.

10. In or about September 1988, respondent and his dog attended narcotic detection training through the Florida Highway Patrol, and received training aids, which contained "pseudo-cocaine," for use in training dogs in the detection of cocaine. These aids were comprised of newborn baby socks, inside of which was placed pseudo-cocaine. The socks were then closed at the top with rubber bands and placed inside a folded towel, which was then rolled and taped. According to respondent, he continued to use these aids 2-3 times a week, after leaving the Florida Highway Patrol course, to keep his dog proficient.

11. Eagle died in early January 1990 and, according to respondent, the week of January 18, 1990, respondent cleared a number of items that were used in the care or training of Eagle from a small aluminum shed in his back yard. Among those items were the training aids, which contained pseudo-cocaine.

12. According to respondent, he disposed of the training aids by cutting the tape from the towels, removed the sock, and then shook the pseudo-cocaine into a trash can, which caused some residue to become airborne and contact him. Respondent's counsel theorizes that such contact with the pseudo-cocaine, as well as the possibility that some residue could have been lodged under respondent's fingernails, when coupled with the fact that respondent occasionally bites his nails, could be an explanation for the positive reading respondent received.

13. Notably, respondent offered no proof at hearing, through representatives from the Florida Highway Patrol or otherwise, as to the chemical composition of the pseudo-cocaine. Under such circumstances, there is no showing of record that the pseudo-cocaine could have resulted in the positive reading he received, and it would be pure speculation to conclude otherwise.

14. As to respondent's second explanation, that in early January 1990, during the course of duty, he had been in contact with 10 bags of rock cocaine, it likewise does not provide a rational explanation for his positive test results. Notably, according to respondent, that rock cocaine was bagged and, necessarily, he would not have had physical contact with the substance. Moreover, even if touched such would not explain its ingestion, and, considering the lapse of time from the event and his testing, is not a rational explanation for the source of his positive results.

15. While the explanations respondent advanced at hearing were not persuasive, such does not compel the conclusion that his testimony is to be discredited. Indeed, if respondent never used cocaine, it is not particularly telling that he could not offer a plausible explanation for what he perceived to be an aberration.

16. Here, while the results of the urinalysis point toward guilt, respondent's credible testimony, the character evidence offered on his behalf, and respondent's employment record suggest otherwise.

17. With regard to respondent's employment history, the proof demonstrates that respondent was on active duty with the United States military from 1966 until 1972, and with the Florida National Guard (FNG) from 1974 until 1983. Prior to reverting to an inactive status with the FNG, respondent attended and graduated from the Southeastern Institute of Criminal Justice, a police academy, and was thereafter certified as a law enforcement officer.

18. Following certification, respondent was employed by the Village of Indian Creek as a police officer for one year, and from January 1985 until his severance in 1990 as a police officer with the City of Opa-Locka. Currently, respondent is employed by the FNG, with the rank of Sergeant First Class, as a military criminal investigator assigned to counter drug programs for the Department of Justice.

19. From respondent's initial employment as a police officer through his current employment, but for the incident in question, respondent has consistently been recognized as a professional, loyal and dedicated police officer who has also dedicated substantial personal time and resources to community service. During this service, he was frequently commended for his performance, and he has further demonstrated dedication to his profession through continued training in the law enforcement field.

20. Among those who testified on his behalf, and spoke approvingly of respondent's good moral character, were Christina Royo, a sworn law enforcement officer with the Florida Department of Law Enforcement, and Alejandro Suarez, a Sergeant First Class with the United States Military, employed as a criminal intelligence analyst, and currently attached to respondent's FNG unit. Each of these witnesses are employed in positions of trust involving sensitive areas of law enforcement, and have known the respondent well for over fifteen years. In their opinions, which are credible, respondent enjoys a reputation reflecting good moral character and, it may be gleamed from their testimony, the use of controlled substances by respondent would be most uncharacteristic.

21. Given the nominal amount of cocaine metabolite disclosed by testing and the credible proof regarding respondent's character, the inference that would normally carry petitioner's burden following proof of a positive test for cocaine metabolite, that such finding reflected the unlawful ingestion of cocaine, cannot prevail. Rather, considering the proof, no conclusion can be reached, with any degree of certainty, as to the reason for the positive test results. Accordingly, such results, standing alone, do not support the conclusion that respondent unlawfully ingested cocaine or that he is lacking of good moral character.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Section 120.57(1) and 120.60(7), Florida Statutes

23. This is a license disciplinary proceeding in which the Department seeks to take action against respondent's certification as a law enforcement officer based on its contention that he has failed to maintain an essential requirement for certification, to-wit: good moral character. In cases of this nature, petitioner bears the burden of proving its charges by clear and convincing evidence. Ferris v. Turlington, 510 So.2d 292(Fla. 1987). "The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." Slomowitz v. Walker, 492 So.2d 797, 800 (Fla. 4th DCA 1983).

24. Section 943.13, Florida Statutes, establishes the minimum qualifications for certification as a law enforcement officer, which includes the following requirement:

> (7) Have a good moral character. . . .

25. Section 943.1395, Florida Statutes, establishes the bases for disciplining the certification of a law enforcement officer. Pursuant to subsection 943.1395(7) such certification may be revoked, suspended or otherwise disciplined should the officer fail to maintain a good moral character as required by Section 943.13(7), Florida Statutes.

26. Pertinent to this case, Rule 11B-27.0011(4), Florida Administrative Code, defines a failure to maintain good moral character, as required by subsection 943.13(7), as:

> (c) The perpetration by the officer of an act or conduct which:
> 1. significantly interferes with the rights of others; or
> 2. significantly and adversely affects the functioning of the criminal justice system or an agency thereof; or
> 3. shows disrespect for the laws of the state or nation; or
> 4. causes substantial doubts concerning the officer's moral fitness for continued service; or
> 5. engage in conduct which violates the standards of test administration, such as communication with

any other examinee during the administration of the examination; copying answers from another examinee or intentionally allowing one's answers to be copied by another examinee during the administration of the examination in accordance with Rule 11B-30.009(3)(b), F.A.C.; or

6. engage in any other conduct which subverts or attempts to subvert the CJSTC, criminal justice training school, or employing agency examination process in accordance with Rule 11B-30.009(2), F.A.C.

(d) The unlawful use of any of the controlled substances enumerated in section 893.13, F.S. or 11B-27.00225, F.A.C.

Among the substances enumerated in Section 893.13, Florida Statutes, or 11B-27.00225, Florida Administrative Code, are cocaine or cocaine metabolite.

27. Here, for the reasons set forth in the findings of fact, the Department has failed to establish, by clear and convincing evidence, that respondent committed any act proscribed by Rule 11B-27.0011(4)(c), which would reflect adversely on his good moral character, or that he engaged in the unlawful use of a controlled substance, as proscribed by Rule 11B-27.0011(4)(d).

RECOMMENDATION

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

RECOMMENDED that a final order be rendered dismissing the administrative complaint filed against respondent.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 24th day of March 1995.

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 24th day of March 1995.

ENDNOTES

1/ GCMS is accepted, scientifically, and the results it produces are acknowledged to possess a 99.99 percent accuracy rate.

2/ Such testing also does not reveal when the cocaine was ingested or how much was ingested. Those conclusions cannot be drawn from the test results because the concentration of cocaine metabolite is influenced by, among other things, a

person's metabolism, how much cocaine was ingested, when it was ingested, and how pure the cocaine was. [Tr. page 121]. It may be noted, however, that at 55 nanograms per milliliter, when tested, the concentration of cocaine metabolite was "not a large reading," according to Dr. Hall, the Department's toxicology expert. Indeed, absent cause to believe a person has ingested cocaine, the cutoff, at the time in question, for any screening for the presence of cocaine was established at 50 nanograms per milliliter.

In noting Dr. Hall's remarks, it should be observed that the transcript of hearing at page 128, line 25, reflects the following question posed to Dr. Hall and his response:

Q. Is 50 nanograms per milliliter reading?

A. No.

The Hearing Officer's notes reflect that the actual question posed and the answer thereto should read as follows:

Q. Is 50 nanograms per milliliter a large reading?

A. No.

APPENDIX

Petitioner's proposed findings of fact are addressed as follows:

1 & 2 Adopted in paragraph 1.

3-23 Addressed in paragraphs 2 and 5, otherwise subordinate or unnecessary detail.

24. Addressed in paragraph 3.

25-32. Addressed in paragraphs 4 and 5, otherwise subordinate or unnecessary detail.

33-43. Addressed in paragraphs 7-14, otherwise subordinate or unnecessary detail.

44. No relevant.

Respondent's proposed findings of fact are addressed as follows:

1 & 2. Addressed in paragraphs 17 and 18.

3. Unnecessary detail.

4-10. Addressed in paragraphs 9-13.

11. Addressed in paragraph 2, otherwise unnecessary detail.

12. Addressed in paragraph 2.

13. Addressed in paragraph 7.

14. No relevant.

15 & 17. Addressed in paragraphs 17-19.

18-26. Addressed in paragraphs 2, 4 and 5, otherwise subordinate or unnecessary detail.

27. Addressed in paragraph 14.

28. Addressed in paragraph 13.

29. Addressed in paragraph 4.

30. Addressed in endnote 2, otherwise not relevant.

31. Addressed in paragraph 13. Moreover, the suggestion that the Florida Highway Patrol provided respondent with "training aids" filled with cocaine, much less that he was allowed to retain them, is rejected as inherently improbable.

32. To the extent relevant, addressed in paragraph 13.

33. No relevant.

34-41. No relevant.

42. First sentence addressed in paragraph 4. Second sentence rejected as not relevant or supported by competent proof.

43 & 44. Unnecessary detail.
45. Addressed in paragraphs 10 and 13.
46. Addressed in paragraph 14, otherwise not relevant.
47-60. Addressed in paragraphs 7, 16 and 20, otherwise constitutes mere recitation of witnesses' testimony or unnecessary detail.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this recommended order. All agencies allow each party at least ten days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.