

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BURTON B. GRIFFIN and)
MICHAEL N. PADGETT,)
)
 Petitioners,)
)
vs.) CASE NO. 95-4021RX
)
CRIMINAL JUSTICE STANDARDS)
AND TRAINING COMMISSION,)
)
 Respondent.)
_____)

FINAL ORDER

This matter came before the Division of Administrative Hearings for the entry of a Final Order by its assigned Hearing Officer, Donald R. Alexander. The parties have agreed to waive an evidentiary hearing.

APPEARANCES

For Petitioners: T. A. Delegal, III, Esquire
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For Respondent: Marty E. Moore, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Rule 11B-27.001(4)(c)1.-4., Florida Administrative Code, constitutes an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

This matter began on August 10, 1995, when petitioners, Burton B. Griffin and Michael N. Padgett, both certified as law enforcement officers, filed a petition challenging the validity of Rule 11B-27.001(4)(c), Florida Administrative Code. The rule is administered by respondent, Criminal Justice Standards and Training Commission. In their petition, petitioners contended that the rule "creates an impermissibly broad definition of moral character," is "impermissibly vague," "impermissibly delegates policy decisions as to what is prohibited to those applying the rule," "exceeds the rulemaking authority granted by sect. 943.1395(7), Fla. Stats. (1995)," and "exceeds the legislative intent evidenced by sections 943.1395(8)(a) and (b), Fla. Stats (1995)." After being examined for legal sufficiency, the petition was assigned to the undersigned hearing officer on August 14, 1995.

By notice of hearing dated August 15, 1995, a final hearing was scheduled on September 13, 1995, in Tallahassee, Florida. The parties then agreed that no factual matters were in dispute and that an evidentiary hearing was unnecessary. Thereafter, proposed findings of fact and conclusions of law were filed by the parties on October 2, 1995. A ruling on each proposed finding is found in the Appendix attached to this Final Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

A. Background

1. Petitioners, Burton B. Griffin and Michael N. Padgett, are certified law enforcement officers employed by the Duval County Sheriff's Office. Both officers are the subject of outstanding administrative complaints filed against them in December 1993 and March 1994, respectively, by respondent, Criminal Justice Standards and Training Commission (Commission). Those cases are now docketed with the Division of Administrative Hearings as Case Nos. 94-2909 and 94-2911, respectively.

2. After considerable delays by the parties, the two complaints are now scheduled to be heard in December 1995. They seek to discipline petitioners' law enforcement certifications and allege that on October 27, 1992, petitioners violated "Sections 943.1395(6), (7) and 943.13(7), Florida Statutes, and Rule 11B-27.001(4)(a) and/or (c), Florida Administrative Code." Specifically, Griffin is charged with unlawfully possessing two crack cocaine pipes and unlawfully and knowingly falsifying, or causing another to falsify, an arrest and booking report. Padgett is charged with unlawfully possessing a crack cocaine pipe and unlawfully possessing crack cocaine. It is agreed that petitioners have standing to initiate this proceeding.

3. On August 10, 1995, petitioners filed a petition challenging the validity of Rule 11B-27.001(4)(c), Florida Administrative Code, on a number of grounds. That portion of the rule in its entirety reads as follows:

(4) For the purposes of the Commission's implementation of any of the penalties enumerated in Rule (sic) subsection 943.1395(6) or (7), F.S., a certified officer's failure to maintain good moral character, as required by Rule (sic) subsection 943.13(7), is defined as:

* * *

(c) The perpetration by the officer of an act of 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.

In their proposed order, however, petitioners suggest that only paragraphs 1. through 4. are being challenged. The undersigned will accordingly assume that only that portion of the rule is in issue.

B. Is the Rule Invalid?

a. The allegations

4. Without correlating their allegations in the petition to the statutory grounds in Section 120.52(8), Florida Statutes, Griffin and Padgett alleged that rule 11B-27.0011(4)(c)1.-4. is an invalid exercise of delegated legislative authority on the grounds the rule (a) "creates an impermissibly broad definition of moral character offenses, prohibiting conduct which is protected by an officer's constitutional rights to free speech, association, and privacy," (b) "fails to provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited, and thus is impermissibly vague," (c) "impermissibly delegates policy decisions as to what is prohibited to those applying the rule, and requires them to make determinations on an ad-hoc basis with the danger of arbitrary and discriminatory application," (d) exceeds its rulemaking authority by creating "an impermissibly broad definition of moral character offenses, rather than creating a statewide standard," and (e) "exceeds the legislative intent" in Sections 943.1395(8)(a) and (b), Florida Statutes, by "creating a vast range of prohibited activities," thus preventing "the promulgation of penalties for possible infractions."

5. The source of authority for the rule is Section 943.12(1), Florida Statutes, which authorizes the Commission to "(p)romulgate rules for the administration of ss. 943.085-943.255 pursuant to chapter 120." The specific laws being implemented are Sections 943.13(7) and 943.1395(7), Florida Statutes. The former statute requires that all law enforcement officers "(h)ave a good moral character as determined by a background investigation under procedures established by the commission," while the latter statute requires, among other things, that the commission, by an established "statewide standard," adopt a rule defining the term "good moral character."

b. Does the rule exceed the agency's rulemaking authority?

6. The source of authority for adopting the challenged rule is found in Section 943.12(1), Florida Statutes. As noted above, that statute authorizes the Commission to adopt "rules for the administration of" various provisions within chapter 943, including section 943.1395(7). The latter statute requires that the Commission establish "as a statewide standard" a rule definition of the term "good moral character." Because the rule on its face purports to administer the terms of section 943.1395(7), and it uniformly applies to all law

enforcement officers on a statewide basis, the rule is not deemed to exceed the Commission's rulemaking authority.

c. Does the rule conflict with "legislative intent?"

7. In their petition, Griffin and Padgett allege that the rule "exceeds the legislative intent" in Sections 943.1395(8)(a) and (b), Florida Statutes, by "creating a vast range of prohibited activities," thereby preventing "the promulgation of penalties for possible infractions." In correlating this allegation to the pertinent statutory ground, the undersigned assumes that petitioners are alleging that the rule enlarges, modifies or contravenes the specific laws being implemented. Although the rule does not cite sections 943.1395(8)(a) and (b) as the laws being implemented, the allegation will nonetheless be considered.

8. Petitioners submitted no extrinsic evidence concerning the legislative intent of the cited statutes. Even so, paragraph (a) simply requires that the Commission adopt, by rule, "disciplinary guidelines and procedures for implementing the penalties provided in subsections (6) and (7)" while paragraph (b) requires that any guidelines adopted "provide reasonable and meaningful notice to officers and the public of penalties that may be imposed for prohibited conduct." Since there is no facial conflict between the rule and the statutory provisions, the contention is hereby rejected.

d. Is the rule vague?

9. Paragraphs (4)(c)1.-4. define "good moral character" as "(t)he 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;

Petitioners claim that this language is impermissibly vague on its face since persons of ordinary intelligence must guess at its meaning.

10. Paragraph 1. simply prohibits a law enforcement officer from significantly interfering "with the rights of others." That definition reasonably implies that an officer should not engage in conduct which hinders or intrudes upon the basic rights of other citizens. Since affected persons are given fair notice of what conduct is prohibited, paragraph 1. is not deemed to be impermissibly vague.

11. As to paragraphs 2. and 3., it can be reasonably inferred that law enforcement officers are presumed to understand the meaning of the terms "the criminal justice system" and "the laws of the state and nation." Therefore, those paragraphs are not deemed to be so vague as to be statutorily invalid.

12. Finally, it cannot be said that conduct which causes "substantial doubts concerning the officer's moral fitness for continued service" is so vague as to leave petitioners, and other affected persons, in doubt as to when they might be subjected to the rule. Therefore, paragraph 4. is deemed to be valid.

e. Does the rule establish adequate standards for agency decisions or vest unbridled discretion in the agency?

13. Petitioners further allege that the rule "impermissibly delegates policy decisions as to what is prohibited to those applying the rule, and requires them to make such determinations on an ad-hoc basis with the danger of arbitrary and discriminatory application." In other words, petitioners complain that the rule fails to establish adequate standards for agency decisions or vests unbridled discretion in the agency.

14. By its own terms, the challenged rule confers some measure of discretion on the Commission to determine whether a licensee's conduct constitutes a failure to maintain good moral conduct. But in the context of the statutory ground raised, this discretion is not unguided. For example, paragraphs 1., 2. and 4. of the rule specify the basis on which this discretion is to be exercised. More specifically, before a violation of those paragraphs can be found, the proscribed conduct by the accused must be significant, adverse and substantial, all measurable standards for agency decisions. At the same time, paragraph 3. simply proscribes conduct which "shows disrespect for the laws of the state or nation," a facially neutral ground for taking disciplinary action. Therefore, the rule is not deemed to be invalid as lacking standards or vesting unbridled discretion in the Commission.

f. Is the rule arbitrary and capricious?

15. In their proposed order, petitioners raise for the first time the contention that the rule is arbitrary and capricious. Aside from the fact that petitioners failed to allege this statutory ground in their initial petition, there was no proof to show that the rule was without a logical or factual underpinning or was adopted without thought or reason. Therefore, this ground is deemed to be both untimely and without merit.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Section 120.56, Florida Statutes.

17. As the party seeking to have the rule declared invalid, petitioners bear the burden of proving by a preponderance of the evidence that the rule is an invalid exercise of delegated legislative authority. See, e. g., *Agrico Chemical Co. v. Dept. of Environmental Regulation*, 365 So.2d 759, 763 (Fla. 1st DCA 1978). This burden has been characterized as "a stringent one indeed." *Id.* at 763.

18. Section 120.52(8), Florida Statutes, defines an invalid exercise of delegated legislative authority as follows:

Invalid exercise of delegated legislative authority means action which goes beyond the powers, functions, and duties delegated by the legislature.

The same statute goes on to provide that a proposed rule is invalid if:

(a) The agency has materially failed to follow the applicable rulemaking procedures set forth in s. 120.54;

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(7);

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; or

(e) The rule is arbitrary or capricious.

19. Although the initial petition does not identify the specific statutory grounds for invalidating the rule, petitioners' proposed order suggests that the rule should be invalidated because it exceeds the agency's grant of rulemaking authority, it enlarges, modifies or contravenes the specific provisions of law implemented, it is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency, and it is arbitrary or capricious. As to the latter ground, there are no allegations in the initial petition regarding the arbitrary and capricious nature of the rule and thus that ground has been disregarded as being untimely raised.

20. Because the rule does not exceed the agency's grant of rulemaking authority in Section 943.12(1), Florida Statutes, in that it purports to administer the terms of Section 943.1395(7), Florida Statutes, and has statewide application in a uniform manner, the allegation that the rule violates section 120.52(8)(b) must necessarily fail.

21. Similarly, because the rule does not conflict with the laws implemented, or any other statute cited by petitioners, it is concluded that the allegation that the rule enlarges, modifies or contravenes the specific laws being implemented is without merit.

22. Next, the allegation is made that the rule is vague. The test to determine whether a rule is impermissibly vague is whether men of common understanding and intelligence must guess at the provision's meaning. See, e. g., *State, Dept. of Health and Rehab. Services v. Health Care & Retirement Corp.*, 593 So.2d 539, 541 (Fla. 1st DCA 1992). For the reasons given in findings of fact 9-12, paragraphs 1.- 4. are deemed to be sufficiently clear and understandable so as to permit petitioners, and other affected persons, to understand the rule's meaning and when it might be applied.

23. Petitioners further allege that the rule is invalid on the ground it fails to establish adequate standards for agency decisions and vests unbridled

discretion in the agency. For the reasons set forth in findings of fact 13 and 14, this contention is rejected. See, e. g., Cortes v. State, Board of Regents, 655 So.2d 132 (Fla. 1st DCA 1995).

24. In reaching these conclusions, the undersigned has agreed with respondent's observation that both the courts and the legislature have recognized the difficulty in defining with precision the term "good moral character." See, e. g., White v. Beary, 237 So.2d 263, 265-66 (Fla. 1st DCA 1970)("We doubt that the legislature could in its infinite wisdom detail each salient standard for good moral character."); Fla. Bd. of Bar Examiners v. G.W.L., 364 So.2d 454, 458 (Fla. 1979)("The term 'good moral character' has no absolute definition.") See also Sections 472.013(5)(a), 473.306(4)(a) and 489.511(4)(a), Florida Statutes, which prescribe licensure qualifications for land surveyors, certified public accountants and contractors, respectively, and define good moral character as "a personal history of honesty, fairness, and respect for the rights of others and for the laws of this state and nation." While a more detailed list of prohibited acts might be preferable, by adopting the existing standards of conduct, which rely heavily on judicial and statutory language, the Commission has reasonably carried out its statutory duty to define the term. This being so, the rule is sufficient to withstand assertions of vagueness and inadequate standards, and the petition to invalidate the rule should be denied.

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

ORDERED that Rule 11B-27.001(4)(c)1.-4. is determined to be a valid exercise of delegated legislative authority.

DONE AND ENTERED this 20th day of October 1995, in Tallahassee, Florida.

DONALD R. ALEXANDER
Hearing Officer
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of October 1995.

APPENDIX TO FINAL ORDER, CASE NO. 95-4021RX

The undisputed findings submitted by the parties have been accepted and substantially incorporated into this order.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

Any party who is adversely affected by this final order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing a copy of a notice of appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the district court of appeal in the district where the party resides. The notice of appeal must be filed within thirty days of rendition of the order to be reviewed.