

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF LAW ENFORCEMENT,)
CRIMINAL JUSTICE STANDARDS)
AND TRAINING COMMISSION,)
)
Petitioner,)
)
vs.) Case No. 98-4070
)
FIDEL DeLEON,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was held by the Division of Administrative Hearings, before Daniel M. Kilbride, Administrative Law Judge, in Orlando, Florida, on January 21, 1999. The following appearances were entered:

APPEARANCES

For Petitioner: Karen Simmons
Assistant General Counsel
Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302-1489

For Respondent: Fidel DeLeon
381 Lake Park Trail
Oviedo, Florida 32765

STATEMENT OF THE ISSUE

Whether on or about January 22, 1996, Respondent, Fidel DeLeon, did unlawfully attempt to commit a sexual battery upon Diane Smalley, a person twelve years of age or older, without the consent of Diane Smalley, by attempting to penetrate her vagina

with his penis or by attempting to place his penis in union with the vagina and/or mouth of Diane Smalley, and in the process thereof used physical force and violence not likely to cause serious personal injury.

Whether Respondent violated the provisions of Section 943.1395(6) and/or (7), Florida Statutes, and Rule 11B-27.0011(4)(a), Florida Administrative Code, in that the Respondent failed to maintain the qualifications established by Section 943.13(7), Florida Statutes, which require that law enforcement officers in the State of Florida have good moral character.

PRELIMINARY STATEMENT

Petitioner filed an Administrative Complaint dated August 27, 1997, charging Respondent with various violations of Florida law. Respondent filed an Election of Rights form disputing the allegations set forth in the Administrative Complaint and requested a formal hearing. The case was referred to Division of Administrative Hearings, which noticed and conducted a formal hearing pursuant to Section 120.57(1), Florida Statutes.

At the formal hearing, Petitioner presented the testimony of four witnesses: Dianne Smalley, David Watson, Denis Volkerson, and Jeff Tramonte. Petitioner offered ten exhibits into evidence. Exhibits 1-9 were admitted. The contents of Petitioner's Exhibit No. 5 is admissible pursuant to Rule

28-106.213(3), Florida Administrative Code. The contents of Petitioner's Exhibit No. 6 is admissible pursuant to Sections 90.803(18) and 90.804(2)(c), Florida Statutes. The contents of Petitioner's Exhibit No. 7 is admissible pursuant to Section 90.803(18) and 90.804(2)(c), Florida Statutes. The contents of Petitioner's Exhibit No. 8 is admissible pursuant to Sections 90.803(18) and 90.804(2)(c), Florida Statutes. The contents of Petitioner's Exhibit No. 9 is admissible pursuant to Sections 90.803(18) and 90.804(2)(c), Florida Statutes. Respondent presented the testimony of two witnesses: Kim Kirkland and Dan Champion. Respondent did not offer any exhibits into evidence.

At the conclusion of formal hearing, the parties were given ten days for the filing of Proposed Recommended Orders from the date of filing of the transcript. A transcript of the proceedings was filed on February 2, 1998. Petitioner filed its Proposed Recommended Order on February 10, 1999. Respondent filed his proposals on February 9, 1999. Both proposals have been given careful consideration in the preparation of this order.

FINDINGS OF FACT

1. Respondent was certified as a law enforcement officer in Florida by the Criminal Justice Standards and Training Commission on December 7, 1990, and was issued certificate No. 113130.

2. Respondent was employed with the Orange County Sheriff's Office on May 9, 1994.

3. Respondent served as a road deputy during the relevant time-period, working the midnight shift.

4. Dianne Smalley was born on January 7, 1953, and is a person twelve years of age or older.

5. Smalley was employed by the Maitland Police Department as a dispatcher in January 1996, and worked the midnight shift.

6. Smalley met and became acquainted with Respondent approximately a month prior to January 22, 1996.

7. On January 21, 1996, Respondent and Smalley made plans to get together socially after Respondent got off duty.

8. On January 22, 1996, at about two o'clock in the morning, Respondent went to the residence of Smalley and was invited in.

9. When Respondent arrived at Smalley's residence, he was wearing his police uniform, which included a holstered gun.

10. Respondent and Smalley socialized for about 30 minutes while in the residence.

11. During the course of their conversation, Respondent told Smalley that he was married.

12. After telling Smalley he was married, Respondent was asked to leave by Smalley.

13. Respondent did not leave Smalley's residence at that point, but instead Respondent moved closer to Smalley who was sitting on the couch.

14. Respondent pushed Smalley back on the couch, however,

Respondent moved forward and kissed her on her neck. Respondent also rubbed his hands all over the body of Smalley.

15. Smalley pushed away Respondent and told him that nothing was going to happen. She got up and walked toward the front door, expecting Respondent to leave.

16. As Smalley moved from the dining room toward the front door, Respondent came up behind her and pushed Smalley back into the living room to where her body was bent forward over the arm of the couch.

17. Respondent stood behind Smalley and, as she was bent over the couch, Respondent held her down by holding her arms and with the weight of his body.

18. Respondent then tried to pull her pants down and pull up her shirt.

19. Respondent unzipped his pants and pulled out his penis.

20. Respondent rubbed his genitals against Smalley's posterior and placed his penis between her legs.

21. Respondent simulated intercourse with Smalley.

22. Respondent tried to put Smalley's hand on his penis but she resisted.

23. Respondent asked Smalley to perform oral sex on him but she refused.

24. Respondent tried to push Smalley's body down to perform oral sex on him, but was unable to because she locked her knees.

25. Respondent then masturbated himself in Smalley's living room and ejaculated on the carpet in the living room.

26. Respondent then let Smalley go and left the residence.

27. During the course of the day, Smalley reported the incident to her roommate.

28. Later that day, Respondent called Smalley on the telephone and apologized for what had happened.

29. Smalley called the Orange County Sheriff's Office after viewing a news broadcast where a rape suspect, who looked similar to Respondent, had gained access to the victim's home by using a police ID. Smalley did not identify herself fully to Detective Volkerson, but identified Fidel DeLeon as a possible suspect because of what he had done to her.

30. Through Respondent's telephone records, detectives were able to identify Smalley as the caller. An investigation was initiated and Smalley cooperated with law enforcement.

31. During the investigation, Respondent gave investigators false and misleading statements.

32. Following the internal investigation, Respondent was terminated from the Orange County Sheriff's Office on August 29, 1996.

33. During the course of the investigation of this matter from January through August 1996, there was insufficient evidence of misconduct by law enforcement which would negate the integrity of the investigation into this matter.

34. Smalley's testimony at the formal hearing was credible.

CONCLUSIONS OF LAW

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

36. Petitioner is charged with the administration of criminal justice standards and training for all law enforcement officers throughout the state, pursuant to Section 943.085-943.255, Florida Statutes (1997), and is authorized to discipline those licensed thereunder who violate the law.

37. Revocation of license proceedings are penal in nature; State ex rel Vining v. Florida Real Estate Commission, 281 So. 2d 487 (Fla. 1973) and must be construed strictly in favor of the one against whom the penalty would be imposed. Munch v. Department of Professional Regulation, Division of Real Estate, 592 So. 2d 1136 (Fla. 1st DCA 1992); Fleischman v. Department of Professional Regulation, 441 So. 2d 1121 (Fla. 3d DCA 1983). The standard of proof required in this matter is that relevant and material findings of fact must be supported by clear and convincing evidence of record. Hal Heifetz d/b/a Key Wester Inn v. Department of Business Regulation, Division of Alcoholic Beverages and Tobacco, 475 So. 2d 1277 (Fla. 1st DCA 1985); Department of Banking and Finance v. Osborne Stern & Co., 670

So. 2d 932 (Fla. 1996). Petitioner has the burden of proving by clear and convincing evidence each of the allegations in the Administrative Complaint. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

38. Section 943.13, Florida Statutes, establishes the minimum qualifications for law enforcement officers in Florida, including at Subsection (7):

Have a good moral character as determined by a background investigation under procedures established by the Commission.

39. In Zemour, Inc. v. Division of Beverage, 347 So. 2d 1102 (Fla. 1st DCA 1977), an application for a beverage license was denied after an administrative finding that the owner was not of good moral character. Although the facts leading to this conclusion are entirely dissimilar to the instant case, the court's definition of moral character is significant.

Moral character as used in this statute 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 qualifies generally acceptable to the populace for positions of trust and confidence.

Such definition should be used in the case before this tribunal.

40. Rule 11B-27.0011(4), Florida Administrative Code, in effect at the time of the alleged offense, defines "good moral character" for purposes of the implementation of disciplinary action upon Florida law enforcement officers. The rule states in

relevant portion:

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

(a) The perpetration by the officer of an act which would constitute any felony offense, whether criminally prosecuted or not. . . . Section 794.011(5): sexual battery.

41. Section 794.011(5), Florida Statutes, Sexual Battery is defined, as follows:

A Person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof does not use physical force and violence likely to cause serious personal injury commits a felony of the second degree. . . .

42. Section 794.011(1), Florida Statutes. As used in this chapter:

(a) "Consent" means intelligent, knowing, and voluntary consent and does not include coerced submission. "Consent" shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender.

(g) "Serious personal injury" means great bodily harm or pain, permanent disability, or permanent disfigurement.

(h) "Sexual battery" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.

43. Section 777.04, Florida Statutes. Attempt--

(1) A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt, ranked for purposes of sentencing as provided in subsection (4).

(4)(d) Except as otherwise provided in s. 828.125(2) or s. 849.25(4), if the offense attempted, solicited, or conspired to is a:

1. Felony of the second degree the offense of criminal attempt is a felony of the third degree.

44. Section 943.1395(6), Florida Statutes, requires:

The Commission shall revoke the certification of any officer who is not in compliance with the provisions of Section 943.13(4) or (7).

45. Section 943.1395(7), Florida Statutes, provides:

"Upon a finding by the commission that a certified officer has not maintained good moral character . . . the commission may enter an order imposing . . . penalties" which include revocation, suspension, probation and/or reprimand

46. Section 943.1395(8), Florida Statutes, provides:

(a) The commission shall, by rule, adopt disciplinary guidelines and procedures to administer the penalties provided in subsections (6) and (7). The commission may, by rule, prescribe penalties for certain offenses. The commission shall, by rule, set forth aggravating and mitigating circumstances to be considered when imposing the penalties provided in subsection (7).

* * *

(d) A Administrative Law Judge assigned to conduct a hearing under ss 120.569 and

120.57(1) regarding allegations that an officer is not in compliance with, or has failed to maintain compliance with, s. 943.13(4) or (7) must, in his or her recommended order:

1. Adhere to the disciplinary guidelines and penalties set forth in subsections (6) and (7) and the rules adopted by the commission for the type of offense committed.

2. Specify, in writing, any aggravating or mitigating circumstances that he considered in determining the recommended penalty.

Any deviation from the disciplinary guidelines or prescribed penalty must be based upon circumstances or factors that reasonably justify the aggravation or mitigation of the penalty. Any deviation from the disciplinary guidelines or prescribed penalty must be explained, in writing, by the Administrative Law Judge.

47. Rule 11B-27.005, Florida Administrative Code, provides, in pertinent part:

(4) The commission sets forth below a range of disciplinary guidelines from which disciplinary penalties will be imposed upon certified officers who have been found by the Commission to have violated section 943.13(7), F.S. The purpose of the disciplinary guidelines is to give notice to certified officers of the range of penalties or prescribed penalties which will be imposed for particular violations of section 943.13(7), F.S. absent aggravating or mitigating circumstances, as provided in paragraph (4), herein. The disciplinary guidelines are based upon a "single count violation" of each provision listed. Multiple counts of violations of section 9443.13(7), F.S., will be grounds for enhancement of penalties. All penalties at the upper range of the sanctions set forth in the guidelines, (i.e., suspension or revocation), include lesser penalties, (i.e., reprimand, remedial training, or probation),

which may be included in the final penalty at the Commission's discretion.

(5) When the Commission finds that a certified officer has committed an act which violates section 943.13(7), F.S., it shall issue a final order imposing penalties within the ranges recommended in the following disciplinary guidelines:

(a) for the perpetration by the officer of an act which would constitute any felony offense, as described in Rule 11B-27.0011(4)(a), F.A.C., . . . the action of the Commission shall be to impose a penalty ranging from suspension of certification to revocation.

48. Section 120.57(1)(c), Florida Statutes, provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

49. Section 90.802, Florida Statutes, provides:

Hearsay rule.--Except as provided by statute, hearsay evidence is inadmissible.

50. Section 90.803, Florida Statutes, provides:

Hearsay exceptions; availability of declarant immaterial.--The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(18) ADMISSIONS.--A statement that is offered against a party and is:

(a) The party's own statement in either an individual or a representative capacity;

(b) A statement of which the party has manifested an adoption or belief in its truth;

(22) FORMER TESTIMONY.--Former testimony

given by the declarant which testimony was given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination; provided, however, the court finds that the testimony is not inadmissible pursuant to s. 90.402 or s. 90.403.

51. Section 90.804, Florida Statutes, provides:

Hearsay exceptions; declarant unavailable.--

(2) HEARSAY EXCEPTIONS.--The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness:

(a) Former testimony.--Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(c) Statement against interest.--A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

52. On or about January 22, 1996, Respondent, Fidel DeLeon,

did unlawfully attempt to commit a sexual battery upon Smalley, a person twelve years of age or older, without the consent of Smalley, by attempting to penetrate her vagina with his penis or by attempting to place his penis in union with the vagina and/or mouth of Smalley, and in the process thereof used physical force and violence not likely to cause serious personal injury.

53. Respondent went over to Smalley's house intent on having sex. He was asked to leave once Smalley found out he was married. She kept rebuffing his advances and telling him no. When he could not have his way, the Respondent tried to force himself on her. He tried to pull her pants off. When that didn't work, he tried to push her head down for oral sex. Luckily, her resistance, as well as his need to relieve himself, prevented the Respondent from completing the actual crime of sexual battery.

54. Clear and convincing evidence was presented to establish that the Respondent committed the act alleged in the Administrative Complaint, to wit: Attempted Sexual Battery, which is a third-degree felony.

55. Based on the behavior of Respondent on January 22, 1996, Petitioner showed by clear and convincing evidence that Respondent failed to maintain good moral character within the meaning of Section 943.13(7), Florida Statutes, and Rule 11B-27.0011(4)(a), Florida Administrative Code.

56. Smalley's testimony as to the events of January 22,

1996, is credible.

57. The Respondent's defense to the charges is not credible.

58. The Criminal Justice Standards and Training Commission disciplinary guidelines provide for a penalty guideline range of suspension to revocation for the charged offense. Clearly, the nature of this offense is one where revocation of certification to be a law enforcement officer is the appropriate penalty.

59. The position of law enforcement officer is one of great public trust. There can be no more basic public expectation than that those who enforce the law must themselves obey the law. City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. 5th DCA 1989). The seriousness of the Respondent's misconduct clearly merits revocation of his law enforcement officer certification.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Commission enter a final order which finds:

(1) Respondent guilty of committing attempted sexual battery on January 22, 1996;

(2) that Respondent failed to maintain the qualifications established by Section 943.13(7), Florida Statutes, which require that law enforcement officers have good moral character; and

(3) revoke the certification of Respondent to be a law

enforcement officer in the State of Florida.

DONE AND ENTERED this 22nd day of February, 1999, in
Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 22nd day of February, 1999.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to

this Recommended Order should be filed with the agency that will issue the final order in this case.