

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF LAW ENFORCEMENT,)
CRIMINAL JUSTICE STANDARDS AND)
TRAINING COMMISSION,)
)
Petitioner,)
)
vs.) Case No. 00-1286
)
LOUIS D. SCARSELLA,)
)
Respondent.)
-----)

RECOMMENDED ORDER

Upon due notice, William R. Cave, an Administrative Law Judge for the Division of Administrative Hearings, held a formal hearing in this matter on September 12-13, 2000, in Fort Myers, Florida.

APPEARANCES

For Petitioner: Gabrielle Taylor, Esquire
Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302-1489

For Respondent: Robert B. Burandt, Esquire
1714 Cape Coral Parkway, East
Cape Coral, Florida 33904-9620

STATEMENT OF THE ISSUE

Should Respondent's Law Enforcement Certificate be revoked, suspended, or otherwise disciplined?

PRELIMINARY STATEMENT

By an Administrative Complaint dated September 30, 1999, and filed with the Division of Administrative Hearings (Division) on March 28, 2000, the Criminal Justice Standards and Training Commission (Commission) is attempting to revoke, suspend, or otherwise discipline Respondent's Law Enforcement Certificate.

As grounds therefor, the Commission alleges that Respondent violated Section 943.1395(7), Florida Statutes, and Rule 11B-27.0001(4)(d), Florida Administrative Code, in that Respondent, on or about June 4, 1999, tested positive for a controlled substance, cannabis (marijuana), by urine test which reflected a positive reading consistent with or indicative of the ingestion of a controlled substance listed in Chapter 893, Florida Statutes. By an Election of Rights dated February 21, 2000, Respondent denied the allegations contained in the Administrative Complaint and requested a formal hearing. By a Request for Assignment of Administrative Law Judge dated March 28, 2000, the Commission referred the matter to the Division for the assignment of an Administrative Law Judge and for the conduct of a formal hearing.

The Commission presented the testimony of Steven P. Furderer, Todd Everly, Bethany Iler, Stephen I. Merlin, M.D., Elizabeth Dulato-Burza, n/k/a Elizabeth Brunelli, Abel Natali,

M.D., and Charlene Golden. The Commission's Exhibits numbered 1 and 3 were admitted in evidence without objection. The Commission's Exhibits numbered 2 and 4 were initially rejected since they pertained to matters not alleged in the Administrative Complaint. However, after reviewing the proffer of, and the testimony surrounding, those exhibits, it became clear that Exhibits 2 and 4 were only being offered to bolster the allegations contained in the Administrative Complaint relating to Exhibits 1 and 3. Therefore, the Commission's Exhibits 2 and 4 were admitted in evidence. Respondent testified on his own behalf and presented the testimony of Steven Furderer, David Scarsella, John Fouchia, John Michael Anderson, David Nye, Caroline Scarsella, William Columbia, Randy Horner, and Kenneth Lieberman, Ph.D. Respondent's Exhibits 1 through 4 were admitted in evidence. Initially, Respondent's Exhibit 5 was rejected. However, Respondent proffered Exhibit 5. After careful review of the proffer of Exhibit 5, it is clear that the exhibit is relevant to the reason Respondent submitted the urine specimen on June 4, 1999, and the urine specimen on June 10, 1999. Therefore, Respondent's Exhibit 23 is admitted in evidence.

A Transcript of this proceeding was filed with the Division on November 21, 2000. Respondent's Motion For Extension of Time to file proposed recommended orders was

unopposed and the parties were given until 5:00 p.m. on December 26, 2000, to file their proposed recommended orders. The extension of time was granted with the understanding that any time constraint imposed under Rule 28-106.216(1), Florida Administrative Code, was waived in accordance with Rule 28-106.216(2), Florida Administrative Code. The parties timely filed their Proposed Recommended under the extended time frame.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. The Commission is the agency of the State of Florida charged with the responsibility for the certification and de-certification of law enforcement officers.

2. At all times pertinent to this proceeding, Respondent was a certified law enforcement officer having been certified by the Commission on January 24, 1992, and issued law enforcement certificate number 20445.

4. At all times pertinent to this proceeding, Respondent was employed by the Cape Coral, Florida Police Department (CCPD).

5. As a certified law enforcement officer, Respondent is sworn to uphold the laws of the State of Florida, in both an

on-duty and off-duty capacity, and must follow a personal code of conduct which precludes the use of marijuana in an on-duty or off-duty capacity. Respondent was aware at the time he was hired by the CCPD that law enforcement officers had to abide by the Drug Free Workplace standards.

6. As part of the biannual physical examination required by the CCPD, the Respondent, on June 4, 1999, presented to the Lee Memorial Health Systems, a/k/a Lee Convenient Care, a Collection Site as defined in Rule 59A-24.003(4), Florida Administrative Code, for the purpose of giving a urine specimen for drug testing.

7. Strict procedures were followed in the collection of Respondent's urine specimen taken on June 4, 1999, in order that the integrity and chain of custody of the specimen were maintained. Respondent's urine specimen taken on June 4, 1999, was collected, identified, and forwarded to Diagnostic Services Inc., d/b/a DSI Laboratories (DSI) in accordance with the procedure set forth in Section 112.0455(8), Florida Statutes, and Rule 59A-24.005, Florida Administrative Code, for the purpose of testing for drugs.

8. DSI is a Forensic Toxicology Laboratory as that term is defined in Rule 59A-24.003(8), Florida Administrative Code, and is a certified, state and federally-licensed forensic toxicology laboratory which conducted the tests of

Respondent's urine specimen taken on June 4, 1999.

Respondent's urine specimen given on June 4, 1999, was given Specimen ID No. 11A, 292409 and Laboratory Accession No. 99-157-0716.

9. When urine is tested for the presence of marijuana, a positive result is indicated when the nanogram level of cannabinoids, or THC, reaches a level of 50 or higher on the initial screening, or immunoassay test. Rule 59A-24.006(4)(e)1, Florida Administrative Code. If the immunoassay test is positive, the sample is subjected to a much more specific test, the Gas Chromatography/Mass Spectrometry (GCMS) test. A result of a nanogram level of 15 or higher is a positive test result for the presence of cannabinoids or THC. Rule 59A-24.006(4)(f)(1), Florida Administrative Code. The establishment of the cut-off levels on the immunoassay or GCMS tests eliminates any possibility of positive test results due to accidental ingestion.

10. Respondent's urine specimen of June 4, 1999, was first subjected to the immunoassay test which reported a level of 169 nanograms of THC in Respondent's urine. Respondent's urine sample was then subjected to the GCMS test which reported a result of the presence of 37 nanograms of THC in Respondent's system.

11. Elizabeth Burza, n/k/a Elizabeth Brunelli, the certifying scientist on the two tests conducted on Respondent's urine specimen of June 4, 1999, reviewed and approved the integrity of the chain of custody, that the machines used to test the specimen were operating correctly, and the accuracy of the positive result for cannabinoids in Respondent's system.

12. On June 8, 1999, Ms. Brunelli certified that urine specimen number 11A-292409 tested positive for presence of cannabinoids. The urine specimen number and laboratory accession number were that of Respondent's urine specimen submitted on June 4, 1999.

13. Abel Natali, M.D. was the Medical Review Officer of the tests conducted on the urine specimen number 11A-292409 submitted by Respondent on June 4, 1999. On June 9, 1999, Dr. Natali reviewed and approved the testing procedures and results thereof. Dr. Natali confirmed the conclusions of Ms. Brunelli that the test results as to specimen number 11A, 292409 did not reflect abnormality, and accurately reflected a positive reading of 37 nanograms of THC, cannabinoids, in Respondent's system.

14. On June 10, 1999, Dr. Natali telephoned Respondent to confirm that Respondent had tested positive for cannabinoids. Dr. Natali inquired of Respondent as to any

valid reason for the positive test for marijuana, such as:

(1) was there a possibility that medical research had exposed Respondent to marijuana and; (2) had Respondent ingested any prescription or over-the-counter drugs which may have contained marijuana. The purpose of these questions was to allow the tested person to admit or deny use, and to allow the Medical Review Officer to follow up on valid explanations for exposure controlled substances.

15. Respondent told Dr. Natali that he had been exposed to marijuana at a party where people were smoking marijuana and that he had smoked marijuana. However, during his testimony at the hearing, Respondent could not recall making that statement to Dr. Natali, and denied smoking marijuana at the party.

16. Dr. Natali advised Respondent that he would be reporting the positive test results for marijuana to his supervisor, and that Respondent could request a retest. Respondent did not request a retest.

17. On June 10, 1999, the positive test results for marijuana were reported to Lieutenant Everly, CCPD. Subsequently, on June 10, 1999, Lieutenant Everly and Lieutenant Furderer requested that Respondent submit another urine sample for testing. Although Respondent was not told that failure to submit another urine specimen would result in

his termination from CCPD, he was advised that failure to submit another urine specimen could possibly result in his termination from the CCPD. Respondent agreed to the submission of a second urine specimen, and on June 10, 1999, Lieutenant Furderer transported Respondent to DSI Laboratories where Respondent submitted another urine specimen for testing.

18. The collection and testing of the second urine specimen submitted by Respondent on June 10, 1999, and identified as 11A, 303243, was handled in accordance with the rules and statutes governing the collection and testing of urine specimens for the purpose of determining the presence of illegal drugs in the person's system.

19. Ms. Brunelli, certifying scientist, certified the results of the two tests conducted on Respondent's second urine specimen identified as number 11A,303243. Ms. Brunelli certified specimen 11A, 303243 as being positive for the presence of cannabinoids on the immunoassay test at a level of 209 nanograms, and on the GCMS test at a level of 56 nanograms.

20. Stephen I. Merlin, M.D., Medical Review Officer, reviewed and approved the collection and testing procedures used with Respondent's urine specimen submitted on June 10, 1999, and identified as 11A, 303243, and the positive results of the tests (a nanogram level of 209 for the immunoassay test

and a nanogram level of 56 for the GCMS test) as reviewed and approved by Ms. Brunelli. Dr. Merlin informed Respondent that he had tested positive for cannabinoids, and inquired as to whether Respondent had taken any prescription drugs containing marinol, or if Respondent had been exposed to marijuana. Respondent replied in the negative. Respondent did not request a retest.

21. Respondent's only explanation for the presence of cannabinoids in his system was the possible passive inhalation of marijuana smoke at a party in a motel room on the weekend prior to giving the first urine specimen on June 4, 1999.

22. While passive inhalation of marijuana smoke under controlled conditions may possibly result in negligible amounts of cannabinoids being detected in a person's urine, Respondent failed to show that the conditions in that motel room were such that it would have resulted in passive inhalation of marijuana smoke by Respondent to the degree that his urine would have reflected, upon testing, even negligible amounts of cannabinoids, let alone the levels found in Respondent's urine.

23. Respondent offered no evidence to demonstrate that he may have accidentally ingested marijuana during this period of time.

24. Respondent's June 4, 1990, and June 10, 1999, urine specimens were disposed of on July 5, 2000. Prior to their disposal, Respondent did not contact anyone and request that the specimens be retain for retesting.

25. Subsequent to being notified of the results of the second urine test, the CCPD terminated Respondent. However, after the CCPD held an informal hearing, CCPD reinstated Respondent. At the time of this hearing, Respondent was still working with the CCPD, apparently in an administrative capacity.

26. Respondent presented no evidence of complete rehabilitation or substantial mitigating circumstances.

27. The nanogram levels for cannabinoids reported for the initial and confirmation tests for the urine specimen given by Respondent on June 4, 1999, and the nanogram levels for cannabinoids reported for the initial and confirmation tests for the urine specimen given by Respondent on June 9, 1999, exceeded the nanogram levels for cannabinoids set out in Rule 59A-24.006(4)(e)1.(f)1., Florida Administrative Code, for positive testing.

CONCLUSIONS OF LAW

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

29. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 2d DCA 1981). To meet this burden, the Commission must establish facts upon which its allegations are based by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection vs. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996).

30. Section 943.1395(7), Florida Statutes, provides in pertinent part as follows:

- (7) Upon a finding by the commission that a certified officer has not maintained good moral character, the definition of which has been adopted by rule and is established as a statewide standard, . . . the commission may enter an order imposing one or more of the following penalties:
 - (a) Revocation of certification.
 - (b) Suspension of certification for a period not to exceed 2 years.
 - (c) Placement on a probationary status for a period not to exceed 2 years, subject to terms and conditions imposed by the commission. Upon the violation of such terms and conditions, the commission may revoke certification or impose additional penalties as enumerated in this section.
 - (d) Successful completion by the officer of any basic recruit, advanced, or career development training or such retraining deemed appropriate by the commission.
 - (e) Issuance of a reprimand.

31. Rule 11B-27.011(4)(d), Florida Administrative Code, provides as follows:

(4) For the purposes of the Commission's implementation of any of the penalties specified in Section 943.1395(6) or (7), F.S., a certified officer's failure to maintain good moral character required by Section 943.12(7), F.S., is defined as:

* * *

(d) Testing positive for controlled substances by conducting a urine or blood test that results in a confirmed nanogram level pursuant to Rule 11B-27.00225, F.A.C., or is consistent with and indicative of the ingestion of a controlled substance pursuant to Chapter 893, F.S., and not having a specific nanogram level listed in Rule 11B-27.00225, F.A.C., shall be an affirmative defense to this provision to establish that any such ingestion was lawful. Any test of this kind relied upon by the Commission for disciplinary action, shall comply with the requirements for reliability and integrity of the testing process pursuant to Rule 11B-27.00225, F.A.C.

32. Rule 11B-27.005(4)(5)(d), Florida

Administrative Code, provides in pertinent part as

follows:

(4) The Commission sets forth in paragraphs (5) (a)--(d), of this rule section, a range of disciplinary guidelines from which disciplinary penalties shall be imposed upon certified officers who have been found by the commission to have violated Section 943.13(7), F.S. . . .

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

* * *

(d) Notwithstanding paragraph (4) of this rule section, the unlawful use by a certified officer of any controlled

substances specified in Section 893.13, F.S., or Rule 11B-27.00225, F.A.C., pursuant to Rule 11B-27.0011(4)(d), F.A.C., the action of the Commission, absent clear and convincing evidence of complete rehabilitation and substantial mitigating circumstances, shall be to impose a penalty of revocation. (Emphasis furnished.)

33. The Commission has met its burden to show that Respondent tested positive for cannabinoids on June 4, 1999, and on June 10, 1999, and thereby failed to maintain "good moral character" as defined by Rule 11B-27.011(4)(d), Florida Administrative Code, and required to be maintained by certified law enforcement officers by Section 943.1395(7), Florida Statutes. Since the Respondent failed to present clear and convincing evidence of complete rehabilitation and substantial mitigating circumstances, the Commission is left with no alternative but to revoke Respondent's law enforcement certification.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Commission enter a final order revoking Respondent's Law Enforcement Certificate number 20445.

DONE AND ENTERED this 12th day of January, 2001, in
Tallahassee, Leon County, Florida.

WILLIAM R. CAVE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6947
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of January, 2001.

COPIES FURNISHED:

Gabrielle Taylor, Esquire
Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302-1489

Robert B. Burandt, Esquire
1714 Cape Coral Parkway, East
Cape Coral, Florida 33904-9620

A. Leon Lowry, II, Program Director
Division of Criminal Justice
Professional Services
Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302

Michael Ramage, General Counsel
Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit 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.