

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF LAW ENFORCEMENT, )  
CRIMINAL JUSTICE STANDARDS )  
AND TRAINING COMMISSION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 00-3478PL  
 )  
ERLENE R. STEWART, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal hearing in Gainesville, Florida on December 11, 2000, before P. Michael Ruff, duly designated Administrative Law Judge of the Division of Administrative Hearings. The following appearances were entered:

APPEARANCES

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

For Respondent: Erlene Stewart, pro se  
Route 1, Box 52  
Sanderson, Florida 32087

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concerns whether the Respondent committed the violations charged in the

Administrative Complaint, involving possessing and introducing onto the grounds of a state correctional institution, certain controlled substances and, if so, what if any penalty is warranted.

PRELIMINARY STATEMENT

This cause arose upon the filing of an Administrative Complaint against the above-named Respondent on November 19, 1999, charging, in essence, that the Respondent unlawfully introduced certain controlled substances onto the grounds of the Union Correctional Institution, a state prison. The Respondent elected to formally dispute the allegations in the Complaint, and requested an administrative hearing pursuant to Chapter 120, Florida Statutes. The case was forwarded to the Division of Administrative Hearings for formal proceeding on August 18, 2000. The cause was assigned to Administrative Law Judge Charles Adams and, shortly prior to hearing was re-assigned to P. Michael Ruff, Administrative Law Judge.

The cause came on for hearing as noticed. The Petitioner (Commission) presented the testimony of witnesses Ms. Oda Somera, Sergeant Kevin Box, Sergeant Perry Mobley, Inspector Mike Bailey, Deputy Henry Tomlinson, Sergeant Dale Pfalzgraf, and Inspector Timmy Yaw. The Respondent testified in her own behalf but presented no other witnesses. Additionally, the Petitioner's Composite Exhibit three, as well as Exhibits

five and six were admitted into evidence, and the Petitioner's Exhibits one, two and four were stipulated into evidence. In that connection, the parties stipulated that the Respondent was certified by the Commission on May 9, 1994, and was issued Correctional Certificate Number 143764; that the black 1993 Pontiac, Grand Am automobile, the subject of the search at issue in this case, was registered at all times pertinent hereto to the Respondent and remains registered to the Respondent.

Upon completion of the hearing, a Transcript of the proceedings was ordered by the Petitioner Agency. The Transcript was filed with the Division of Administrative Hearings and the parties were accorded the right to file Proposed Recommended Orders. The Proposed Recommended Orders were timely filed and have been considered in the rendition of this Recommended Order.

#### FINDINGS OF FACT

1. The Respondent, Erlene Stewart, has been employed as a correctional officer at Union Correctional Institution (UCI). She was so employed on February 1, 1999, and had been employed there for almost five years at that time.

2. The Respondent was working on Saturday, January 30, 1999. On that day, officers at UCI examined employees coming to work by conducting an "Ion Scan" of employees to attempt to detect any drug or drug residues on or about their persons when

they entered the institution to go on duty. The Respondent was subjected to such an Ion Scan and successfully passed it. Thus, she was aware that a drug detection effort was being conducted on Saturday, January 30, 1999, at UCI.

3. February 1, 1999, was the Monday after that Saturday. The Respondent was working that day in tower number five of UCI. She had driven to work that day in the black Pontiac Grand Am in question, which is registered in her name. She was working on the 8:00 a.m. to 4:00 p.m., shift on that Monday.

4. It was very unusual for a drug detection operation to be conducted on that Monday, immediately succeeding the Ion Scan drug detection operation which had been conducted on Saturday, two days before. Such a drug detection operation was conducted in the parking lot of UCI on Monday, February 1, 1999, however, using a drug detection dog. It was very unusual for a drug detection dog to be used so soon after an Ion Scan drug detection operation and also unusual for the dog to be used at 12:30 in the afternoon. The Respondent was surprised to find that a drug detection dog was being used in the parking lot of UCI on February 1, 1999.

5. When the Respondent came to work on that day she locked her car leaving the windows slightly cracked and went inside to go on duty. Later that day, at approximately 12:30 p.m., a drug detection dog, handled by Sergeant Box of UCI, was examining

vehicles in the parking lot and "alerted" to the presence or odor of narcotics inside or on the Respondent's vehicle. The dog had been trained and certified to be capable of passively alerting to the odors of four narcotics: marijuana, powdered cocaine, crack cocaine and heroin. After the dog alerted to the presence of contraband drugs in or on the Respondent's vehicle, the Respondent, who was then working in tower number five, was relieved of duty and summoned to her vehicle in the parking lot on the grounds of UCI. When she arrived in the vicinity of her vehicle, she was informed that a drug detection dog had alerted to her vehicle. She provided a written consent, to the officers present, to a search of her vehicle. The Respondent had to unlock her vehicle in order for the drug detection officers to begin their search of its interior. Upon gaining access to the interior of the Respondent's vehicle, Sergeant Mobley of Hamilton Correctional Institution, discovered an aluminum foil package containing a white powder suspected to be cocaine, on the passenger's side of her vehicle. Sergeant Mobley turned that package over to the custody of Inspector Bailey.

6. Sergeant Dugger found what appeared to be marijuana on the driver's side of the Respondent's vehicle. Prior to his entry into the vehicle, Sergeant Dugger and Inspector Bailey had observed through the window what appeared to be marijuana and marijuana seeds on and about the driver's seat. The Respondent

is familiar with the appearance of marijuana and cocaine. Moreover, she is aware that cocaine is commonly wrapped in aluminum foil. Her former husband had been known to use cocaine according to the Respondent's testimony.

7. Inspector Bailey took custody of the suspected cocaine and marijuana and conducted two tests on both substances. The results of his field test and Ion Scan test were positive for marijuana and cocaine. The evidence was then turned over to Inspector Yaw who conducted another Ion Scan test on the white powder confirming it as cocaine.

8. Sergeant Dale Pfalzgraf of the Union County Sheriff's Office, was summoned to UCI on that day, after the suspected drugs were located in the Respondent's vehicle. Inspector Yaw turned over to him a sealed plastic bag containing what appeared to be marijuana and a tin-foil package of what appeared to be cocaine. Deputy Pfalzgraf placed the Respondent under arrest and transported her and the evidence to the Sheriff's office. He placed the evidence into a secure locker with the evidence custodian, pending its transportation to the Florida Department of Law Enforcement (FDLE) laboratory.

9. Deputy Tomlinson of the Union County Sheriff's Office was given the evidence that was seized from the Respondent's vehicle by the evidence custodian and transported it to the FDLE laboratory in Jacksonville, Florida, for testing.

10. At the FDLE laboratory, Allison Harms received the evidence from Deputy Tomlinson. The evidence bag remained sealed until testing was performed by Ms. Somera, the FDLE chemistry analyst. Ms. Somera tested the substances contained within the bag and positively identified them as cannibis and cocaine.

11. The Respondent maintains in her testimony that her former husband had access to her vehicle and had used it in the last several days with some of his friends. She contends that he is a known illicit drug user (cocaine). She also states that she left the windows to her car slightly cracked for ventilation when she parked it in the parking lot on the day in question to go to work. She states, in essence, that either the illicit drug materials found in her car were placed there without her knowledge by her former husband or his friends or, alternatively, that the correctional officers involved in the investigation planted the drug materials in her car in order to remove her from employment and/or licensure as retaliation for past employment-related friction she states she had with prison authorities. She also contends that another prison employee told her in private that she was being "framed" but that that person refused to testify on her behalf because of fear of potential loss of his job. In any event, her self-serving

testimony is not corroborated by any other witness or exhibit and is not credited.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. Section 120.569 and 120.57(1), Florida Statutes (2000).

13. Section 943.13(7) Florida Statutes, provides that

Any person employed or appointed as a correctional officer shall have good morale character as determined by a background investigation under procedures established by the Commission.

14. Section 943.1395(7), Florida Statutes, has authorized the Commission to revoke certification of any officer who has failed to maintain good morale character . . . as required by Section 943.13(7), Florida Statutes, or, alternatively, to impose specified, lesser penalties upon the officer.

15. Section 943.1395, Florida Statutes (1997), establishes the criteria for revocation or discipline of an officer's certificate upon the finding that the officer has failed to maintain good morale character:

(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, as required by Section 943.13(7), 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 subsection.
- (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.

16. In cases where revocation or suspension is sought based upon an officer's alleged failure to maintain "good moral character," the lack of good moral character must be established by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); McKinney v. Castor, 667 So. 2d 387, 388 (Fla. 1st DCA 1995).

17. The Court of Appeals for the First District provided an operative definition of moral character in Zemour, Inc. v. Division of Beverage, 347 So. 2d 1102 (Fla. 1st DCA 1977):

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 an establishes the qualities

generally acceptable to the populace for positions of trust and confidence.

18. The Florida Supreme Court stated in Florida Board of Bar Examiners Re: G.W.L., 364 So. 2d 454 (Fla. 1978):

In our view 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.

19. Rule 11B-27.0011(4), Florida Administrative Code, provides a definition of "good moral character" for purposes of implementation of disciplinary action upon Florida correctional officers. The rule states in pertinent part:

(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 943.13(7), F.S., is defined as:

(a) The perpetration by an officer for an act that would constitute any felony offense whether criminally prosecuted or not; and

(b) The perpetration by an officer of an act that would constitute any of the following misdemeanor or criminal offenses whether criminally prosecuted or not:

1. Section [ . . . ] 893.13, [ . . . ], F.S.

20. Section 893.03(1)(c)7, Florida Statutes, specifies that marijuana is a controlled substance. Further, Section 893.13(6)(b), Florida Statutes, provides that: "[i]f the offense is the possession of not more than 20 grams of cannabis, as defined in this chapter, the person commits a misdemeanor of the first degree."

21. Section 893.03(2)(a)4, Florida Statutes, specifies that cocaine is a controlled substance. Further, Section 893.13(6)(a), Florida Statutes, provides that it is unlawful for any person to be in actual or constructive possession of such a controlled substance and that violation of that provision is a felony of the third degree.

22. Section 944.47(1)(a), Florida Statutes, provides that it is unlawful to introduce upon the grounds of any state correctional institution any controlled substances defined in Section 893.02(4), Florida Statutes. Such a violation is therein provided to be a felony of the second degree. Section 944.47(2), Florida Statutes.

23. Rule 11B-27.005(5), Florida Administrative Code (1998), provides a range of disciplinary guidelines to be imposed on officers who are determined to have violated the "good moral character" requirement found in Section 943.13(7), Florida Statutes, to-wit:

(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 that would constitute any felony offense, pursuant to Rule 11B-27.0011(4)(a), F.A.C., but where there was not a violation of Section 943.13(4), F.S., the action of the commission shall be to impose a penalty ranging from, suspension of certification to revocation. Specific violations and penalties that shall be imposed, absent mitigating circumstances, include the following:

4. Possession, sale of controlled substance (893.13, F.S.) - Revocation.

(b) For the perpetration by the officer of an act which would constitute any of the misdemeanor offenses, pursuant to Rule 11B-27.0011(4)(b), F.A.C., but where there was not a violation of Section 943.13(4), F.S., the action of the Commission shall be to impose a penalty ranging from, probation of certification to revocation. Specific violations and penalties that will be imposed, absent aggravating or mitigating circumstances, include the following:

11. Possess or delivery without consideration, and not more than 20 grams of Cannabis (893.13, F.S.) - Revocation.

24. The evidence is clear and convincing that on February 1, 1999, the Respondent drove her vehicle containing the marijuana and cocaine to her work site at UCI. She was not concerned about any drug investigation or the presence of drugs within her vehicle because she did not expect any inspection to

be conducted since the Ion Scan inspections had been conducted just two days previously.

25. The evidence establishes that the Respondent possessed marijuana and cocaine by having it in her vehicle. She introduced it upon the grounds of a state correctional institution by parking her car in the parking lot although she did not seek to introduce any controlled substances into the prison itself. These actions by the Respondent are sufficient to establish lack of good moral character for purposes of the above authority. The position of any law enforcement officer, including a corrections officer, is one of great public trust with a great public expectation that those who are licensed to enforce the laws must themselves obey the law. City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. 5th DCA 1989).

26. The penalty guideline for the offenses charged under the above-cited rule includes revocation of licensure. However, the Respondent's misconduct is rendered less serious in that she did not actually attempt to introduce controlled substances into the prison itself for profit or for other motives, but merely had the substances inside her locked vehicle. Although her testimony to the effect that the substances were not hers, may have been her husband's, or may have been planted by correctional officers for vindictive purposes, is uncorroborated and not accepted as fact, the possibility that she had at least

inadvertently introduced the substances in her possession in her car onto UCI property warrants imposition of less than the maximum penalty.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record and the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED:

That the Respondent be found guilty of failure to maintain good moral character as defined by the above-cited legal authority and that her certification be suspended for a period of two years.

DONE AND ENTERED this 2nd day of April, 2001, in Tallahassee, Leon County, Florida.

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P. MICHAEL RUFF  
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Filed with the Clerk of the  
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this 2nd day of April, 2001.

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.