

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF CAPE CORAL,)
)
Petitioner,)
)
vs.) Case No. 02-0386
)
HECTOR CALDERON,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a formal hearing was conducted in this case on April 30 and May 1, 2002, in Cape Coral, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Marilyn W. Miller, Esquire
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For Respondent: Hector L. Calderon, pro se
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Cape Coral, Florida 33914

STATEMENT OF THE ISSUE

The issue presented in this case is whether there is just cause for the City of Cape Coral's decision to terminate the employment of Hector Calderon, a police officer with the City of Cape Coral Police Department.

PRELIMINARY STATEMENT

By Final Notice of Disciplinary Action dated December 21, 2001, Chief Arnold A. Gibbs of the Cape Coral Police Department informed Officer Hector Calderon that his employment with the City of Cape Coral was being terminated. Chief Gibbs' action was based on the findings of a Department Disciplinary Review Board conducted on December 19, 2001, which in turn upheld the findings of an internal affairs investigation conducted by Lt. Michael Maher of the Cape Coral Police Department. Pursuant to ordinance, Officer Calderon requested an appeal hearing before the city manager. The request was granted, and the hearing was held on January 8, 2002. By letter dated January 10, 2002, Interim City Manager Howard Kunik affirmed Chief Gibbs' action, making final Officer Calderon's termination.

By letter dated January 21, 2002, Officer Calderon requested a hearing for review of the Final Notice of Disciplinary Action. On January 30, 2002, the City of Cape Coral referred the matter to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct a formal administrative hearing. The matter was set for hearing on April 10, 2002. On March 27, 2002, the City of Cape Coral filed a consented motion for continuance. By order

dated March 29, 2002, the motion was granted, and the hearing rescheduled for April 30 through May 1, 2002.

At the final hearing, the City of Cape Coral presented the testimony of Lt. Michael Maher of the office of professional standards of the Cape Coral Police Department; Nicole Beougher; Arnold Gibbs, chief of the Cape Coral Police Department; Roger Montgomery; and Officer Robert Slager of the Cape Coral Police Department. The City of Cape Coral's Composite Exhibits 1 through 3 and Exhibits 4 through 8 were admitted into evidence.

Officer Calderon presented the testimony of Officers Dan O'Hara, Carlos Mena, Jack Fulop, Don Donakowski, Jason Matyas, Kurt Grau, Jack Betz, and Alan Kowlak; Lt. Craig Durham, Lt. William Rivers, Sgt. John Dickman, Sgt. Keith Munser, Det. Scott Johnson, and Lawrence Stringham, all of the Cape Coral Police Department. Officer Calderon's Exhibits 1 and 2 were admitted into evidence. Officer Calderon's Exhibit 1 was included in the City of Cape Coral's Composite Exhibit 1 (Book 1, Tab 10).

A Transcript of the final hearing was filed at the Division of Administrative Hearings on June 7, 2002. At the close of the hearing, the parties stipulated that the proposed recommended orders would be filed no later than 20 days after the filing of the Transcript. Both parties timely filed

Proposed Recommended Orders.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following findings of fact are made:

1. The City of Cape Coral (the "City") employed Hector Calderon as a police officer in the operations division of the Cape Coral Police Department (the "Department") from January 11, 1997 through January 11, 2002, the effective date of his termination. Officer Calderon was employed as a patrol officer, and his main duties were traffic enforcement during the 6 p.m. to 6 a.m. shift.

2. On October 29, 2001, Sgt. Keith Perrin of the Department received a telephone complaint concerning Officer Calderon from a woman named Cheryl Sugar. Ms. Sugar told Sgt. Perrin that Officer Calderon had lived with her over the past several months. She offered information about narcotics usage and deviant sexual behavior by Officer Calderon, both on and off duty. She specifically alleged that Officer Calderon had been taking cocaine.

3. Ms. Sugar also told Sgt. Perrin that Officer Calderon had been seeing a woman named Nicole Beougher, whom he had met working at a Circle K store when he stopped there during his work shift. Ms. Sugar alleged that Officer Calderon had been

taking Ms. Beougher on "ride-alongs" in his police car. Ms. Sugar was angry at Officer Calderon because she had only recently discovered that he had also been dating Ms. Beougher. She and Ms. Beougher had spoken to each other, and realized that Officer Calderon had been deceiving both of them.

4. Sgt. Perrin made a report to Lt. Michael Maher, the Department's head of internal affairs. Lt. Maher contacted Ms. Sugar by telephone on the morning of October 30, 2001. Ms. Sugar reiterated her allegations and agreed to come in later that afternoon to give a sworn statement and submit to a polygraph examination. However, she telephoned Lt. Maher at 3 p.m. and stated that she had placed herself in an "awkward position" and could not give a statement after all. From that point forward, Ms. Sugar declined to cooperate with the Department, despite frequent attempts by Lt. Maher to secure her testimony.

5. On or about November 3, 2001, officers from the Department responded to a domestic dispute call involving Officer Calderon and Ms. Sugar. The officers on the scene noted that Officer Calderon acted unusually. He was upset, shaken, and verbally abusive. He refused to leave the scene until Lt. Maher gave him a direct order to leave or go to jail.

6. This incident, coupled with Ms. Sugar's earlier complaint, led Lt. Maher to place Officer Calderon on administrative leave and send him for a "fitness for duty" psychological evaluation. The evaluation was conducted by a psychologist on November 8, 2001. The psychologist concluded that Officer Calderon was not capable of returning to duty. Officer Calderon was placed on administrative desk duty and his patrol vehicle was taken from him.

7. Officer Calderon's patrol vehicle was assigned to another officer, Robert Slager. Following routine procedure, Officer Slager inventoried the vehicle to assure that Officer Calderon's personal property was accounted for and returned to him. While conducting the inventory, Officer Slager discovered sixteen driver's licenses in the vehicle. The licenses were in a cup holder, in plain sight.

8. Upon investigation, Lt. Maher determined that the driver's licenses had been confiscated by Officer Calderon during traffic stops over a four-year period. Department procedure called for confiscated licenses to be turned in to the records division along with the citation, but Officer Calderon simply kept them in his vehicle. Lt. Maher questioned Officer Calderon as to why he kept the licenses. Officer Calderon's only explanation was that they were his "personal collection."

9. Several officers testified that they had heard of the practice of keeping confiscated driver's licenses as trophies, but all denied that they did it themselves. They could not or would not name any other officer who indulged in the practice.

10. Officer Calderon kept the licenses in plain sight, and his vehicle was inspected by his superiors on a regular basis, yet no disciplinary action was taken against him concerning the confiscated licenses until this investigation developed.

11. Despite Ms. Sugar's failure to cooperate, Lt. Maher continued investigating her allegations. Ms. Sugar had provided the name of Nicole Beougher, and Lt. Maher contacted Ms. Beougher, who provided a sworn statement and testified at the hearing.

12. In October or November 2000, Ms. Beougher was working nights in a Circle K store in Officer Calderon's patrol zone. She was 18 years old. Officer Calderon came in, and they began talking. He started coming in frequently to talk to her. He gave her his business card, adding a handwritten note with the code for his voice mailbox at work.

13. During their conversations, Ms. Beougher mentioned that she had never ridden in a police car, and Officer Calderon offered to take her on a "ride-along." At the time, the Department had a "ride-along" program as part of its

community outreach. The program encouraged citizens to ride with patrol officers as they conducted their daily course of duties. Interested persons were required to fill out a release of liability form and permit the Department to run a criminal background check. By Department policy, each citizen was limited to one ride-along every six months.

14. Ms. Beougher completed the form and went on a ride-along with Officer Calderon on Christmas Eve 2000. He picked her up at her mother's house at 6 p.m. and drove to the police station for roll call. Then Officer Calderon and Ms. Beougher went out on the road on his patrol duties. They discussed personal matters, such as whether Ms. Beougher had a boyfriend.

15. At around midnight, they drove to a secluded area on the north end of Cape Coral. Officer Calderon stopped the car. They both got out and walked to the rear of the car. Officer Calderon began kissing Ms. Beougher. Nothing further of a sexual nature occurred. Officer Calderon dropped Ms. Beougher off at her mother's house at approximately 5:30 a.m. on Christmas Day.

16. In January 2001, Officer Calderon and Ms. Beougher began seeing each other regularly. On May 6, 2001, Officer Calderon moved in with Ms. Beougher. While they lived together, Officer Calderon, on duty, would stop by their

apartment five or six times per shift, sometimes for as long as 45 minutes. On one or two of these occasions, they engaged in oral sex.

17. While they lived together, Ms. Beouger rode along with Officer Calderon on his work shift on 15 to 20 different occasions. Ms. Beouger never filled out another release of liability form, and the number of ride-alongs was clearly in violation the Department's policy. However, the evidence at hearing established that the Department's enforcement of its policy was lax. Officer Calderon's shift sergeant saw Ms. Beouger with him on more than one occasion and made no inquiry.

18. On one or two of these unauthorized ride-alongs, they drove to a secluded area of northern Cape Coral, and Ms. Beouger performed oral sex on Officer Calderon.

19. One evening while they were living together, Officer Calderon brought home a small amount of cocaine and offered to use it with Ms. Beouger. She was afraid to use it, fearing that Officer Calderon was trying to set her up for an arrest. Ms. Beouger said she would use it if he did first. Officer Calderon snorted the cocaine through a rolled dollar bill. Ms. Beouger then joined him.

20. From that point forward, Officer Calderon and

Ms. Beougher used cocaine frequently on weekends when Officer Calderon was not working.

21. Officer Calderon and Ms. Beougher frequently spent weekends at a Motel 6 in North Fort Myers. They did this to get away from their roommate and to be closer to the clubs downtown. They would drink heavily at the clubs, to the point where

Ms. Beougher could not remember much of what occurred. They would bring other people, male and female, back to the motel and have sex with them. They also used cocaine while at the motel.

22. Officer Calderon sometimes worked details at a bar called the Hired Hand Saloon, a place he also frequented when off duty. A prior acquaintance named Roger Montgomery worked there as a bouncer. Ms. Beougher testified that Mr. Montgomery was the source of Officer Calderon's cocaine. At the hearing, Mr. Montgomery confirmed the details of Ms. Beougher's testimony.

23. At the Hired Hand, Mr. Montgomery would give Officer Calderon "bumps" of cocaine, i.e., small amounts sufficient for him and Ms. Beougher to get high. On at least two occasions, Mr. Montgomery sold \$50 worth of cocaine to Officer Calderon.

24. Mr. Montgomery never gave or sold cocaine to Officer Calderon while he was on duty. Mr. Montgomery never saw Officer Calderon appear to be under the influence of alcohol or any other drug while he was on duty. Mr. Montgomery never actually witnessed Officer Calderon taking cocaine, though he was certain that he saw him high on cocaine. Ms. Beougher testified that she and Officer Calderon used cocaine while at the Hired Hand.

25. On one occasion when Officer Calderon was off duty at the Hired Hand, he asked Mr. Montgomery for cocaine. Mr. Montgomery did not have the cocaine on his person, but did have some in the ashtray of his truck. He gave Officer Calderon the keys to his truck, and Officer Calderon went out to the truck. When Mr. Montgomery later went out to his truck, the cocaine was gone.

26. Officer Calderon invited Mr. Montgomery to the Motel 6 to use cocaine and have sex with Ms. Beougher and him. Mr. Montgomery wanted to go, but couldn't. Mr. Montgomery testified that Ms. Beougher, under the influence of alcohol and cocaine, performed oral sex on both him and Officer Calderon at the Hired Hand. Ms. Beougher could not recall this incident, but did not deny that it might have happened while she was under the influence.

27. One evening at the Hired Hand, Officer Calderon gave Mr. Montgomery a bag of marijuana. Officer Calderon told him that he had confiscated the marijuana from a group of teenagers while on duty. Officer Calderon had earlier shown the marijuana to Ms. Beougher and told her the same story.

28. On one occasion, Officer Calderon asked Mr. Montgomery to get him the drug Ecstasy. Mr. Montgomery made the attempt but was unable to get it because his seller's supplier had been arrested.

29. Officer Calderon and Ms. Beougher took the drug Oxycontin on several occasions. Officer Calderon procured the drug from a person unknown to Ms. Beougher.

30. Officer Calderon had no car other than his patrol vehicle, which he was authorized to take home. Ms. Beougher testified that while off duty, Officer Calderon drove the patrol vehicle under the influence of alcohol on several occasions. He also allowed Ms. Beougher to drive the police vehicle.

31. Sometime in August 2001, Officer Calderon moved out of Ms. Beougher's apartment. He told Ms. Beougher he was moving because there had been a drug bust in the apartment next door, and he was concerned that the Department would somehow associate him with it.

32. Officer Calderon's move also coincided with his

learning that Ms. Beougher was pregnant with twins. Ms. Beougher was certain that Officer Calderon was the father. Officer Calderon did not deny it, but wanted to make certain prior to undertaking support obligations. The results of a DNA test were pending at the time of the hearing.

33. Ms. Beougher testified that her drug use ceased when she learned she was pregnant, and that she never saw Officer Calderon take illegal drugs after she stopped taking them.

34. During the investigation, Lt. Maher discovered that Officer Calderon failed to notify the Department of several address changes, in violation of General Order D-1, Section III.18.

35. Officer Calderon admitted to the sexual allegations that occurred at the Hired Hand and the Motel 6. He denied having sex with Ms. Beougher in his patrol car, and denied that he had ever used any illegal drugs.

36. Officer Calderon alleged that Ms. Sugar and Ms. Beougher were bitter about his seeing them both at the same time, and thus concocted a false tale of his drug usage. He contended that Mr. Montgomery, a known drug dealer, had been intimidated through fear of arrest into testifying, and that Mr. Montgomery was sexually involved with Ms. Beougher and thus part of the conspiracy.

37. Officer Calderon's contentions about the opposing witnesses cannot be credited. Neither Ms. Beougher nor Mr. Montgomery knew the other's last name, and both credibly testified that their only involvement with each other was through Officer Calderon at the Hired Hand.

38. Ms. Beougher admitted to being angry at Officer Calderon, but credibly denied that she invented her story of drug usage. Adding to her credibility was that she freely implicated herself in the illegal activities that occurred, rather than portraying herself as an innocent bystander.

39. Mr. Montgomery admitted that his motive for testifying was fear of prosecution for his drug dealings. He was reluctant to testify against Officer Calderon. He did not want to get Officer Calderon in trouble. His testimony was credible and corroborated that of Ms. Beougher as to the particulars of occurrences at the Hired Hand.

40. Officer Calderon had a prior disciplinary history, which Chief Gibbs testified played a role in his decision to terminate Officer Calderon. In 1999, Officer Calderon was given a eight-hour suspension without pay for failing to report the discharge of his service revolver. He and his live-in girlfriend at the time, Allison Gimello, were involved in a domestic disturbance. When the police arrived, they

discovered bullet holes in a closet door. Ms. Gimello told police that Officer Calderon had fired his police weapon after threatening to kill her. She later changed her story, saying that she had accidentally fired the gun. Because of this ambiguity, Officer Calderon was disciplined only for not reporting the discharge of his weapon. He did not file a grievance or appeal his suspension.

41. Also in 1999, Officer Calderon was disciplined for showing a photograph of himself, naked with an erection, to female employees of the Department. Without grievance or appeal, Officer Calderon received a 24-hour suspension without pay.

42. Upon completion of the internal affairs investigation in the instant case, Officer Calderon was charged with the following: failure to notify the Department of an address change; loafing while on duty; use of a controlled substance while off duty; purchase and possession of a controlled substance while on and off duty; intentional violation of state law; conduct unbecoming a public employee; using the prestige of his official position or the Department's time, facilities, equipment or supplies for private gain; improper performance of his duties; engaging in sex while on duty and in a City of Cape Coral police vehicle; malfeasance or misfeasance in office; perpetration of an act

or conduct which causes substantial doubt concerning an officer's honesty, fairness, or respect for the rights of others or for the laws of the state, irrespective of whether such act or conduct constitutes a crime; and violation of the rules of conduct of the Criminal Justice Standards and Training Commission ("CJSTC") by failing to maintain good moral character and having a pattern of conduct not consistent with state standards.

43. Lt. Maher's internal affairs report, dated December 5, 2001, sustained all of the charges except loafing on duty and use of a controlled substance. Lt. Maher dropped the loafing charge after consulting with Officer Calderon's immediate superiors, who did not see a problem with his frequent visits to the Circle K store or to the apartment he later shared with Ms. Beougher, provided his productivity was unaffected. It was conceded at the hearing that Officer Calderon was one of the most productive officers in the Department throughout his employment.

44. Lt. Maher dropped the drug usage charge because the only drug test given to Officer Calderon came back negative. At the outset of the investigation, Lt. Maher wanted to test Officer Calderon for drugs but was advised by the City attorney that he lacked reasonable suspicion to order a test.

By the time his investigation built reasonable suspicion, Officer Calderon had been placed on administrative duty and was aware that the Department was looking into his activities. Nonetheless, Lt. Maher believed that, without a positive drug test, he could not sustain a charge of drug usage.

45. At the hearing, Officer Calderon challenged the alleged inconsistency between the Department's finding there was insufficient evidence to support that he used drugs, but finding the same evidence sufficient to support that he bought and/or possessed drugs. This argument is rejected. The evidence at hearing established that Officer Calderon both possessed and used drugs. Lt. Maher's decision to drop one of the potential charges does not change the fact that the other charge was proven.

46. Lt. Maher's report was forwarded to Officer Calderon's immediate superiors for a recommendation on corrective action. One of the superiors, Lt. Craig Durham, recommended termination. Officer Calderon's immediate superior, Sgt. John Dickman, recommended a 30-day suspension without pay or benefits.

47. These recommendations then went to the division commander, Major B. A. Murphy, who recommended termination and forwarded the file to Chief Gibbs for his review on December

12, 2001.

48. Officer Calderon elected to have the recommended discipline reviewed by a Department Disciplinary Review Board ("DDRB"). The DDRB was composed of five Department employees: two selected by Officer Calderon, two selected by the Department's administrators, and a fifth member selected by the other four. Lt. Maher presented the case for the Department. Officer Calderon presented his case in rebuttal. The DDRB then deliberated and rendered a decision. On December 19, 2001, the DDRB unanimously recommended termination.

49. On December 21, 2001, Chief Gibbs entered a Final Notice of Disciplinary Action terminating Officer Calderon's employment. Officer Calderon sought and received an appeal of this decision with the City Manager. On January 10, 2002, Interim City Manager Howard Kunik upheld the decision to terminate Officer Calderon's employment.

CONCLUSIONS OF LAW

50. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to City of Cape Coral Ordinance 50-94, Article Eight, which provides that employee appeals from disciplinary actions will be heard by Administrative Law Judges of the Division of

Administrative Hearings, pursuant to contract with the City of Cape Coral. The ordinance provides that the Administrative Law Judge shall enter a Final Order in these proceedings. Article Eight, Section E.8.

51. Article Seven of Ordinance 50-94 authorizes the City to suspend, demote, or terminate employees for the 35 offenses named therein. Relevant to this proceeding are the following offenses, as listed in Section C of the cited article:

21. Engaging in personal or business activities unrelated to City employment during work hours.

* * *

33. Utilization of official position for unauthorized personal gain.

34. Actions or conduct detrimental to the interests of the City.

52. General Order D-1 of the City of Cape Coral Police Department establishes rules of conduct for members of the Department. Relevant to this proceeding are the following requirements, as set forth in Section III of General Order D-1:

All members of the Department shall:

1. Conduct themselves in a proper manner and with appropriate demeanor; they shall not engage in any conduct unbecoming a public employee and member of the department.

* * *

13. Be held strictly responsible for the proper performance of their duties.

* * *

18. Shall [sic] maintain a telephone at his home of record and report any changes in his marital or draft status, residence, telephone number or any other change affecting his personal information within twenty-four (24) hours.

53. Also relevant to this proceeding are the following prohibited acts set forth in Section IV of General Order D-1:

No member of the department shall:

* * *

2. Make personal contact with persons of questionable character or frequent places suspected of violating the law unless in the performance of his duty.

3. Withhold any information concerning criminal activity.

* * *

5. Use the prestige or influence of his official position; or time, facilities, equipment or supplies of the department for his private gain or advantage of another.

* * *

14. Intentionally violate any Federal, State, or County law or City Ordinance.

* * *

19. Possess or use any controlled substance while on or off duty, except with the approval and guidance of a licensed physician. Any medication taken while on duty must be with the knowledge and approval of his supervisor.

* * *

38. Engage in any conduct on or off duty which adversely affects the morale and efficiency of the department or which has a tendency to destroy public respect or confidence in the department or himself.

54. City of Cape Coral Ordinance 50-94, Article Eight, Section E.7. provides:

7. DECISION. In rendering his or her decision, the hearing officer shall determine whether, based on the evidence presented, the discipline ordered was for just cause. The evidentiary standard to be applied by the hearing officer shall be a preponderance of the evidence.

55. The City has met its burden in this case. The evidence established that Officer Calderon failed to report his address changes, engaged in sex while on duty, and was given and purchased cocaine. Officer Calderon knowingly and openly engaged in criminal activity. He frequented places at which he knew illegal activities were occurring, and there accepted and purchased illegal drugs. He participated in conduct that would tend to bring the Department into disrepute.

56. The position of police 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 it. City of Palm Bay v. Bauman, 475 So. 2d 1322, 1326 (Fla. 5th

DCA 1985). The seriousness of Officer Calderon's misconduct merits termination of his employment.

57. This conclusion is not based on either Officer Calderon's too-frequent use of the "ride-along" program or his improper retention of the 16 driver's licenses. While the City proved the facts as to both of these issues, the evidence indicated that both these violations were relatively widespread and laxly enforced by the Department. Officer Calderon's superiors were aware of Ms. Beougher's repeated presence in his car, but took no action. The circumstantial evidence also pointed to their awareness of the driver's licenses in Officer Calderon's patrol vehicle well before Officer Slager's inventory. It is concluded that it would be unfair to base Officer Calderon's termination, even in part, on violations of Department orders that appeared to be seldom if ever enforced.

ORDER

Upon the foregoing findings of fact and conclusions of law, it is ordered that the discipline imposed in this case was for just cause and is hereby upheld.

DONE AND ORDERED this 8th day of August, 2002, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative

Hearings

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Filed with the Clerk of the
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Hearings

this 8th day of August, 2002.

COPIES FURNISHED:

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NOTICE OF RIGHT OF JUDICIAL REVIEW

Article Eight, Section E.9 of City Ordinance 50-94 provides that any party who is adversely affected by this final order may apply to the local circuit court for judicial relief within thirty (30) days after rendition of the final order by filing a petition for writ of certiorari.