

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF LAW ENFORCEMENT,)
CRIMINAL JUSTICE AND TRAINING)
STANDARDS COMMISSION,)
)
Petitioner,)
)
vs.) Case No. 06-2380PL
)
JOE L. WHEELER,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on September 13, 2006, by video teleconferencing between Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Joseph S. White, Esquire
Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302

For Respondent: Joe L. Wheeler, pro se

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Joe L. Wheeler, committed the violations alleged in an Administrative

Complaint issued by Petitioner, the Department of Law Enforcement, Criminal Justice Standards and Training Commission, and dated November 16, 2005, and, if so, what disciplinary action should be taken against him.

PRELIMINARY STATEMENT

In an Administrative Complaint dated November 16, 2005, the Department of Law Enforcement, Criminal Justice Standards and Training Commission (hereinafter referred to as the "Commission"), charged Joe L. Wheeler, with having violated statutory and rule provisions governing the conduct of Florida-certified law enforcement officers. Those violations were based upon, in addition to the allegation that Mr. Wheeler holds a law enforcement certificate from the Commission, the following allegations of fact:

On or about June 11, 2003, the Respondent, Joe L. Wheeler, did unlawfully commit a battery upon Donna Wheeler, by actually touching or striking her or intentionally causing bodily harm to her against her will.

Mr. Wheeler timely disputed the factual allegations in the Administrative Complaint by executing an Election of Rights form in which he requested a formal administrative hearing before the Division of Administrative Hearings.

Mr. Wheeler's request for hearing was forwarded to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct an evidentiary hearing. The

matter was designated DOAH Case No. 06-2380PL and was assigned to the undersigned.

By Notice of Hearing by Video Teleconference entered July 24, 2006, the final hearing of this case was scheduled to commence September 13, 2006. The hearing was scheduled to be conducted by video teleconferencing between Lauderdale Lakes, Florida, and the offices of the Division of Administrative Hearings in Tallahassee, Florida. Counsel for the Commission, the witnesses, Mr. Wheeler, and the court reporter appeared from Lauderdale Lakes.

At the final hearing, the Commission presented the testimony of Donna Wilson-Wheeler, Vaughn Mitchell, S. M. (who was 16 years of age at the time of the hearing), Pembroke Pines Police Department Officer Archibald Pinder, and Hollywood Police Department Lieutenant Forrest Jeffries. The Commission also had admitted two Exhibits.

By Notice of Filing of Transcript issued October 11, 2006, the parties were informed that the Transcript of the final hearing had been filed on October 10, 2006. The parties were also informed that they had until October 30, 2006, to file proposed recommended orders. The Commission filed Petitioner's Proposed Recommended Order on September 30, 2006. Mr. Wheeler did not file any post-hearing pleading.

FINDINGS OF FACT

1. The Commission is charged with the responsibility for, among other things, certifying individuals for employment or appointment as a law enforcement officer and investigating complaints against individuals holding certificates as law enforcement officers in the State of Florida, pursuant to Section 943.3195, Florida Statutes.

2. At the times pertinent to this matter, Respondent, Joe L. Wheeler, was certified by the Commission as a law enforcement officer, having been issued Law Enforcement Certificate Number 169035 on December 11, 1996. He was employed with the Hollywood Police Department.

3. At the times relevant to this matter, Mr. Wheeler was married to Donna Wilson-Wheeler. They were married in April 1996. They divorced in November 2004, after the events at issue in this matter.

4. On June 11, 2003, Mr. Wheeler and Ms. Wilson-Wheeler lived together, along with four children: Vaughn Mitchell, who was 17 years of age at that time; S.M, who was 13 years of age at that time; J.W., who was five years of age at that time; and Jo. W., who was 12 years of age at that time. Vaughn Mitchell and S.M. are Ms. Wilson-Wheeler's sons from a previous marriage; J.W. is the daughter of Mr. Wheeler and Ms. Wilson-Wheeler; and Jo. W. is Mr. Wheeler's son.

5. During the evening of June 11, 2003, Mr. Wheeler, Ms. Wilson-Wheeler, and all four children were in the family residence. At approximately 7:00 p.m., an argument began between Mr. Wheeler and Ms. Wilson-Wheeler in a downstairs room.

6. Following the verbal altercation, which was over a video camera that Ms. Wilson-Wheeler had purchased for Mr. Wheeler, Mr. Wheeler went upstairs.

7. Shortly after Mr. Wheeler went upstairs, Ms. Wilson-Wheeler, concerned about whether Mr. Wheeler would take her cellular telephone out of her purse, which she had left in the master bedroom, also went upstairs.

8. When Ms. Wilson-Wheeler walked into the master bedroom, not finding her cellular phone in her purse, she confronted Mr. Wheeler, who was in the master bedroom bathroom.

9. Ms. Wilson-Wheeler accused Mr. Wheeler of taking her cellular phone, which Mr. Wheeler denied. Ms. Wilson-Wheeler continued to accuse Mr. Wheeler, demanding that he return the phone. Both were angry and the "discussion" was heated.

10. Ms. Wilson-Wheeler, angry over her husband's denials, went to a desk in the bedroom and picked up a camera used by Mr. Wheeler and offered it in exchange for her phone. Mr. Wheeler angrily demanded she give him the camera, and she complied because she "knew now that he was ticked off."

11. Ms. Wilson-Wheeler told Mr. Wheeler that she would just have the telephone service provider turn her phone off and went to retrieve her purse from the bed. As she did so, Mr. Wheeler said, "Here's your phone in the bathroom where you left it."

12. Ms. Wilson-Wheeler went to the bathroom to retrieve the phone. Believing that she had not left the phone there, she told Mr. Wheeler, "You took it out." She also told him that she guessed he was still angry about the video camera. Mr. Wheeler replied, "Fuck you, fuck you" and told her he could buy his own camera, to which Ms. Wilson-Wheeler said, "Good."

13. As the verbal sparring continued, Mr. Wheeler lost control and grabbed Ms. Wilson-Wheeler, who was facing the bathroom sink, by the neck with his left hand and punched her hard in the head with his right fist. His grip on her throat was tight enough to restrict her breathing.

14. After punching her, Mr. Wheeler kicked Ms. Wilson-Wheeler's legs out from under her, causing her to fall to the bathroom floor. Mr. Wheeler pinned Ms. Wilson-Wheeler on the floor with his knee and, while cursing her, continued to punch her in the face and head, causing her head to strike the bathroom floor.

15. Mr. Wheeler continued to choke Ms. Wilson-Wheeler while he hit her, causing her to have difficulty breathing. She began to fear that she would lose consciousness.

16. The children, who were downstairs when Mr. Wheeler first struck Ms. Wilson-Wheeler and heard the commotion, ran upstairs to see what was happening. Vaughn came into the bathroom and, as Mr. Wheeler held his fist above Ms. Wilson-Wheeler ready to strike her again, he grabbed Mr. Wheeler's fist. Jo. W. also entered the bathroom yelling at his father to stop. S.M. entered the room, pleading with his mother to get up.

17. Mr. Wheeler, when Vaughn grabbed him, got up off the floor and, with Vaughn attempting to restrain him, told Vaughn he would not hurt Ms. Wilson-Wheeler anymore.

18. Mr. Wheeler's attack on Ms. Wilson-Wheeler caused visible bruises and swelling to her face, right arm, and left leg. She also had scratches on her neck, arm, and legs as result of the battery.

19. Ms. Wilson-Wheeler, picked up the telephone to call 911, but, when Mr. Wheeler threatened to kill her, did not make the call. Instead, she left the house. Although she considered driving to a police station to report the incident, she did not because of fear of what Mr. Wheeler would do to her.

20. Eventually she drove to a nearby store, after picking up S.M., and had him go into the store to purchase a disposable camera. She then had S.M. take photographs, which were admitted into evidence, of the injuries caused by Mr. Wheeler.

21. Ms. Wilson-Wheeler eventually returned to the family home. She spent the night in her daughter's room.

22. The next day, Ms. Wilson-Wheeler attempted to discuss family finances with Mr. Wheeler, who was lifting weights in the garage. Mr. Wheeler became angry, cursed her, and repeated his threat to kill her.

23. On June 18, 2003, after a dispute over the telephone, Ms. Wilson-Wheeler told Mr. Wheeler that she was going to report the incident. She was later told by her son that police officers were at the house with Mr. Wheeler. She immediately left her place of employment and went to the Pembroke Pines Police Department where she reported the June 11th incident.

24. On June 19, 2003, Ms. Wilson-Wheeler sought a domestic violence injunction against Mr. Wheeler.

25. The State Attorney's Office charged Mr. Wheeler in Broward County Court Case No. 03-21011MM10A with criminal misdemeanor battery based upon the events of June 11, 2003. On December 2, 2004, a jury returned a verdict finding Mr. Wheeler guilty of committing the criminal misdemeanor battery he had

been charged with. Adjudication was withheld, and Mr. Wheeler was sentenced to a term of probation.

26. On December 29, 2004, Mr. Wheeler resigned from employment with the Hollywood Police Department.

CONCLUSIONS OF LAW

A. Jurisdiction.

27. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2006).

B. The Burden and Standard of Proof.

28. In the Administrative Complaint, the Commission is seeking the imposition of, among other penalties, the revocation or suspension of Mr. Wheeler's certification. Therefore, the Commission has the burden of proving the allegations in the Administrative Complaint by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and McKinney v. Castor, 667 So. 2d 387 (Fla. 1st DCA 1995).

29. Clear and Convincing evidence has been defined as evidence which:

requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly

remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

30. The grounds proven in support of the Commission's assertion that Mr. Wheeler's certificate should be revoked or suspended must be those specifically alleged in the Administrative Complaint. See, e.g., Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996); Kinney v. Department of State, 501 So. 2d 129 (Fla. 5th DCA 1987); and Hunter v. Department of Professional Regulation, 458 So. 2d 842 (Fla. 2nd DCA 1984).

C. The Charges Against Mr. Wheeler: Sections 943.13(7), and 943.1395(6) and (7), Florida Statutes (2003).

31. The Commission seeks to discipline Mr. Wheeler for a violation of Section 943.13(7), Florida Statutes (2003), which provides the following:

On or after October 1, 1984, any person employed or appointed as a full-time, part-time, or auxiliary law enforcement officer or correctional officer; on or after October 1, 1986, any person employed as a full-time, part-time, or auxiliary correctional probation officer; and on or after October 1, 1986, any person employed as a full-time, part-time, or auxiliary correctional officer by a private entity under contract to the Department of Corrections, to a county

commission, or to the Correctional Privatization Commission shall:

. . . .

(7) Have a good moral character as determined by a background investigation under procedures established by the commission.

32. The Commission also seeks to discipline Mr. Wheeler for violating Section 943.1395(6) and/or (7), which provide the following:

(6) The commission shall revoke the certification of any officer who is not in compliance with the provisions of s. 943.13(4) or who intentionally executes a false affidavit established in s. 943.13(8), s. 943.133(2), or s. 943.139(2).

. . . .

(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 s. 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.

D. Section 943.13(7).

33. The Commission has defined what constitutes good moral character by rule, as discussed, infra. Mr. Wheeler, again, as discussed, infra, has failed to maintain good moral character in violation of Section 943.13(7), Florida Statutes (2003).

E. Section 943.1395(6).

34. The Commission has failed to prove clearly and convincingly that Mr. Wheeler violated Section 943.1395(6). The Commission failed to prove that Mr. Wheeler "intentionally execute[d] a false affidavit" or that he was not in compliance with the provisions of Section 943.13(4), which requires that a law enforcement officer

[n]ot have been convicted of any felony or of a misdemeanor involving perjury or a false statement, or have received a dishonorable discharge from any of the Armed Forces of the United States. . . .

35. All of the provisions cited in Section 943.1395(6) deal with giving false statements, which the evidence failed to prove Mr. Wheeler is guilty of, and which the Commission did not allege or prove.

F. Section 943.1395(7).

36. Section 943.1395(7) contemplates that a law enforcement officer will maintain good moral character and that

disciplinary action may be taken against a law enforcement officer "[u]pon a finding by the commission that a certified officer has not maintained good moral character. . . ."

37. The term "moral character" has been defined for purposes of Section 943.1395(7) in Florida Administrative Code Rule 11B-27.0011. In its Administrative Complaint, the Commission has alleged that Mr. Wheeler failed to maintain good moral character as defined in Rule 11B-27.001(4)(b), which provides, in pertinent part, as follows:

(4) For the purposes of the Criminal Justice Standards and Training 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:

(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. Sections 316.193, 316.1935, 327.35, 414.39, 741.31, 784.011, 784.03, 784.047, 784.048, 784.05, 790.01, 790.10, 790.15, 790.27, 794.027, 796.07, 800.02, 800.03, 806.101, 806.13, 810.08, 812.014, 812.015, 812.14, 817.235, 817.49, 817.563, 817.565, 817.567, 817.61, 817.64, 827.04, 828.12, 831.30, 831.31(1)(b), 832.05, 837.012, 837.05, 837.06, 839.13, 839.20, 843.02, 843.03, 843.06, 843.085, 847.011, 856.021, 870.01, 893.13, 893.147, 914.22, 934.03, 944.35, 944.37, and 944.39, F.S. [Emphasis added].

. . . .

38. In support of its complaint, the Commission has alleged that Mr. Wheeler's actions would constitute the offense of "battery" as defined in Section 784.03, Florida Statutes (2003):

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or

2. Intentionally causes bodily harm to another person.

(b) Except as provided in subsection (2), a person who commits battery commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

39. The evidence clearly and convincingly proved that Mr. Wheeler, on the night of June 11, 2003, touched and struck Ms. Wilson-Wheeler against her will intentionally causing bodily harm to her. Mr. Wheeler did, therefore, perpetuate the offense defined in Section 784.03, Florida Statutes (2003), in violation of Florida Administrative Code Rule 11B-027.0011(4), and Section 943.1295(7), Florida Statutes (2003).

G. Appropriate Disciplinary Action.

40. The Commission is authorized, upon finding a violation of Section 943.1395(7), to impose the discipline specified in

Section 943.1395(7)(a) through (e), which ranges from revocation to a reprimand.

41. Florida Administrative Code Rule 11B-27.005(5) sets forth the disciplinary guidelines for the discipline of law enforcement officers. In pertinent part, Rule 11B-27.005(5)(b)2. sets forth the following guideline:

(a) For the perpetration by the officer of an act that would constitute any of the misdemeanor offenses, pursuant to paragraph 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 suspension of certification. Specific violations and penalties that shall be imposed, absent aggravating or mitigating circumstances, include the following:

. . . .

2. Battery (784.03, F.S.) Suspension

42. Florida Administrative Code Rule 11B-27.005(6) sets forth aggravating and mitigating circumstances which are also be taken into account:

(a) Aggravating circumstances:

1. Whether the certified officer used official authority to facilitate the misconduct.
2. Whether the misconduct was committed while the certified officer was performing other duties.
3. The number of violations [3] found by the Commission.
4. The number and severity of prior disciplinary actions taken against the

certified officer by the Commission, provided the officer was previously disciplined by the Commission within the preceding eight years or received a Letter of Guidance within the preceding five years.

5. The severity of the misconduct.

6. The danger to the public.

7. The actual damage, physical or otherwise, caused by the misconduct.

8. The lack of deterrent effect of the penalty imposed by the employing agency.

9. The pecuniary benefit or self-gain to the officer realized by the misconduct.

10. Whether the misconduct was motivated by unlawful discrimination.

11. Any behavior constituting "domestic violence" defined by Section 741.28(1), F.S.

12. Whether the certified officer has previously received a Letter of Acknowledgement within the preceding three years.

(b) Mitigating circumstances:

1. The officer's employment status in a position requiring Commission certification at the time of the final hearing before the Commission.

2. The recommendations of character or employment references.

3. The lack of severity of the misconduct.

4. The length of time the officer has been certified by the Commission.

5. Any effort of rehabilitation by the certified officer.

6. The effect of disciplinary or remedial action taken by the employing agency or recommendations of employing agency administrator.

7. The recommendation of a Probable Cause Panel to impose a penalty below the penalty guideline.

8. Effort of the officer to retract a false statement prior to the close of the disciplinary or criminal investigation.

43. The evidence failed to prove any mitigating circumstances exist in this matter. Aggravating circumstances include the violent manner in which Mr. Wheeler attacked his former wife and the injuries he caused to her. Additionally, Mr. Wheeler compounded his wrong by intimidating Ms. Wilson-Wheeler, by threatening to kill her if she reported his attack. Mr. Wheeler's conduct also constituted domestic violence, a specifically-listed aggravating circumstance, violence that was carried out in the family home with minor children present and witnesses at least to the injuries caused by Mr. Wheeler to their mother.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Commission finding that Joe L. Wheeler, violated Sections 943.13(7), and 943.1395(7) Florida Statutes (2003); dismissing the allegation that he violated Section 943.1395(6); and revoking his certification.

DONE AND ENTERED this 8th day of November, 2006, in
Tallahassee, Leon County, Florida.



LARRY J. SARTIN
Administrative Law Judge
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Filed with the Clerk of the
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this 8th day of November, 2006.

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.