STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF LAW ENFORCEMENT, CRIMINAL JUSTICE STANDARDS AND TRAINING COMMISSION,	)	
Petitioner,	)	
vs.	)	Case No. 07-3654PL
CHRISTOPHER B. GUNN,	)	
Respondent.	)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Fort Pierce, Florida, on October 2, 2007.

APPEARANCES

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

For Respondent: Christopher B. Gunn, pro se
2398 Southeast Patio Circle
Port St. Lucie, Florida 34952

STATEMENT OF THE ISSUES

The issues are whether Respondent is guilty of failing to maintain good moral character and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated January 31, 2007, Petitioner alleged that Respondent "did unlawfully commit a battery upon Jamilyn Gunn, by actually and intentionally touching or striking said person against said person's will, or by intentionally causing bodily harm to said person, when at the time of the battery such person was pregnant, and the [R]espondent knew or should have known that said person was pregnant." The Administrative Complaint alleges that Respondent thus violated Section 784.045, or any lesser included offenses, and Section 943.1395(6) and (7), Florida Statutes, and Florida Administrative Code Rule 11B-27.0011(4)(a) by failing to maintain good moral character. In its proposed recommended order, Petitioner withdrew its allegation of a violation of Section 943.1395(6), Florida Statutes.

Respondent timely requested a formal hearing.

At the hearing, Petitioner called three witnesses and offered into evidence two exhibits, which were admitted into evidence. Respondent called no witnesses and offered into evidence no exhibits.

The court reporter filed the transcript on October 26, 2007. Petitioner filed a Proposed Recommended Order on November 2, 2007.

FINDINGS OF FACT

1. Respondent is a certified correctional officer, holding correctional certificate number 247100. He has been a correctional officer since March 9, 2005. Respondent has not previously been disciplined.

2. Since 2002, Respondent has been married to Jamilyn Gunn, who is 25 years old. They have four children born of this marriage. The youngest was born on July 29, 2006.

3. On January 4, 2006, Respondent's mother came by their apartment to pick up one of the children. Ms. Gunn, who works nights at a Hess convenience store, had laid out the clothes of the child that the grandmother was to take. However, the grandmother decided to take out one of the other children as well, and Ms. Gunn had not laid out the clothes for this child.

4. Respondent tried to find socks for the child, but was unable to do so. He asked Ms. Gunn to assist him, but she was tired from working and declined. Respondent and Ms. Gunn began to argue, quietly, so as not to disturb the children or Respondent's mother, who were going in and out of the apartment. Finally, Respondent pulled Ms. Gunn out of the bed and demanded that she help him find the socks. Ms. Gunn pushed him away and fell back into the bed. Respondent grabbed her arm to remove her from the bed, and Ms. Gunn began kicking at him. Finally, Respondent angrily struck her in her left jaw with his hand.

5. Ms. Gunn, who testified frankly about the incident, stated that she was shocked by the blow, as Respondent has never struck her other than on this day. The force of the impact left Ms. Gunn unable to close her jaw and in considerable pain.

6. Not wishing to be in the company of her husband, Ms. Gunn drove herself to the hospital emergency room. X-rays revealed a fractured left jaw. Ms. Gunn disclosed what had happened to a nurse in the emergency room and to a law enforcement officer, who had been summoned by the nurse. Ms. Gunn was treated and released without admission. However, her jaw had to be wired closed for 7-8 weeks, during which time Ms. Gunn was limited to a liquid diet.

7. Later on the day of the incident, the law enforcement officer arrested Respondent for aggravated domestic battery. The record does not disclose the outcome of the criminal case.

8. Ms. Gunn was pregnant with the couple's fourth child at the time of the battery, but neither she nor Respondent was aware of this fact. Ms. Gunn testified that she had missed her menstrual period and had told Respondent that she had missed her period, but that she was often late with her periods and did not realize that she was pregnant until she received the results of a urine test prior to the administration at the hospital of

x-rays (with appropriate shields). The evidence thus fails to establish that Respondent should have known that his wife was pregnant at the time of the battery.

9. Respondent never testified and asked fewer than a half dozen questions during the entire hearing. In particular, Respondent did not ask his wife, who cried briefly at one point while describing the incident on direct examination, anything about subsequent events, evidently trying to spare her the pain of extending her time on the stand.

10. These failures by Respondent leave the record devoid of useful information, not for liability, but for penalty. In nearly all cases of domestic violence, similar omissions from the record would not invite inferences favorable to Respondent in setting the penalty. However, such a result in this case would punish Respondent for his strategic misjudgments at hearing when the focus must be on finding the right punishment for the battery that he inflicted on his wife nearly two years ago.

11. At all times during the hearing, Respondent appeared painfully aware of the injuries--physical and emotional--that he caused his wife in an unprecedented moment of violent rage. At all times during the hearing, Respondent and his wife were relaxed with each other, even though Ms. Gunn, in no way, appears to have tried to simply ignore the incident. While

candidly describing the battery, Ms. Gunn spoke calmly, but did not look to her husband for approval. For his part, Respondent displayed no sign of argumentativeness or resistance to anything that any of the witnesses said, except for the suggestion that he had known that his wife was pregnant when he hit her.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Fla. Stat. (2007).

14. Petitioner must prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

15. The Administrative Complaint charges Respondent with a violation of Section 784.045, Florida Statutes, which provides:

> (1)(a) A person commits aggravated battery who, in committing battery:
>
> 1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
>
> 2. Uses a deadly weapon.
>
> (b) A person commits aggravated battery if the person who was the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant.

16. Citing the statute that defines aggravated battery, which is a felony of the second degree, pursuant to Section 784.045(2), Florida Statutes, the Administrative Complaint

relies exclusively on the pregnant-victim provision. Alleging the extent of bodily harm, the Administrative Complaint replaces the statutory language describing aggravated battery ("great bodily harm") with the statutory language describing simple battery ("bodily harm"). Section 784.03(1)(a), Florida Statutes, defines simple battery, which is a misdemeanor of the first degree, as: "Actually and intentionally touch[ing] or strik[ing] another person against the will of the other; or [i]ntentionally caus[ing] bodily harm to another person."

17. The Administrative Complaint therefore alleges that Respondent committed: 1) aggravated battery, but only on the basis of the pregnancy of the victim, not on the basis of "great bodily harm"; or 2) simple battery, as a lesser included offense of aggravated battery.

18. Section 943.1395(7), Florida Statutes, authorizes Petitioner to impose discipline for the failure to maintain good moral character, as defined by rule. Discipline authorized by statute comprises revocation, suspension for up to two years, probation for up to two years, and the issuance of a reprimand.

19. Florida Administrative Code Rule 11B-27.0011(4)(a) and (b) provides that a certificate holder fails to maintain good moral character if he is guilty of an act that would constitute any felony or the misdemeanor of simple battery, among other misdemeanors.

20. The distinction between felony and misdemeanor battery emerges in the penalty guidelines. Florida Administrative Code Rule 27.005(5)(a)2. provides that the penalty range for aggravated battery is prospective suspension (meaning no credit for the time suspended from correctional employment for the offense) to revocation. Florida Administrative Code Rule 27.005(5)(b)2. provides that the penalty for simple battery is suspension.

21. Florida Administrative Code Rule 27.005(6) lists the aggravating and mitigating factors. The two aggravating factors are the actual damage caused by Respondent (Rule 27.005(6)(a)7); and the fact that the incident consists of domestic violence, as defined in Section 741.28(2), Florida Statutes (Rule 27.005(6)(a)(11). The listed mitigating factors fail to address Respondent's situation, but mitigating factors include Respondent's refusal to try to avoid responsibility for the incident and his apparent refusal to try to enlist his wife in such an effort. It is important that Respondent's wife has not tried to minimize the incident, but seems to have accepted Respondent's evident contrition.

22. But for the pleadings, Respondent would be facing revocation for the great bodily damage that he inflicted upon his wife.[1] The penalty for simple battery is suspension. Although aggravating and mitigating factors exist, suspension is

a fitting penalty under the circumstances described above and would be, even if Petitioner had properly pleaded aggravated battery for "great bodily harm."

RECOMMENDATION

It is

RECOMMENDED that the Criminal Justice Standards and Training Commission enter a final order finding Respondent guilty of failing to maintain good moral character, by violating Section 784.03, Florida Statutes, and imposing a two-year suspension, with credit for any suspension imposed upon him by any correctional employer for the same incident.

DONE AND ENTERED this 6th day of November, 2007, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of November, 2007.

ENDNOTE

1/ Even when permitted by its pleadings to seek revocation, Petitioner does not invariably impose revocation for aggravated battery in the form of domestic violence. See Criminal Justice Standards and Training Commission v. Jacqueline L. Scriven, DOAH Case No. 03-3240PL (February 16, 2004) (two-year suspension for aggravated battery by certificate holder who admitted that she had struck her 21-year-old daughter on her back and shoulders repeatedly with a claw hammer).

A common element in the Scriven case and the present case is the absence of any attempt by the certificate holder to deny responsibility for his or her wrongful act. Disciplinary statutes and rules exist to protect the public. In cases of domestic violence, in which the perpetrator lies to investigators or this forum or causes or permits the victim to lie, the prospect of additional offenses looms unacceptably large, so protection of the public demands revocation. This heightened risk is absent from the present case.

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 must be filed with the agency that will issue the final order in this case.