

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND)
CONSUMER SERVICES, DIVISION OF)
LICENSING,)
)
Petitioner,)
)
vs.) Case No. 07-5753
)
NOVA SECURITY AGENCY, INC.,)
JOSEPH M. CONOVER, PRESIDENT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on February 26, 2008, by video teleconference between sites in Orlando and Tallahassee, Florida.

APPEARANCES

For Petitioner: Suzanne V. Estrella, Esquire
Division of Licensing
Department of Agriculture and
Consumer Services
2520 North Monroe Street
Tallahassee, Florida 32301

For Respondents: John Urban, Esquire
Urban & Their, P.A.
200 South Orange Avenue, Suite 2025
Orlando, Florida 32801

STATEMENT OF THE ISSUE

The issue is whether Respondent Joseph M. Conover committed the acts alleged in the Administrative Complaint, and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

In separate Administrative Complaints dated July 20, 2007, the Department of Agriculture and Consumer Services (Department) alleged that Respondents violated various provisions of Chapter 493, Florida Statutes.^{1/} Respondents disputed the allegations in the Administrative Complaints and timely requested a hearing.

On December 18, 2007, the Department referred this matter to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge to conduct the hearing requested by Respondents. DOAH received the referral on December 20, 2007.

The parties entered into a stipulation prior to the final hearing that resolved Administrative Complaint No. CD2006-1317 against Respondent Nova Security Agency, Inc. (Nova). The case proceeded to hearing only on Administrative Complaint No. CD2006-1316, which alleges that on two occasions in 2006, Respondent Joseph M. Conover "carried a firearm that was not required by [his] duties, which is prohibited by Section 493.6115(3), Florida Statutes."

At the final hearing, the Department presented the testimony of Mr. Conover, Robert Baird, and Richard Jacobsen; and Respondents presented the testimony of Mr. Conover, who was accepted as an expert in the private security industry. The Department's Exhibits P1 and P2 were received into evidence, as were Respondents' Exhibits R1 through R3.

No transcript of the final hearing was filed with DOAH. The parties were given ten days from the date of the hearing to file proposed recommended orders (PROs). The PROs were timely filed and have been given due consideration.

FINDINGS OF FACT

1. Mr. Conover is a licensed security officer. He holds Class D, DI, G, and MB licenses from the Department. His license numbers are D9817475, DI2000134, G2003451, and MB9900202.

2. Mr. Conover's Class G license allows him to carry a firearm, subject to the provisions of Section 493.6115, Florida Statutes.

3. Mr. Conover has been licensed by the Department since 1998, and he has been an armed security officer since 2000 or 2001.

4. Mr. Conover is the president and chief operating officer of Nova, which has its principle office in Brevard County.

5. Mr. Conover resides in Brevard County. Nova's principle office is located within his home.

6. Mr. Conover has managerial and supervisory duties in his position as president and chief operating officer of Nova. The duties include scheduling armed security guards for clients, ensuring the guards' compliance with applicable regulations, soliciting new clients, and maintaining contact with clients and the guards that are on duty.

7. At the time of the events giving rise to the Administrative Complaints, Nova provided armed security guard services for ten apartment complexes and residential communities in Orlando. Nova did not provide security services for any location in Brevard County.

8. On April 29, 2006, while in route to an armed security post in Orlando, Mr. Conover stopped to render aid at a motor vehicle accident in Brevard County. He rendered emergency medical care^{2/} to one of the individuals involved in the accident, and he also directed traffic at the scene. He was wearing his security guard uniform and carrying his firearm in plain view at the time.

9. On May 1, 2006, while in route to an armed security post in Orlando, Mr. Conover stopped at a Starbucks in Brevard County. He got out of his car and went into the store to

purchase a cup of coffee. He was wearing his uniform and carrying his firearm in plain view at the time.

10. Mr. Conover testified that he was "on duty" at the time of each incident because he was performing managerial and supervisory duties while in route to Orlando. He testified that immediately prior to the accident on April 29, 2006, he was fielding calls on his two-way radio from the armed security guards who were on duty in Orlando, and he can be seen talking on his radio or cell phone on the videotape of the May 1, 2006, incident. However, there is no credible evidence that Mr. Conover was providing any managerial or supervisory duties to the security guards during the time that he was rendering emergency medical care and directing traffic at the accident scene.

11. The managerial and supervisory duties that Mr. Conover was performing at the time of the incidents did not require him to be armed.

12. First, as Mr. Conover acknowledged, there is a difference between managerial and supervisory duties and armed security guard duties. A Class G license is not required in order to perform managerial and supervisory duties for armed security guards, particularly where such duties are being performed off-site.

13. Second, Mr. Conover was nowhere near the sites that Nova was providing armed security services at the time of the incidents. He was approximately 40 miles, and at least 25 to 30 minutes, away from the sites.

14. Criminal charges were brought against Mr. Conover for impersonating a police officer and carrying a weapon in plain view based upon his activities at the accident scene on April 29, 2006. The charges were not prossed by the State.

15. The Department began its investigation of Mr. Conover in May 2006 based upon information received from the Indialantic Police Department in Brevard County concerning the incidents described above.

16. In July 2006, Mr. Conover's attorney sent a letter to the Department requesting the Department's "official interpretation of Florida Statutes § 493.6115 regarding carrying of weapons and firearms." The letter included the following summary of a conversation between Mr. Conover's attorney and Art Varnadore, who the letter represented to be the Chief of Regulation and Enforcement for the Department:

[A]ccording to Florida Statutes Chapter 493, a security officer can only carry a firearm while on duty at an armed post. A security agency manager can only carry a firearm while on duty at an armed post. A security agency manager or security officer traveling between armed posts may keep his firearm on him in the car. However, he cannot leave

the vehicle with a firearm unless at an armed post.

17. The Department did not respond to this letter or a follow-up letter sent by Mr. Conover's attorney in August 2006.

18. The letters were sent after the Department began its investigation into the incidents giving rise to the Administrative Complaint. There is no evidence that Mr. Conover ever sought guidance from the Department prior to the incidents.

19. Mr. Conover has been complying with the procedures quoted above since July 2006.

20. The Department publishes a "Security Officer Handbook," as required by Section 493.6123(2), Florida Statutes, in order to provide guidance to licensees regarding "the legal authority, rights, and obligations of his or her specific license." A copy of the handbook is supposed to be provided to each licensee.

21. The handbook includes the following provisions pertinent to this case:

e. Class "D" Security Officers who also possess a Class "G" license may carry a firearm only when the duty assignment requires armed security and only while on the post of duty.

Section 493.6115(3), F.S.

Example: A Class "D" Security Officer who also has a Class "G" license and is normally assigned to an armed post is assigned, temporarily, to an unarmed post. He may not

carry his firearm on the temporary assignment.

Example: The same security officer, while serving on his usual armed post, may not wear his firearm when he leaves his assigned post for other than duty purposes, such as for lunch, or when traveling to or from home. During such non-duty periods, the firearm must be removed and secured.

* * *

g. While the licensee is on duty, his firearm must be carried in a holster and in plain view. It may only be carried concealed under those conditions addressed in VIII.c.

Section 493.6115(3), F.S.^[3/]

22. The handbook does not include a specific example addressing the conduct of licensees responsible for managing and supervising armed security guards. The examples in the handbook focus on licensees with assigned "posts of duties."

23. Mr. Conover did not rely on any of the guidance in the handbook; he testified that he did not recall ever receiving a copy of the handbook.

24. Mr. Conover has no disciplinary history with the Department.

25. There is no credible evidence that the Department investigated or prosecuted this case for an "improper purpose," as alleged by Respondents.

CONCLUSIONS OF LAW

26. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

27. The Department is the state agency responsible for licensing and regulating security officers under Chapter 493, Florida Statutes.

28. The Department has the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence. See Dept. of Banking & Finance v. Osborne, Stern & Co., 670 So. 2d 932 (Fla. 1996).

29. The clear and convincing evidence standard requires that 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." In re Davey, 645 So. 2d 398, 404 (Fla. 1994).

30. Section 493.6115(3), Florida Statutes, provides:

No employee shall carry or be furnished a weapon or firearm unless the carrying of a weapon or firearm is required by her or his duties, nor shall an employee carry a weapon or firearm except in connection with those duties. When carried pursuant to this subsection, the weapon or firearm shall be encased in view at all times except as provided in subsection (4).

31. The Department's interpretation of this statute must be given "closer scrutiny" because it has the authority to

discipline licensees for violating the statute, but the Department's interpretation is still entitled to considerable deference. See Garcia-Cantero v. Dept. of State, 615 So. 2d 804, 805-06 (Fla. 3d DCA 1993).

32. It is undisputed that Mr. Conover was carrying a firearm in plain view on April 29, 2006, and May 1, 2006, at locations where he was not under contract to provide armed security services. The parties disagree, however, whether Mr. Conover was required by his duties to carry a firearm at those times and whether carrying the firearm was in connection with his duties.

33. Mr. Conover argues that he was engaged in managerial and supervisory duties at the time of the incidents, and, as such, he was required to carry his firearm. In support of this argument, Mr. Conover cites Section V.g. of the Security Officer Handbook, which requires the licensee to carry his firearm while he is "on duty."

34. The handbook must be read in pari materia with Section 493.6115(3), Florida Statutes, which permits a licensee to carry a firearm only if doing so (1) is "required by her or his duties" and (2) is "in connection with those duties."

35. Mr. Conover acknowledged that he did not need to carry a firearm in performance of his managerial and supervisory duties, and even if it was determined that he was required to do

so by virtue of the language in Section V.g. of the handbook, the carrying of the firearm had no connection to the managerial and supervisory duties. Simply put, there was no need for Mr. Conover to carry a firearm in Brevard County in order to manage or supervise armed guards providing security to locations in the Orlando area.

36. Thus, the Department met its burden to prove that Mr. Conover violated Section 493.6115(3), Florida Statutes.

37. The Department may discipline a licensee for violating Section 493.6115(3), Florida Statutes. See § 493.6118(1)(t), Fla. Stat.

38. The disciplinary action that may be imposed by the Department includes the issuance of a reprimand, imposition of an administrative fine of up to \$1,000 for each offense, placement of the licensee on probation, and suspension or revocation of the license. See § 493.6118(2), Fla. Stat.

39. The penalty range for violations of Section 493.6115(3), Florida Statutes, set forth in the disciplinary guidelines adopted by the Department is "[f]rom an administrative fine of \$250 - \$450 or probation to suspension or denial of license." See Fla. Admin. Code R. 5N-1.113(2)(c).

40. The Department is authorized to deviate from the penalty range based upon aggravating and mitigating

circumstances presented to the finder of fact. See Fla. Admin. Code R. 5N-1.113(5).

41. The Department represented at the final hearing that it is seeking a \$1,000 fine (\$500 for each incident) and one year of "reporting probation" in this case.

42. The record does not support that level of discipline. First, the requested fine exceeds the penalty range of \$250 to \$450 per offense in the disciplinary guidelines. Second, the guidelines call for the imposition of a fine or probation to suspension, not imposition of a fine and probation. Third, there are no aggravating circumstances present that warrant an upward departure from the penalty range. Fourth, as discussed below, there are mitigating circumstances that warrant a downward departure from the penalty range.

43. A \$100 fine and a reprimand is a more reasonable and appropriate discipline under the circumstances of this case. First, Mr. Conover has been licensed by the Department for ten years and has had no prior disciplinary actions against his licenses. Second, his conduct was based upon a good faith, albeit erroneous understanding of his responsibilities under Section 493.6115(3), Florida Statutes. Third, it has been almost two years since the incidents, and Mr. Conover has conformed his behavior to the guidance that his attorney received from the Department in July 2006. Fourth, the handbook

prepared by the Department to provide guidance to licensees does not squarely address the responsibilities of managers and supervisors under Section 493.6115(3), Florida Statutes.

44. Respondents are not entitled to an award of prevailing party attorney's fees under Section 120.595, Florida Statutes.^{4/} Mr. Conover cannot be considered the prevailing party even though the recommended discipline is lower than that sought by the Department because it was determined that he violated Section 493.6115(3), Florida Statutes. Nova cannot be considered a prevailing party because it entered into a stipulated settlement with the Department prior to the final hearing. Moreover, even if Mr. Conover and/or Nova were somehow considered prevailing parties, the evidence fails to establish that the Department initiated or prosecuted this case for an "improper purpose," as defined by Section 120.595(1)(e)1., Florida Statutes.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department issue a final order that:

1. Finds Mr. Conover guilty of carrying a firearm in violation of Section 493.6115(3), Florida Statutes, on April 29, 2006, and on May 1, 2006, as charged in Administrative Complaint No. CD2006-1316;

2. Imposes an administrative fine of \$100 on Mr. Conover;
and

3. Issues a formal reprimand to Mr. Conover.

DONE AND ENTERED this 20th day of March, 2008, in
Tallahassee, Leon County, Florida.



T. KENT WETHERELL, II
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of March, 2008.

ENDNOTES

^{1/} All references to provisions in Chapter 493, Florida Statutes, are to the 2005 version in effect at the time of the events giving rise to the Administrative Complaints. All other statutory references are to the 2007 version of the Florida Statutes.

^{2/} Mr. Conover is a licensed emergency medical technician.

^{3/} Security Officer Handbook, Section V (included in Exhibit P1).

^{4/} Respondents made an ore tenus motion for attorney's fees at the final hearing. The statutory basis for the request identified in Respondents' PRO is Section 120.595, Florida Statutes. That statute provides for an award of attorney's fees and costs to the prevailing party only if it is determined that

the non-prevailing adverse party participated in the proceeding for an "improper purpose." See § 120.595(1), Fla. Stat.

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.