

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CRIMINAL JUSTICE STANDARDS AND)
TRAINING COMMISSION,)
)
Petitioner,)
)
vs.) Case No. 08-0713PL
)
LAMAR S. GREEN,)
)
Respondent.)
_____)

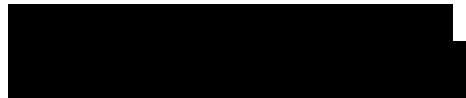
RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a final administrative hearing in this case on April 2, 2008, in Lakeland, Florida.

APPEARANCES

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

For Respondent:



STATEMENT OF THE ISSUE

Whether Respondent, Lamar S. Green's, conduct evidenced lack of "good moral character" as alleged in the Administrative Complaint in this matter.

PRELIMINARY STATEMENT

On June 15, 2007, Petitioner, Florida Department of Law Enforcement, Criminal Justice Standards and Training Commission, filed an Administrative Complaint alleging that on September 15, 2007, Respondent, Lamar S. Green, made a false statement that he knew to be untrue while under oath during an official proceeding; that on October 15, 2007, Respondent did unlawfully, knowingly, and willfully resist, obstruct, or oppose another law enforcement officer who was engaged in the lawful execution of his duty; and further alleging that this conduct evidenced lack of "good moral character" so as to warrant disciplining Respondent's certification as a law enforcement officer. (The Administrative Complaint contained other allegations that were withdrawn at the beginning of the final hearing.)

Respondent disputed the allegations of fact contained in the Administrative Complaint and requested a final hearing before an Administrative Law Judge.

By letter dated February 12, 2008, the matter was forwarded by Petitioner to the Division of Administrative Hearings requesting that the matter be assigned to an Administrative Law Judge for hearing. On that same day, an Initial Order was sent to both parties. Based on the responses of the parties to the Initial Order, the case was scheduled for final hearing on April 2, 2008, in Lakeland, Florida.

The final hearing took place as scheduled. Petitioner presented three witnesses: Deputy Sheriff Jeff Blair; Captain Joseph Glenn Watson (Retired); and Lieutenant Phillip Petote. Petitioner offered three exhibits that were received into evidence and marked Petitioner's Exhibits 1 through 3. Respondent presented two witnesses: Tracy Phillips and Darlene Stalk.

The Transcript of Proceedings was filed with the Division of Administrative Hearings on April 28, 2008. On May 5, 2008 Petitioner filed a motion to allow additional time for filing proposed recommended orders. While the Order Granting Extension of Time erroneously required proposed recommended orders to be filed by May 8, 2008 (the original filing date), Petitioner's filing date is accepted, as reflected in the subsequent amended order issued on May 14, 2008. Petitioner's Proposed Recommended Order was considered in the preparation of this Recommended Order. Respondent did not file a proposed recommended order.

All references are to 2006 Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following Findings of Fact are made:

1. Respondent was certified by Petitioner on November 18, 1998. He holds law enforcement Certificate No. 197843.

2. At the times relevant to the allegations of impropriety in the Administrative Complaint, Respondent was a bailiff with the Polk County Sheriff's Office.

3. On October 15, 2006, Deputy Jeff Blair of the Polk County Sheriff's Office responded to a residence in Lakeland regarding a child custody dispute.

4. Upon arrival at the residence, Deputy Blair met with Tracy Fields. Ms. Fields wanted Deputy Blair to get her children back from her ex-husband, Mr. Fields.

5. Based on the initial information he obtained, Deputy Blair told Ms. Fields that in the absence of a court order, he was not authorized to intervene in the matter. (Apparently, it was later determined that a restraining order as a result of domestic violence had been issued against Mr. Fields. It appeared that the restraining order had been issued prior to October 15, 2006. It is also similarly unclear as to whether the restraining order awarded custodial responsibility and visitation and would have provided the "court order" Deputy Blair required.)

6. Subsequently, Respondent, Ms. Fields' boyfriend, arrived on the scene. Deputy Blair did not know Respondent and Respondent was not in uniform.

7. Deputy Blair repeated his statement to Respondent and Ms. Fields that in the absence of a court order, he was not

authorized to intervene in the matter. Respondent reacted angrily to Deputy Blair, became confrontational, and questioned Deputy Blair as to his time in service as a law enforcement officer by telling him that given his identification number, he had not been a deputy very long. Respondent subsequently apologized to Deputy Blair and identified himself as a deputy sheriff, serving as a bailiff.

8. While Deputy Blair was discussing the matter with Ms. Fields and Respondent, Deputy Blair received a report that a "911" call had been made reporting Ms. Fields at Mr. Fields' house, which was obviously untrue since she was with him. In addition, Mr. Fields agreed to meet Deputy Blair and his watch commander at a gas station to return the Fields' children. He failed to meet them. Neither of these incidents resulted in an incident report; however, Deputy Blair was directed to author an Incident Report regarding Respondent's conduct.

9. In June 2006, Respondent was re-assigned from his post as a court bailiff to the court holding section based on a memorandum from a judge to Respondent's supervisor regarding Respondent's work performance.

10. The stated reason for Respondent's reassignment was his reported absenteeism from his courtroom duties. Respondent was told this by his Captain, and he acknowledged that he understood. Respondent explained to his Captain that he had

been having difficulties with his bowels that made it necessary to be absent from the courtroom from time to time.

11. On September 15, 2006, Respondent testified as a witness before Polk County Circuit Court Judge Carpanini in a domestic violence injunction hearing in Fields v. Fields, Polk County Circuit Court Case No. 2006DR-6613. During direct examination, Respondent was questioned about his removal from his job assignment as a bailiff with the Polk County Sheriff's Office.

12. The following is the relevant portion of the testimony:

T. Fields: Has there been any other type of harassment that you feel Mr. Fields has employed upon you?

Respondent: He's contacted the Polk County Sheriff's Office and filed a complaint with the internal affairs against me, which is not true. I have documentation and we'll have testimony from the deputy that was at the Kroger's Dance Studio that what he alleges in the complaint is not factual, also he alleged a, tried to put an injunction of protection against me, stating I threatened his secretary that I didn't (inaudible) him. It was denied. He then entered a voluntary dismissal up of [sic] that injunction, but there still is an investigation at the sheriff's office that's going to be followed up on where he filed a bogus complaint against me there.

T. Fields: And because of this harassment Mr. Green, you've had to hire an attorney haven't you?

Respondent: That's correct.

T. Fields: And you've been removed from your current position as a bailiff here at the courthouse?

Respondent: That's correct.

T. Fields: And was that on or before-

Judge Carpanini: Mrs. Fields is this; this case doesn't involve Mr. Green. It involves you so please move on.

13. During cross-examination, Respondent was questioned further about his removal from his job assignment as a bailiff with the Polk County Sheriff's Office.

14. The following is the relevant portion of that testimony:

ML: You know, you mentioned with Mrs. Fields earlier that you've been removed from your job, your current job here at the courthouse because of Mr. Fields.

Respondent: Believe so. That investigation isn't complete.

15. Respondent's testimony set forth hereinabove is ancillary to the matter at issue before the Circuit Court and not dispositive of any issue in the domestic violence case involving Mr. and Mrs. Fields, and, as pointed out by the presiding Circuit Court Judge, this testimony is not germane to the issue being considered by the Court. In addition, it clearly expresses Respondent's opinion or belief on why his job was changed.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. § 120.569, Fla. Stat. (2007)

17. Petitioner has the burden of proof to show by "clear and convincing" evidence that Respondent committed the acts alleged in the Administrative Complaint. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

18. The "clear and convincing" standard requires:

[T]hat 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.

In Re: Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

19. Disciplining a professional license, such as a law enforcement certification, is penal in nature. Statutes that authorize the imposition of penal sanctions must be strictly construed and any ambiguity must be construed in favor of Respondent. Elmariah v. Department of Business and Professional Regulation, 574 So. 2d 164, 165 (Fla. 1st DCA 1990).

20. Paragraphs 2 and 3 of the Administrative Complaint, which is the charging document in this case, allege:

(a) On or about September 15, 2006, the Respondent, Lamar S. Green, did unlawfully make a false statement, which he did not believe to be true, under oath administered by Judge Mark Carpanini in an official proceeding, to wit: a Domestic Violence Injunction Hearing in regard to a material matter, . . . gave an incorrect account of the reasons why he was reassigned in his employment.

* * *

(c) On or about October 15, 2006, the Respondent, Lamar S. Green, did unlawfully, knowingly, and willfully resist, obstruct or oppose Deputy Sheriff Jeffrey Blair in the lawful execution of any legal duty, to wit, the investigation of a civil disturbance, by belittling Officer Blair and questioning his competence.

* * *

3. The actions of the Respondent did violate the provisions of Section 837.02(1), 843.02, 843.02 or any lesser included offenses, Section 943.1395(7), Florida Statutes[,] and Rule 27.011(4)(a)and (b), Florida Administrative Code, in that Respondent has failed to maintain the qualifications established in Section 943.139(7), Florida Statutes, which require that a Law Enforcement and Correctional officer in the State of Florida have good moral character.

21. Section 943.13, Florida Statutes, establishes the minimum qualifications for law enforcement officers in Florida.

Subsection 943.13(7), Florida Statutes, states, in part, that law enforcement officers must:

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

22. Subsection 943.1395(7), Florida Statutes, authorizes Petitioner to specify by rule the definition of "good moral character" for purposes of implementing the penalties Petitioner may levy against an officer for violating the "good moral character" clause contained in Subsection 943.13(7), Florida Statutes, after the officer is certified. Subsection 943.1395(7), Florida Statutes, provides that:

(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.

23. Florida Administrative Code Rule 11B-27.0011(4) defines "good moral character" for purposes of the implementation of disciplinary action upon Florida law enforcement and correctional officers. The Rule states in relevant portion:

(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 acts or conduct that constitute the following offenses:

1. Sections . . . 837.012, . . .
843.02, . . .;

24. While the Administrative Complaint specifically alleges that Respondent violated "Section 837.02(1)," Florida Statutes, Florida Administrative Code Rule 11B-27.0011(4)(b)1. does not list Subsection 837.02(1), Florida Statutes, as an offense relative to the determination of good moral character. Whether or not Subsection 837.02(1), Florida Statutes, is listed in Florida Administrative Code Rule 11B-27.0011(4)(b)1. is not relevant because Petitioner has failed to prove that Respondent

committed the offense of perjury by clear and convincing evidence.

25. Subsection 837.02(1), Florida Statutes, reads, as follows:

(1) Except as provided in subsection (2), whoever makes a false statement, which he or she does not believe to be true, under oath in an official proceeding in regard to any material matter, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

26. As set forth in Vargas v. State, 795 So. 2d 270 (Fla. 3rd DCA 2001), a case involving a police officer in a homicide investigation, where the police officer was determined to be not guilty of perjury, as her statements were not material to the underlying murder investigation and were merely statements of her opinion or belief and not of fact, the court reiterates that the essential elements of the crime of perjury are:

(1) willful; (2) giving of false testimony; (3) on a material point; (4) in a judicial proceeding; and (5) by a person to whom a lawful oath has been administered. Hirsh v. State, 279 So. 2d 866, 869 (Fla. 1973)

27. "Materiality" is not an element of the crime of perjury in Florida, but is a threshold issue that a court must determine as a matter of law prior to trial. State v. Ellis, 723 So. 2d 187 (Fla. 1998); State v. Diaz, 785 So. 2d 744 (Fla. 3d DCA 2001). To be material, statements must be germane to the

inquiry and have a bearing on a determination in the underlying case. Diaz, 785 So. 2d at 746. Unless the alleged testimony given under oath is germane or material to the inquiry or charge, then its truthfulness is not the vital issue because the purpose to be guarded against and the reasons for the punishment for perjury are to deter persons from testifying under oath to false statements in order to mislead the trier of the facts such as the court or the jury or both and, thereby, to thwart and pervert justice. Thus, it is insufficient that the statements are untrue or incorrect; the statements must have a bearing on a determination in the underlying case.

28. A statement alleged to be perjury must be one of fact and not of opinion or belief. The crime of perjury does not encompass expressions of opinion. Vargas, 795 So. 2d at 272.

29. Whatever Respondent said about why his job responsibilities were changed within the Polk County Sheriff's Office, whether true or not, had nothing to do with the domestic violence case pending before the court and was no more than an expression of his opinion of the reason for his transfer.

30. Section 843.02, Florida Statutes, states:

Whoever shall resist, obstruct, or oppose any officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); member of the Parole Commission or any administrative aide or supervisor employed by the commission; county probation officer; parole and probation supervisor; personnel or

representative of the Department of Law Enforcement; or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree, punishable as provided in S. 775.082 or s. 775.083.

31. The evidence presented revealed that Respondent became angry when advised by Deputy Blair that he (Deputy Blair) could not intervene in the Fields' domestic relations matter without a court order and questioned the deputy's time in service and experience. Respondent's reaction and questions hardly rise to the level of resistance, obstruction, or opposition contemplated by the statute as interpreted by Florida's courts. Nor was Respondent the subject of the exercise of Deputy Blair's lawful duty. Deputy Blair was investigating a domestic problem involving divorced parties and missing children. Respondent was not a family member or directly involved, but he was Ms. Fields' boyfriend.

32. As stated in Wilkerson v State, 556 So. 2d 453, 455 (Fla. 1st DCA 1990):

The statute uses only two operative words, i.e., "obstruct or oppose" an officer. The word "obstruct" means "to interfere with, impede, or retard," American Heritage Dictionary of the English Language, p. 907 (1979 ed.), and in this sense contemplates acts or conduct apart from verbal expressions, which operate to physically hinder or impede another in doing something.

The word "oppose" has a broader definition, i.e., (1) "To be in contention or conflict with; combat; resist: oppose the enemy force"; and (2) "To be against; be hostile to: oppose new ideas." Id. at 922. Thus, the word "oppose" can be used to connote either (1) conduct or acts of physical resistance and opposition, or (2) verbal expression of conflicting or differing ideas; but obviously its use in the first sense does not connote the second sense. We have no doubt that the use of "oppose" in conjunction with "obstruct" manifests a clear and unambiguous legislative intent to proscribe only acts or conduct that operate to physically oppose an officer in the performance of lawful duties.

33. D. A. W. v. State, 945 So. 2d 624 (Fla. 2d DCA 2006), states, regarding the involvement of the individual charged with violating Section 843.02, Florida Statutes:

If a police officer is not engaged in executing process on a person, is not legally detaining that person, or has not asked the person for assistance with an ongoing emergency that presents a serious threat of imminent harm to person or property, the person's words alone can rarely, if ever, rise to the level of an obstruction. Thus, obstructive conduct rather than offensive words are normally required to support a conviction for obstructing an officer without violence.

Id. at 626, quoting D.G. v. State, 661 So. 2d 75, 76 (Fla. 2d DCA 1995).

34. Based on Respondent's status as a bystander and, more importantly, the innocuous nature of his conduct and inquiry,

Petitioner has failed to prove clearly and convincingly that Respondent violated Section 843.02, Florida Statutes.

RECOMMENDATION

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

RECOMMENDED that Respondent, Lamar S. Green, be found not guilty of failure to maintain good moral character as required by Subsection 943.13(7), Florida Statutes; and that no disciplinary action be taken against Respondent's law enforcement certification. This matter should be dismissed.

DONE AND ENTERED this 22nd day of May, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.