

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF LAW ENFORCEMENT,	)	
CRIMINAL JUSTICE STANDARDS AND	)	
TRAINING COMMISSION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-2072PL
	)	
JOHN T. MARICH,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on August 21 and 22, 2008, in Apalachicola, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner:	Joseph S. White, Esquire Department of Law Enforcement Post Office Box 1489 Tallahassee, Florida 32302
For Respondent:	Philip F. Lupo, Esquire 319 South Washington Avenue, Suite 102 Titusville, Florida 32796-3589

STATEMENT OF THE ISSUES

The issues are whether Respondent violated Subsections 943.1395(7) and 943.13(7), Florida Statutes (2007),<sup>1</sup> and Florida

Administrative Code Rule 11B-27.0011(4)(b), and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On February 6, 2008, Petitioner, Department of Law Enforcement, Criminal Justice Standards and Training Commission (Commission), filed an Administrative Complaint against Respondent, John T. Marich (Mr. Marich), alleging that he had violated Subsections 943.1395(7) and 943.13(7), Florida Statutes, and Florida Administrative Code Rule 11B-27.0011(4)(b). Mr. Marich requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings on April 24, 2008, for assignment to an Administrative Law Judge to conduct the final hearing. The case was originally assigned to Administrative Law Judge Charles C. Adams, but was transferred to Administrative Law Judge Susan B. Harrell to conduct the final hearing.

The final hearing was originally scheduled for June 17, 2008. Mr. Marich moved for a continuance, and the final hearing was re-scheduled for July 21, 2008. Mr. Marich moved for another continuance, and the final hearing was re-scheduled for August 22, 2008. The parties later advised that the final hearing would take two days, and the final hearing was re-scheduled to commence on August 21, 2008.

On August 1, 2008, the Commission filed its first and second notices of its intention to rely on similar fact evidence.

On August 14, 2008, the Commission filed an unopposed Motion for Leave to Amend the Administrative Complaint. The motion was granted, and the Commission filed an Amended Administrative Complaint on August 19, 2008.

The parties entered into a Pre-hearing Stipulation and stipulated to certain facts contained in Section (8) of the Pre-hearing Stipulation. Those facts have been incorporated into this Recommended Order, to the extent relevant.

At the final hearing, the Commission called the following witnesses: Chester Creamer, James Ward, Goldie Harris, Rodney Glass, and Dewey Williams. Petitioner's Exhibits 1 and 2 were admitted in evidence. Mr. Marich testified in his own behalf and called the following witnesses: John Ford, Jonathan Riley, Robert Shelley, Mike Mock, Anthony Sapp, Bruce Varnes, and Charles Nichols. Respondent's Exhibits 1 and 6 were admitted in evidence.

The three-volume Transcript was filed on September 5, 2008. The parties agreed to file their proposed recommended orders within ten days of the filing of the Transcript. On September 12, 2008, Respondent filed a request for extension of time to file proposed recommended orders. The request was

granted by Order dated September 12, 2008, extending the time for filing proposed recommended orders to October 15, 2008. The parties timely-filed their Proposed Recommended Orders, which were considered in preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Mr. Marich was certified by the Commission on February 2, 1971, and was issued Law Enforcement Certificate Number 47090. At all times material to the Amended Administrative Complaint, Mr. Marich was employed as a law enforcement officer with the Franklin County Sheriff's Office (Sheriff's Office).

2. In October and part of November 2007, Mr. Marich was a lieutenant assigned to the duty of road supervisor, which meant that he supervised six men in 12-hour shifts. Mr. Marich was issued a marked patrol car to use in the performance of his law enforcement duties. Mr. Marich's patrol car was a Ford Crown Victoria. No evidence was presented to establish the year the patrol car was manufactured.

3. The Sheriff's Office provided gasoline to run the patrol cars assigned to its employees. The gasoline was the property of the Sheriff's Office. The Sheriff's Office's fueling station was located behind the jail. The fueling station is a self-serve station. Each officer would pump the

gasoline into his or her patrol car and log the amount on a log book kept near the pump.

4. The gasoline dispensed from the pump by the law enforcement officers was to be used only by the law enforcement officers to carry out their official duties. The Sheriff's Office, as owner of the gasoline, did not authorize or consent to any appropriation of gasoline for any law enforcement officer's private use or personal benefit.

5. In October and November 2007, Mr. Marich carried one or more gasoline cans in the trunk of his patrol car. His supervisor, Major Chester Creamer, did not direct Mr. Marich to carry gasoline cans in his patrol car to assist stranded motorists or other deputies. Major Creamer is not aware of any of the other Sheriff's Office's law enforcement personnel carrying gasoline cans in their patrol cars.

6. Mr. Marich worked 12-hour shifts from 6:00 p.m. to 6:00 a.m. on October 26 and 27, 2007; October 28 and 29, 2007; October 31 and November 1, 2007; November 5 and 6, 2007; and November 6 and 7, 2007. On the intervening days, Mr. Marich was not on duty.

7. The Sheriff's Office had reason to believe that gasoline was being taken without authorization from the Sheriff's Office's fueling station. Surveillance video cameras were set up at the fueling station. Petitioner's Exhibit 1 is a

video disc made from the recordings of the surveillance video cameras. The disc fairly and accurately depicts Mr. Marich on October 27 and 29, 2007, and November 2, 6, and 7, 2007, while at the fueling station located at the Sheriff's Office, knowingly dispensing gasoline into the fuel tank of his assigned Sheriff's Office's patrol car and also into a gasoline can or cans located in the trunk of Mr. Marich's patrol car.

8. Mr. Marich claims that the gasoline which he was dispensing into gasoline cans in the trunk of his patrol car was used for official purposes. He claims that he helped stranded motorists; that he used more than a tank of gasoline on each shift and needed the extra gasoline so that he would not run out of gasoline; and that his wife, who is an employee of the Sheriff's Office, would often forget to fill her Sheriff's Office's vehicle with gasoline, and he had to put gasoline in her vehicle from the cans in the trunk of his patrol car.

9. It is not a frequent occurrence for the Sheriff's Office's law enforcement officers to help motorists who have run out of gasoline. Normally, a deputy assisting such motorists would take the motorist to the nearest service station so that the motorist can purchase gasoline or the deputy would get a gasoline can and go to the nearest service station to get gasoline, and the motorist would be responsible for paying for the gasoline. However, there have been exceptions to this

method of aiding stranded motorists when the motorist was unable to pay for the gasoline. A deputy could get enough gasoline from the Sheriff's Office's fueling station to get the motorist home. The deputy was to log the amount of gasoline taken and note in the log that the gasoline was for a stranded motorist.

10. Mr. Marich has provided stranded motorists with gasoline from the cans in the back of his patrol car in the past. On one such occasion, he was called by the then sheriff to aid a motorist who had run out of gasoline. Mr. Marich responded to the call and provided the motorist with gasoline. The then sheriff approved of Mr. Marich carrying gasoline in the trunk of his patrol car for such purposes.

11. When a Sheriff's Office's law enforcement officer encounters a disabled vehicle, including vehicles that are out of gasoline, the officer is to advise the dispatcher for the Sheriff's Office that he or she has encountered a disabled vehicle and give the location of the vehicle. The officer is also supposed to log the encounter on the Sheriff's Office's computer system and to run a check on the vehicle's license tag to make sure the vehicle is not stolen. From October 27 through November 7, 2007, the records for the Sheriff's Office do not contain any record of Mr. Marich encountering a disabled vehicle and providing assistance to a stranded motorist. No evidence

was provided to establish that Mr. Marich noted on the log that he had used gasoline for a stranded motorist.

12. On at least one occasion prior to October 2007, Mr. Marich has provided gasoline from the cans in the back of his patrol car to a deputy, other than his wife, who had run out of fuel.

13. No evidence was presented to rebut Mr. Marich's claims that he used the gasoline that he put in the cans in the back of his patrol car for the patrol car that his wife used in her official duties with the Sheriff's Office. Thus, his testimony is credited.

14. No evidence was presented to rebut Mr. Marich's claims that he used the gasoline that he put in the cans in the back of his patrol car for his patrol car while he was on road patrol. Thus, his testimony is credited.

15. Mr. Marich was terminated from his employment with the Sheriff's Office on November 7, 2007, for the unauthorized taking of gasoline. Major Creamer inspected Mr. Marich's patrol car within an hour of Mr. Marich's termination. Major Creamer noticed a strong smell of gasoline in the interior of the car, which was emanating from the trunk of the car. The odor lingered after several cleanings, and the matting had to be removed from the trunk to get rid of the gasoline smell.

16. During 2006 and 2007, Mr. Marich drove a blue, two-tone Dodge pickup truck as one of his personal vehicles. On two occasions, Mr. Marich was observed siphoning gasoline from a Sheriff's Office's patrol car into a gasoline can and pouring the gasoline into a blue, two-tone Dodge pickup truck. However, the Commission did not establish by clear and convincing evidence that the gasoline in the patrol car was the property of the Sheriff's Office. Mr. Marich could have bought the gasoline and put it in the patrol car. Thus, the siphoning of the gasoline does not establish that Mr. Marich stole the gasoline.

17. There was testimony from a mechanic, who had worked on the Sheriff's Office's patrol cars for several years, that Ford Crown Victoria's had an anti-siphoning device which prevented gasoline from being siphoned from the fuel tank. The mechanic did not know when Ford Motor Company began installing the anti-siphoning devices and had not examined the patrol car driven by Mr. Marich to determine whether it contained an anti-siphoning device or to determine whether anyone had tampered with the gasoline nozzle. Thus, the mechanic's testimony is not credited with establishing that gasoline could not be siphoned from the patrol car driven by Mr. Marich.

18. The evidence is not clear and convincing that Mr. Marich used the gasoline that he put in the gasoline cans in the trunk of patrol car on the dates alleged in the Amended

Administrative Complaint for his personal benefit or for the benefit of others who were not authorized to use the gasoline.

#### CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2008).

20. The Commission has the burden of establishing the allegations in the Amended Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). Clear and convincing evidence has been described by the courts as follows:

[C]lear and convincing evidence 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 witness 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 the 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).

21. The Commission has alleged that Mr. Marich violated Subsections 943.1395(7) and 943.13(7), Florida Statutes, and Florida Administrative Code Rule 11B-27.0011(4)(b), in that he "did knowingly and unlawfully obtain or use or did endeavor to obtain or use, money or property valued at one hundred dollars

(\$100) or more, the property of the Franklin County Sheriff's Office, with the unlawful intent to either temporarily or permanently deprive the Franklin County Sheriff's Office of a right to the property or a benefit therefrom or to appropriate the money or property to his own use or to the use of any person not entitled thereto." The Commission alleged that these actions violated provisions of Subsection 812.014(2)(e), Florida Statutes, or any lesser included offenses.

22. Subsection 943.1395(7), Florida Statutes, provides:

(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. Subsection 943.13(7), Florida Statutes, provides that law enforcement officers shall "[h]ave a good moral character as determined by a background investigation under procedures established by the commission."

24. Florida Administrative Rule 11B-27.0011(4)(b) provides:

(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 . . . 812.014, . . . F.S.

25. Section 812.014, Florida Statutes, provides:

(1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit from the property.

(b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

26. It is undisputed that on October 27 and 29, 2007, and November 2, 6, and 7, 2007, Mr. Marich did pump gasoline

belonging to the Sheriff's Office into one or more gasoline cans in the trunk of his patrol car while on duty as a deputy sheriff for the Sheriff's Office.

27. The evidence does not establish by clear and convincing evidence that Mr. Marich took the gasoline on the dates in question for his personal benefit or for the benefit of other persons who were not entitled to use the gasoline. Testimony of witnesses did establish that in the past Mr. Marich had used the Sheriff's Office's gasoline for stranded motorists, for use in his patrol car for his official duties, and for other law enforcement personnel in their official duties, including his wife. There was evidence to establish that Mr. Marich had siphoned gasoline from a Sheriff's Office's patrol car and put the gasoline into a pickup truck. However, there was no clear and convincing evidence that that the gasoline in the patrol car came from the Sheriff's Office's fueling station.

28. The Commission established that Mr. Marich siphoned gasoline from a Sheriff's Office's patrol car on two occasions. However, the Amended Administrative Complaint did not allege that Mr. Marich had stolen gasoline from the Sheriff's Office on those two occasions. Mr. Marich can not be found guilty of a violation of conduct not alleged in the Amended Administrative Complaint. See Marcelin v. State Dept. of Business and

Professional Regulation, 753 So. 2d 745 (Fla. 3d DCA 2000).

Additionally, even if the siphoning of the gasoline had been alleged in the Amended Administrative Complaint, the evidence did not establish by clear and convincing evidence that the gasoline in the patrol car was the property of the Sheriff's Office.

29. The Commission has failed to establish that Mr. Marich violated Subsections 943.13(7) and 943.1395(7), Florida Statutes, or Florida Administrative Code Rule 11B-27.0011(4)(b).

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that John T. Marich did not violate Subsections 943.13(7) and 943.1395(7), Florida Statutes, and Florida Administrative Code Rule 11B-27.0011(4)(b), and dismissing the Amended Administrative Complaint.

DONE AND ENTERED this 30th day of October, 2008, in  
Tallahassee, Leon County, Florida.

*Susan B. Harrell*

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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of October, 2008.

ENDNOTE

<sup>1/</sup> Unless otherwise indicated, all references to the Florida  
Statutes are to the 2007 version.

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.