

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CRIMINAL JUSTICE STANDARDS AND)
TRAINING COMMISSION,)
)
Petitioner,)
)
vs.) Case No. 09-0042PL
)
ALLEN P. PERRY,)
)
Respondent.)
_____)

AMENDED RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on April 8, 2009, in Ft. Myers, Florida, before Carolyn S. Holifield, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Kenneth J. Afienko, Esquire
Kenneth J. Afienko, P.A.
560 First Avenue, North
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Allen P. Perry, a law enforcement officer, committed the offenses set forth in the

Administrative Complaint, and, if so, what disciplinary action should be taken.

PRELIMINARY STATEMENT

By Administrative Complaint issued November 3, 2008, Petitioner, Criminal Justice Standards and Training Commission ("Commission"), alleged that Respondent, Allen P. Perry ("Respondent"), committed acts which violated Sections 836.05 and 837.021, Subsection 893.13(6)(a) and (b), or any lesser included offenses, and 943.1395(7), Florida Statutes (2006)¹; and Florida Administrative Code Rule 11B-27.0011(4)(a) and (b). The Administrative Complaint further alleges that because of those violations, Respondent failed to maintain the qualifications established by Subsection 943.13(7), Florida Statutes (i.e., requirement that certified officers in the State of Florida have good moral character).

The Administrative Complaint made the following factual allegations as the basis for the charged violations:

(a) On or between January 1, 2007, and February 17, 2007, Respondent did unlawfully possess not more than 20 grams of cannabis;

(b) On or between January 1, 2007, and February 17, 2007, Respondent did unlawfully have, in his actual or constructive possession, a controlled substance, to wit: Cocaine;

(c) On or between January 1, 2007, and February 17, 2007, did unlawfully have, in his actual or constructive possession, a

controlled substance, to wit: Alprazolam (Xanax);

(d) On or between January 1, 2007, and February 17, 2007, Respondent, did unlawfully and maliciously threaten to accuse Anthony Lattarulo of a crime or offense, to wit: possession of a controlled substance and/or possession of controlled substance paraphernalia, with the intent to compel Anthony Lattarulo to do an act against his will; and

(e) On or between February 17, 2007, and March 16, 2007, Respondent did unlawfully, in one or more official proceeding, to wit: internal investigation interviews willfully made two or more material statements under oath which contradict each other.

Respondent timely filed an Election of Rights form disputing the allegations set forth in the Administrative Complaint. The case was referred to the Division of Administrative Hearings on January 7, 2009, for assignment of an Administrative Law Judge to conduct a formal hearing pursuant to Subsection 120.57(1), Florida Statutes (2008). The formal hearing was initially scheduled for March 3 and 4, 2009. Prior to the hearing, Respondent's unopposed motion for continuance was granted, and the hearing was re-scheduled for April 8 and 9, 2009.

In the Pre-Hearing Stipulation filed prior to the hearing, the parties stipulated to certain facts which required no proof at hearing.

At hearing, the Commission presented the testimony of two witnesses, Deputy Kenneth A. Sherman and Sergeant Timothy Fisher. The Commission's Exhibit 1 was offered and admitted into evidence. Respondent testified on his own behalf and presented the testimony of seven witnesses: (1) Sergeant Dennis Sullivan; (2) Lieutenant James Dryzmala; (3) Detective Ryan Lowe; (4) Detective Charles Warf; (5) Thomas Flynn; (6) Deputy John Craven; and (7) Sergeant David Piasecki. Respondent's Exhibits 1 through 3 were offered and received into evidence.

A Transcript of the proceeding was filed with the Division of Administrative Hearings on May 4, 2009. Both parties timely filed Proposed Recommended Orders which have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto, Respondent was certified by the Commission as a law enforcement officer, having been first certified in August 1999. The Commission issued to Respondent, Certificate No. 186964.

2. At all times relevant hereto, Respondent was employed as a law enforcement officer by the Lee County Sheriff's Office ("Sheriff's Office").

Controlled Substances in Respondent's Patrol Car

3. On or between January 1, 2007, and February 17, 2007, Respondent knowingly and actually possessed cocaine, less than

20 grams of cannabis and Alprazolam, all of which are controlled substances under Florida law.

4. On or between January 1, 2007, and February 17, 2007, Respondent kept the cocaine, less than 20 grams of cannabis, and Alprazolam in a tackle box which was in the trunk of his assigned patrol car. Also, in the tackle box were scales, presumptive test kits, baggies, and a knife that had been issued to Respondent by the Sheriff's Office.

5. During the time the cocaine, cannabis, and Alprazolam were in the tackle box in the trunk of Respondent's assigned patrol car, there was no active criminal investigation pertaining to those items. Moreover, there was no other lawful or bona fide reason for Respondent's having the controlled substances in the tool box in his assigned patrol car.

Sheriff's Office Policy on Controlled Substances

6. At all times relevant to this proceeding, the Sheriff's Office had a policy governing how law enforcement officers should handle the controlled substances that they confiscated or took into custody during the course of performing investigations or other job responsibilities.

7. Pursuant to that policy, law enforcement officers were required to label and package the controlled substances that they confiscated or took into custody in the performance of their duties. On the label, the officers were to note the date,

time, place, from whom, and the circumstances under which the controlled substances were confiscated. Furthermore, the officers were to indicate on the label the case number related to the specific controlled substances and whether the controlled substances were to be destroyed or preserved as physical evidence. Finally, the policy required that the law enforcement officers take any controlled substances they confiscated during their shifts to the Sheriff Office's drug repository at the end of their shifts.

8. Notwithstanding the Sheriff's Office policy, officers sometimes did not comply fully with the policy. The most common infraction involved instances when an officer's shift ended late at night or very early in the morning and, his assigned work location was not close to the drug repository. In those instances, officers sometimes waited until later that day or the following day to take the confiscated controlled substances to the drug repository. This delay in an officer's taking the controlled substances to the drug repository is a violation of the policy. However, apparently because such delay is a relatively short one, the Sheriff's Office takes no disciplinary action against the officer in this situation.

9. Respondent was aware of the Sheriff's Office policy concerning how controlled substances confiscated or taken into custody by officers should be handled. Nevertheless, with

regard to the cocaine, cannabis, and Alprazolam which Respondent confiscated, he did not comply with that policy.

10. Respondent did not label the cocaine, cannabis, and Alprazolam that were in the tackle box in the trunk of his assigned patrol car. Moreover, Respondent never took those controlled substances to the Sheriff Office's drug repository, but kept them in the trunk of his patrol car for about two months. In fact, the cocaine, cannabis, and Alprazolam remained in the trunk of Respondent's patrol car until an officer with internal affairs found them there during an investigation.

11. Respondent testified that he confiscated the cocaine, cannabis, and Alprazolam during traffic stops he made while performing his duties with the Sheriff's Office. However, because the above-referenced controlled substances were not labeled or otherwise marked, the date and circumstances regarding how they came into Respondent's custody cannot be accurately determined.

Respondent's Field Training Practice

12. At all times relevant hereto, Respondent was assigned to the Sheriff's Office field training program as a field training officer ("FTO"). As an FTO, Respondent supervised and trained newly-hired recruits who were assigned to him for about a month.

13. In February 2007, Respondent was assigned the task of serving as FTO for Deputy Kenneth Sherman, a recruit with the Sheriff's Office. During Phase Two field training, Deputy Sherman was required to accompany Respondent as he (Respondent) performed his normal patrol duties.

14. While serving as FTO for Deputy Sherman, Respondent showed him the cocaine, cannabis, and Alprazolam in the tackle box in the trunk of his patrol car. Respondent's reason for doing so was that he thought Deputy Sherman should know what various controlled substances looked like. At the time Respondent showed Deputy Sherman the cocaine, cannabis, and Alprazolam, he also explained to him how to test for various drugs, narcotics, and/or controlled substances.

15. At or near the time Respondent showed Deputy Sherman the controlled substances, he told Deputy Sherman that the "policy" required that drug/narcotics and/or controlled substances that had been confiscated and that were not needed as evidence should be turned in to the drug repository for destruction. However, Respondent stated that, notwithstanding that policy, he kept the cocaine, cannabis, and Alprazolam for training purposes.

16. Respondent believed that recruits should know what narcotics and/or controlled substances looked like. Consistent with that belief, Respondent showed drugs/narcotics and/or

controlled substances that were in the tackle box in his patrol vehicle to some of the recruits he was training.

17. Respondent never sought or obtained authorization from any official at the Sheriff's Office to keep and use confiscated narcotics and/or controlled substances as training aids.

18. Showing recently confiscated drugs/narcotics and/or controlled substances to a recruit or trainee may be lawful when such display occurs during the course of an active investigation or other official duties. However, to do so when there is no investigation, and/or after a case is closed, is not a bona fide lawful purpose.

19. Law enforcement officers are not authorized to be in possession of controlled substances. The only time officers are allowed to be in possession of controlled substances is when they have been confiscated or taken then into custody during the course of their law enforcement duties (i.e., an active investigation pertaining to those controlled substances). In such cases, the officers are responsible for complying with the Sheriff Office policy discussed in paragraph 7.

February 2007 Incidents

20. On February 17, 2007, at about 2:00 a.m., Respondent and Deputy Sherman were patrolling a high crime area in Bonita Springs near an apartment complex. They observed a car or small sports utility vehicle in the middle of the apartment complex

parking lot with several people standing around the vehicle. After Respondent drove his patrol car into the parking lot, almost everyone who had been standing near the vehicle scurried away.

21. Because the vehicle in the middle of the parking lot belonged to Anthony Lattarulo, he approached the patrol car to explain the reason his vehicle was there. Mr. Lattarulo then told Respondent and Deputy Sherman that he needed a "jump" for his battery and/or that he needed gas for his Honda.

22. When Mr. Lattarulo approached the patrol car, Respondent immediately began interrogating him. Meanwhile, at some point during the interrogation, Deputy Sherman checked Mr. Lattarulo's identification and also conducted a pat-down of him.²

23. During the interrogation, Respondent asked Mr. Lattarulo where he was coming from, what he was doing there, whether he did drugs, was he there to buy drugs, and when was the last time he smoked crack. Mr. Lattarulo told Respondent that he had been "hanging out" with a guy who lived in the apartment complex; he then pointed to a unit in a nearby building in the apartment complex, presumably the one in which the person he had been visiting lived.

24. Mr. Lattarulo never told Respondent that he had been using crack cocaine or any other illegal drug or purchasing such

drugs while visiting someone in the apartment complex.

Nonetheless, Respondent seemed to believe or suspect that Mr. Lattarulo had not just been "hanging out," but had been at the apartment complex using and/or purchasing illegal drugs.³

25. After Mr. Lattarulo pointed to the apartment where he had been visiting, Respondent told him to knock on the door of that unit, and tell "those people" to come out because "Perry" wanted to talk to them. Mr. Lattarulo told Respondent more than once that he did not want to knock on the door and tell the occupant(s) that the "police" wanted to talk them. Nonetheless, he did so reluctantly after being threatened by Respondent. After no one came to the door of the unit, Mr. Lattarulo returned to the area where Respondent and Deputy Spencer were and told Respondent that no one was in the unit.

26. Although no one answered the door of the unit when Mr. Lattarulo knocked, Respondent seemed unconvinced that no one was in the unit. Respondent then ordered Mr. Lattarulo to return to the unit where he had already been and knock on the door again. As he had done initially, Mr. Lattarulo told Respondent that he did not want to knock on the door and tell the occupants to come out. However, Mr. Lattarulo complied with Respondent's demand after Respondent threatened him. Still no one came to the door of the apartment unit.

27. Mr. Lattarulo knocked on the door of the unit as described in paragraphs 25 and 26 only because of the threats made by Respondent. It is unclear which threat Respondent made first. However, in one instance, Respondent threatened to use Mr. Lattarulo or Mr. Lattarulo's head as a battering ram to "open that door." In the other instance, Respondent threatened Mr. Lattarulo by telling him if he refused to go to the apartment unit and knock on the door, "I'll go into my pharmaceutical refrigerator [and], let you pick the drug you want to go to jail for tonight."

28. After no one answered the door of the apartment unit the second time, Mr. Lattarulo again returned to the area where Respondent and Deputy Sherman were located. At or about that time, Deputy Sherman apparently noticed a junction box on the side of the apartment building. Not knowing what the "box" was, Deputy Sherman asked Respondent. Respondent then instructed Mr. Lattarulo to go pull the lever and "we'll see what it is."

29. As Mr. Lattarulo began walking toward the junction box, Respondent told Deputy Sherman that when Mr. Lattarulo pulled the lever of the junction box, the electrical power would go off in that apartment building. As Respondent had indicated, as soon as Mr. Lattarulo pulled the lever, the electricity went off in the entire apartment building. After several seconds, Respondent then ordered Mr. Lattarulo to turn the electricity

on. Mr. Lattarulo then pulled the lever, and the electricity in the building came back on.

30. Following the incident involving the junction box, Respondent and Deputy Sherman left the apartment complex.

Internal Investigation

31. Later on February 17, 2007, or the next day, Deputy Sherman called an unidentified person with the Sheriff's Office to share his concerns about the incident involving Mr. Lattarulo and to seek advice. As a result of the conversation between Deputy Sherman and the unidentified person, Sergeant Timothy Fisher of the Sheriff Office's internal affairs division was contacted and informed of the allegations made by Deputy Sherman.

32. In response to the information given to Sergeant Fisher, an internal investigation was immediately commenced. As part of that investigation, Sergeant Fisher searched the trunk of Respondent's assigned vehicle and discovered the cocaine, less than 20 grams of cannabis, and Alprazolam in the tool box.⁴

33. After the controlled substances were found in the tackle box in the trunk of Respondent's patrol car, Sergeant Fisher interviewed Respondent. During those interviews and/or sworn statements, Respondent gave inconsistent statements regarding why the controlled substances were in the trunk of his patrol car. Respondent's stated reasons included the following:

(1) He used the controlled substances as an aid for training recruits; (2) He forgot the controlled substances were in the tackle box in the trunk of his assigned patrol car; and (3) He was either too "lazy" or "stupid" to turn them in for destruction.

34. Sergeant Fisher followed up on Respondent's explanation that he failed to take the drugs to the repository because he was lazy by reviewing files of the Sheriff's Office. The credible testimony of Sergeant Fisher was that those records documented that Respondent had gone to the Sheriff's Office drug depository three times to deposit drugs and/or other evidence after the date he reported confiscating the controlled substances that were in his patrol car.

35. At this proceeding, Respondent also gave inconsistent statements regarding the controlled substances in the tool box. He testified that he used the above-referenced controlled substances for training recruits. Nonetheless, he stated that he intended to submit them for destruction, but had "no idea" when he would do so. Also, despite testifying that he used the controlled substances for training, Respondent testified that he never moved or touched the controlled substances from the tackle box or from the trunk of his patrol car. According to Respondent's testimony, he, instead, required Deputy Sherman to

retrieve the test kit, scale, and controlled narcotics from the toolbox.

36. Respondent was terminated as a deputy sheriff with the Sheriff's Office.

Credibility of Witnesses

37. With regard to the February 17, 2007, incident involving Mr. Lattarulo, Respondent testified that he never threatened to plant drugs or controlled substances to place charges on Mr. Lattarulo. Respondent also initially testified that he never threatened to use Mr. Lattarulo as a battering ram; however, on cross-examination, he acknowledged that he "may" have threatened to use Mr. Lattarulo's head as a battering ram.

38. The testimony of Deputy Sherman regarding the events of February 17, 2007, including the threats made by Respondent to Mr. Lattarulo is more credible than that of Respondent. Moreover, Deputy Sherman's testimony is corroborated by the credible sworn statement of Mr. Lattarulo given on February 27, 2007.⁵

39. Respondent contends that Deputy Sherman made the allegations concerning the threats, because he may have been afraid that he was not going to pass the field-training phase. Respondent further contends that Deputy Sherman's fear was based on Respondent's documenting areas of concern (i.e., officer

safety skills and radio skills) which could have jeopardized Deputy Sherman's passing the field-training phase. However, there is nothing in the record which indicates that Deputy Sherman had been notified or had reason to believe that he might not pass his Phase Two training.

CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2009).

41. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue in the proceeding. Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). Here, the Commission is asserting the affirmative. Therefore, it has the burden of proof.

42. Because this case is penal in nature, the material allegations set forth in the Administrative Complaint must be proven 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).

43. Section 943.13, Florida Statutes, establishes the minimum qualifications for law enforcement officers in Florida. That section provides in pertinent part the following:

Officer's minimum qualifications for employment or appointment.--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. . . shall:

* * *

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

44. Subsection 943.1395(7), Florida Statutes, authorizes the Commission to take disciplinary action against certified law enforcement officers who have not maintained good moral character. That subsection 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 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.

45. Pursuant to its rulemaking authority, the Commission promulgated Florida Administrative Code Rule 11B-27.0011 (2006 version). See §§ 943.03(4) and 943.12(1), Fla. Stat. That rule provides in pertinent part:

(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:

(a) The perpetration by an officer of an act that would constitute any felony offense, whether criminally prosecuted or not.

(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. . . . 893.13, . . . F.S.

46. The Administrative Complaint alleges that Respondent committed acts which constitute felony offenses under Sections 836.05, 837.021, and 893.13(6)(a), Florida Statutes, and an act which constitutes a misdemeanor offense under Subsection 893.13(6), Florida Statutes, whether criminally prosecuted or not.

47. Section 836.05, Florida Statutes, provides in pertinent part:

Threats; extortion.--Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication maliciously threatens injury to the person . . . with the intent to compel the person so threatened to . . . to do any act or refrain from doing any act against his or her will, shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or 775.084.

48. Subsection 837.02(1), Florida Statutes, provides in pertinent part:

Perjury by contradictory statements.
(1) Except as provided in subsection (2), whoever, in one or more official proceedings, willfully makes two or more material statements under oath which contradict each other, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

49. Subsection 893.13(6), Florida Statutes, provides in pertinent part:

(6)(a) It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. Any person who violates this provision commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If the offense is the possession of not more than 20 grams of cannabis, as defined in this chapter, the person commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. For the purposes of this subsection, "cannabis" does not include the resin extracted from the plants of the genus Cannabis, or any compound manufacture, salt, derivative, mixture, or preparation of such resin. [Emphasis in original.]

50. Pursuant to Subsection 893.13(9), Florida Statutes, the provisions of Subsection 893.13(6), Florida Statutes, are inapplicable to persons in certain classes or the agents or employees of such persons.

51. Subsection 893.13(9), Florida Statutes, provides in pertinent part:

(9) The provisions of subsections (1)-(8) are not applicable to the delivery to, or actual or constructive possession for medical or scientific use or purpose only of controlled substances by, persons included in any of the following classes, or the agents or employees of such persons, for use in the usual course of their business or profession or in the performance of their official duties:

* * *

(h) Law enforcement officers for bona fide law enforcement purposes in the course of an active criminal investigation.

52. The clear and convincing evidence established that Respondent failed to maintain good moral character within the

meaning of Subsection 943.13(7), Florida Statutes, and Florida Administrative Code Rule 11B-27.0011(4).

53. Here, the clear and convincing evidence established that, while on duty as a law enforcement officer, Respondent ordered Mr. Lattarulo to knock on the door of an apartment unit and tell the occupants to come out and talk to Respondent. Further, the clear and convincing evidence showed that when Mr. Lattarulo indicated that he did not want to comply with Respondent's order, Respondent told him that he (Respondent) would: (1) have Mr. Lattarulo select a "drug" from the tackle box ("pharmaceutical refrigerator") for which he wanted to go to jail; and (2) use Mr. Lattarulo, or his head, as a battering ram to open the door of the apartment unit.

54. By engaging in the foregoing conduct, Respondent maliciously threatened to accuse Mr. Lattarulo of a crime or offense and to injure Mr. Lattarulo. Moreover, Respondent made the threats with the intent to compel Mr. Lattarulo to do something (knock on the door and tell the occupants to come out) against his will. The threats made by Respondent constitute felony offenses within Section 836.05, Florida Statutes.

55. The evidence established that during the Sheriff Office's investigation and interviews, Respondent made several different statements regarding the reason the controlled substances were in the trunk of his patrol car (i.e. he used

them to "train recruits" and he was "lazy" and "stupid"). Although Respondent's statements provided different explanations, the statements are not clearly contradictory. Moreover, no clear and convincing evidence was presented to establish that Respondent's statements were made under oath during "one or more official proceedings." Accordingly, the evidence failed to show that Respondent committed an act that is a felony offense under Subsection 837.021(1), Florida Statutes.

56. The parties stipulated that on or between January 1, 2007, and February 17, 2009, Respondent knowingly and actually possessed less than 20 grams of cannabis, cocaine, and Alprazolam. This stipulation is supported by clear and convincing evidence that Respondent knowingly and actually possessed the cannabis, cocaine and Alprazolam for about two months.

57. Pursuant to Subsections 893.03(1)(c)7., 893.03(2)(a)4. and 893.03(4)(a), Florida Statutes, cannabis, cocaine, and Alprazolam, respectively, are controlled substances.

58. Respondent's possession of the controlled substances is lawful, only if it falls within one of the exceptions provided in Subsection 893.13(9), Florida Statutes. Relevant to this case is Subsection 893.13(9)(h), Florida Statutes, which allows law enforcement officers to be in possession of

controlled substances for bona fide law enforcement purposes in the course of an active investigation.

59. The clear and convince evidence established that during the approximately two months that Respondent was in possession of the controlled substances, he was not involved in any bona fide law enforcement purpose in the course of any investigation. Thus, in accordance with Subsection 893.13(6)(a), Florida Statutes, Respondent was unlawfully in actual or constructive possession of the controlled substances.

60. By unlawfully being in actual or constructive possession of cocaine and Alprazolam, Respondent committed an act that would constitute a felony of the third degree, whether prosecuted or not. See § 893.13(6)(a), Fla. Stat.

61. By unlawfully being in actual or constructive possession of less than 20 grams of cannabis, Respondent committed an act that would constitute a misdemeanor of the first degree, under Subsection 893.13(6)(b), Florida Statutes, whether prosecuted or not.

62. In summary, the clear and convincing evidence established that Respondent committed acts which constituted felonies under Section 836.05 and Subsection 893.13(6)(a), Florida Statutes, and a misdemeanor under Subsection 893.13(6)(b), Florida Statutes.

63. The Commission met its burden. It has shown by clear and convincing evidence that Respondent failed to maintain good moral character as required by Subsection 943.13(7), Florida Statutes.

64. The Commission proposes to revoke Respondent's law enforcement certification for the offenses he committed. That penalty is within the disciplinary guidelines set forth in Subsection 943.1395(7), Florida Statutes.

RECOMMENDATION

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

RECOMMENDED that Petitioner, Criminal Justice Standards and Training Commission, enter a final order finding that Respondent, Allen P. Perry, failed to maintain good moral character as defined by the Commission and revoking his certificate.

DONE AND ENTERED this 11th day of September, 2009, in Tallahassee, Leon County, Florida.

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of September, 2009.

ENDNOTES

^{1/} All statutory references are to Florida Statutes (2006), unless otherwise noted.

^{2/} Using the identification provided to him, Deputy Sherman ran a check on Mr. Lattarulo; however, based on that check, there was no indication that there were any outstanding criminal matters pending against him. Also, there is no indication that any illegal drugs were found on Mr. Lattarulo during the pat-down.

^{3/} While interrogating Mr. Lattarulo, Respondent told him to open his mouth. Respondent then used a flashlight to look down Mr. Lattarulo's throat. Respondent had previously told Deputy Sherman that if a person had recently smoked crack, the "little nodes" or glands in the back of that person's throat would be "sticking up." Even though there was no evidence to support this claim, it appears that Respondent used the flashlight to look down Mr. Lattarulo's throat to determine if he had recently used crack cocaine.

^{4/} The nature and amount of the narcotics found in the tackle box are not in dispute.

^{5/} In this sworn statement, Mr. Lattarulo recanted denials made during an interview on February 19, 2007, in which he was not under oath. According to the typed record of the interview, the session lasted only seven minutes and consisted of mostly leading questions.

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.