

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CRIMINAL JUSTICE STANDARDS AND)	
TRAINING COMMISSION,)	
)	
Petitioner,)	
)	
vs.)	Case No. 09-2127PL
)	
LEONARDO MARTINEZ,)	
)	
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 August 18, 2009, in Lakeland, Florida.

APPEARANCES

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

For Respondent: Leonardo Martinez, pro se

STATEMENT OF THE ISSUE

Whether Respondent's conduct evidenced lack of "good moral character" as alleged in the Administrative Complaint.

PRELIMINARY STATEMENT

On October 29, 2008, Petitioner, Florida Department of Law Enforcement, Criminal Justice Standards and Training Commission, filed an Administrative Complaint alleging that on July 13, 2007, Respondent, Leonardo Martinez, "did unlawfully handle, fondle, or assault a minor female victim, a child under 16 years of age, in a lewd, lascivious, or indecent manner"; and, further, alleging that this conduct evidenced lack of "good moral character" so as to warrant disciplining Respondent's certifications as a correctional and law enforcement officer.

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

By letter dated April 17, 2009, 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 April 21, 2009, 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 July 1, 2009, in St. Cloud, Florida. On June 12, 2009, Petitioner requested a continuance, which was granted, and the case was rescheduled for August 18, 2009.

The final hearing took place as rescheduled. Petitioner presented two witnesses: S. R., the minor victim, and Tom Clem.

Petitioner offered four exhibits that were received into evidence and marked Petitioner's Exhibits 1 through 4. Respondent was present during the initial stage of the hearing when procedural matters were discussed; however, he elected to leave the hearing room when Petitioner presented its witnesses. Respondent did not testify and did not offer any exhibits.

The Transcript of Proceedings was filed with the Division of Administrative Hearings on September 16, 2009. Petitioner filed its Proposed Recommended Order on September 28, 2009. On October 6, 2009, Respondent requested an additional ten days to file his proposed recommended order. On October 7, 2009, an Order Granting Extension of Time was entered. Respondent did not file a proposed recommended order.

All statutory references are to Florida Statutes (2008), unless otherwise noted.

FINDINGS OF FACT

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

1. Respondent has two certifications: Correctional (No. 188545) issued on December 13, 1999; and Law Enforcement (No. 192621) issued on July 27, 2000.
2. At the times relevant to the allegations of impropriety in the Administrative Complaint, Respondent was a law

enforcement officer with the Kissimmee, Florida, Police Department.

3. On or about July 13, 2007, while sleeping over at the minor victim's father's residence, Respondent picked up S.R., a 15-year-old child, put her into a bed and straddled her, holding her wrists with one hand while sliding his other hand over the side of her body. He then "nuzzled" or "sucked" on her neck and ear while S.R. struggled underneath him. Respondent "jumped" or "flinched back" when S.R.'s younger sister came back into the room, while S.R. continued to struggle with Respondent.

5. The younger sister of S.R. was in the bathroom and heard S.R. call out. When she ran into the bedroom, Respondent jumped off of the bed, and the younger sister saw S.R. jump off of the bed and get into a second bed in the room. The younger sister also noticed that S.R. was "scared."

6. S.R. sat "quietly and cried" while telling Krista Davis, her father's girlfriend that "while her little sister . . . was in the bathroom, . . . Leo had gotten on top of her in her bed and started to kiss her down her neck and on her ear . . . and rubbed the side of her body."

CONCLUSIONS OF LAW

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

8. 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).

9. 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).

10. 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).

11. 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:

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

12. 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.

13. 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:

* * *

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

14. Subsection 800.04(6), Florida Statutes, defines the felony, "lewd and lascivious" conduct, as:

(a) A person who:

1. Intentionally touches a person under 16 years of age in a lewd or lascivious manner;

(b) An offender 18 years of age or older who commits lewd or lascivious conduct commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

15. The evidence demonstrates that Respondent, intentionally touched S.R., a person under 16 years of age, in a lewd and lascivious manner.

16. The facts in the instant case are similar to the facts in Washington v. State, 766 So. 2d 325 (Fla. 4th DCA 2000),

where the court ruled that evidence of a defendant brushing, touching or caressing a 15-year-old minor was sufficient to establish a prima facie case of lewd assault on a child. In the Washington case, the perpetrator made moaning noises of pleasure, and while no like sounds were testified to in the instant case, Respondent was "sucking" or "nuzzling" the neck and ears of the child while she was squirming and trying to push him off as he straddled her body.

17. The only evidence in the record clearly shows that Respondent intentionally touched S.R. in a lewd and lascivious manner committing a felony.

18. Florida Administrative Code Rule 11B-27.005(5)(a)11., specifies the recommended penalty for an officer's violation of a lewd and lascivious offense on a child under 16, is revocation.

RECOMMENDATION

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

RECOMMENDED that Respondent, Leonardo Martinez, be found guilty of failure to maintain good moral character as required by Subsection 943.13(7), Florida Statutes; and that his certifications as a correctional and law enforcement officer be revoked.

DONE AND ENTERED this 12th day of November, 2009, in
Tallahassee, Leon County, Florida.



JEFF B. CLARK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of November, 2009.

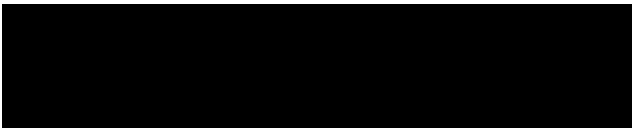
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Leonardo Martinez



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.