

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CRIMINAL JUSTICE STANDARDS )  
AND TRAINING COMMISSION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 09-2140PL  
 )  
MARKEITH L. DANIELS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On July 6, 2009, a duly-noticed hearing was held in Apalachicola, Florida, before Lisa Shearer Nelson, an Administrative Law Judge appointed by the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Markeith Daniels, pro se

STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent committed the acts alleged in the Administrative Complaint and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On August 6, 2008, the Criminal Justice Standards Training Commission of the Department of Law Enforcement (Petitioner or the Commission) filed an Administrative Complaint against Respondent, charging him with violating Section 943.1395(7), Florida Statutes (2007), by driving or being in physical control of a vehicle within the State of Florida while under the influence of alcoholic beverages to the extent that his normal faculties were impaired, or with a blood or breath alcohol level of .08 or above. Respondent disputed the allegations of the Administrative Complaint in an undated Election of Rights form that did not include Respondent's name and address. On April 22, 2009, the matter was forwarded to the Division of Administrative Hearings for the assignment of an administrative law judge.

The Initial Order was addressed to Respondent at the only address provided by the Commission and was returned to the Division as undeliverable. Because no hearing could be noticed without a proper address for Respondent, an Order to Show Cause was issued May 5, 2009, directing the Commission to provide a usable address or show cause why jurisdiction should not be relinquished back to the Agency. The Commission responded with an updated address for Respondent, and on June 5, 2009, a Notice of Hearing issued scheduling the case for July 6, 2009.

The matter proceeded as scheduled. At hearing, Petitioner presented the testimony of Lieutenant Thomas Webb and Patrick

Murphy, and Petitioner's Exhibits 1-3 were admitted into evidence. The Respondent testified on his own behalf and submitted no exhibits.

The Transcript of the proceedings was filed with the Division on July 20, 2009, and the Petitioner's Proposed Recommended Order was submitted July 31, 2009. Respondent did not choose to submit a proposed recommended order. All references to the Florida Statutes are to the 2007 codification, unless otherwise indicated.

#### FINDINGS OF FACT

1. Respondent, Markeith Daniels (Respondent or Daniels), is a correctional officer certified by the Criminal Justice Standards and Training Commission, having been issued certificate number 254286.

2. At the time of the events giving rise to these proceedings, Respondent was employed by the Florida Department of Corrections as a correctional officer assigned to the Dade Correctional Institution.

3. On or about November 2, 2007, then-Deputy (now Lieutenant) Thomas Webb stopped Respondent in Apalachicola for an improper start of the vehicle he was driving. After approaching Respondent's car, Lt. Webb could smell alcohol on his breath. Lt. Webb asked if Respondent had been drinking, and Respondent indicated he had had a few beers. Lt. Webb asked Respondent to step out of the car and perform selected field sobriety tests.

4. Lt. Webb testified that, based upon his training and experience, Respondent was under the influence of alcohol. He failed the field sobriety tests because he did not wait for complete directions to be given before starting the tests, and did not follow directions once given. For example, on the "one-leg stand" test, he did not count out loud as instructed, began counting at 4 and at the end of what was to be 30 seconds, Respondent had only counted to 22.

5. Daniels' vehicle was searched. Lt. Webb found two bottles of Verdi Spumante, an alcoholic beverage, in the car. One bottle was unopened while the other was open and empty. Lt. Webb also found two cans of cold, Natural Lite beer in the back seat. Respondent claimed that the beer had been taken from a refrigerator at approximately 9:30 p.m., and that he had given several beers from the twelve-pack to a friend.

6. Daniels was placed under arrest and transported to the Franklin County Jail, where his breath was tested for alcohol content.

7. Protocols for breath alcohol testing require two samples to be given and tested. The first breath sample given by Respondent registered a reading of .121 at 4:28 a.m. The machine provides a two-minute break between breath sample attempts, and this two-minute window is recorded on the breath alcohol test affidavit as "air blanks," at 4:29 and 4:30. From the air blank recorded at 4:30, Respondent had three minutes to provide an

additional sample. After three minutes, no sample had been provided, and Lt. Webb pressed the "refusal" button.

8. Respondent would have been able to see the results from the first breath sample before being asked to give the second one.

9. The criminal charges against Daniels were dismissed for reasons that are not clearly identified in this record.

#### CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2008).

11. This disciplinary action by Petitioner is a penal proceeding in which Petitioner seeks to discipline Respondent's certification as a correctional officer. Petitioner bears the burden of proof to demonstrate the allegations in the Administrative Complaint by clear and convincing evidence.

Department of Banking and Finance v. Osborne Sterne & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

12. Clear and convincing evidence:

[R]equires 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 lacking in confusion as to the facts in issue. The evidence must be of such a 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 Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 797, 800 (Fla. 4th DCA 1983).

13. The Administrative Complaint contains the following allegations:

2. On or about November 2, 2007, the Respondent, Markeith L Daniels, did unlawfully drive or was in actual physical control of a vehicle within this state while under the influence of alcoholic beverages, any chemical substance set forth in s.877.111, or any substance controlled under chapter 893, when affected to the extent that his normal faculties were impaired; or with a blood or breath alcohol level of .08 or above.

3. The actions of the Respondent did violate the provisions of Section 316.193 or any lesser included offenses, Section 943.1395(7), Florida Statutes, and Rule 11B-27.0011(4)b, Florida Administrative Code, in that Respondent failed to maintain the qualifications established in Section 943.13(7), Florida Statutes, which require that a Correctional Officer in the State of Florida have good moral character.

14. Section 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.

(8)(a) The commission shall, by rule, adopt disciplinary guidelines and procedures to administer the penalties provided in subsections (6) and (7). The commission may, by rule, prescribe penalties for certain offenses. The commission shall, by rule, set forth aggravating and mitigating circumstances to be considered when imposing the penalties provided in subsection (7).

(b)1. The disciplinary guidelines and prescribed penalties must be based upon the severity of specific offenses. The guidelines must provide reasonable and meaningful notice to officers and to the public of penalties that may be imposed for prohibited conduct. The penalties must be consistently applied by the commission.

15. Florida Administrative Code Rule 11B-27.0011(4)

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:

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

(b) Except as otherwise provided in Section 943.13(4), F.S., a plea of guilty or a

verdict of guilty after a criminal trial for any of the following misdemeanor or criminal offenses, notwithstanding any suspension of sentence or withholding of adjudication, or 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 316.193 . . . .

16. Section 316.193, Florida Statutes, provides in pertinent part:

1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a vehicle within this state and:

(a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired;

(b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or

(c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

17. The Department has demonstrated by clear and convincing evidence that Respondent was under the influence of alcohol to the extent that his normal faculties were impaired. Respondent was driving a car when stopped by Lt. Webb. He had the smell of alcohol on his breath and admitted he had consumed a "few beers." He was unable to follow the simple directions given in the field sobriety tests, and the one sample of breath alcohol content he provided was .121, well above the legal indication of impairment.



This one result does not rise to the level of a presumption of impairment, but when taken together with the other evidence presented, the evidence supports the conclusion that Respondent was impaired. The fact that he was not criminally convicted of violating Section 316.103 is irrelevant, inasmuch as the rule definition of failing to maintain good moral character specifically indicates that no prosecution is required. Compare Criminal Justice Standards and Training Commission v. Tena Grant, Case No. 05-4458 (DOAH April 4, 2006; Final Order May 10, 2006).

18. The Commission has established disciplinary guidelines, as required by Section 943.1395(7), Florida Statutes. Florida Administrative Code Rule 11B-27.005(b)10. provides:

(5) When the Commission finds that a certified officer has committed an act that violates Section 943.13(7), F.S., the Commission shall issue a final order imposing penalties within the ranges recommended in the following disciplinary guidelines:

\* \* \*

(b) For the perpetration by the officer of an act that would constitute any of the misdemeanor offenses, pursuant to paragraph 11B-27.0011(4)(b), F.A.C., but where there was not a violation of Section 943.13(4), F.S., the action of the Commission shall be to impose a penalty ranging from probation of certification to suspension of certification. Specific violations and penalties that shall be imposed, absent aggravating or mitigating circumstances, include the following:

\* \* \*

10. Driving or boating under the influence second DUI Offense (316.193 and 327.35, F.S.): Probation with substance abuse counseling and prospective suspension to revocation.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered finding that Markeith Daniels has violated Section 943.13(7), Florida Statutes, and that Respondent's license be placed on probation for a period of one year, with terms to be determined by the Commission.

DONE AND ENTERED this 21st day of August, 2009, in Tallahassee, Leon County, Florida.



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LISA SHEARER NELSON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 21st day of August, 2009.

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.