

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CRIMINAL JUSTICE STANDARDS)
AND TRAINING COMMISSION,)
)
Petitioner,)
)
vs.) Case No. 09-4602PL
)
HARRY J. DONALDSON,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On November 12, 2009, a duly-noticed hearing was held in Starke, Florida, before Administrative Law Judge Lisa Shearer Nelson 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: Harry J. Donaldson, pro se


STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent is guilty of violating Sections 943.1395(7) and 943.13(7), Florida Statutes (2007), and Florida Administrative Code Rule 11B-27.0011, as alleged in the Administrative Complaint, and if so, what penalties should be imposed?

PRELIMINARY STATEMENT

On June 23, 2009, the Criminal Justice Standards and Training Commission (Petitioner or Commission) filed an Administrative Complaint against Respondent, alleging that Respondent had violated Sections 943.1395(7) and 943.13(7), Florida Statutes (2007), and Florida Administrative Code Rule 11B-27.0011, by possessing not more than 20 grams of cannabis and drug paraphernalia. Respondent disputed the allegations in the Administrative Complaint and requested a hearing pursuant to Section 120.57(1), Florida Statutes (2009). On August 20, 2009, the case was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

On September 8, 2009, a Notice of Hearing was issued, scheduling the final hearing to be conducted on November 12, 2009, and the case proceeded as scheduled. At hearing, Petitioner presented the testimony of Officer Paul King. Respondent testified on his own behalf. Neither party submitted exhibits.

The proceedings were recorded and the Transcript was filed with the Division on December 1, 2009. Petitioner filed its Proposed Recommended Order on December 7, 2009, which has been carefully considered in the preparation of this Recommended Order. To date, no post-hearing submission has been received from Respondent.

FINDINGS OF FACT

1. At all times material to these proceedings, Respondent was certified by Petitioner as a correctional officer, and issued certificate number 183026.

2. On June 25, 2008, Respondent was a passenger in a vehicle that he owned but that was driven by his son, James Donaldson.

3. The car was pulled over by Officer Paul King of the Starke Police Department because its brake lights were not working. Officer King explained to the driver the reason for the stop.

4. Officer King smelled what he recognized to be burnt cannabis coming from inside the vehicle. He asked both occupants if they had any marijuana in the vehicle, and both men denied having any.

5. Officer King asked James Donaldson to exit the vehicle. Upon searching his person, Officer King found in a pocket of James' trousers a plastic bag containing less than 20 grams of cannabis. He also seized a package of cigarette rolling papers, of a type commonly used to roll marijuana, from the seat of the car. James Donaldson identified the rolling papers as belonging to him.

6. At that point, Officer King arrested James Donaldson, and placed him in handcuffs.

7. Officer King then asked Respondent to exit the car, and asked him if he had anything on his person. Respondent stated that he had marijuana. A search revealed that in his right-front shorts pocket, there was a silver metal grinder with marijuana residue. In Respondent's left-front shorts pocket, Officer King found a clear plastic baggy containing a green leafy substance, less than 20 grams, along with a package of rolling papers.

8. The metal grinder was of type commonly used to prepare cannabis for smoking, and was approximately the size of a chewing tobacco can.

9. Officer King used a field test kit to test the specimens taken from both men. Both tested positive for cannabis. Officer King then arrested Respondent for possession of cannabis and possession of drug paraphernalia.

10. Respondent did not deny having the marijuana or the metal grinder on his person. However, he claimed that both were hidden within a pack of cigarettes that belonged to his son, but that he had picked up the pack and put it in his shirt front pocket at his son's request. He claimed that he did not smell the marijuana because he has difficulty smelling anything.

11. Respondent's claim is not credible. Even assuming that the metal grinder and the baggie of marijuana would fit in a cigarette package, it is not believable that Respondent would pick up a cigarette package containing such an implement and not realize the cigarette package contained something other than

cigarettes. Officer King's testimony that he did not confiscate a cigarette package, on the other hand, was clear, straightforward and candid.

CONCLUSIONS OF LAW

12. 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 (2009).

13. 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).

14. 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).

15. The Administrative Complaint contains the following factual allegations:

2. (a) On or about June 25, 2008, the Respondent, Harry J. Donaldson, did unlawfully possess not more than 20 grams of cannabis.

(b) On or about June 25, 2008, the Respondent, Harry J. Donaldson, did unlawfully use, or possess with intent to use, drug paraphernalia; to wit: a metal grinder containing cannabis residue and a clear plastic baggie containing cannabis, to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of Florida Statutes Chapter 893.

3. The actions of Respondent did violate the provisions of Section 893.13(6); 893.147(1) or any lesser included offenses

16. Section 943.1395(7), Florida Statutes (2007), 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.

17. The Commission has defined "good moral character" for purposes of Section 943.1395(7), Florida Statutes, in Florida Administrative Code Rule 11B-27.0011(4), which 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 . . . 893.13 . . . 893.147 . . .

18. Section 893.13(6), Florida Statutes (2007), 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. . . .

(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.

19. Section 893.147(1), Florida Statutes (2007), provides
in pertinent part:

(1) USE OR POSSESSION OF DRUG
PARAPHERNALIA.--It is unlawful for any person
to use, or to possess with intent to use,
drug paraphernalia:

(a) To plant, propagate, cultivate, grow,
harvest, manufacture, compound, convert,
produce, process, prepare, test, analyze,
pack, repack, store, contain, or conceal a
controlled substance in violation of this
chapter; or

(b) To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

20. Petitioner has proven by clear and convincing evidence that Respondent committed the violations alleged in the Administrative Complaint. Respondent's claim that they did not know that the substances were cannabis and drug paraphernalia until confiscated is rejected.

21. The Commission has established disciplinary guidelines for the imposition of penalties for failure to maintain good moral character. For possession of less than 20 grams of cannabis, the guidelines provide for revocation of certification. Fla. Admin. Code R. 11B-27.005(5)(b)11. Respondent did not present any evidence of mitigating circumstances as described in the disciplinary guidelines.

RECOMMENDATION

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

RECOMMENDED that the Commission enter a Final Order finding that Respondent has violated Section 943.13(7), Florida Statutes (2007), and revoking his certification.

DONE AND ENTERED this 31st day of December, 2009, in
Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of December, 2009.

COPIES FURNISHED:

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

Harry J. Donaldson



Michael Ramage, General Counsel
Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302

Michael Crews, Program Director
Division of Criminal Justice
Professionalism Services
Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302

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.