

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS


CRIMINAL JUSTICE STANDARDS)
AND TRAINING COMMISSION,)
)
Petitioner,)
)
vs.) Case No. 10-0748PL
)
JARROD RAPPAPORT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On April 20, 2010, a duly-noticed hearing was held by means of video teleconferencing with sites in Tallahassee and Gainesville, Florida, before Lisa Shearer Nelson, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joseph White, Esquire
Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302

For Respondent: Jarrod Rappaport, pro se


STATEMENT OF THE ISSUES

The issues to be determined in this case are whether Respondent has violated Section 943.1395(7), Florida Statutes (2007), and if so, what penalty should be imposed for any proven violations?

PRELIMINARY STATEMENT

On October 30, 2009, the Criminal Justice Standards and Training Commission (Commission) issued an Administrative Complaint against Respondent, Jarrod Rappaport, asserting that he had violated Section 943.1395(7), Florida Statutes (2007), by virtue of violating Section 784.03, Florida Statutes, and failed to maintain good moral character as defined by Florida Administrative Code Rule 11B-27.0011(4)(b) and (c). On November 10, 2009, Respondent executed an election of rights form disputing the facts in the Administrative Complaint and requesting a hearing pursuant to Section 120.57(1), Florida Statutes. On February 12, 2010, the case was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

On February 24, 2010, the case was noticed for hearing to be conducted by means of teleconferencing April 20, 2010, and the hearing proceeded as scheduled. Petitioner presented the testimony of Felecia Stallworth, Nickole Jackson (by telephone), Officer John Yarbrough, Stephen Topham and Sergeant Jorge Campos. Petitioner submitted no exhibits.

Prior to the hearing, the Respondent filed a CD with the Division. Because the CD case did not contain a certificate of service and had no accompanying papers, it remained unopened by the undersigned until the hearing commenced. At that time, it was determined that a copy of the CD had been received by

opposing counsel and its contents examined. Respondent wanted some, but not all, of the items contained on the CD to be admitted into evidence.^{1/} Respondent's Composite Exhibit 2 and Exhibit 4 were received into evidence. Respondent's proposed Exhibits 1 and 3 were rejected. Respondent presented no witnesses. After substantial discussion regarding what could be presented by means of proposed recommended orders (argument, as opposed to testimony) and the requirement that counsel for Petitioner be allowed to cross-examine him if he appeared as a witness, Respondent opted not to testify at hearing.

The transcript of the proceedings was filed with the Division on May 12, 2010. Respondent filed his Proposed Recommended Order May 18, 2010. In reviewing Respondent's Proposed Recommended Order, however, most of what is included is Respondent's written account of what happened, as opposed to proposed findings based upon the evidence that was admitted at hearing. Accordingly, to the extent that it contains inadmissible testimony, Respondent's Proposed Recommended Order has not been considered in the preparation of this Recommended Order. The Commission's Proposed Recommended Order was timely filed on May 24, 2010. Unless otherwise indicated, all references to Florida Statutes are to the 2009 codification.

FINDINGS OF FACT

1. Respondent is a certified law enforcement officer, having been issued certificate number 245960.

2. On June 26, 2008, Respondent was a Gainesville Police Department (GPD) officer assigned to a Wal-Mart store on an overtime detail. The overtime detail was arranged in response to complaints of vandalism and disturbances at the store by groups of juveniles. No complaints had been registered regarding the wrongful use of handicapped parking.

3. Late in the evening of June 26, 2008, Felecia Stallworth drove to the Wal-Mart Store and parked her car in a handicapped parking space in the store parking lot. A handicapped placard was displayed hanging from Ms. Stallworth's rear view mirror. She exited her vehicle, along with her 12-year-old son and six-year old niece. As she headed toward the entrance of the store, Ms. Stallworth was talking on a cell phone.

4. Respondent, dressed in his police uniform and wearing a badge, walked up to Ms. Stallworth and spoke to her, presumably asking for her ID. Because she was talking on the phone, Ms. Stallworth did not hear him at first. She stopped and asked Respondent what he wanted, and he told her to return to her car and to provide him with proof that she was authorized to park in a handicapped parking space.

5. Ms. Stallworth's un rebutted testimony was that Respondent was rude and demeaning. She asked him why he needed the information, and Respondent told her to "shut up" and again told her to provide the requested information.

6. Respondent's comments to Ms. Stallworth were heard by others. One bystander who did not know Ms. Stallworth previously testified about the incident. Her testimony is consistent with Ms. Stallworth's and is credited.

7. Ms. Stallworth returned to her car and, leaving the car door open, sat in the driver's seat and retrieved the handicapped registration from the glove compartment. While doing so, she instructed the two children to get back in the car. The children started toward the passenger car door, only to be instructed by Respondent to stay where they were.

8. Ms. Stallworth was unhappy with the way she perceived Respondent to be treating her. While looking for her driver's license, she asked Respondent for his name and badge number, and stated she intended to complain about his behavior. She could not find her driver's license, however, because Respondent was shining his flashlight toward her face. Ms. Stallworth asked Respondent repeatedly to stop shining the light in her eyes, but he continued to direct the beam of the light toward her face.

9. Ms. Stallworth decided to exit the car and place her purse on the hood of the car to continue to look for her driver's license. She stood up to exit the car for this purpose. She did not tell Respondent she intended to get out of the car.

10. As soon as she stood up, Respondent pushed her up against the side of the car, using a "blocking" type move. The force of the impact pushed Ms. Stallworth's back against the

frame of the car, and pushed the side of her face against the door. The action left her sitting back in the driver's seat of the car. Respondent told her if she stood up again, he would arrest her. Ms. Stallworth responded by telling Respondent his behavior made no sense.

11. Ms. Stallworth experienced some burning of her face and some back pain as a result of the incident, but had no lasting injuries. She was, however, very upset about Respondent's actions and especially upset about her son and niece seeing her treated this way. She reported that her son previously wanted to be a police officer. After the incident he no longer wanted to pursue law enforcement as a career.

12. Ms. Stallworth located her driver's license and handed it to Respondent. After inspecting her documentation, Respondent returned it to her, told her to have a nice day, and then walked toward the store entrance.

13. After Respondent left Ms. Stallworth's car, several bystanders walked over to see if she was alright. Ms. Stallworth obtained the names of several witnesses with the intention of supplying them to the police department as part of a complaint against Respondent.

14. After speaking with the bystanders, Ms. Stallworth entered the store to make her purchase. When she exited the store, she observed Respondent standing in the parking lot behind her car. It appeared that he was writing down her tag number.

15. Later that evening, Ms. Stallworth called the GPD to complain about Respondent. Her call was returned by Sergeant Yarbrough. After hearing her complaint, Sergeant Yarbrough discussed the matter with his immediate supervisor, and then went to the Wal-Mart to talk to Respondent about the complaint.

16. The two men spoke at Wal-Mart in the early hours of June 27, 2008. Respondent described his interaction with Ms. Stallworth, and admitted pinning her against the car for several seconds and pushing her back into the car. He justified his behavior as necessary to protect his safety.

17. Sergeant Yarbrough felt that Respondent's attitude deteriorated as their conversation progressed. He was defensive and confrontational, and asked Sergeant Yarbrough, in an aggressive tone, whether he had a problem with Respondent's behavior in a manner that clearly indicated that Respondent did not feel his behavior was inappropriate and did not feel anyone else should.

18. Respondent volunteered that he had already checked with Wal-Mart personnel about the availability of surveillance video recording the event. Respondent reported his understanding that the video could not be provided until Monday.

19. Sergeant Yarbrough went back to the police station and spoke with his lieutenant about the matter. Although Ms. Stallworth had indicated she would file her own complaint

with internal affairs, Sergeant Yarbrough referred the matter himself as well.

20. The following Monday, June 30, 2008, Respondent returned to the Wal-Mart. He met with loss prevention employee Stephen Topham in the store's loss prevention office. Respondent asked for a copy of the video recording from the store's security cameras for the time period covered by the June 28, 2008, incident with Ms. Stallworth.

21. Wal-Mart's policy was to release copies of security tapes only where a customer presents a police report; a subpoena is produced; or a law enforcement officer or high-ranking official in Wal-Mart requests a copy.

22. Mr. Topham provided Respondent with a copy of the security video because he was a law enforcement officer in uniform or identified himself as a law enforcement officer. He assumed the request was made for official law enforcement purposes and did not ask questions.

23. The Respondent was not conducting any police investigation and had no official need for the videotape. He did not fill out any paperwork regarding the collection of the videotape and did not turn the tape over to the GPD's evidence room.

24. The GPD's policy provides that whenever a police officer uses physical force against a citizen, the officer must document the incident with a written report. Respondent did not

complete a written report with respect to the incident involving Ms. Stallworth.

25. Subsequent to Respondent's obtaining a copy of the security tape from Wal-Mart, Sergeant Campos from GPD's Office of Internal Affairs called the store to request a copy of the tape for his investigation. When he went to obtain the tape, he was told another officer had already picked it up. Sergeant Campos was then provided with a copy of the security footage from the June 28, 2008, incident, as well as footage of Respondent in the security office on June 30, 2008.

CONCLUSIONS OF LAW

26. 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).

27. The Criminal Justice Standards and Training Commission is responsible for the certification and regulation of law enforcement officers and instructors. § 943.12, Fla. Stat.

28. In this case, the Commission seeks to take disciplinary action against Respondent's certification as a law enforcement officer. This disciplinary action by Petitioner is a penal proceeding, and 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).

29. As reiterated by the Supreme Court of Florida,

Clear 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 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. 2d 797, 800 (Fla. 4th DCA 1983).

30. Section 943.13, Florida Statutes, establishes the minimum qualifications for certification of law enforcement officers in the State of Florida. Among those qualifications is the requirement that a law enforcement officer possess good moral character, as determined by a background investigation under procedures established by the Commission.

31. Once an officer is certified, Section 943.1395(7), Florida Statutes, authorizes the Commission to define good moral character by rule for the purpose of imposing discipline. Subsection (6) outlines the procedure the Commission follows upon receiving a complaint against a law enforcement officer.

Subsections 943.1395(7) and (8) provide:

(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.

32. Pursuant to the mandate in Section 943.13(7), the Commission has defined good moral character for the purposes of discipline. Florida Administrative Code Rule 11B-27.0011(4) 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:

* * *

(b) Except as otherwise provided in Section 943.13(4), F.S., . . . 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. Section . . . 784.03, . . . F.S.

* * *

(c) The perpetration by an officer of acts or conduct that constitute the following offenses:

1. Excessive use of force, defined as a use of force on a person by any officer that is not justified under Section 776.05 or 776.07,
2. Misuse of official position, defined by Section 112.313(6), F.S.

33. Section 784.03(1), Florida Statutes, provides that a battery occurs when a person "actually and intentionally touches or strikes another person against the will of the other"; or "intentionally causes bodily harm to another person."

34. Section 112.313(6), Florida Statutes, which prohibits the misuse of one's official position, provides:

No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform

his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others.

35. The Administrative Complaint in this case alleged the following facts in support of discipline:

(2)(a) On or about June 26, 2008, the Respondent, Jarrod Rappaport, did unlawfully commit a battery upon Felecia Stallworth, by actually touching or striking Felecia Stallworth or intentionally causing bodily harm to Felecia Stallworth against her will.

(b) On or about June 30, 2008, the Respondent, Jarrod Rappaport, did then corruptly use or attempt to use his official position as a Law Enforcement Officer, or any property or resource within his trust, or did perform his official duties, in such a manner as to secure a special privilege, benefit, or exemption for himself or others, to wit: Rappaport presented himself to Wal-Mart Security as a police officer investigating an incident in order to retrieve video footage for his personal reasons.

36. Petitioner has proven the allegations in the Administrative Complaint by clear and convincing evidence. When Officer Rappaport pushed Ms. Stallworth against her car, causing her to fall back into the driver's seat, he committed a battery as prohibited by Section 784.03, Florida Statutes. Commission of a battery is within the definition of failure to maintain good moral character pursuant to Rule 11B-27.0011(4)(c), and is therefore a violation of Section 943.1395(7), Florida Statutes.

37. Respondent has argued that when he pushed Ms. Stallworth, he did so in self defense. However, he presented no evidence to support such a claim, and the evidence in the

record does not do so. Ms. Stallworth simply went from sitting in her car, to standing at the car door. She was not under arrest, and had not committed or threatened any act of violence or aggression. Her only actions had been to complain about Respondent's behavior, and to ask him repeatedly not to shine a flashlight into her eyes, so that she could produce the documentation he was demanding. While telling Respondent she intended to stand up might have been advisable, it was not required. No need for self defense was established.

38. The Administrative Complaint does not specify whether Respondent's actions constituted an excessive use of force (Rule 11B-27.0011(4)(c)1.), or an abuse of official position (Rule 11B-27.0011(4)(c)2.). However, in its Proposed Recommended Order, the Commission asserts that the conduct alleged in the Administrative Complaint regarding the retrieval of the surveillance video represents an abuse of official position. The evidence established that Wal-Mart only allowed release of the video under limited circumstances, including a request from a police officer. When Respondent requested the video tape from Mr. Topham, he had no official basis for doing so. There was no pending investigation of Ms. Stallworth. He was not investigating the internal affairs inquiry regarding his own conduct. He did not follow GPD protocols regarding the chain of custody for evidence and did not submit the tape to the GPD evidence room for safekeeping. Instead, the only logical

inference that can be drawn from his actions is that he retrieved the videotape for his own purposes, and did so by presenting himself as a police officer on official business. Petitioner has shown by clear and convincing evidence that Respondent misused his official position for his personal benefit. Misuse of Respondent's official position is evidence of failure to maintain good moral character as defined in Rule 11B-27.0011(4)(c)2., and is a violation of Section 943.1395(7), Florida Statutes.

39. The Commission has adopted disciplinary guidelines to give notice of the customary penalty to be imposed for violations of Section 943.1395(7), Florida Statutes. See Fla. Admin. Code R. 11B-27.005. With respect to the commission of a battery and misuse of official position, in each instance, in the absence of aggravating or mitigating factors, the guideline penalty is suspension. Rule 11B-27.005(5)(b)2. and (c)3.

40. Florida Administrative Code Rule 11B-27.005(6) also lists aggravating and mitigating factors to be considered by the Commission when imposing penalties. This portion of the rule provides in pertinent part:

(6) The Commission shall be entitled to deviate from the disciplinary guidelines in this rule section, upon a showing of aggravating or mitigating circumstances by evidence presented to the Commission, if pursuant to Section 120.57(2), F.S., or to an Administrative Law Judge, if pursuant to Section 120.57(1), F.S., prior to the imposition of a final penalty. The Commission shall base a deviation from the disciplinary guidelines upon a finding of one or more of the following:

- (a) Aggravating circumstances:
1. Whether the certified officer used official authority to facilitate the misconduct.
 2. Whether the misconduct was committed while the certified officer was performing other duties.
 3. The number of violations found by the Commission.
 4. The number and severity of prior disciplinary actions taken against the certified officer by the Commission, provided the officer was previously disciplined by the Commission within the preceding eight years or received a Letter of Guidance within the preceding five years.
 5. The severity of the misconduct.
 6. The danger to the public.
 7. The actual damage, physical or otherwise, caused by the misconduct.
 8. The lack of deterrent effect of the penalty imposed by the employing agency.
 9. The pecuniary benefit or self-gain to the officer realized by the misconduct.
 10. Whether the misconduct was motivated by unlawful discrimination.
 11. Any behavior constituting "domestic violence" defined by Section 741.28(2), F.S.
 12. Whether the certified officer has previously received a Letter of Acknowledgement within the preceding three years.

- (b) Mitigating circumstances:
1. The officer's employment status in a position requiring Commission certification at the time of the final hearing before the Commission.
 2. The recommendations of character or employment references.
 3. The lack of severity of the misconduct.
 4. The length of time the officer has been certified by the Commission.
 5. Any effort of rehabilitation by the certified officer.
 6. The effect of disciplinary or remedial action taken by the employing agency or recommendations of the employing agency administrator.

7. The recommendation of a Probable Cause Panel to impose a penalty below the penalty guideline.

8. Effort of the officer to retract a false statement prior to the close of the disciplinary or criminal investigation.

41. Based upon the evidence at hearing, several aggravating factors are present and must be considered. Respondent used his official authority to facilitate the misconduct, when he presented himself in uniform to obtain a copy of the video surveillance. Respondent's mistreatment of Ms. Stallworth occurred while he was on duty for an overtime detail. Two violations of Section 943.1395(7) have been proven. The misconduct was significant, causing both embarrassment and shortlived pain for Ms. Stallworth, and a loss of respect for law enforcement in general on the part of Ms. Stallworth's son.

42. No evidence of mitigation was presented.

43. In determining whether the aggravating factors justify an increase in penalty, as advocated by Petitioner, the undersigned is mindful of the position of trust that a law enforcement officer holds in today's society. A cursory view of Chapter 943, Florida Statutes, illustrates the breadth of responsibilities law enforcement must embrace. Officers are called upon to diffuse volatile situations and to act quickly in order to protect the public. They deal with both our society's most violent and most fragile citizens. Because of the pivotal

role played by police officers in protecting the public and maintaining civil order, it is essential that they have and use good judgment in carrying out their duties.

44. It is good judgment that was sadly lacking in the events giving rise to this proceeding. It is this lack of judgment, as evidenced by the aggravating factors outlined above, that compels the conclusion that revocation of Respondent's certificate is appropriate.

RECOMMENDATION

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

RECOMMENDED:

That the Criminal Justice Standards and Training Commission enter a final order finding that Respondent has violated the provisions of Section 943.1395(7), Florida Statutes, and revoking his certification.

DONE AND ENTERED this 4th day of June, 2010, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of June, 2010.

ENDNOTE

1/ For purposes of the record, inasmuch as Respondent's exhibits are some, but not all of the contents of the CD, they are identified as follows: Composite Exhibit 2 consists of four video clips labeled "rooftop 03_6.26.20" contained in the visual subfile of the visual and audio file on the CD. Respondent's Exhibit 4 consists of pages 19-21 of the file labeled Probable Cause. No other documents or other contents of the CD were admitted into evidence.

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.