

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND )  
CONSUMER SERVICES, DIVISION OF )  
LICENSING, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 10-1967PL  
 )  
JEAN M. DUTERNE, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held on September 13, 2010, by video teleconference between sites in St. Petersburg and Tallahassee, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Tracy Sumner, Esquire  
Division of Licensing  
Department of Agriculture and  
Consumer Services  
2520 North Monroe Street  
Tallahassee, Florida 32301

For Respondent: James A. Thomas, Esquire  
334 South Hyde Park Avenue  
Tampa, Florida 33606

## STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Jean M. Duterne (Respondent), committed the violations alleged, and, if so, what penalty should be imposed.

## PRELIMINARY STATEMENT

On November 17, 2008, Petitioner, Department of Agriculture and Consumer Services, Division of Licensing (Petitioner or Department), issued an Administrative Complaint against Respondent. The complaint alleged that on or about August 20, 2008, Respondent committed fraud, deceit, negligence, or misconduct in the practice of regulated activities by discharging a round from his 9mm semi-automatic pistol at a moving vehicle in violation of Subsection 493.6118(1)(f), Florida Statutes (2008). Thereafter, Respondent filed an Election of Rights that disputed the material facts in the case and requested an administrative hearing in connection with the allegations. The case was forwarded to the Division of Administrative Hearings (DOAH) for formal proceedings on March 12, 2010.

At the hearing, Petitioner presented testimony from Officer Rodney White and Investigator Michael Smoak. Petitioner's Exhibits A through H, L, and M were admitted into evidence. Respondent testified in his own behalf. The Transcript of the proceeding was filed with DOAH on October 8, 2010. The parties

were granted leave until October 25, 2010, to file proposed recommended orders. Petitioner timely filed a Proposed Recommended Order that has been considered in the preparation of this Recommended Order. Respondent did not file a proposed order.

#### FINDINGS OF FACT

1. Petitioner is the state agency charged with the responsibility of regulating and licensing security officers within the State of Florida. See §§ 493.6101(1) and 493.6118, Fla. Stat. (2010).

2. At all times material to the allegations of this case, Respondent held Security Officer License D 2526539 (D-license) and Statewide Firearms License G 2800118 (G-license). Prior to being licensed, Petitioner went through security officer training. To that end, Petitioner has read and asserts he understands Chapter 493, Florida Statutes (2008).

3. Respondent was on-duty working as an armed security guard at the JMS Hotel (the hotel), located at 21601 32nd Street, South, St. Petersburg, Florida, on August 20, 2008.

4. Respondent was involved in an incident in the hotel's parking lot that resulted in police responding to the property. Respondent provided information to police at or near the time of the incident on August 20, 2008.

5. On August 20, 2008, Respondent responded to a call to investigate a possible credit card theft in Room 166 of the hotel. When he presented at the room, Respondent observed a woman sitting in a car parked adjacent to the room and another woman loading items into the car. When Respondent attempted to speak to the woman inside the car, she started the engine and began to exit the property.

6. At that time, Respondent reached into the vehicle and attempted to remove the key from the ignition. It was Respondent's intention to detain the woman to determine what she was doing.

7. Contrary to Respondent's effort, the vehicle began to pull away, and Respondent hurriedly pulled himself from harm's way and stepped back away from the vehicle. In the excitement of the moment, Respondent drew his 9 mm semi-automatic pistol and discharged it, in an effort to hit the tire of the exiting vehicle. Respondent did not hit the tire. It is unknown what, if anything, was struck by the bullet discharged.

8. Respondent's G-license expired on June 2, 2010. Respondent's D-license is still valid.

9. The course Respondent took to obtain the G-license required a 28-hour course taught by a state-licensed instructor. The course training includes a manual that contains scenarios for licensees to consider as examples of when one should retreat

from potentially dangerous situations. Generally, licensees should avoid using deadly force (equivalent to discharging a firearm) whenever possible. Only under limited situations should a licensee discharge a weapon.

10. To further explain and provide guidance for the use of deadly force, the manual sets forth the following examples:

Situation #1

You are guarding a liquor store and are advised by a customer that there is an armed robbery in progress. You look around the corner and see a man rushing out the front door with a firearm in his hand.

Instructor Discussion:

Instead of immediately looking around the corner, call the police first. The suspect could turn around and see you as you look around the corner, thus increasing the probability of armed conflict. The man is running away from you and there is no threat of death or great bodily injury. Don't shoot.

Situation #2

You have been advised that a burglary has occurred at a warehouse you are guarding. The suspects were observed leaving the scene in a blue, 1972 Dodge. Later that night, while patrolling the grounds in a well-marked security vehicle, you observe the suspects' vehicle traveling through the parking lot at a high rate of speed with the headlights off. You see a flash come from the driver's side of the suspects' vehicle and almost simultaneously the front windshield of your patrol car cracks. The suspect vehicle continues through the parking lot at a high rate of speed.

Instructor Discussion:

Don't shoot. Record license number and description of vehicle and suspects if it is possible to do so from a covered position. Pursuit could result in serious injury to you or to innocent bystanders who may get in the way. Call for police as soon as possible.

11. Respondent created the incident in this case by reaching into the vehicle. Had he used the methods outlined in the manual, Respondent would have responded to the room, contacted police with the information concerning the description of the car and its occupants, and followed up by determining whether a theft had occurred. Instead, by injecting himself into the car and attempting to remove the ignition key, Respondent could have easily been injured. Even so, such an injury would not have supported the discharge of Respondent's weapon in a location where others could have been injured. This is especially true in light of the fact that the vehicle was pulling away from Respondent and not toward him.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.57(1) and 493.6118, Fla. Stat. (2009).

13. Section 493.6118, Florida Statutes (2008), provides, in pertinent part:

(1) The following constitute grounds for which disciplinary action specified in subsection (2) may be taken by the department against any licensee, agency, or applicant regulated by this chapter, or any unlicensed person engaged in activities regulated under this chapter.

\* \* \*

(f) Proof that the applicant or licensee is guilty of fraud or deceit, or of negligence, incompetency, or misconduct, in the practice of the activities regulated under this chapter.

\* \* \*

(2) When the department finds any violation of subsection (1), it may do one or more of the following:

(a) Deny an application for the issuance or renewal of a license.

(b) Issue a reprimand.

(c) Impose an administrative fine not to exceed \$1,000 for every count or separate offense.

(d) Place the licensee on probation for a period of time and subject to such conditions as the department may specify.

(e) Suspend or revoke a license.

14. Petitioner seeks to impose administrative penalties against Respondent that include the suspension or revocation of his D-license and the nonrenewal of the G-license. Therefore, Petitioner has the burden of proving the specific allegations of fact that support its charges by clear and convincing evidence.

See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

15. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116 n. 5 (Fla. 1st DCA 1989), as follows:

. . . [C]lear 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 evidence 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 the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998) (Sharp, J., dissenting).

16. Petitioner has established that Respondent was either negligent or committed misconduct when he discharged his firearm in a public parking lot at an occupied vehicle. Respondent's




personal safety was not in peril nor was anyone else in eminent danger. Moreover, Respondent created the problem by attempting to take the key from the ignition. Respondent's explanation of what might have justified his behavior is not persuasive.

Petitioner has met its burden of proof in this case and has shown by clear and convincing evidence that Respondent's G-license should not be renewed and that Respondent's D-license should be subject to disciplinary action, requiring that Respondent's license be on probation for a period of time, not less than two years, and subject to such additional conditions as the Department may deem appropriate.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Agriculture and Consumer Services, Division of Licensing, enter a final order denying the renewal of Respondent's G-license and placing Respondent's D-license on probation with such additional terms as the Department might deem appropriate.

DONE AND ENTERED this 1st day of December, 2010, in  
Tallahassee, Leon County, Florida.

  
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J. D. PARRISH  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 1st day of December, 2010.

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.