

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CRIMINAL JUSTICE STANDARDS)
AND TRAINING COMMISSION,)
)
Petitioner,)
)
vs.) Case No. 10-2158PL
)
DANIEL W. DONOVAN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On June 15, 2010, a duly-noticed hearing was held by video teleconferencing with sites in Tallahassee and Daytona Beach, Florida, before Lisa Shearer Nelson, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Daniel Donovan, pro se

STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent failed to maintain good moral character as required by Section 943.1395(7), Florida Statutes, and if so, what penalty should be used?

PRELIMINARY STATEMENT

On October 28, 2009, the Criminal Justice Standards and Training Commission (Commission) filed an Administrative Complaint against Respondent, Daniel Donovan, alleging that he had violated the provisions of Section 943.1395(7), Florida Statutes, by using excessive or unnecessary use of force with respect to an inmate; by failing to make a report regarding use of force as required by Section 944.35, Florida Statutes; and by making a false statement during an interview in an official proceeding with respect to a material matter.

Respondent filed an Election of Rights form disputing the allegations in the Administrative Complaint and requested a hearing pursuant to Section 120.57(1), Florida Statutes. On April 20, 2010, the case was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

On April 28, 2010, the undersigned issued a Notice of Hearing scheduling the final hearing for June 15, 2010, and the case proceeded as scheduled. At hearing, Petitioner presented the testimony of James Hines, Darlene Taman and John Joiner. Petitioner's Exhibits 1-3 were admitted into evidence without objection. Respondent testified on his own behalf but presented no exhibits. Respondent stipulated to the allegation in paragraph 1 of the Administrative Complaint, and Petitioner voluntarily dismissed the allegation contained in paragraph 2(a).

On June 15, 2010, Petitioner also filed a Motion to Seal Video Recording (Petitioner's Exhibit 1), because the recording contains matters that are exempt from public inspection or copying pursuant to Section 119.071, Florida Statutes. Respondent did not oppose the Motion, and it is granted.

The Transcript of the proceedings was filed with the Division on July 6, 2010, and both parties timely filed Proposed Recommended Orders which have been carefully considered in the preparation of this Recommended Order. All references to Florida Statutes are to Florida Statutes (2008), unless otherwise indicated.

FINDINGS OF FACT

1. At all times material to the allegations of the Administrative Complaint, Respondent was certified as a correctional officer by the Commission, having been issued Correctional Officer Certificate number 144670.

2. On or about January 14, 2009, Respondent was employed by Tomoka Correctional Facility (Tomoka). He had been employed by the Department of Corrections (DOC) for approximately 15 years.

3. At some point during the day, Inmate William Cash became disorderly and disruptive in his cell, and a psychological emergency was called. Officer James Hinds and Respondent came to Cash's cell to transport him to a holding cell where he could be seen by a psychologist.

4. In preparing for the transfer, Respondent and Officer Hinds restrained Inmate Cash using handcuffs, leg irons, a waist chain, and a black box which secured Cash's handcuffs. After restraints were applied, Inmate Cash was transported to a holding cell, with Captain Darlene Taman observing the transfer. Consistent with DOC protocols, the transfer of Inmate Cash from his cell to a holding cell was videotaped.

5. Once they arrived at the holding cell, Respondent had Inmate Cash sit down on a bench in the cell. Inmate Cash attempted to twist and pull away from Respondent's grasp. In response, Respondent reasserted his grip and raised one arm, placing his hand against Inmate Cash's neck. The inmate continued pulling away from Respondent until he was lying down on his side.

6. Respondent did not report the incident to his Captain or complete any type of incident report regarding the events occurring in connection with the transport. Captain Taman did not actually see the interaction between Respondent and Inmate Cash, because she was attempting to monitor several situations simultaneously.

7. Consistent with DOC procedure, the warden at Tomoka reviewed the videotape of the transfer. After reviewing the videotape, the warden filed a complaint with John Joiner, Senior Prison Inspector with the DOC Office of Inspector General to

investigate whether there was excessive use of force with respect to the interaction between Respondent and Inmate Cash.

8. A use of force occurs when a correctional officer touches an inmate who is offering resistance, applying force to overcome the inmate's resistance. Touching alone does not constitute use of force. It is the application of force to overcome resistance that is key to determining whether a use of force has occurred.

9. When a use of force occurs, a correctional officer is required to report the use of force to his or her commanding officer; to complete a Use of Force report; and to complete an incident report on the use of force. Use of Force reports are to be completed within 24 hours. Correctional officers are trained regarding use of force and the required reporting of use of force on an annual basis.

10. Respondent did not report the incident to his supervisor and did not complete a use of force report. In his view, no use of force occurred because Inmate Cash was pulling away from him and he was not applying force to overcome Inmate Cash's resistance. According to Respondent, he attempted to get a better grip on Inmate Cash and then allowed him to lie down on his side on the bench where he was sitting. He described the event as follows:

MR. DONOVAN: . . . Use of force, because you place your hands on an inmate, it does not necessarily incur a use of force. It is the resistance to that, me overcoming his

resistance is what determines if there is or is not a use of force.

The inmate initially pulled away from me. I reasserted my grasp and put my arm up to defend myself. Like I indicated in my interview, that is why my arm went up.

He sat back down on his own and he pulled away and started leaning down on the bench to lay down. And after he got down on the bench, after the whole thing was over is when I gave him more orders to stop pulling away, because he continued to pull away from me.

I knew he was restrained -- completely restrained, i.e., leg irons, black box, the waist chain and the -- the handcuffs, which is why I didn't use the force. I just wanted to be sure that I had control of the situation, that I had control of him, so that I didn't get hurt or he didn't get hurt.

I have been kicked by inmates. I have been spit on and head-butted by inmates, who were completely restrained, such as Mr. Cash was restrained that day.

And I know through my training, that just because you touch an inmate, it's not use of force; that you have to -- you have to overcome the resistance that he's presenting to you in order for it to be a use of force.

I did not do that. I did not force him to sit down. As he tugged away, he sat down on his own. And then after I reasserted my grasp to make sure that I had ahold of him and was in control of the situation, he laid down on his own. I do not know why; if it was just an attempt to continue to try to get away from me. However, he did all of that on his own. I did not push him down.

11. The video of the incident was observed by both Captain Taman, Respondent's supervisor, and by Inspector Joiner. Both

believed, as did Officer Hinds, that the exchange between Respondent and Inmate Cash involved a use of force.

12. It is found that there was a use of force, but that the force used was not excessive.

13. Inspector Joiner interviewed Respondent as a part of the investigation of the incident on January 19, 2010. His response during the interview was consistent with his testimony at hearing: that he did not file a report on use of force because he did not believe a use of force occurred and that, in his view, there was nothing to report. Respondent's testimony was candid, credible and sincere. He believed what he said in the interview and at hearing. However, his ultimate conclusion regarding the use of force was in error.

CONCLUSIONS OF LAW

14. 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).

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

16. In this case, the Commission seeks to take disciplinary action against Respondent's certification as a correctional 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).

17. The burden to prove the allegations in the Administrative Complaint by clear and convincing evidence is a significant burden. 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 explicit and the witnesses must be 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).

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

19. 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 correctional 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.

20. 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:

(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., . . . 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 . . . 944.35. . . , 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, F.S., or a use of force on an inmate or prisoner by any correctional officer that would not be authorized under Section 944.35(1)(a), F.S. . . .

21. Paragraph (2)(b) of the Administrative Complaint alleges that Respondent "did unlawfully and knowingly and willfully fail to make a report or prevented another from making a report required by section 944.35, F.S." Section 944.35, Florida Statutes, provides in pertinent part:

(4)(a) Any employee required to report pursuant to this section who knowingly or willfully fails to do so, or who knowingly or willfully prevents another person from doing so, commits a misdemeanor of the first degree. . . .

22. There is no question that Respondent did not file a Use of Force Report. The question, however, is whether he "knowingly and willfully" failed to do so. In order to make a finding that he knowingly and willfully failed to file a Use of Force Report, it must be found that Respondent believed that a use of force had occurred, knew that a report was required and failed to complete one.

23. Issues regarding state of mind are factual issues for the trier of fact to resolve. See State v. Franchi, 746 So. 2d 1126 (Fla. 4th DCA 1999). Determination of the facts, and inferences to be drawn from those facts, is necessarily left to the trier of fact. Forbes v. State. 933 So. 2d 706 (Fla. 4th DCA 2006).

24. The determination of whether Respondent knowingly or willfully failed to file a use of force report is a question of intent. Respondent knew that a report was required if and when

use of force was employed. However, he did not believe that use of force occurred in this instance, and therefore did not believe a report was required. Under these circumstances, it cannot be said that he knowingly or willfully failed to file the Use of Force Report, and the allegations in paragraph 2(b) in the Administrative Complaint were not proven by clear and convincing evidence.

25. Similarly, paragraph 2(c) charges Respondent with making a false statement, "which he . . . did not believe to be true" in an official proceeding. Based upon this factual allegation, Petitioner contends that Respondent violated Section 837.02, Florida Statutes, which makes it a felony whenever someone:

 makes a false statement, which he or she does not believe to be true, under oath in an official proceeding in regard to any material matter

26. Respondent clearly indicated, both in his statement during the investigation and in his testimony at hearing, that, in his view, no use of force occurred. This statement is not correct. However, Petitioner did not demonstrate by clear and convincing evidence that Respondent made this statement believing that it was false. His assessment of what happened differed from that of others who watched a videotape, which does not give a clear view of what happened. It also differed from that of another officer present at the scene. By all accounts, however, there is no indication that Inmate Cash was injured in any way.

Given the short duration of the encounter, the limited view available and the inability of anyone other than Cash (who did not testify) and Respondent to state whether any resistance to force was offered, it is reasonable that people could differ in their interpretations of the events that took place.

27. The fact that Respondent disagreed with the ultimate conclusion regarding whether use of force occurred, does not transform his statement regarding his genuinely held belief into a false statement that he did not believe to be true. The allegations in paragraph 2(c) were not demonstrated by clear and convincing evidence.

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 dismissing the Administrative Complaint.

DONE AND ENTERED this 29th day of July, 2010, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
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this 29th day of July, 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.