

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND)	
CONSUMER SERVICES, DIVISION OF)	
LICENSING,)	
)	
Petitioner,)	
)	
vs.)	Case No. 10-2197
)	
THE BUXTON GROUP, INCORPORATED,)	
KAVIN P. BUXTON, OWNER AND)	
KAVIN P. BUXTON, INDIVIDUALLY,)	
)	
Respondent.)	
)	
<hr/>)	
KAVIN P. BUXTON,)	
)	
Petitioner,)	
)	
vs.)	Case No. 10-2198
)	
DEPARTMENT OF AGRICULTURE AND)	
CONSUMER SERVICES, DIVISION OF)	
LICENSING,)	
)	
Respondent.)	
<hr/>)	

RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was commenced in this case on June 18, 2010, and was completed on July 30, 2010, in St. Petersburg, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings. The parties were represented as set forth below.

APPEARANCES

For Department of Agriculture and Consumer Services:

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For The Buxton Group, Incorporated, and Kavin Buxton:

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STATEMENT OF THE ISSUES

The issues in these consolidated cases are: Whether The Buxton Group, Incorporated, and Kavin P. Buxton (hereinafter jointly referred to as "Buxton") committed fraud, deceit, negligence, or misconduct, and, if so, whether the Department of Agriculture and Consumer Services (the "Department") may deny the issuance of or revoke various licenses held by Buxton--DOAH Case No. 10-2197; and Whether administrative denial of Buxton's existing Class "G" license is warranted--DOAH Case No. 10-2198.

PRELIMINARY STATEMENT

Case No. 10-2197: By Administrative Complaint dated October 14, 2008, the Department notified Buxton that disciplinary action would be taken against licenses held by Buxton. Buxton timely filed a request for hearing to contest the intended disciplinary action. The request for hearing was forwarded to the Division of Administrative Hearings (the

"Division") so that a formal administrative hearing could be conducted.

DOAH Case No. 10-2198: The Department denied Buxton's application for License G-9402513 which would have entitled Buxton to carry a firearm in the furtherance of his duties as a security guard. Buxton timely filed a request for an administrative hearing to contest the denial. The request was forwarded to the Division so that a formal administrative hearing could be conducted.

The two cases were consolidated by the undersigned Administrative Law Judge upon review of the files. The hearing on the consolidated cases was commenced on June 18, 2010. However, the final hearing was interrupted by an event outside the control of the parties. (Contrary to Buxton's representation in his motion for continuance filed June 22, 2010, the undersigned did attempt to conclude the hearing on June 18, 2010, but was advised by local police authority that it would not be possible to do so.) The final hearing was rescheduled for July 30, 2010, and was concluded on that date.

At the final hearing, the Department called the following witnesses: Ken Scott, service manager at Dew Cadillac; Jim Rexroad, police officer with the Pinellas Park Police Department ("PPPD"); Michael Smoak, investigator for the Department; Scott Martin, police officer with PPPD; and Detective Joseph Doswell,

PPPD. The Department's Exhibits A through H were offered and admitted into evidence. The Department was given until August 6, 2010, to submit Exhibit I. The exhibit was timely filed with the Division and was admitted into evidence.

Buxton opted not to testify at the final hearing and did not submit any exhibits into evidence.

A Transcript of the final hearing was ordered by the parties and was filed at the Division on August 18, 2010. By rule, the parties were allowed ten days, i.e., until August 28, 2010 (which fell on a Saturday, therefore, until August 30, the following Monday), to submit proposed recommended orders.

Buxton filed a Proposed Recommended Order on August 13, 2010, some two weeks after the conclusion of the final hearing, but prior to the transcript being filed at the Division. The Department timely submitted its Proposed Recommended Order on August 27, 2010. Each party's Proposed Recommended Order was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency responsible for, inter alia, the issuance and monitoring of various licenses related to the field of private security. It is the Department's responsibility to take disciplinary action against any licensee who violates statutes or rules relating to the licenses issued by the Department.

2. Buxton has held, now holds, or has applied for the following licenses which are issued by the Department:

- D9414758: A security officer's license which has an expiration date of August 30, 2010;
- DI9900012: An instructor's license for which Buxton applied for, but was denied renewal;
- B9400126: A license to operate a security agency. Buxton's license has expired and there is an administrative action pending against it;
- G9402513: A statewide firearms license. Buxton's license has expired, and his request for renewal has been denied by the Department;
- A9700094: A private investigative agency license, effective May 19, 2008; and
- MB9500099: A license to manage a security agency. Buxton's license has expired, and there is an administrative action pending.

3. The basis of the Department's disciplinary actions against Buxton's licenses (and the reason the Department has denied applications for renewals) is an incident occurring on March 27, 2008, in Pinellas Park, Florida. Buxton was on that date working as a security guard for Dew Cadillac, a new and used car dealership. At approximately 5:05 a.m., Buxton was returning to the dealership after taking a coffee break

off-site. He was driving his personal automobile down an unpaved track of land on the east side of the dealership. He turned unto an unpaved area at the northern end of the lot at which time he noticed movement around an employee's pick-up truck which was parked in the car lot. It appeared a window of the truck had been broken, and there was glass lying around the outside of the vehicle. Buxton approached the vehicle and found a person (later identified as Mark Lobban) "rummaging around" in the cab of the truck.

4. Buxton noted that two windows had been smashed, and there was a dent in the passenger side door. Buxton ordered Lobban to exit the vehicle. When Lobban came out of the truck, his eyes indicated a drugged or intoxicated state, and he reached his hand into his shirt along the front waistline of his pants. When Buxton saw that movement, he drew his weapon, a Springfield Armory XP 9mm semi-automatic handgun, for which he held a current permit to carry. Lobban took his hand out of his shirt and stated that he was looking for his cousin.

5. Buxton ordered Lobban to the ground and began to dial 9-1-1 as he kept an eye on Lobban. Just as Buxton finished dialing 9-1-1, Lobban allegedly lunged at Buxton, then took off running. Lobban ran behind some Hummer vehicles parked nearby. Buxton says that as Lobban ran, he again reached his hand into his shirt near his waistline. That placed Buxton in fear that

Lobban may have a gun, so Buxton ran to another row of Hummers for protection and began firing shots toward Lobban from his own handgun.

6. Lobban then ran past the row of Hummers and appeared to be exiting the premises. Buxton followed Lobban and later recounted in his Firearms Incident Report, that he ran toward Lobban "to insure that the suspect was actually exiting the property. At this point, I felt he was possibly running away. I followed further in an attempt to maintain sight of the suspect." Lobban approached a hedgerow located at the west side of the dealership, attempted to jump over it, but caught his leg and fell over the hedges. By this time, Buxton had cleared the last line of parked vehicles and, thus, had no more cover. When Lobban stood up on the other side of the hedgerow, he turned to face Buxton. Buxton wrote in his report, "Fearing he had drawn a weapon behind the hedge, I fired another round, at which time the suspect turned and fled east, through the wooded area adjacent to the property." Lobban did not at any time display or fire a weapon at Buxton.

7. Buxton returned to his cell phone which he had dropped when first apprehending Lobban. The 911 operator was just calling him back at that moment. Buxton was put through to PPPD and, within minutes, the first officer, Scott Martin, arrived at the dealership. Martin had ensured that a police perimeter was

established around the dealership concurrent with his arrival. When Scott got to the dealership, he found Buxton and was briefed as to what had transpired.

8. A brief search of the premises was commenced pending arrival of the PPPD K-9 unit. While awaiting their arrival, Buxton spotted Lobban hiding under a vehicle in the dealership's service area. Lobban was apprehended by Scott and placed in a police cruiser. Scott determined that Lobban was impaired, probably by alcohol, and was essentially incoherent.

9. Scott did an "article search" of the premises to see if any items belonging to Lobban could be found. A cell phone and wallet were recovered, but there was no sign of a firearm. The search did not concentrate on a firearm specifically, but the search was intended to find any item that Lobban had handled. The K-9 unit was able to trace Lobban's scent through the Hummers, across the hedgerow and back to the service area. The search concentrated on the areas where Lobban had been known to have crossed. No search was done of the wooded area behind the hedge, because the tracking dogs did not point to that area as having been traveled by Lobban.

10. Scott reported in to his headquarters after hearing Buxton's explanation of the events that transpired. The discharge of a weapon in that scenario seemed unwarranted to Scott, so he reported it to his supervisor. Within minutes,

Detective Doswell arrived at the dealership to further investigate the situation.

11. Doswell arrived to find Lobban already in custody and Buxton standing in the parking lot with another security guard. Buxton told Scott he had fired four shots at Lobban initially and then two more shots after Lobban jumped the hedge. However, there were five shell casings found in the first location and only one near the hedgerow. The events concerned Doswell enough that he asked Buxton to come into headquarters and make a statement about what had occurred. Buxton initially agreed to do so. After a few minutes, however, he handed his cell phone to Doswell so that Doswell could talk to Buxton's attorney. Doswell and the attorney set up a meeting for later that same day, a Thursday. The attorney later called Doswell and said he and Buxton could not come in until the next day (Friday), so the meeting was rescheduled for that day.

12. On Friday, March 28, 2010, Buxton and his attorney arrived at the PPPD headquarters. Doswell informed Buxton that he was investigating the event as a probable illegal discharge of a firearm and that criminal charges could be filed. Buxton was not read his Miranda rights at that time however, in that no charges had yet been filed.

13. At some point, Doswell determined that Buxton had been involved in another incident relating to the discharge of his

firearm while on duty. In that case, Buxton was working at a bowling alley when a group of kids attempted to "jump him." One kid spit on Buxton and during the brief confrontation, Buxton pulled his firearm. Buxton discharged his gun, firing into the ceiling of the establishment (because, said Buxton, someone hit his arm just as he was shooting. Buxton did not say what he was aiming at when he fired.).

14. After interviewing Buxton and his attorney, Doswell revisited Dew Cadillac and did some further investigation. Fragments of bullets from Buxton's firearm had been recovered from the tires of two Hummers on the car lot.

15. In order to obtain licenses which allow a person to use a firearm in conducting their authorized activities, a person must undergo a background check and certain training and education. The Class "D" license held by Buxton required 40 hours of training (which can be dispensed with if the applicant has prior corrections or law enforcement experience). The training necessarily included instruction from the Firearm Instructor's Training Manual (the "Manual"). The Manual specifically warns against the unauthorized use of deadly force, i.e., discharging a firearm at an individual. The Manual stresses the need to retreat and disengage, rather than entering into a situation that might require using the firearm. Several examples are set out in the Manual to provide applicants

guidance about how to avoid using deadly force. Two of those examples follow:

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 suspect's 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 the license number and description of the 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.

16. According to the expert testimony at final hearing (which was not rebutted or contradicted by Buxton), each of the

above-described situations is more egregious than the one Buxton encountered at Dew Cadillac. It is clear that discharge of a firearm in Buxton's situation would be contrary to the guidance provided in the training materials.

17. Each of the facts stated herein are based upon the testimony of live witnesses and written statements from police and investigative reports. Each of the witnesses appeared knowledgeable about his area of testimony, and each was credible. Buxton provided no evidence to contest or rebut any of the evidence.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2009). Unless stated otherwise herein, all references to Florida Statutes shall be to the 2009 codification.

19. The Department, as the party asserting the affirmative of the issue, has the burden of proof in each of the consolidated cases. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The standard of proof for a licensure revocation case is clear and convincing evidence. Osborne Stern and Co., Inc. v. Department of Banking and Finance, 647 So. 2d 245, 248 (Fla. 1st DCA 1994).

20. Clear and convincing evidence is an intermediate standard of proof which is more than the "preponderance of the evidence" standard used in most civil cases, but less than the "beyond a reasonable doubt" standard used in criminal cases. See State v. Graham, 240 So. 2d 486 (Fla. 2d DCA 1970). Clear and convincing evidence has been defined as evidence which:

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 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.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)
(citations omitted).

21. Section 493.6118, Florida Statutes, states in pertinent part:

Grounds for disciplinary action.-

(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.

22. The Department has proven that Buxton engaged in misconduct by discharging his firearm in a situation that was not warranted. The suspect at whom Buxton was firing was, by Buxton's own written admission, attempting to flee. Once the suspect fled after the first shots were fired, it was even more egregious for Buxton to follow him and continue firing.

23. The Department has met its burden of proof in each of the consolidated cases. The Department proved, by a preponderance of the evidence, that Buxton is guilty of negligence, incompetency and/or misconduct by way of his actions.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by the Department of Agriculture and Consumer Services denying Buxton's licensure application for License No. G9402513 and taking such action as the Department deems appropriate as to each of Buxton's other licenses issued by the Department.

DONE AND ENTERED this 10th day of September, 2010, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of September, 2010.

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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.