

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

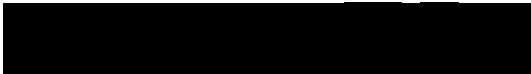
CRIMINAL JUSTICE STANDARDS AND)
TRAINING COMMISSION,)
)
Petitioner,)
)
vs.) Case No. 10-2459PL
)
ERIC S. FERGUSON,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Edward T. Bauer, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Okeechobee, Florida, on July 15, 2010.

APPEARANCES

For Petitioner: Joseph S. White
Assistant General Counsel
Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302

For Respondent: Eric S. Ferguson, pro se


STATEMENT OF THE ISSUES

The issues are whether Respondent is guilty of failing to maintain good moral character and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated September 15, 2010, Petitioner alleged that Respondent "did unlawfully commit battery upon April Ferguson, by actually touching or striking April Ferguson or intentionally causing harm to April Ferguson against her will." The Administrative Complaint alleges that Respondent thus violated Section 943.13(7), Florida Statutes, by failing to maintain good moral character. Respondent disputed the allegations in the Administrative Complaint and timely requested a formal hearing.

On June 16, 2010, Petitioner filed a Notice of Intent to Introduce Evidence of Other Crimes, Wrongs, or Acts. The Notice pertained to an alleged battery committed by Respondent on July 12, 2008, against April Ferguson in Highlands County, Florida.

At the hearing, Petitioner called six witnesses and introduced two exhibits, numbered 1-3, into evidence. Respondent called three witnesses, testified on his own behalf, and introduced three exhibits, numbered 1-3. The proceedings were recorded and a Transcript was filed with the Division on July 27, 2010. Petitioner timely filed a Proposed Recommended Order, which was considered in the preparation of this Recommended Order. Respondent did not submit a proposed recommended order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2009 Florida Statutes.

FINDINGS OF FACT

1. At all times material to the allegations in the Administrative Complaint, Respondent was certified by the Department as a correctional officer in the State of Florida, having been issued Correctional Certificate #121381 on June 30, 1989.

2. During the evening of March 23, 2009, Respondent and his wife, April Ferguson, were at home socializing with several friends. On at least one occasion during the evening, to the dismay of Ms. Ferguson, Respondent referred to a particular female guest as "baby" or "sweetie."

3. At approximately 1:30 a.m., after their friends had departed, Ms. Ferguson told Respondent that she could not believe that he had referred to one of the guests as "baby." Respondent replied that the comment was unintentional, at which point Ms. Ferguson went into the bathroom and took a shower. Thereafter, while Ms. Ferguson and Respondent were lying in bed, Ms. Ferguson once again brought up the subject of Respondent's comments.

4. It is undisputed that an argument ensued, and that Ms. Ferguson ultimately suffered injuries to her face, which included bruising to her forehead, a swollen nose, and a

significant laceration to her lip. It is also undisputed that Ms. Ferguson was driven to the hospital within five minutes of sustaining the injuries, and that she was hysterical because she feared that the split lip would leave her "deformed." However, the manner in which Ms. Ferguson's injuries were sustained (i.e., by accident or the result of an intentional battery) was sharply contested during the final hearing.

5. Petitioner's principal witnesses during the final hearing was Ms. Cynthia Baker, the mother of Ms. Ferguson. Ms. Baker testified that on March 24, 2009, at approximately 2:30 a.m., she received a telephone call from Ms. Ferguson, who sounded distraught. According to Ms. Baker, Ms. Ferguson stated, "Mom, I need you to come to the hospital." Ms. Baker testified that she arrived at emergency room approximately 15 minutes later and made contact with Ms. Ferguson, who was "extremely upset," crying, and visibly injured. Ms. Baker further testified that Ms. Ferguson told her that she and Respondent had gotten into an argument concerning his inappropriate comments, which culminated in Respondent pulling her out of bed and striking her in the face.

6. Upon hearing how her daughter was injured, Ms. Baker immediately contacted the authorities. The undersigned finds Ms. Baker's testimony credible in all respects.¹

7. At some point thereafter, Deputy Donald Ellis of the Okeechobee Sheriff's Office arrived at the hospital to investigate. During the final hearing, Deputy Ellis testified that Ms. Ferguson, who was crying, initially refused to provide any specific information concerning how the injuries were sustained and stated that she did not want to press charges against her husband.

8. Deputy Ellis further testified, however, that Ms. Ferguson agreed to speak with him after he acknowledged her desire that criminal charges not be pursued. At that point, Ms. Ferguson advised Deputy Ellis that Respondent had injured her with a "palm strike." The undersigned concludes that Deputy Ellis' testimony is credible.

9. In contrast to the accounts detailed above, Respondent testified that he did not strike Ms. Ferguson and that her injuries were sustained as the result of an accidental fall. Ms. Ferguson offered a similar explanation during her final hearing testimony. The undersigned does not find the testimony of Respondent or Ms. Ferguson concerning the cause of the injuries to be credible.

10. The undersigned concludes that Petitioner has presented clear and convincing evidence that Respondent failed to maintain good moral character by committing a battery against Ms. Ferguson on or about March 24, 2009.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Subsection 120.57(1), Florida Statutes.

12. This is a disciplinary proceeding against Respondent's license. Accordingly, Petitioner must prove the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Sterne, Inc., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987).

13. 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 Davey, 645 So. 2d 398, 404 (Fla. 1994)(quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

14. The Administrative Complaint alleges that Respondent failed to maintain good moral character as required by Section 943.13(7), and thereby violated Section 943.1395(7), Florida Statutes, which 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.

15. The Department has defined the failure to maintain good moral character, as required by Section 943.13(7), Florida Statutes, in Florida Administrative Code Rule 11B-27.0011. This rule 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., 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 . . . 784.03 [battery]. . . ,
F.S.

Fla. Admin. Code R. 11B-27.0011 (emphasis added).

16. In evaluating the evidence presented in this matter, the undersigned was strongly persuaded by Ms. Baker, who testified credibly that she made contact with a crying and "extremely upset" Ms. Ferguson at approximately 2:45 a.m., at which time Ms. Ferguson stated that Respondent had pulled her out of bed and struck her in the face.

17. Petitioner argues, and the undersigned agrees, that Ms. Ferguson's statements to Ms. Baker qualify as excited utterances pursuant to Section 90.803(2), Florida Statutes. In order for an excited utterance to be admissible, the following requirements must be met: (1) there must have been an event startling enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent; and (3) the statement must have been made while the person was under the stress of excitement caused by the

startling event. Stoll v. State, 762 So. 2d 870, 873 (Fla. 2000).

18. The first prong of the test outlined above is easily satisfied, as an event occurred (either a fall or a battery) that resulted in injuries to Ms. Ferguson so significant that by her own admission, she was "very, very upset" and in hysterics because she feared a possible deformity.

19. The second prong of the test, which inquires whether the statement was made before there was time for reflection, presents a closer question. The evidence reveals that Ms. Ferguson sustained her injuries at some point after 1:30 a.m. and that Ms. Baker made contact with Ms. Ferguson at the hospital at approximately 2:45 a.m., at which time the statements were made. Accordingly, it is possible that nearly 75 minutes could have elapsed between the time of the incident and the statements at issue. It is well settled, however, that "the test regarding the time elapsed is not a bright-line rule of hours or minutes." Rogers v. State, 660 So. 2d 237, 240 (Fla. 1995). Thus, while the length of length of time between the event and the statement is a relevant consideration, other factors must be evaluated, such as the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statements. Williams v. State, 967 So. 2d 735, 748 (Fla. 2007); see also United States v.

Belfast, 2010 U.S. App. LEXIS 13538, *74 (11th Cir. July 15, 2010) ("It is the totality of the circumstances, not simply the length of time that has passed between the event and the statement, that determines whether a hearsay statement was an excited utterance"). After weighing the relevant factors, which include Ms. Ferguson's emotional state and the nature of her injuries, the undersigned finds that Petitioner has adequately demonstrated that Ms. Ferguson did not engage in reflection prior to making the statements to Ms. Baker. See Hayward v. State, 24 So. 3d 17, 20 (Fla. 2009) (holding statement qualified as an excited utterance; "[g]iven Destefano's physical and emotional condition following his devastating injuries, the evidence clearly indicates he was still under the effect of the startling events of that early morning, thus supporting a conclusion that he did not engage in reflection prior to making the statement"); Werley v. State, 814 So. 2d 1159, 1161 (Fla. 1st DCA 2002) (holding trial court did not abuse its discretion in admitting statement of domestic battery victim as an excited utterance, even though victim's 911 call occurred more than one hour after she was struck in the face with a bottle); Bell v. State, 847 So. 2d 558, 561 (Fla. 3d DCA 2003) (holding statements of attempted kidnapping victim were properly admitted as excited utterances despite 50 minute delay between incident and statements); see also United States v. Iron Shell, 633 F.2d

77, 85-86 (8th Cir. 1980) (holding no abuse of discretion in admitting statements of attempted rape victim as excited utterances, notwithstanding 45 to 75 minute delay between incident and interview with law enforcement).

20. Petitioner has also satisfied the third prong of the test, which examines whether the statement was made while the declarant was under the stress of excitement caused by the startling event. As detailed previously, Ms. Ferguson testified that she was in hysterics when she arrived at the hospital. Upon Ms. Baker's arrival a short time later, Ms. Ferguson was still "very upset" and crying. The undersigned is persuaded that Ms. Ferguson was continuing to experience the stress of the incident at the time of her statements to Ms. Baker, and that this is not a situation where the declarant had recovered her composure after an incident and once again became excited when describing what had occurred.

21. As Petitioner has met the three prongs of the test, Ms. Ferguson's statements to Ms. Baker qualify under the excited utterance exception to the hearsay rule. Since a hearsay exception applies, the statements to Ms. Baker provide a basis upon which the undersigned can find that Respondent committed a battery against Ms. Ferguson. § 120.57 (1)(c), Fla. Stat.; Dieguez v. Fla. Dep't of Law Enforcement, Criminal Justice Standards & Training Comm'n, 947 So. 2d 591, 594 (Fla. 3d DCA

2007) ("Under [Section 120.57(1)(c)], the evidence which can support a factual finding includes evidence which is not hearsay, and evidence which is admissible under a hearsay objection.").

22. The undersigned concludes that Ms. Baker's testimony, supplemented by the hearsay statements described by Deputy Ellis,² constitutes clear and convincing evidence that Respondent is guilty of the March 24, 2009, battery charged in the Administrative Complaint.³

23. As Respondent committed the battery alleged in the Administrative Complaint, he failed to maintain good moral character as required by Section 943.13(7), Florida Statutes.

24. The undersigned must next determine what penalty is warranted. Pursuant to Florida Administrative Code Rule 11B-27.005(5)(b)15., the disciplinary guidelines provide for a penalty that ranges from prospective suspension to revocation.

25. Noting the nature of Ms. Ferguson's injuries, as well as the fact that a minor child observed the "aftermath" of the episode, Petitioner argues that revocation of Respondent's law enforcement certification is warranted. Petitioner also notes that in Criminal Justice Standards & Training Comm'n v. Coleman, Case No. 07-668PL (DOAH May 31, 2007), and Criminal Justice Standards & Training Comm'n v. Wheeler, Case No. 06-2380PL (DOAH

November 8, 2006), both of which involved instances of domestic battery, the Administrative Law Judges recommended revocation.

26. The undersigned disagrees that Coleman and Wheeler support revocation of Respondent's certification. In Coleman, the respondent had only been licensed for approximately five months at the time of the battery, whereas Mr. Ferguson has been licensed since 1989 without any apparent disciplinary history. With respect to Wheeler, the respondent kicked, choked, and repeatedly punched the victim, whom he threatened to kill if she told anyone of the attack. Although the facts of the instant case are serious, they are not as egregious as what occurred in Wheeler.

27. The undersigned concludes that revocation is too severe and that a two-year suspension, which is the maximum suspension period that may be imposed,⁴ is a fair and just penalty under the circumstances. See Criminal Justice Standards & Training Comm'n v. Gunn, Case No. 07-3654PL (DOAH November 6, 2007) (recommending two-year suspension where victim's jaw was wired shut for seven or eight weeks as a result of a battery committed by her husband); Criminal Justice Standards & Training Comm'n v. Scriven, Case No. 03-3240PL (DOAH December 22, 2003) (recommending two-year suspension where respondent repeatedly struck her daughter on the back with a claw hammer).

RECOMMENDATION

It is

RECOMMENDED that the Criminal Justice Standards and Training Commission enter a final order finding Respondent guilty of failing to maintain good moral character, in violation of Section 943.13, Florida Statutes, and imposing a two-year prospective suspension.

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



EDWARD T. BAUER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of August, 2010.

ENDNOTES

¹ The undersigned concludes, as a preliminary question of fact, that Ms. Ferguson's statements to Ms. Baker qualify as excited utterances pursuant to Subsection 90.803(2), Florida Statutes. See Frederick v. State, 923 So. 2d 1288 (Fla. 5th DCA 2006) ("Whether the necessary state of mind is present for a court to admit a statement as an excited utterance is a preliminary fact to be determined by the trial court").

² Petitioner argues that Ms. Ferguson's statements to Deputy Ellis likewise qualify as excited utterances. The undersigned cannot agree, however, as the record fails to establish the time Deputy Ellis arrived at the hospital. Without some idea as to the amount of time that elapsed between the incident and the statement to the deputy, Petitioner cannot meet its burden of demonstrating that Ms. Ferguson did not engage in reflective thought.

³ As the testimony of Ms. Baker and Deputy Ellis was sufficient to establish the alleged battery by clear and convincing evidence, it was unnecessary for the undersigned to consider the testimony relating to the July 12, 2008, "similar fact" episode. The undersigned would also note that he did not rely upon the testimony of Ms. Georgene Shreves, the nurse who treated Ms. Ferguson. Ms. Shreves, whose testimony essentially consisted of reading from medical records that were never introduced into evidence, admitted during her testimony that she had no independent recollection of Ms. Ferguson. Contrary to Petitioner's argument, the past recollection recorded exception to the hearsay rule does not apply, as Ms. Shreves never testified that she recorded the facts contained in the records accurately or correctly, nor did she testify that she would not have recorded the facts in the medical records unless they were true. See Charles W. Ehrhardt, Ehrhardt's Florida Evidence, § 803.5, p. 872 (2008 ed.) ("The foundation may be laid by testimony that the witness remembers making an accurate recording of the fact or event or by testimony that the witness is confident that the facts would not have been written unless they were true"). The undersigned also rejects Petitioner's alternative contention that Ms. Ferguson's statements to Ms. Shreves regarding the cause of her injuries fall under the "statements for purpose of medical diagnosis or treatment" exception to the hearsay rule. See Llanos v. State, 766 So. 2d 1219, 1219-20 (Fla. 4th DCA 2000).

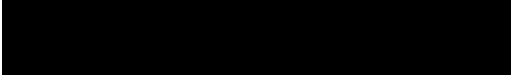
⁴ See § 943.1395(7)(b), Fla. Stat.

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Eric S. Ferguson


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 must be filed with the agency that will issue the final order in this case.