STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA DEPARTMENT OF
LAW ENFORCEMENT, CRIMINAL
JUSTICE STANDARDS AND
TRAINING COMMISSION,

Petitioner,

vs. Case No. 19-6331PL

KURN TSUK HO LAM,

Respondent.
_____/

RECOMMENDED ORDER

An administrative hearing was conducted in this case on January 24, 2020, in Pensacola, Florida, before James H. Peterson, III, an Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ray Anthony Shackelford, Esquire
Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302

For Respondent: Kurn Tsuk Ho Lam
(Address of record)

STATEMENT OF THE ISSUES

Whether Respondent, Kurn Tsuk Ho Lam (Respondent), failed to maintain good moral character required of law enforcement officers because he knowingly and willfully[1] failed to report suspected child abuse and, if so, what is the appropriate penalty.

[1] Pre-hearing stipulation, ¶1.

PRELIMINARY STATEMENT

On September 19, 2018, the Florida Department of Law Enforcement (Petitioner or the Department) filed an administrative complaint before the Florida Criminal Justice Training and Standards Commission (Commission) against Respondent, alleging that Respondent failed to maintain good moral character required of law enforcement officers in violation of sections 943.1395(7) and 943.13(7), Florida Statutes, and Florida Administrative Code Rule 11B-27.0011(4)(a) because he failed to report suspected child abuse as required by Sect. 39.205(1), Florida Statutes. [2] Respondent timely filed an Election of Rights form disputing the allegations and requesting an administrative hearing.

On November 26, 2019, the Department referred the case to the Division of Administrative Hearings (DOAH) for assignment of an administrative law judge. The case was assigned to the undersigned and scheduled for an administrative hearing to be held live in Pensacola on January 24, 2020.

During the hearing, Petitioner presented the testimony of Jordan Hoffman, provided two "demonstrative aids" (consisting of a family tree and timeline), and offered six exhibits marked as Petitioner's Exhibits A (a child protective team interview), B (an internal affairs investigative report), C (various transcribed investigative interviews), D (audible recordings of the transcribed interviews in Petitioner's Exhibit C), E (Panama City Police Department's General Order 410.00 with records showing that Respondent

[2] All references to the Florida Statutes and Florida Administrative Code are, unless otherwise specified, to the 2017 versions which were in effect at the time of the alleged violation. Although there have been some changes, the applicable portions of the current laws and rules have not substantively changed since the time of the alleged incidents forming the basis of the administrative complaint against Respondent in this case.

reviewed that general order), and F (a composite exhibit marked Petitioner's Exhibit F, consisting of judgment and probationary sentences imposed upon [redacted] dated November 21, 2018, and [redacted] dated December 20, 2018, for contributing to the delinquency of a minor, and the Order of Delinquency Disposition withholding adjudication of delinquency and imposing juvenile probation on D.G. dated June 25, 2019, for a charge of felony battery under section 784.041(1), Florida Statutes.)

Petitioner's Exhibits A through D were considered hearsay and were not received into evidence except to the extent that they reflect statements of Respondent or corroborate non-hearsay evidence. The Department's mere certification of the exhibits as "business records" does not, *ipse dixit,* convert the exhibits into the business records that would qualify for an exception to the hearsay rule. Rather, the exhibits were primarily prepared in the anticipation of litigation and are replete with hearsay.[3] Exhibit E was received into evidence, and official recognition was taken of Exhibit F.

Respondent testified on his own behalf and offered one composite exhibit received into evidence as R-1, consisting of four letters attesting to Respondent's good character.

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[3] *See, e.g., M.S. v. Dep't of Child. & Fams*., 6 So. 3d 102, 104 (Fla. 4th DCA 2009)(in ruling that investigative reports not based on personal knowledge do not meet the business records exception to the hearsay rule, observed "in *Reichenberg v. Davis*, 846 So. 2d 1233 (Fla. 5th DCA 2003), the court held that records of DCF could not be admitted into evidence as a business record because the records contained witness statements made to investigators, the substance of which was not within the personal knowledge of the agency employee. On the same rationale, the records could not be admitted as a public record under section 90.803(8). *See Lee v. Dep't of Health & Rehab. Servs*., 698 So. 2d 1194, 1200-01 (Fla. 1997)." Moreover, if "a record is made for the purpose of preparing for litigation, its trustworthiness is suspect and should be closely scrutinized." *King v. Auto Supply of Jupiter, Inc.*, 917 So. 2d 1015, 1019 (Fla. 1st DCA 2005) (quoting Professor Ehrhardt comments, § 803.6 at 786, Flor. Evidence (2004)).

The proceedings were recorded and a transcript was ordered. The parties were given 30 days from the filing of the transcript within which to file proposed recommended orders. The one-volume Transcript was filed on February 12, 2020, and the parties timely filed their respective Proposed Recommended Orders, both of which were considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Respondent was certified as a Law Enforcement Officer in the State of Florida by the Commission on August 3, 2017, and issued Law Enforcement Certification #344454. He was employed at age 23 by the Panama City Police Department in the beginning of 2018, prior to the events that are the subject of this proceeding.

2. As an employee of the Panama City Police Department, Respondent was required to review General Orders promulgated by his agency, to include General Order 410.00 which mandates that "all members of the Panama City Police Department shall report any known or suspected child abuse in accordance with F.S.S. 39.201." Respondent reviewed and was familiar with[4] General Order 410.00, which defines child abuse as "any willful act or threatened act that results in any physical, mental, or sexual injury or harm."

3. In February 2018, T.M., a seven-year-old minor, lived in a home with her guardians, [redacted], and their child D.G., who was a 17-year-old minor at the time.

4. T.M. is [redacted]

5. [redacted].

[4] On January 25, 2018, Respondent electronically signed that he reviewed Panama City Police Department's General Order 410.00.

6. At all pertinent times, Respondent had the understanding that T.M. was living with [redacted] because she had been sexually molested by her father when she was three-years old, and that her natural father and mother were in prison.

7. According to investigative reports and interviews, on or about Thursday night, February 8, 2018, while [redacted] were at the hospital visiting a relative, D.G. licked his finger and put it in T.M.'s vagina. The reports further inform that, upon their return home, the next morning, February 9, 2018, T.M. told [redacted] what D.G. purportedly did.

8. Two days later, Sunday, February 11, 2018, [redacted] called Respondent and advised him that, based on conversations that [redacted] had with D.G. and his wife, T.M. had said that she had a dream that someone was touching her "down there."

9. [redacted] told Respondent that, according to D.G., D.G. was up late on the night of the incident when he heard T.M. scream, and that when D.G. went to check on her, she associated the person who she was dreaming about with D.G.

10. During the telephone conversation, [redacted] further advised Respondent that T.M. was seeing a counselor because she had recurrent night terrors as a result of being molested by her natural father years before. [redacted] also told Respondent during that phone call that [redacted] had stated that D.G. might need to be arrested. At the time, Respondent believed that the incident with T.M. had occurred the night before he received the February 11th phone call from [redacted], i.e., on February 10, 2018.

11. At the hearing, Respondent credibly explained his perspective derived from his February 11, 2018, telephone conversation with [redacted]:

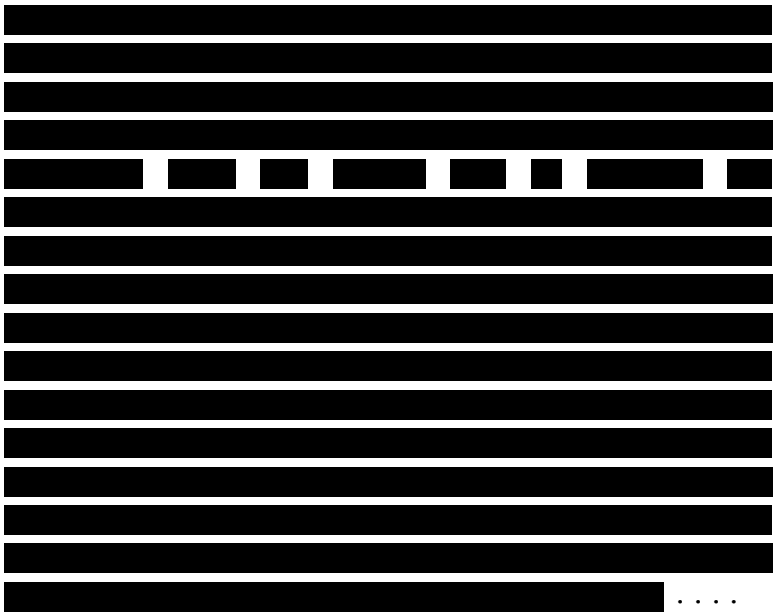
> So following that conversation, I asked if he wanted to report this, which he said no, and he seemed

> uncertain if anything did happen, so I had no reasonable suspicion to actually [sic] upon, because he's telling me something he was told by someone, who he's not even sure about what to do, and I advised him, because she already seeks counseling for this, you know, night terrors, that that's what he should do, take it to a medical professional to determine if anything did happen.

12. Respondent believed that, the next day, Monday, February 12, 2018, [redacted] took T.M. to see her counselor, and that the incident had been reported. That understanding is consistent with Petitioner's timeline, which states that the Department of Children and Families was notified about the incident involving T.M. on Tuesday, February 13, 2018.

13. On Tuesday, February 13, 2018, D.G. moved [redacted] because [redacted], that the counselor advised that D.G. could not live in the same house with T.M. during the investigation. D.G. spent the nights of Tuesday, February 13, and Wednesday, February 14, 2018, with [redacted] and their 10-month-old daughter.

14. Respondent explained during his sworn interview at the Panama City Police Department on Thursday, February 15, 2018:



15. On Thursday, February 15, 2018, while both [redacted] and D.G. were at [redacted] home, D.G. asked [redacted] to take him to the police station. Apparently, D.G. had been contacted by the police and was asked to come to the police station.

16. [redacted] called his wife, who was on the way back from a job interview in the couple's only car, and told her they needed to take D.G. to the police station. After [redacted] wife arrived home, [redacted], D.G., and [redacted] wife got into the car, with [redacted] wife driving, and headed to the police station. On the way, [redacted] wife talked to [redacted] and [redacted] on the phone and became emotional about taking [redacted] to the police station. At some point, she stopped the car and switched places with Respondent, and Respondent drove them the rest of the way to the Panama City Police Department.

17. That same day, February 15, 2018, the Panama City Police conducted sworn interviews with [redacted] wife's sister, [redacted] and [redacted] regarding the allegations and reporting of allegations against D.G.[5] [redacted] were arrested for not properly reporting T.M.'s accusation.[6] D.G. was arrested for inappropriately touching T.M.[7]

18. The next day, February 16, 2018, law enforcement officers from the Panama City Police Department and Bay County Sheriff's Department came to Respondent's house and had him sign papers stating that he was being

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[5] There may have been other interviews in connection with the case that day, but these were the only interviews that were marked and offered as exhibits in this case.

[6] On those charges, both [redacted] ultimately pled no contest to a misdemeanor charge of contributing to the delinquency of a minor, for which each was adjudicated guilty, received 12 months' probation, was required to pay fines and fees, and had to perform 50 hours of community service.

[7] D.G. pled nolo contendere as a minor to a charge of felony battery under section 784.041(1), and on June 25, 2019, an Order of Delinquency Disposition was entered withholding adjudication of delinquency and imposing juvenile probation on D.G., including, *inter alia*, 75 hours of community service.

terminated from his job as a police officer. They took all of Respondent's police equipment and arrested him for failure to report child abuse.

19. After his arrest for failure to report child abuse, Respondent spent one day in jail. Respondent was offered, and he accepted, a pretrial intervention consisting of 12 months of probation and 100 hours of community service. Respondent's probation was ended early and the charge against him for failure to report child abuse was nolle prossed.

20. The four letters submitted by Respondent are all positive letters reflecting his honesty and good moral character. The Department's counsel stipulated that the letters could be considered as favorable mitigating factors for Respondent.

21. The witness called by Petitioner suggested that Respondent may have been withholding information during his police interview on February 15, 2018. However, upon review of the transcript of that interview, as well as considering Respondent's testimony and demeanor during the final hearing in this case, it is found that his testimonies regarding this matter were honest and credible.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. *See* §§ 120.569, 120.57(1), 120.60(5), and 943.1395(8)(e), Fla. Stat. (2019).

23. Petitioner is responsible for prosecuting disciplinary cases against certified law enforcement officers. *See* §§ 943.12 and 943.1395, Fla. Stat. (2019).

24. Petitioner, as the party asserting the affirmative in this proceeding, has the burden of proof. *See, e.g., Balino v. Dep't of HRS*, 348 So. 2d 349 (Fla. 1st DCA 1977). Because Petitioner is seeking to prove violations of a statute and impose administrative fines or other penalties, it has the burden to prove the allegations in the complaint by clear and convincing

evidence. *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987). Clear and convincing evidence:

> [r]equires that 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 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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005)(*quoting Slomowitz v. Walker*, 429 So. 797, 800 (Fla. 4th DCA 1983)).

25. In determining whether Petitioner has met its burden of proof, the evidence presented should be evaluated in light of the specific factual allegations in the administrative complaint. Disciplinary actions against licensees may only be based upon those offenses specifically alleged in the charging document. *See, e.g., Trevisani v. Dep't of Health*, 908 So. 2d 1108 (Fla. 1st DCA 2005).

26. The charging instrument in the instant case, the Administrative Complaint, alleges that Respondent:

> violated the provisions of Section 39..205(1), or any lesser included offenses, Section 943.1395(7), Florida Statutes and Rule 11B-27.0011(4)(a), Florida Administrative Code, in that Respondent has failed to maintain the qualifications established in Section 943.13(7), Florida Statutes, which require that a Law Enforcement officer in the State of Florida have good moral character.

27. Disciplinary statutes are penal in nature and must be construed against the authorization of discipline and in favor of the individual sought to be penalized. *Munch v. Dep't of Bus. & Prof'l Reg.,* 592 So. 2d 1136 (Fla. 1st DCA 1992). Penal statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to

broaden the application of such statutes. Thus, the provisions of law upon which this disciplinary action has been brought must be strictly construed, with any ambiguity construed against Petitioner. *Elmariah v. Dep't of Bus. & Prof'l Reg.*, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); *see also Griffis v. Fish & Wildlife Conserv. Comm'n*, 57 So. 3d 929, 931 (Fla. 1st DCA 2011); *Beckett v. Dep't of Fin. Servs.*, 982 So. 2d 94, 100 (Fla. 1st DCA 2008); *Whitaker v. Dep't of Ins.*, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); *Dyer v. Dep't of Ins. & Treas.*, 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

28. Section 943.1395(7) subjects a certified officer to discipline "[u]pon 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) . . . ."

29. Rule 11B-27.0011(4)(a), provides:

> (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.

30. Section 39.201(1)(c), Florida Statues, states:

> Any person who knows, or has reasonable cause to suspect, that a child[8] is the victim of childhood sexual abuse[9] shall report such knowledge or suspicion to the department[10]. . . .

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[8] Section 39.01(12) defines a child as: "any unmarried person under the age of 18 years who has not been emancipated by order of the court."

[9] Section 39.01(2) defines abuse as:

> Any willful act or threatened act that results in any physical, mental, or sexual abuse, injury or harm that causes or is likely to cause the child's physical, mental or emotional health to be significantly impaired.

[10] As used in Chapter 39, "department" means the Department of Children and Families.

31. Section 39.205(1) provides that:

> A person who is required to report known or suspected child abuse, abandonment, or neglect, and who knowingly and willfully fails to do so, or who knowingly and willfully prevents another person from doing so, commits a felony of the third degree . . . .

32. As explained in *Urquhart v. Helmich,* 947 So.2d 539, 542-43 (Fla. 1st DCA 2006):

> The phrase "reasonable cause" is used in section 39.201, Florida Statutes to describe a legal standard, and in this respect, it is no different from legal standards that are applied in other areas of the law. For example, the existence of reasonable suspicion to justify temporary detention is a question of law, as is the existence of probable cause to search a person. As with these standards, reasonable cause to suspect child abuse either exists on the facts known to the person taking the action or it does not.
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> * * *
>
> The question is not whether child abuse actually occurred, but whether there was reasonable cause to suspect that it had occurred. That is a question that can only be answered by considering the facts that were know at the time the report was made.

33. In *Urquhart,* the court held that a "doctor may have reasonable cause to suspect that a child has been abused, even though the parent has given an innocent explanation for the child's injuries." There, the doctor was facing a lawsuit by the parents who claimed that the doctor had wrongfully reported child abuse. In that case, the doctor made the child abuse report after her review of a radiologist report from a CT scan the doctor had ordered which

reported a skull fracture "caused either by child abuse or by birth trauma." *Id.* at 540-43.

34. Unlike the facts known to the doctor in *Urquhart*, who had actually examined the infant, the facts known to Respondent in the case-at-bar regarding potential child abuse were much more attenuated. Respondent did not see or talk to T.M. from the time [redacted] called him on February 11, 2018, until Respondent was arrested on February 16, 2018.

35. Respondent received all of the information regarding the alleged incident from [redacted], who reported that T.M. had recurrent night terrors because of abuse she had suffered from her father three years before, and further told Respondent that D.G. had explained that T.M. confused him with the person in her dream.[11]

36. Since Respondent was told that T.M. was seeing a counselor for her night terrors, he suggested that [redacted] take T.M. to the counselor to determine if anything actually happened. As a result of Respondent's suggestion, T.M. was taken to the counselor, the incident was reported to the Department of Children and Families on February 13, 2018, and an investigation of the incident was undertaken.

37. While the fact that someone else reports suspected child abuse does not excuse others from failing to report known or reasonably suspected child abuse, *see e.g.*, *Barber v. State,* 592 So. 2d 330 (Fla. 2nd DCA 1992)(analyzing the prior version of section 39.201 found in section 414.505, Florida Statutes (1991), "even if an incident of child abuse is determined to have already been reported to the abuse registry, the statute requires the incident to be reported to the abuse registry again"), that fact does not negate Respondent's proactive advice resulting in T.M.'s evaluation by a healthcare professional and the February 13, 2018, report of the allegations to the Department of

[11] As explained in *Urquhart*, although an innocent explanation from a parent might not negate reasonable suspicion, "the history given by the parent is only one factor the doctor must rely on in assessing the likely cause of the injury." *Id.*

Children and Families. In addition, objectively, considering the facts known to Respondent at the time, it cannot be concluded, as a matter of law, that Respondent knew or had reasonable cause to suspect that child abuse had occurred.

38. Moreover, the fact that Respondent [redacted] demonstrates that Respondent did not, subjectively, know or have reason to believe that D.G. had sexually abused T.M., and supports the conclusion that Respondent did not knowingly or willfully violate the law.

39. And, while rule 11B-27.0011(4)(a) pertains "whether criminally prosecuted or not," the fact that the criminal charge against Respondent for failure to report was nolle prossed cannot be ignored--especially in light of the evidence presented in this case, which was insufficient to clearly and convincingly demonstrate that the facts known to Respondent, as a matter of law, gave him the knowledge or reasonable cause to suspect that child abuse had occurred. In other words, Petitioner failed to prove that Respondent knowingly and willfully failed to report known or suspected child abuse in violation of sections 39.201 or 39.205.

40. As the evidence was insufficient to prove that Respondent failed to report known or suspected child abuse, it was also insufficient to show that Respondent failed to maintain good moral character in violation of sections 943.1395(7) or 943.13(7), or rule 11B-27.0011(4)(a).

41. In addition, the four letters submitted by Respondent, all of which are positive letters reflecting his honesty and good moral character, as well as his testimony and demeanor in this case, weigh in favor of Respondent's good moral character.

42. In sum, the Department failed to prove the allegations of the Administrative Complaint by clear and convincing evidence.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered dismissing the Administrative Complaint.

DONE AND ENTERED this 2nd day of April, 2020, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of April, 2020.

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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.