

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CRIMINAL JUSTICE STANDARDS AND)
TRAINING COMMISSION,)
)
Petitioner,)
)
vs.) Case No. 09-3938PL
)
STEPHEN L. DEMETER,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to proper notice, this cause came on for formal proceeding and hearing before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings in Shalimar, Florida, on September 18, 2009. The appearances were as follows:

APPEARANCES

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

For Respondent: Gene Mitchell, Esquire
2101 North 9th Street
Pensacola, Florida 32502

STATEMENT OF THE ISSUES

The issues to be determined in this proceeding concern whether the Respondent committed the violations of Sections 943.13(7), 943.1395(7), and 800.03, Florida Statutes, and

Florida Administrative Code Rule 11B-27.0011(4)b, concerning the licensure qualification of good moral character.

PRELIMINARY STATEMENT

This case arose when the Petitioner agency filed an Administrative Complaint on May 13, 2009, alleging that the Respondent had unlawfully exposed his sexual organs in a public place or on the private premises of another, in a vulgar or indecent manner, in purported violation of the above-cited legal authority. The Respondent chose to contest the charges and timely sought a formal proceeding to dispute the factual and legal issues thus advanced.

The case was transmitted to the Division of Administrative Hearings on or about July 22, 2009 and, by transfer, ultimately assigned to the above-named Administrative Law Judge. The matter was scheduled for hearing on September 18, 2009, in Shalimar, Florida.

The case came on for hearing as noticed. The Petitioner presented the testimony of four witnesses and had one exhibit admitted into evidence. The Respondent presented two witnesses, including the Respondent. The Respondent also offered one exhibit, which was a report of the results of a polygraph test taken by the Respondent. That exhibit was not admitted into evidence, based on the authority referenced in the Conclusions of Law below. The exhibit was proffered. Additionally, by

agreement of counsel, official recognition was taken of a "No Prosecution" or Nolle Prosequi, filed by the State Attorney for the First Judicial Circuit, concerning the same charged conduct, based upon the State's conclusion that there was insufficient evidence to prove the charges related to these facts beyond a reasonable doubt.

Upon conclusion of the hearing, a transcript of the testimony was ordered by the Petitioner. The transcript was filed on September 29, 2009. The Petitioner filed a Proposed Recommended Order and the Respondent a "Proposed Order," on or before October 14, 2009. The post-hearing submittals have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is an agency of the State of Florida, charged, as pertinent, with licensure and regulation of the practice standards and practice of certified law enforcement officers, in the manner prescribed by Chapter 943, Florida Statutes. The Respondent was certified as a Law Enforcement Officer on May 8, 1995, and issued Certification Number 155216. The Respondent was a Fire Chief in Gulf Breeze, Florida, at times pertinent to this proceeding.

2. On June 21, 2008, the Respondent went to the Edge of Paradise Day Spa (the Spa) as a customer seeking a massage. He arrived at about 5:45 p.m. The Spa is owned by Ms. Vickie Edge.

She holds a Massage Establishment License and a Facial Specialist License issued by the State of Florida. The business is located in Destin, Florida, on Highway 98. It offers its customers massage therapy and various beauty treatments. It employed Jennifer Edwards, a state-licensed massage therapist, on June 21, 2008.

3. Because he did not have an appointment, the Respondent had to wait until the massage therapist, Ms. Edwards, returned from a meal break. During this time he conversed with the owner, Ms. Edge, while he completed a "new customer form."

4. The Respondent is a public servant and did not want his identity associated with patronizing a massage establishment. Ms. Edge assured him that customers often did not use their true identities, in completing the form, for this reason. The Respondent therefore entered a fictitious name, "Jim Martin" on the form, also stating that he was from Ohio. He told Ms. Edge that he was a guest at a nearby Days Inn motel and was in the area on business, working on a "Networking" job for a Pensacola bank.

5. The customer form contained a notice to the effect that removal of all clothing was not required, that body parts not being massaged would be covered by a large sheet or towel, and that ". . . no reputable massage therapist will ever touch you in a sexual way." The Respondent signed the form, with the

fictitious name and phone number, and paid Ms. Edge a cash fee of \$75.00 for a 60-minute massage.

6. The massage therapist, Ms. Edwards, returned to the spa at about 6:10 p.m., accompanied by her friend, Karen Arrington. She met the Respondent (for the first time) and then went to the massage room to prepare for the Respondent's massage. About five minutes later she showed the Respondent to the massage room. She told him to undress and lie face down on the massage table under a twin-size bed sheet. She told him to thus cover his "private areas" and to tuck the sheet under his hips.

7. The Respondent agreed and, while Ms. Edwards was out of the room, he disrobed. After several minutes, Ms. Edwards knocked on the door and re-entered the room, finding the Respondent lying face down under the bed sheet. He was nude, except for the sheet covering him.

8. Ms. Edwards pulled the sheet down to his lower back and began massaging his lower back, keeping his buttocks covered by the sheet. During this process the Respondent pulled the sheet down, exposing his buttocks. Ms. Edwards replaced the sheet, admonishing him to keep that area covered.

9. Upon finishing with his back, Ms. Edwards told the Respondent to roll over and lie on his back while she continued with the massage. He was covered from the top of his back downward while this change of position was made.

10. Ms. Edwards then continued with the massage. While thus lying on his back, the Respondent pulled the sheet down, exposing his erect penis to Ms. Edwards while she was about three feet away. She testified that she had never before seen a man's penis like that, in that there was ". . . excess skin over the top of his penis." The Respondent acknowledged in testimony that he is uncircumcised.

11. While thus exposed, the Respondent began to apparently masturbate, using his hand. Ms. Edwards was about three feet away at the time. She did not consent to this conduct and was very upset by such an act in front of her.

12. Ms. Edwards ran out of the room and to the lobby area and told Ms. Edge that the Respondent was "back there jerking off." She also told Ms. Arrington, and told her to call the police. The Respondent then dressed and came into the lobby. Ms. Edwards yelled at him that the spa was a respectable establishment and that the police were being called.

13. Ms. Edwards tried to block his exit, but the Respondent fled the building at this point. Ms. Edwards followed him. Ms. Arrington was already outside speaking with the "911" operator on her cell phone. Ms. Arrington grabbed the Respondent by the shirt and confronted him, at which point he pushed her to the ground and fled on foot down the sidewalk along Highway 98. He left his car in the spa parking lot.

14. Ms. Edwards and Ms. Arrington followed the Respondent, calling to him to stop and that the police were on their way. Ms. Arrington stopped and picked up a beer bottle and broke it,

carrying it with her to use as a weapon. She testified that she feared the Respondent might do her violence if she confronted him.

15. The chase continued for more than one-half mile. A deputy sheriff arrived and Ms. Arrington pointed out the Respondent. The deputy took him into custody. On his own volition, the Respondent told the deputy that he had scratched himself during a massage and the masseuse had gone "ballistic." The Respondent stated that he had done nothing wrong. When the officer asked him why he fled, he replied that one of the women was throwing bottles at him. Both Ms. Edwards and Ms. Arrington wrote witness statements for the deputy.

16. In testimony, Ms. Edwards described the Respondent's act verbally and with an illustrative hand motion. She did not describe the duration of the act, as she observed it. The Respondent maintained that he was doing no such act, but rather was scratching himself because the sheet caused him to itch.

17. The Respondent used false identification information when he went to the spa because he is a public servant (fire chief) and did not want adverse publicity associated with his paying for a massage during a time when employees were subject to lay-offs due to shrinking budgets. He did not flee in his car because he did not want his identity to become known through means of his tag number.

CONCLUSIONS OF LAW

18. The Division of Administrative hearings has jurisdiction of the parties to and the subject matter of this proceeding. §§ 120.57 and 120.569, Fla. Stat. (2009).

19. Section 943.13, Florida Statutes (2007), provides for the minimum qualifications for certification of law enforcement officers. Subsection (7) provides: "Have a good moral character as determined by a background investigation under procedures established by the Commission."

20. Section 943.1395(7), Florida Statutes (2007), authorizes the Commission to specify by rule the definition of "good moral character" for purposes of licensure prosecutions of certified officers for violating the "good moral character" clause contained in Section 943.13(7), Florida Statutes. Subsections 943.1395(6) and (7), Florida Statutes, provide that:

(6) The commission shall revoke the certification of any officer who is not in compliance with the provisions of § 943.13(4) or who intentionally executes a false affidavit established in § 943.13(8), § 943.133(2), or § 943.139(2).

(a) The commission shall cause to be investigated any ground for revocation from the employing agency pursuant to § 943.139 or from the Governor, and the commission may investigate verifiable complaints. Any investigation initiated by the commission pursuant to this section must be completed within 6 months after receipt of the completed report of the disciplinary or internal affairs investigation from employing agency or Governor's office. A verifiable complaint shall be completed

within 1 year after receipt of the complaint. An investigation shall be considered completed upon a finding by a probable cause panel of the commission. These time periods shall be tolled during the period of any criminal prosecution of the officer.

* * *

(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 § 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.

21. Florida Administrative Code Rule 11B-27.0011(4)

provides a definition of "good moral character" for purposes of disciplinary action for Florida officers. The rule states 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), Fla. Stat., a certified officer's failure to maintain good moral character required in

Section 943.13(7), Fla. Stat., is defined as:

(d) The perpetration by an officer of an act that would constitute any of the following misdemeanor or critical offenses whether criminally prosecuted or not. . . 800.03 . . .

22. Section 800.03, Florida Statutes, provides in relevant part:

It is unlawful to expose or exhibit one's sexual organs in public or on the private premises of another, or so near thereto as to be seen from such private premises, in a vulgar or indecent manner, or to be naked in public except in any place provided or set apart for that purpose. Violation of this section is a misdemeanor of the first degree. . . .

23. Additionally, the case of Zemour, Inc. v. Division of Beverage, 347 So. 2d 1102 (Fla. 1st DCA 1977), is instructive as to the applicability of the standard or concept of moral character to the conduct of one who serves in a position of public trust. The facts were quite different (denial of a beverage license based on an adverse finding regarding moral character) but the court's definition is noteworthy:

Moral character as used in this statute, means not only the ability to distinguish between right and wrong, but the character to observe the difference; the observance of the rules of right conduct, and conduct which indicates and establishes the qualities generally acceptable to the populace for positions of trust and confidence.

24. The clear and convincing evidence, culminating in the above findings of fact, shows that, in the manner found above, the Respondent displayed his erect penis on the private premises of the spa and intentionally masturbated, or at least engaged in similar hand motions or manipulations. Ms. Edwards did not consent to this act or to witnessing this act. She was upset by witnessing it. The Respondent's act was vulgar and indecent. The Respondent's claim that he was merely scratching an itch is irreconcilable with Ms. Edward's description of his conduct. Her testimony, coupled with her demonstration of his hand motion is unmistakable. She described his penis as "having excess skin over the top" and the Respondent admitted that he is not circumcised. There is no evidence that Ms. Edwards had any motive to fabricate her description of the events which occurred in the massage room. Indeed, the subject occasion was the first time she had ever met the Respondent.

25. Ms. Edward's testimony concerning these events is corroborated to some extent by Ms. Edge and Ms. Arrington, who described Ms. Edward's highly emotional state as she left the massage room from her interrupted session with the Respondent. She was visibly upset when she described to the women the Respondent's conduct.

26. The Respondent's conduct before and after the incident during the massage corroborates Ms. Edwards to some extent. He

made efforts to conceal his identity. When he was told that the police were being summoned, he pushed his way out of the door of the spa and fled on foot. His car was in the parking lot, but he chose not to use it for fear that he could be identified to the police through his tag number. This behavior is consistent with that of a man who is conscious of his guilt and fears arrest.

27. The Respondent offered the results of a polygraph test the Respondent took into evidence. The judge rejected the test results, and any evidence that the Respondent took such a test, as inadmissible. Polygraph test results are inadmissible in proceedings such as this, unless the parties stipulate their admissibility. Metro Dade County v. Bannister, 683 So. 2d 130 (Fla. 3d DCA 1996); Maddox v. Dept. of Professional Regulation, 592 So. 2d 717 (Fla. 1st DCA 1991) rev. den., 601 So. 2d 552 (Fla. 1992); Lieberman v. Dept. of Professional Regulation, Bd. Of Medicine, 573 So. 2d 349 (Fla. 5th DCA 1991); Carter v. State, 474 So. 2d 397, 398 (Fla. 3d DCA 1985). See also, Ehrhardt, Florida Evidence, § 401.5.

28. The clear and convincing evidence establishes that the Respondent committed the conduct described in the above Findings of Fact. Pursuant to the referenced case law and rules, the facts show a failure to maintain good moral character. The described exposure of the sexual organs is unlawful and, under

the cited rule definition (and the above-quoted court's definition), the Respondent has violated the referenced good moral character standard. Fla. Admin. Code R. 11B-27.0011(4)(b).

29. The guideline for penalties range from probation to suspension, with counseling, up to, and including revocation. The facts show substantially egregious conduct. The Respondent not only exposed his sexual organs in a private location, open to the public, in the presence of an unwilling witness, he also at least attempted to masturbate in her presence. A certificated officer who behaves in such a vulgar and depraved manner should be disciplined in proportion to the gravity of the violation. See Criminal Justice Standards and Training Commission v. Eric C. Denoun, Case No. 98-4705 (DOAH May 27, 1999) (officer who stood naked in his neighbor's back yard failed to maintain good moral character and certificate should be revoked); Criminal Justice Standards and Training Commission v. Raymond C. Riddles, Case No. 86-4735 (DOAH May 13, 1987) (officer who exposed and stroked his semi-erect penis at a wayside park should have his certification revoked.) See also Criminal Justice Standards and Training Commission v. Shawn C. Jones, Case No. 06-2091PL (DOAH October 17, 2006).

30. The Respondent's conduct, as described in the above findings, is inconsistent with the minimum standard of conduct

and moral character demanded of one who, as a certificated law enforcement officer, occupies a position of great public trust. There is a basic public expectation that officers serving the public trust, by enforcing the laws, must themselves obey the law. City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. 5th DCA 1989).

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the record evidence and the pleadings and arguments of the parties, it is

Recommended that a Final Order be entered by the Criminal Justice Standards and Training Commission, revoking the Respondent's Law Enforcement Certification, Number 155216.

DONE AND ENTERED this 3rd day of December, 2009, in Tallahassee, Leon County, Florida.



P. MICHAEL RUFF
Administrative Law Judge
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Filed with the Clerk of the
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this 3rd day of December, 2009.

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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.