

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GREGORY B. TAYLOR,)
)
 Petitioner,)
)
 vs.) Case No. 06-0605
)
 ST. JOHNS RIVER WATER)
 MANAGEMENT DISTRICT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for final hearing, as noticed, before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted in Palatka, Florida, on May 11, 2006. The appearances were as follows:

APPEARANCES

For Petitioner: Gregory B. Taylor, pro se
Post Office Box 1514
Palatka, Florida 32178-1514

For Respondent: William Abrams, Esquire
St. Johns River Water Management
District
4049 Reid Street
Palatka, Florida 32177-2529

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concern whether the Petitioner, Gregory B. Taylor, violated the attendance

policy of the St. Johns River Water Management District, the Respondent (District) thereby subjecting himself to a one day suspension.

PRELIMINARY STATEMENT

This cause was initiated upon the District providing the Petitioner a letter notice of December 27, 2005, whereby he was informed he was suspended for one-day without pay for violating the attendance and leave policy of the District. The Petitioner was thus informed that he had a right to request a formal hearing in accordance with Chapter 120, Florida Statutes. He filed a request for an Administrative Hearing. The matter was referred to the Division of Administrative Hearings (Division) and ultimately to the undersigned Administrative Law Judge.

The Petitioner has challenged the suspension without pay as unfair. The Petitioner seeks an order removing the disciplinary action from his personnel file. The District maintains that the suspension was based on three incidents of absence without authorized leave, was appropriate and was within the permissible range of discretionary disciplinary actions under the District's regular policy, of which all employees have been informed.

The cause came on for hearing as noticed. The Petitioner testified on his own behalf at the hearing and offered one exhibit which, was not admitted into evidence and one exhibit marked as Petitioner's Exhibit One, which was admitted into

evidence without objection. The District presented the testimony of witnesses Robin Hudson, the Director of the Office of Human Resources; Robert L. Green, Jr., the Network and Systems Coordinator of the Division of Computer Information Services (CIS); and Martin T. Barnes, the Director of the Division of Computer Information Services. The District offered 10 Exhibits which were admitted into evidence without objection as Respondent's Exhibits 1 through 10.

Upon conclusion of the hearing a transcript was ordered by the parties and they requested and received an opportunity to file proposed recommended orders. The Proposed Recommended Orders have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner was employed by the District as a customer service technician II. He has worked for the District for seven years and is assigned to the Division of CIS. He is supervised by Robert Green, and Robert Green's supervisor, the Division Director, Martin Barnes.

2. The District has policies that govern work place conduct including attendance and leave. The District routinely informs employees of these policies that govern their workplace conduct through orientation meetings and discussions with supervisors. The policies are posted on the District's internet

website and the Petitioner is aware of where to find these policies, by his own admission.

3. The attendance policy provides that employees must be present on their job for the scheduled hours and the established workday and workweek unless absence from duty has been approved by the appropriate supervisor.

4. Mr. Green testified that he has reviewed the District's attendance policies with the Petitioner. Concerning annual leave, the attendance policy provides that "except in emergencies, annual leave must have supervisory approval before being taken." District policy as to sick leave provides that sick leave shall only be used with prior supervisory approval.

5. The District classifies absences as either planned or unplanned. Planned absences are those that are approved in advance, and unplanned are those for which prior approval has not been obtained.

6. Each District work unit, including CIS, establishes practices to implement the means of obtaining prior approval for planned absences and reporting of unplanned absences. The policy for CIS employees for reporting unplanned absences is to contact the supervisor. If the employee cannot contact that supervisor then the employee is to contact the Division Director, Assistant Department Director, or Department Director, in that order of priority.

7. Each District work unit may impose specific requirements with regard to the reporting of unplanned absences for the purposes of correcting behavior. The District written attendance policy provides that:

If a department/office director determines that an employee is excessively absent based on a pattern of absences, such as regular absence on the day proceeding or following the employee's regular days off; . . . [or] continual use of sick leave as it is accrued . . .; the department/office director may take action to control such excessive absences. Such action may be taken only after the absences have been discussed with the employee and the plan to control the absences has been reviewed by the office of human resources.

8. In December 2004, after several discussions and meetings with the Petitioner and after consulting with the District's office of Human Resources, Robert Green gave the Petitioner a memorandum regarding his attendance. The memorandum restated the attendance policy and, in order to control the Petitioner's excessive absences and failure to contact his supervisors regarding unplanned absences, the memorandum instructed the Petitioner to notify Mr. Green, or if Mr. Green was not available, the three other staff members at progressively higher supervisory levels, mentioned above. The memorandum explicitly instructed the Petitioner to contact the supervisors by phone.

9. A little more than a month later, at the end of January 2005, Mr. Green conducted the Petitioner's annual performance evaluation. The "additional comments" section of that evaluation, before the space for the supervisor's and employee's signatures includes the following statement:

[T]hroughout this evaluation period I have counseled [Petitioner] on his tardiness during his scheduled working hours.

10. Mr. Green testified that, in addition to the statement above, he counseled the Petitioner during the evaluation regarding the Petitioner's tardiness and failure to notify his supervisors when he was out and reiterated that the notification was to be made by phone.

11. In February 2005, less than two weeks after the evaluation, and after additional unplanned absences and tardiness following the December 2004 memorandum, Mr. Green provided the Petitioner with a memorandum related to the Petitioner's tardiness and unplanned absences. This memorandum noted that an excessive number of unplanned absences and tardiness had become apparent and set forth 22 unplanned absences--the majority of which immediately preceded or followed regular scheduled days off.

12. In addition, the memorandum reiterated that the Petitioner's habitual tardiness was unacceptable and provided examples. The memo concluded with the following paragraph,

which re-stated the plan to control the Petitioner's excessive absences:

You are expected to adhere to your regular work schedule. If you cannot, effective February 14th, at the beginning of your workday, you will notify me or Martin Barnes, Division Director of Computer Information Systems by phone when you will be absent or more than seven minutes late to work. Voice mail or e-mail is not an appropriate notification. Continued tardiness and unplanned absences will lead to disciplinary action.

13. The Petitioner testified that he received the instruction, both in writing and orally, to call Mr. Green or Mr. Barnes. On November 4 and 7, 2005, a Friday and a Monday, the Petitioner was sick. On both days he failed to contact either Mr. Green or Mr. Barnes by phone.

14. The Petitioner testified that upon his return to work, Mr. Green told him that he, Green, "appreciated" the fact that the Petitioner called the help desk when he was sick, and the Petitioner asserts that meant that Mr. Green approved of calling the help desk rather than Mr. Green.

15. Mr. Green testified that he did say that he appreciated that the Petitioner had at least called in and then added that he made that statement after he stated that it was inappropriate to call someone other than him, and before telling the Petitioner (again) that notification should be made to Mr. Green directly.

16. Mr. Green never communicated to the Petitioner, in a memo or otherwise, that the requirement that the Petitioner called his supervisors to report or request unplanned absences no longer applied to the Petitioner.

17. Mr. Green established that the requirement that the Petitioner call in is consistently interpreted and applied throughout the CIS management.

18. The Petitioner testified that he called in sick on November 4 and November 7 at 7:00 a.m. so that he could immediately return to resting.

19. There was no testimony that the Petitioner called in later on either day and Mr. Green testified that neither he nor any other supervisor was contacted by the Petitioner.

20. The Petitioner testified that he had, previous to November 4, 2005, attempted to call Mr. Green early in the morning and had been unsuccessful, implying that he did not call either Mr. Green or Mr. Barnes because they are not available by phone at 7:00 a.m. in the morning.

21. Mr. Green attempted to call the Petitioner back when the Petitioner had been unable to reach him by phone in the early morning hours.

22. Mr. Green is required to always have his cell phone on. He told the Petitioner that he was available by cell phone. Martin Barnes, Mr. Green's supervisor, confirmed that he

requires Mr. Green to keep his cell phone on and with him at all times. At 7:00 a.m. Mr. Green is on his way to work and available at that time. The Petitioner admitted that he had never called Mr. Barnes's cell phone. Mr. Barnes testified that his office phone is forwarded to his cell phone so that he is available almost 24 hours a day.

23. The Petitioner's normal work day concludes at 4:00 p.m. On November 22, 2005, the Petitioner sent an e-mail to a group of recipients, "IR Management," that included Martin Barnes, the CIS Division Director, and Kevin Brown, Mr. Barnes supervisor, requesting authorization to leave work early. The Petitioner made his request at 2:17 p.m. and left work at 3:15 p.m.

24. In between the time that the Petitioner made his request and the time he left, the Petitioner was away from his desk and unavailable by e-mail.

25. Robert Green was not working at the District that day. Accordingly, the next person to whom the Petitioner was directed to seek approval for leave was Martin Barnes.

26. Shortly after the Petitioner sent the e-mail, Kevin Brown replied by e-mail. Rather than grant permission, the body of the message stated: "Please address this with Martin."

Mr. Brown's instruction to contact Mr. Barnes was given even though the e-mail Brown received was also clearly addressed to other members of "IR Management," including Mr. Barnes.

27. The Petitioner did not call Mr. Barnes by phone. Rather, the Petitioner stated, "I knew in my mind that I had already contacted Martin Barnes concerning this and that I had not been notified by anyone in management saying this would be unacceptable."

28. The Petitioner's unilateral use of a negative notice procedure directly conflicts with specific instruction he received to contact supervisors by phone. It also is not in compliance with the instruction, provided after the Petitioner had already e-mailed Mr. Barnes, that he address leaving work early with Mr. Barnes.

29. Although the Petitioner referred to other e-mails that purportedly evidenced use of this procedure by the Petitioner and other employees, he failed to produce any such e-mails or any corroborating evidence.

30. The testimony of Ms. Hudson and Mr. Green was that phoning was the only acceptable method of communicating for the Petitioner.

31. Further, the phone requirement was the result of a plan to control the Petitioner's tardiness and excessive

absences, not directed toward the issue of other employees' attendance.

32. The District's disciplinary action policy describes "absence without authorized leave" as:

Failure to obtain prior approval for absence from work, except in the case of an emergency; failure to notify the proper supervisor in a timely or appropriate manner of intended absence from work; or obtaining leave based on a misrepresentation.

33. On December 8, 2005, the Petitioner was provided with a letter from the District's executive director that informed him that the District intended to suspend him for one day without pay for being absent without leave.

34. The letter, dated December 7, 2005, indicated that the intended suspension was based on the District's findings that: (1) the Petitioner failed to properly report his absence from work on two consecutive work days (November 4 and November 7) and that (2) the Petitioner failed to properly secure authorization to leave work early (on November 22).

35. The District's director of human resources established that either of these two bases would serve independently as a basis for the disciplinary action taken.

36. The Petitioner was notified in the letter that he could request a pre-determination conference for the purpose of presenting information to the executive office that would

support a decision not to suspend the Petitioner, before a final decision was made regarding the intended disciplinary action. The Petitioner did not request a pre-determination conference. On December 27, 2005, the Petitioner was provided with the second letter from the District's executive director informing the Petitioner that, given the facts recited in the December 7, letter and given that the Petitioner had not taken the opportunity to be heard as to those facts, that he would be suspended for one day.

37. That letter also stated that the Petitioner had the right to appeal the executive director's decision through the administrative hearing process pursuant to Chapter 120, Florida Statutes.

38. Under the District's disciplinary action policy, the failure to properly notify the appropriate supervisor of an intended absence, in this case either because the employee is sick or seeks approval for leaving his work station early, constitutes an absence without authorized leave.

39. The appropriate discipline level for being absent without leave ranges from reprimand to dismissal. The District has terminated employees for repeated occurrences of absence without leave.

40. The District tends to take the least severe disciplinary action needed to correct behavior. However, when

an employee's behavior does not respond, the severity of the discipline is progressively increased.

41. Under District practice, violations of District policies are considered cumulative. All previous disciplinary actions, whether for the same or a different violation, are considered in determining which disciplinary action to impose.

42. The Petitioner has a previous reprimand in his personnel file for insubordination. The Petitioner has also been counseled by memo, evaluation, and meetings before November 2005, regarding his lack of adherence to District attendance policy.

43. Both the history of counseling and informal corrective action for the particular behavior, absence without authorized leave, and the previous formal reprimand for an unrelated violation were considered in determining the appropriate level of disciplinary action in the case at bar.

44. When asked what remedy he sought the Petitioner at the hearing stated: "I only ask that the disciplinary action be removed from my personnel file." The Petitioner did not identify an applicable exemption from Florida's broad public records laws or document retention schedules that would support the removal of an agency's final action from the agency's files.

CONCLUSIONS OF LAW

45. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.59, Fla. Stat. The District is a special taxing District charged with managing the state's water resources and to administer and enforce the provisions of Chapter 373, Florida Statutes, and rules promulgated thereunder. Section 373.016, Florida Statutes (2005). The District is an agency of the State of Florida for purposes of employee discipline-related disputes such as this one. Grimshaw v. South Florida Water Management District, 195 F. Supp. 2d 1358, (S.D. Fla. 2002).

46. It has been held in Arnold v. South Florida Water Management District, 910 So. 2d 431 (Fla. 4th DCA 2005) that an "at will" employee of the water management district does not have standing to obtain review of a termination of employment since that employee does not have a substantial interest in that employment. See also Toth v. South Florida Water Management District, 895 So. 2d 482, 483 (Fla. 4th DCA 2005) (an at will employee is without standing to challenge a demotion and transfer).

47. Although it may appear that a suspension as a less adverse impact than termination would also not give rise to standing, the District through its written policies has provided

its employees the standing opportunity to challenge disciplinary suspension through the administrative hearing process pursuant to Chapter 120, Florida Statutes. Therefore on that basis Petitioner has standing.

48. The burden of proof herein is on the agency as the party seeking to establish the affirmative of the issue or, that is, to impose the penalty of suspension. The standard of proof is by a preponderance of evidence.

49. The Executive Director of the District has the "authority to establish and implement polices and procedures to manage the District's work force" pursuant to Section 373.083, Florida Statutes, and District policy 79-03, Administration of Governing Board, Section 12. This authority includes both the setting and enforcing of the standards of conduct.

50. The Executive Director is accorded wide latitude in determining appropriate disciplinary actions.

[T]he taking of more or less severe action than would be indicated by these guidelines is within the discretion of the Executive Director. . . . In determining the appropriate disciplinary action for such a violation, [he] shall consider the specific violation, the consequences of the violation, the circumstances surrounding the violation, previous disciplinary action the employee has received for related and unrelated violations, the time between the violations, and the overall work record of the employee.

51. The Petitioner has not shown any abuse of discretion in which the District ignored any clear evidence that the Petitioner has not violated policy. In fact, the Petitioner, when provided an opportunity to explain or excuse his conduct, or refute the District's findings, chose not to offer any evidence or explanation, prior to the disciplinary action being imposed.

52. In accordance with the above findings of fact, the District has established by a preponderant evidence that the Petitioner was subject to a requirement that he phone his supervisor or other supervisors to report or receive approval when he would not be at his work place as planned.

53. In accordance with the above findings of fact, the District has proved by preponderant evidence that the Petitioner did not comply with that requirement on three occasions in November 2005.

54. In consideration of those findings of fact, the District has established that suspending the Petitioner for one day was a disciplinary action within the Executive Director's discretion to impose. The District has thus established by preponderant evidence that the disciplinary action was properly imposed.

RECOMMENDATION

Having considered the foregoing findings of fact, conclusions of law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED: That the St. Johns River Water Management District enter a final order suspending the Petitioner from work for one day without pay.

DONE AND ENTERED this 29th day of August, 2006, in Tallahassee, Leon County, Florida.



P. MICHAEL RUFF
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of August, 2006.

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.