

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EMERALD COAST)
UTILITIES AUTHORITY,)
)
Petitioner,)
)
vs.) Case No. 10-10591
)
MICHAEL EDLER,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this matter before Diane Cleavinger, Administrative Law Judge with the Division of Administrative Hearings, on February 14, 2011, in Pensacola, Florida.

APPEARANCES

For Petitioner: John E. Griffin, Esquire
Carson & Adkins
2930 Wellington Circle, North
Suite 201
Tallahassee, Florida 32309

For Respondent: Ryan Barnett, Esquire
Whibbs & Stone
801 Romana Street, Unit C
Pensacola, Florida 32502

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent has violated the personnel policy established by Emerald Coast Utilities Authority.

PRELIMINARY STATEMENT

By letter dated October 19, 2010, Respondent, Michael Edler, was advised that his supervisor recommended termination of his employment with Petitioner, Emerald Coast Utilities Authority (ECUA or Petitioner), for alleged violations of the ECUA personnel policy. Specifically, the letter alleged that Respondent violated ECUA policy Section F-4(4), Conduct Unbecoming an Employee, and Section F-4(28), Threatening and/or Abusive Language, when he allegedly engaged in a verbal altercation with a coworker in the sanitation department's cafeteria. The letter also advised Respondent of his right to a predetermination/liberty interest hearing.

On November 3, 2010, a predetermination/liberty interest hearing was held in ECUA's Board Room. Respondent participated in the hearing.

By certified letter dated December 3, 2010, Respondent was notified that his employment with Petitioner was terminated. The letter stated that ECUA's action was based on ECUA Human Relations Policy Manual, Section F-4(4) Conduct Unbecoming an Employee, Section F-4(16) Insubordination, and Section F-4(28) Threatening and/or Abusive Language. The letter further advised Respondent of his right to appeal Petitioner's employment action and request a formal hearing before an Administrative Law Judge with the Division of Administrative Hearings (DOAH).

By letter dated December 5, 2010, Respondent timely filed a request for hearing. The case was forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner presented the testimony of five witnesses and offered eight exhibits into evidence. Respondent testified on his own behalf and offered one exhibit into evidence.

FINDINGS OF FACT

1. ECUA was created in 1981 pursuant to chapter 81-376, Laws of Florida. By law, it provides utility services throughout Escambia County, Florida.

2. Approximately 20 years ago, Respondent was hired by Petitioner as a sanitation equipment operator. At some point in time, Respondent was given a copy of the employee handbook.

3. The handbook is a summary of Petitioner's human resource policies. Specific human resource policies are contained in Petitioner's Human Resources Policy Manual. The manual is available to all employees. Both documents provide for the discipline of employees. The Human Resources Policy Manual, states as follows:

Section F-4 Disciplinary Offenses

* * *

(4) Conduct Unbecoming an ECUA Employee

Any act or activity on the job or connected with the job which involves moral turpitude, or any conduct, whether on or off the job, that adversely affects the employee's effectiveness as an ECUA employee, or that adversely affects the employee's ability to continue to perform their job, or which adversely affects the ECUA's ability to carry out its assigned mission. Conduct unbecoming an ECUA employee includes any conduct which adversely affects the morale or efficiency of the ECUA, or any conduct which has a tendency to destroy public respect or confidence in the ECUA, in its employees, or in the provision of ECUA services.

The seriousness of the conduct which constitutes a "conduct unbecoming an ECUA employee" offense determines the appropriate penalty. Further, the repetition of the same or similar conduct may lead to progressive discipline. If an employee repeatedly engages in conduct unbecoming, but the acts or conduct which are unbecoming are dissimilar to each other, cumulative discipline may be imposed.

* * *

(16) Insubordination

An employee's unwillingness or deliberate refusal to comply with a direct order, directive, or instruction of the immediate or higher-level supervisor whether in writing or orally communicated. Insubordination also includes an expressed refusal to obey a proper order, as well as, willful or direct failure to do an assigned job or follow orders. Gross insubordination or willful neglect of duties is defined as a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority. Insubordination is a serious offense.

(28) Threatening and/or Abusive Language

The use of language which is threatening or abusive, whether directed toward a supervisor, other employees, or the public. Includes offensive language, whether or not directed toward anyone in particular and regardless of intent.

4. On November 19, 2010, Respondent arrived at work around 5:00 a.m. He entered the sanitation department's cafeteria. The department's time clock is located in the cafeteria. At the time, the cafeteria was noisy with a number of employees in the room.

5. Another department co-worker who knew Respondent, Ronnie Prim, was clocking in at the time clock. Both Mr. Prim and Respondent are black.

6. Respondent said hello to his supervisor and got in line to clock in behind Mr. Prim. The supervisor's desk was located about 10 to 15 feet away from the area of the time clock. Notably, because of the noise and the fact that other employees were involved in other things, there were no independent witnesses to the entire interaction between Mr. Prim and Respondent. Likewise, there were no independent witnesses to the entire conversation between the two men. The entire incident lasted about 5 minutes.

7. After clocking in, Mr. Prim turned and saw Respondent and said good morning. Respondent did not respond to Mr. Prim's greeting.

8. Mr. Prim responded with words like "What? You are not going to talk to me?" Respondent denies becoming angry. However, all of the independent witnesses to the incident and the better evidence demonstrated that Respondent became angry and indicated to Mr. Prim that he should not talk to him. He called Mr. Prim "boy." Other witness testimony differed on the number of times that Respondent called Mr. Prim "boy." However, the better evidence was that the reference was made at least two to three times by Respondent.

9. Respondent testified that he did not intend the word "boy" to be offensive. However, use of the term "boy" towards a black man is generally considered offensive. In fact, Mr. Prim was insulted at being called "boy" and became angry at the reference and Respondent's attitude. Given these facts, Respondent is guilty of using offensive language towards a co-worker in violation of Section F-4(4), Conduct Unbecoming an Employee and Section F-4(28), Threatening and/or Abusive Language.

10. Thereafter, Respondent indicated to Mr. Prim that "they could settle this in the street" or "we can handle (settle) this after work." Shortly afterwards, Respondent left

the cafeteria. However, the evidence was not clear whether Respondent was escalating the argument or was trying to calm the situation down by his statement. Respondent's testimony was that he was trying to calm the situation down and walk away. Independent witnesses disagreed on what was said and the meaning of the statement. Given the conflict and the short duration of the incident, the evidence did not demonstrate that Respondent escalated the incident with Mr. Prim before he left the cafeteria. Moreover, the overall seriousness of the incident was moderately low given the short duration of the incident and the fact that only a few derogatory words were involved.

11. Respondent's supervisor overheard the term 'boy' and saw that the "conversation was not good." From about 10 to 15 feet away, he instructed Respondent to "go on to work." During the incident, the supervisor instructed Respondent to "go to work" about 3 times. Respondent gave no indication that he heard his supervisor's instructions. Indeed, the better evidence was that Respondent did not hear his supervisor's instructions since Respondent has significantly impaired hearing and poor word recognition in his right ear. Additionally, another coworker, who was at a table approximately five feet away, could only hear pieces of the conversation between Respondent and Mr. Prim. Given that Respondent did not hear his supervisor's instruction and was therefore unaware of that

instruction, he did not fail or refuse to follow a direct order of his supervisor and is not guilty of insubordination

12. As an employee, Respondent received a written reprimand on April 22, 2010. The reprimand was for his use of profanity and refusal to follow a direct order of his supervisor in violation of Sections F-4(4), (7) and (16) of the ECUA Human Resource Policy Manual. The only similarity between the April offense and the present offense was the use of different derogatory terms.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. See Administrative Law Judge Services Contract effective March 3, 2006; § 120.65(7), Fla. Stat. (2010).

14. As set forth above, ECUA relied on Section F-4(4), Conduct Unbecoming an Employee, Section F-4(16), Insubordination, and Section F-4(28), Threatening and/or Abusive Language contained in the ECUA Human Resource Policy Manual.

15. Additionally, Chapter F of the ECUA Human Resource Policy Manual provides for progressive and cumulative discipline, and reads in pertinent part:

Section F-1 Progressive and Cumulative
Discipline

In determining the severity of the
discipline to be applied, the supervisor

should take into account the following variables:

- (a) The seriousness of the offense.
- (b) The circumstances surrounding the offense.
- (c) The effect of the employee's actions on the ECUA's operations and ability to carry out its responsibilities, and on other employees.
- (d) The overall work record of the employee.
- (e) If the offense is not a first offense for the employee, the length of time since earlier disciplinary actions, the similarity or dissimilarity of offenses, and the severity of earlier offenses shall be considered.
- (f) Other factors may be considered as appropriate.

Progressive discipline is based on the idea that once employees have been informed of the performance and behavior expected of them, discipline will generally be administered progressively from minor to major penalties. However, the seriousness of the offense or the cumulative nature of the offense in light of the employee's disciplinary history may warrant more severe discipline eliminating progressive discipline as an option.

For example, major disciplinary infractions, because of their serious nature, may warrant suspension or dismissal on the first occurrence even though the employee has no prior record for discipline. . . .

16. ECUA has the burden of proof by a preponderance of the evidence. See paragraph 7(j), contract between ECUA and DOAH.

17. In this case, the evidence did not demonstrate that Respondent violated Section F-4(16) (insubordination). Respondent was hearing impaired and did not hear his supervisor's instructions. He, therefore, was unaware of any direct instructions given by his supervisor to him.

18. However, the evidence did demonstrate that Respondent violated Section F-4(4) (conduct unbecoming an ECUA employee) and Section F-4(28) (threatening or abusive language) when he engaged in a verbal argument with Mr. Prim and derogatorily referred to him as "boy" several times during that argument.

19. Finally, Respondent did not demonstrate that Respondent escalated or threatened Mr. Prim when he suggested that the matter could be settled elsewhere. There was conflict in the evidence about what was said and it is debatable whether the statement made by Respondent was a threat or an escalation/de-escalation of the argument. In fact, the argument was of short duration. Thus, Respondent should be found guilty of two violations of the ECUA Human Resources Policy Manual arising out of one incident and discipline should be imposed according to ECUA policies.

RECOMMENDATION

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

Recommended that the Executive Director of the Emerald Coast Utilities Authority find that Respondent violated its Human Resource Policies F-4(4) and (28), and impose such discipline on Respondent as determined appropriate under the provisions of the Human Resource Policy Manual.

DONE AND ENTERED this 21st day of March, 2011, in Tallahassee, Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of March, 2011.

COPIES FURNISHED:

John E. Griffin, Esquire
Carson & Adkins
2930 Wellington Circle, North, Suite 201
Tallahassee, Florida 32309

Michael J. Edler
801 West Baars Street
Pensacola, Florida 32501

Ryan Barnett, Esquire
Whibbs & Stone
801 Romana Street, Unit C
Pensacola, Florida 32502

Richard C. Anderson, Director
Human Resources and
Administrative Services
Emerald Coast Utilities Authority
9255 Sturdevant Street
Pensacola, Florida 32514

Steve Sorrell, Executive Director
Emerald Coast Utilities Authority
9255 Sturdevant Street
Pensacola, Florida 32514

NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT

Pursuant to Paragraph 7(m) of the contract between ECUA and DOAH, all parties have the right to submit written argument within 10 days of the issuance of this Recommended Order with the Executive Director of the ECUA as to any appropriate penalty to be imposed. The Executive Director will then determine the appropriate level of discipline to be imposed upon the Respondent.