

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EMERALD COAST UTILITIES)
AUTHORITY,)
)
Petitioner,)
)
vs.) Case No. 11-5284
)
A. J. STOVALL, II,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on December 13, 2011, in Pensacola, Florida.

APPEARANCES

For Petitioner: John Edmund Griffin, Esquire
Carson and Adkins
2930 Wellington Circle, North, Suite 201
Tallahassee, Florida 32309

For Respondent: A. J. Stovall, II, pro se
8351 Calvert Street
Pensacola, Florida 32514

STATEMENT OF THE ISSUE

The issue is whether the termination of Respondent's employment was in accordance with the personnel policy and procedure established by Emerald Coast Utilities Authority (ECUA).

PRELIMINARY STATEMENT

On August 4, 2011, Respondent was involved in an accident while driving ECUA's boom truck. The nature of the accident was a failure to completely lower the boom at the Perdido Landfill which led to the boom hitting power lines and bringing them down on the private road exiting the landfill.

As was the policy of ECUA, Respondent was required to undergo a drug test after having been involved in an accident. Respondent tested positively for cocaine in his bloodstream and was notified that he was subject to a predetermination/liberty interest hearing to be conducted by ECUA.

On September 22, 2011, a predetermination/liberty interest hearing was held in ECUA's Board Room. Respondent participated in the hearing and presented information for consideration.

By certified letter dated September 28, 2011, Respondent was notified that his employment with Petitioner was terminated. The letter stated that ECUA's action was based on violations of ECUA Human Relations Policy Manual, section F-4(29) and (33). 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 October 7, 2011, Respondent timely filed a request for hearing. The case was forwarded to DOAH.

At the hearing, Petitioner presented the testimony of Mike Emmons, ECUA Sanitation Supervisor; Rose Carter, an employee of Laboratory Corporation of America (LabCorp); Carol J. Law, Ph.D., president of Drug Free Workplaces; Cynthia S. Sutherland, ECUA Human Resources Manager; and Randy Rudd, ECUA Deputy Executive Director of Shared Services; and offered 18 exhibits, all of which were admitted into evidence. Respondent testified on his own behalf and offered one exhibit, which was admitted 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. Respondent was employed by Petitioner in May 2010. On May 3, 2010, Respondent signed a written acknowledgement of ECUA's drug-free workplace program and agreed to be tested according to section 440.101-.102, Florida Statutes, and ECUA's Drug and Alcohol Policy. Respondent also acknowledged, in writing, receipt of the ECUA Employee Handbook on May 10, 2010. Until the incident described in this order, Respondent was considered by his direct supervisor to be an excellent employee.

3. The handbook is a summary of Petitioner's human resource policies. Specific human resource policies are

contained in Petitioner's Human Resource Policy Manual. The manual states, in relevant part:

Section F-4 Disciplinary Offenses

(29) Use of or Being Under the Influence of any Controlled Substance as defined in Section 893.03, Florida Statutes or Federal regulation, Not Pursuant to a Lawful Prescription While on Duty; or Possession, Sale,

"Illegal drug" means any controlled substance as defined in Section 893.03, Florida Statutes or Federal regulation which is not possessed, sold, distributed, or dispensed in accordance with law.

* * *

(33) Violation of ECUA Rules or Policies or State or Federal Law.

The failure to abide by ECUA rules, policies, directives or state or federal statutes. . . .

* * *

CHAPTER G DRUG AND ALCOHOL ABUSE POLICY

It is a condition of employment with the Escambia County Utilities Authority for an employee to refrain from reporting to work or working with the presence of drugs or alcohol in his or her body.

* * *

If an employee tests positive for alcohol or drugs, his employment may be terminated

* * *

Section G-2 Definitions

B. "Drug abuse" means the use of any controlled substance as defined in Section 893.03, Florida Statutes, as amended from time to time, not pursuant to lawful prescription. The term "drug abuse" also includes the commission of any act prohibited by Chapter 893.03, Florida Statutes, as amended from time to time. The use of illegal drugs, or being under the influence of illegal drugs on the job, by ECUA employees is strictly prohibited.

Section G-5 Rehabilitative/Corrective Action

B. Any employee found to have possessed, used or been under the influence of illegal drugs or alcohol while on duty shall be subject to disciplinary action, up to and including dismissal

* * *

E. Any employee who tests positive for alcohol or who tests positive for illegal drugs on a confirmation test shall be subject to disciplinary action, up to and including dismissal

4. On August 4, 2011, Respondent was driving an ECUA vehicle, a knuckle boom truck used for picking up large garbage items, while performing his job duties for Petitioner. After making a trip to the Perdido Landfill, Respondent failed to completely lower the boom on the truck. As he drove the truck from the landfill, the boom made contact with some power lines and brought them down. While there was no damage to the ECUA truck, the damage to the power lines was estimated to be \$3,000.

Power was disconnected to the downed lines and no injuries occurred.

5. Respondent called his supervisor, Mike Emmons, who went to the scene of the accident, secured the area, and called his supervisor, Randy Rudd, to report the downed power lines. Mr. Emmons also called Carrie Langley, the ECUA Human Resources Director. He did not witness any behavior to indicate Respondent was under the influence of alcohol or drugs. Since a vehicle accident had occurred, and in accordance with ECUA policies, Respondent was required to undergo a urine test for drugs and alcohol.

6. After Respondent signed a consent form for the drug and alcohol test, Mr. Emmons drove Respondent to LabCorp, ECUA's occupational testing services company. LabCorp is a licensed facility under state and federal law to obtain urine samples for drug testing purposes.

7. Respondent was seen by a LabCorp technician, who was well-qualified to obtain and process urine samples. The technician checked Respondent's identification and had him empty his pockets prior to the test. The technician gave Respondent a sample cup with a temperature strip on it. The temperature strip helps ensure that the liquid in the cup is close to body temperature indicating the liquid is urine and has not been adulterated.

8. Respondent took the cup into the bathroom and urinated into it. Respondent returned the sample to the technician. In the presence of Respondent, the technician checked the temperature of the sample which was normal. The technician then split the sample into two test tubes, sealed each tube, labeled them, and had Respondent initial each tube. The technician recorded her activity in processing the sample on a custody and control form which Respondent then signed, acknowledging the sample-taking process. Again in the presence of Respondent, both the custody and control form and the two samples were placed in a sample bag which was sealed with an evidence sticker and placed in a locked specimen box for transport to a licensed drug testing facility in North Carolina. There was no evidence that appropriate and thorough procedures were not followed in the collection and processing of Respondent's urine sample.

9. Respondent's sample arrived at LabCorp's testing facility at Research Triangle Park in North Carolina on August 5, 2011. Sample A was used for initial testing and Sample B was frozen to preserve it for later testing if required. The sample was tracked through the testing process by number and the name of Respondent is not known to the technician performing the tests.

10. The first test performed on Respondent's Sample A was an immunoassay test. The sample was initially tested with

various cut-off levels for the types of drugs tested, ranging from 15 nanograms per milliliter (ng/mL) for Cannabis to 2000 ng/mL for Opiates. The cut-off levels are used to limit the possibility of a positive result due to secondhand exposure. Respondent's sample tested presumptive positive for Benzoyllecgonine, a metabolite which demonstrates the presence of cocaine in the subject's system. Since the sample was positive, it was sent for gas chromatography/mass spectrometry (GCMS) confirmation testing. GCMS tests with greater specificity for the presence of Benzoyllecgonine. Respondent's sample tested positive at a level of 506 ng/mL, a significant amount above the screening threshold of 300 ng/mL. The results were reported to ECUA's medical review officer and to ECUA.

11. Upon learning of the positive test results, Respondent, at his own expense, requested that the second sample be tested by another lab. The sample was sent to another LabCorp testing facility in Raritan, New Jersey. The second sample also tested positive for cocaine.

12. As an explanation for the positive test for cocaine, Respondent testified that his dentist had given him anesthetics for some serious dental work that may have included cocaine. Respondent produced his medical records, but no cocaine or cocaine derivative (including the metabolite for cocaine) was listed among the anesthetics given by the dentist. Septocaine,

one of the anesthetics used, is not cocaine or a cocaine derivative according to Dr. Carol Law, from LabCorp. Respondent further attempted to explain the presence of cocaine in his urine by stating that the dentist had given him some anesthetics for pain that he did not put on the charts because they were illegal substances, such as cocaine. This testimony is not credible, and no credible evidence was produced at hearing to demonstrate any of the samples were adulterated, mixed up, or improperly tested. Given these facts, Petitioner has established that Respondent tested positive for cocaine in violation of ECUA drug policy.

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. (2011).

14. The ECUA Human Resource Policy Manual contains provisions, set forth above, that prohibit an employee from using controlled substances. Respondent had notice of and knows about these policies, by virtue of his acknowledgement of receipt of the handbook and policies, as well as his testimony.

15. Because Respondent violated the above-referenced policies of ECUA and violated state law regarding the use of controlled substances, in this matter cocaine, Respondent's act

violated sections F-4(29) and (33) of the ECUA Human Resources Policy Manual.

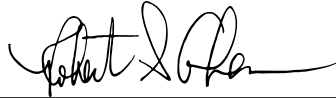
16. Respondent provided no reasonable explanation for the presence of cocaine in his system following his work-related accident and required urine test incident to the accident. His allegation that his dentist administered cocaine or a cocaine derivative to him is not supported by any evidence of record. Accordingly, Respondent's testimony on this point is not deemed credible.

RECOMMENDATION

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

RECOMMENDED that the Executive Director of ECUA find that Respondent violated sections F-4(29) and (33) of the ECUA Human Resources Policy Manual and impose such discipline on Respondent as deemed appropriate.

DONE AND ENTERED this 31st day of January, 2012, in
Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of January, 2012.

COPIES FURNISHED:

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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.