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**FILED**

2012 DEC 17 PM 12 13  
December 14, 2012

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DIVISION OF  
ADMINISTRATIVE  
HEARINGS

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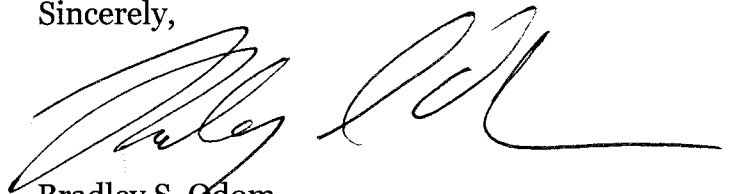
Claudia Llado  
Clerk of the Division  
State of Florida  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060

Re: *Emerald Coast Utilities Authority v. Michael A. Emmons*  
*DOAH Case Number: 12-2915*

Dear Ms. Llado:

Administrative Law Judge Diane Cleavinger rendered an Order Closing File in the above-referenced matter on October 18, 2012, which for reasons articulated in the enclosed has been deemed a Recommended Order. Subsequent thereto, the Emerald Coast Utilities Authority (ECUA) entered a Final Order on December 12, 2012. Pursuant to Section 120.57(1)(m) you are hereby being provided a copy of that Final Order. Should you have any questions please do not hesitate to contact me.

Sincerely,



Bradley S. Odom  
ECUA General Counsel

BSO:cab

Enclosure

cc: Linda Iversen (w/o encl.)

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

EMERALD COAST UTILITIES  
AUTHORITY,

Petitioner,

v.

MICHAEL A. EMMONS,

Respondent.

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**FILED**

2012 DEC 17 PM 12 14

DIVISION OF  
ADMINISTRATIVE DOAH Case No.: 12-2915  
HEARINGS

**FINAL ORDER**

Petitioner, Emerald Coast Utilities Authority (hereinafter either "ECUA" or "Petitioner"), terminated Respondent, Michael A. Emmons (hereinafter either "Emmons" or "Respondent"), from his employment with ECUA effective at the close of business on August 24, 2012. Emmons timely requested a hearing in order to appeal his termination, and his case was forwarded to Florida Division of Administrative Hearings to conduct a hearing and issue findings of fact and recommended conclusions of law. After being properly noticed, a formal hearing was held in this cause on October 15, 2012 in Pensacola, Florida, before Diane Cleavinger, Administrative Law Judge with the Florida Division of Administrative Hearings, which Emmons elected not to attend.

Three days later, on October 18, 2012, Judge Diane Cleavinger submitted an Order Closing File, which for reasons set forth below is deemed a Recommended Order.

Pursuant to Section 120.57(1)(k), Florida Statutes, the Parties had 15 days within which to submit written exceptions to the Recommended Order. That time-frame has expired, with only Petitioner's having filed a submission. Emmons also filed no response to Petitioner's exceptions. See Rule 28-106.217(3), Florida Administrative

Code (affording a party 10 days from the filing of the other party's exceptions to respond to those exceptions).

### FINDINGS OF FACT

1. Emmons was a Residential Services Supervisor who had a predetermination/liberty interest (name clearing) hearing held on August 24, 2012. After that hearing, he was terminated effective at the close of business on August 24, 2012 and notified of that fact via correspondence dated August 27, 2012. (See, e.g., Exhibit 4).
2. On September 4, 2012, Emmons submitted a written request to ECUA's Director of Human Resources and Administrative Services (hereinafter "HR Director") appealing disciplinary action taken against him in his employment with ECUA.
3. That same date, ECUA requested the services of an Administrative Law Judge (hereinafter "ALJ") from the Florida Division of Administrative Hearings ("DOAH") to conduct an evidentiary hearing and issue a Recommended Order to ECUA's Executive Director pursuant to the Administrative Law Judge Services Contract previously entered into between ECUA and DOAH.
4. DOAH assigned an ALJ to preside over the matter, who in turn issued a Notice of Hearing scheduling an evidentiary hearing to take place beginning at 10:00 a.m. on October 15, 2012 in ECUA's Board Room.
5. ECUA was present and ready to proceed with the evidentiary hearing at the appointed time and place, yet neither Emmons nor anyone acting on his behalf appeared. Furthermore, no one had heard from Emmons.

6. After waiting fifteen (15) minutes after the designated start-time for the hearing, neither Emmons nor anyone acting on his behalf had been heard from.

7. Thereafter, the ALJ called the hearing to order, and ECUA proffered witness testimony and admitted exhibits into the record. The record established the following:

a. Emmons was a Residential Services Supervisor in ECUA's Sanitation Department.

b. On March 28, 2012 Emmons was notified by a Sanitation Equipment Operator under his supervision that his truck (Truck #43B), had broken down. After Emmons arrived on the scene in ECUA Truck #11C, he went to sleep while on duty.

c. Emmons slept for approximately twenty to thirty minutes, and his vehicle, Vehicle #11C, was idling with the air conditioner on throughout this time.

d. While Emmons slept, an ECUA employee photographed him.

e. This was not the first time Emmons had slept while on duty; instead, in the Summer of 2011 Emmons was observed sleeping in his ECUA-assigned vehicle by another ECUA employee.

f. Furthermore, within the past twelve months Emmons was observed by ECUA employees reclined with his eyes closed for an extended period of time on two other occasions during the past twelve months.

g. Additionally, in 2010 a photograph of Emmons apparently sleeping on duty was brought to one of his superiors' attention. In this instance, Emmons was cautioned that it was completely unacceptable for a supervisor to be sleeping anywhere

at any time while on duty and that if this were to happen again disciplinary action would be imposed.

h. ECUA issued a written notice of predetermination hearing to Emmons on August 21, 2012 regarding contemplated disciplinary action for violations of Section B-13A(4) [Conduct Unbecoming an ECUA Employee], Section B-13A(18) [Loafing], Section B-13A(21) [Neglect of Duty], Section B-13A(25) [Sleeping on Duty], and Section B-13A(33) [Violation of ECUA rules or policies] of ECUA's Human Resources Manual.

i. Section B-37(A) of ECUA's Human Resources Manual additionally provides that ECUA employees shall avoid unnecessary vehicle idling and prohibits allowing a vehicle to idle solely to operate the air conditioner for the comfort of the vehicle's occupants.

j. Emmons knew of the above-referenced provisions of ECUA's Human Resources Manual by virtue of the fact that he had received it, as well as the fact that the substantive provisions of it applicable to his sleeping on duty had been previously discussed with at least one of his superiors.

k. Upon proper notice a predetermination hearing was held on August 24, 2012, and thereafter a written notice of disciplinary action was issued to Emmons on August 27, 2012 notifying him that his conduct violated Sections B-13A(4), (18), (21), (25), and (33) of ECUA's Human Resources Manual.

8. The hearing was closed at approximately 10:27 a.m.

9. Based upon a review of the record, the evidence shows that Emmons' conduct was violative of Sections B-13A(4) [conduct unbecoming an ECUA employee],

Section B-13A(18) [loafing], Section B-13A(21) [neglect of duty], Section B-13A(25) [sleeping while on duty], Section B-13A(33) [violation of ECUA rules or policies], and Section B-37 [vehicle and equipment idle reduction] of ECUA's Human Resources Manual. (See ECUA ex. 5, 6). The evidence further shows that you were aware of these provisions within the Human Resources Manual. (See ECUA ex. 7).

10. Two days later, on September 17, 2012, R. John Westberry, Esq., entered an appearance on behalf of Emmons and filed a Notice of Voluntary Dismissal on his behalf. In neither of these filings was any justification proffered for Emmons' having failed to appear at the scheduled evidentiary hearing. Additionally, good cause was not shown for Emmons' attorney having failed to appear at the hearing (although it is unclear whether the attorney had been retained at that time).

11. Nevertheless, on October 18, 2012 the ALJ rendered an Order Closing File ostensibly dismissing the matter.

#### CONCLUSIONS OF LAW

12. The Division of Administration Hearings had jurisdiction to conduct an evidentiary hearing and issue a Recommended Order in this proceeding pursuant to the Administrative Law Judge Services Contract entered into between ECUA and DOAH which became effective March 3, 2006. See, e.g., Administrative Law Judge Services Contract; Fla. Stat. § 120.65(7).

13. In pertinent part, that contract provides:

The ALJ will issue findings of fact and recommended conclusions of law to the Executive Director within thirty (30) days after the close of the hearing record. Based upon the findings of fact and recommended conclusions of law, the ALJ will determine whether the employee has committed the violation as charged, but the ALJ will not comment on, or recommend, any

disciplinary penalty.

14. Nowhere in the Administrative Law Judge Services Contract does it provide that the ALJ may dismiss the case after the close of the hearing. Moreover, nothing in that contract empowers the ALJ to take any final action in the matter, as the ALJ's authority merely extends to issuing findings of fact and recommended conclusions of law. As a result, I have deemed the ALJ's purported Order Closing File dated October 18, 2012 to be a Recommended Order.

15. In the instant case, Emmons requested an evidentiary hearing, but he failed to appear at the designated time and place for the hearing which he requested. Although Emmons sought to unilaterally dismiss his petition, he failed to do so until two days after the scheduled hearing date. He did not have the unilateral right to cancel that hearing after-the-fact without good cause, which he has clearly not shown here. See, e.g., John Ziolkowski v. Park Shore Landing Condominium Ass'n, Case No. 10-9509 (DOAH Mar. 8, 2011) (explaining that a party who fails to appear at a scheduled administrative hearing must demonstrate a reasonable excuse and good circumstances which prevented him from appearing); Lesia Patterson v. Panama City Housing Auth., Case No. 10-8661 (DOAH Oct. 21, 2010), adopted in Final Order 11-001 (FCHR Jan. 13, 2011); Crump v. Majestic Tower at Bal Harbour, FCHR Order No. 10-702 (FCHR Sept. 21, 2010); Bermudez v. Lake County Housing Auth., FCHR Order No. 10-041 (FCHR Apr. 27, 2010); Cowden v. Difiglio, FCHR Order No. 09-115 (FCHR Dec. 14, 2009); Scott v. Two Men and a Truck, FCHR Order No. 09-009 (FCHR Jan. 27, 2009); Prek v. Workforce Central Fla., FCHR Order No. 06-079 (FCHR Sept. 18, 2006). See also, e.g., Rule 28-106.210, Florida Administrative Code (indicating that a continuance must be

made at least five days prior to the noticed hearing, absent an emergency).

16. In the instant case, Emmons requested the hearing which he failed to attend. No good cause has been shown for that failure.

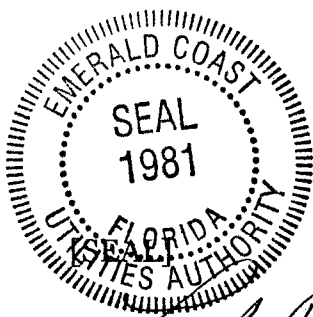
17. Petitioner prepared for that hearing and was present at the appointed time and place for that hearing, despite the fact that Emmons apparently had no intention of attending. It proffered testimony and offered exhibits which were received into evidence.

18. The only competent, substantial evidence presented at that hearing showed that Emmons' actions constituted violations of Sections B-13A(4), B-13A(18), B-13A(21), B-13A(25), B-13A(33), and B-37 of ECUA's Human Resources Policy Manual.

BASED ON THE FOREGOING, it is ORDERED:

That the termination of Respondent is appropriate and warranted. Accordingly, the termination of employment of Michael A. Emmons is hereby upheld and affirmed, and he shall go forth without day.

DONE AND ENTERED this 12<sup>th</sup> day of December, 2012.



Linda G. Iversen  
Executive Assistant  
to the Board

Stephen E. Sorrell, P.E., M.P.A.  
Executive Director  
Emerald Coast Utilities Authority



A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO A JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF ECUA, AND A SECOND COPY ALONG WITH FILING FEE AS PRESCRIBED BY LAW, WITH THE CIRCUIT COURT OF ESCAMBIA COUNTY. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

COPIES FURNISHED:

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