

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF CAPE CORAL,)
)
 Petitioner,)
)
 vs.) Case No. 12-3274
)
 JOHN ENRICO,)
)
 Respondent.)
 _____)

FINAL ORDER

Pursuant to notice to all parties, the final hearing was conducted in this case on November 28, 2012, in Cape Coral, Florida, before the Honorable R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gail G. Roberts, Esquire
City of Cape Coral
Post Office Box 150027
Cape Coral, Florida 33915-0027

For Respondent: John Enrico, pro se
2614 Southwest 32nd Street
Cape Coral, Florida 33914

STATEMENT OF THE ISSUE

The issue in this case is whether the discipline imposed on Respondent, John Enrico ("Enrico"), by Petitioner, City of Cape Coral (the "City"), was appropriate.

PRELIMINARY STATEMENT

This case is conducted by the Division of Administrative Hearings ("DOAH"), pursuant to an Administrative Law Judges Services Contract (Contract No. C-003) between the City and DOAH, as amended by way of an addendum dated September 12, 2007.

This case commenced with the issuance of a memorandum to Enrico from John Szerlag, City Manager, dated September 7, 2012, and entitled "Decision on Appeal of Disciplinary Action." The memorandum advised Enrico of the decision to impose discipline against him and of his right to appeal the decision, a right which Enrico exercised. Pursuant to the aforementioned contract, Enrico's request for an appeal was forwarded to DOAH for assignment of an Administrative Law Judge. The final hearing was held at the time and place set forth above.

Enrico had filed a Motion in Limine the week prior to the final hearing, but the time for the City's response had not yet run before the hearing commenced. Enrico argued his motion at final hearing; the City responded to the arguments. The motion sought to limit testimony, evidence, and witnesses at final hearing to a single issue, i.e., the tone or intent of the June 7, 2012, email, between Enrico and his supervisors. Then, throughout the final hearing, and in his proposed order submitted thereafter, Enrico addressed and utilized the very emails he sought to prohibit in his motion in limine. The

motion in limine was denied. Although the June 7, 2012, email was indeed the primary focus of proceeding, other testimony and evidence, however, was allowed for the purpose of showing background and context for the June 7, 2012, email.

At the final hearing, the City called three witnesses: Jeff Pearson, utilities director; Brian Fenske ("Fenske"), acting water reclamation superintendent; and Scott Slusser, human resources specialist. Fenske was also recalled as a rebuttal witness. Exhibits A, B, C, and Rebuttal Exhibit 1, offered by the City were entered into evidence. Enrico testified on his own behalf; his Exhibits 1 and 3 were entered into evidence. Enrico's Exhibits 2 and 4 were accepted as demonstrative exhibits only. Enrico's Exhibit 5 was not accepted into evidence.

The final hearing was recorded by way of a digital recorder. At the conclusion of the final hearing, copies of the recording were provided by the City to Enrico and the undersigned. Pursuant to the contract between the City and DOAH, DOAH has final order authority in these matters. Under the contract, a final order should be entered within 10 days of the final hearing. However, in this case, the undersigned gave the parties 10 days from the date of the final hearing to submit proposed orders (which were mistakenly called proposed recommended orders). The proposed orders were due on

December 10, 2012. The parties each timely filed a proposed final order, each of which was duly considered in the preparation of this Final Order.

FINDINGS OF FACT

Based upon the oral testimony and other evidence presented at final hearing, the following findings of fact were made:

1. The City has the authority to monitor and regulate its employees in accordance with the laws and rules of the State of Florida, the City Charter, and ordinances and rules promulgated thereto.

2. Enrico is employed by the City as an instrumentation supervisor in the Water Reclamation Division of the City's Utilities Department. He has been employed for an indeterminate number of years, but is a "director level" employee.^{1/}

3. The City suspended Enrico for one week without pay pursuant to the City of Cape Coral Code of Ordinances, Article III, Division 7, entitled Discipline of Regular Employees. (Pertinent sections of the Code of Ordinances are set forth in the Conclusions of Law, below.)

4. The alleged violation was primarily based on an email Enrico sent on June 7, 2012. The June 7 email was sent to Jeff Pearson and copied to Brian Fenske.

5. The June 7 email states in its substantive body:

Jeff and Brian,

As a courtesy, I am affording both of you a small glimpse into a potential future.

If you decide to discipline me regarding my communications outside of this department, please find below what is just the beginning of the resistance you will meet in public forums and otherwise.

As a friend, not as a contemporary [sic], I strongly advise you both not to pursue your current course of action, as it would be embarrassing and detrimental to the cities [sic] interests.

Please feel free to call me and discuss the matter.

Distinct Regards,

6. There was other information attached to the June 7 email, including some narrative by Enrico concerning his rationale for sending an earlier email, excerpts from OSHA regulations and the City Code, and other legal information about quasi-judicial matters, freedom of speech, and the International Covenant on Civil and Political Rights. It is not clear whether the additional information was supposed to be support for Enrico's actions, or a description of the "resistance" the email recipients could expect to meet in the future if they decided to discipline Enrico.

7. In order to better understand the June 7 email, some discussion of the background leading up to the email is necessary.

8. Early in calendar year 2012, the City began looking at a product called Multitrode. The product was to be used within the City's sewage system to, inter alia, control, monitor, or report data regarding usage. The system would have an impact on the equipment and services overseen by Enrico.

9. Enrico was directed by Fenske to install the program via email dated May 18, 2012. Enrico was apparently leaving for a two-week vacation just hours after he received the email. He attempted unsuccessfully to contact his superiors to express some concerns he had about how the Multitrode was going to be implemented. Enrico felt that the system had some potential to do harm to the water reclamation system if installed or used incorrectly. He was not able to reach his superiors.

10. Failing to reach his superiors, Enrico sent an email dated May 23, 2012, to Jody Sorrels, a civil engineer employed by the City.^{2/} The email was copied to Jeff Pearson, Brian Fenske, Dennis Morgan, Oliver Clark, Michael Hines, and Margaret Krym (the City Manager). Except for Krym, all of the recipients of the email were within Enrico's chain of command in his area of employment. Krym was intentionally copied on the email by Enrico because he wanted someone outside his chain of command to

know about his concerns. The Utilities Department did not report directly to the City Manager. Enrico had been disciplined previously for violating the chain of command protocols.

11. The May 23 email contained Enrico's reasons for why he did not think the Multitrode should be implemented. He did not believe the program was appropriate or the best use of the City's money. He was concerned that if implemented improperly, it might even cause significant problems for the wastewater system. The email suggests that it is in response to an earlier telephone conversation between Enrico and Sorrels.

12. Enrico's supervisors were concerned that Enrico had intentionally chosen to copy the City Manager on the May 23 email. Inasmuch as Krym was not within Enrico's chain of command and had no direct connection to the utilities department, the supervisors felt like Enrico was again attempting to circumvent protocol and create dissension within the City. As a result, the supervisors began to discuss what sort of discipline should be imposed against Enrico for sending the May 23 email.

13. After various discussions between Enrico and his supervisors, cooler heads prevailed. A meeting was held on June 19, 2012, wherein Enrico retreated from his stance and acknowledged the impropriety of sending an email to the City

Manager concerning issues outside her area of concern. During his testimony at final hearing, Enrico denied that he had acknowledged it was wrong to copy Krym on the email. The most persuasive evidence is that he did acknowledge his error. At the conclusion of the June 19 meeting, the participants shook hands and it was decided that no discipline would be imposed against Enrico. Enrico's acknowledgement of his error was a key reason for his superiors' decision not to impose discipline.

14. However, before the June 19 meeting, Enrico issued the June 7 email. That email followed a June 6, 2012, email, wherein Enrico notified Jeff Pearson that he needed to talk to Pearson concerning the Multitrode program. The June 6 email ended with Enrico stating, "I need a response (phone call) from you by 9AM EST today to discuss the matter, or I may be forced to escalate the issue appropriately." The June 7 email appears to be the escalation he warned Pearson about.

15. The June 6 email references "Mr. Sorrels [sic] unwarranted and unprofessional email response." Sorrels had sent an email to Enrico concerning Enrico's May 23 email. Sorrels' email included the statement, "I have neither the time nor inclination to entertain an email chain concerning your [Enrico's] metathesiophobia or ideophobia." Metathesiophobia is the fear of moving or making changes. The origin of the word meta is Greek (meaning to change), thes is Latin (meaning

setting) and phobia is Greek (meaning fear). Ideophobia is an anxiety disorder characterized by the irrational fear or distrust of ideas or reason. Enrico denied being afflicted with either condition.

16. On June 5, 2012, Enrico had responded to Sorrels, copying Pearson and Fenske on an email accusing Sorrels of libel and defamation. Enrico's email said that Sorrels' failure to verbally apologize and write a retraction of his statements by June 8 would result in Enrico referring the matter to the city attorney and his own attorneys to seek unspecified damages.

17. This exchange was followed by the aforementioned June 6 and June 7 emails. The June 7 email was apparently the last straw for Enrico's supervisors and they decided to impose discipline against him. After discussions with the human resources department and city attorney, the city manager approved a one-week suspension without pay as the appropriate sanction.

18. Enrico denies the June 7 email was intended as a threat, but that is how it was perceived by his superiors. The language in the email about the "beginning of the resistance you will meet," and telling his superiors that "I strongly advise you not to pursue your current course of action" are both, however, certainly threatening in nature. Though, Enrico said

that he did not threaten physical harm, thus there was no threat at all, his testimony is not persuasive.

19. In defense of his actions, Enrico claims the City violated his free speech rights under the United States Constitution, his fair labor practices rights under the State Fair Labor Law, and his rights under the Florida Whistleblower's Act, among other things. None of those defenses are germane to the issue in this proceeding, nor does DOAH have jurisdiction over those laws.

20. It is clear Enrico knows his area of employment and may have some legitimate concerns about the Multitrode system that was implemented. He may have personal feelings about the fiscal propriety of the City's use of the Multitrode system. Enrico may not particularly like his superiors. However, those feelings do not justify the use of threats.

CONCLUSIONS OF LAW

21. DOAH has jurisdiction over this matter based upon a contract between DOAH and the City of Cape Coral.

22. Pursuant to the contract and related City Code provisions, the final hearing shall be de novo in nature, and the City has the burden of proof by a preponderance of the evidence standard. The Administrative Law Judge shall issue a Final Order including findings of fact and conclusions of law.

City of Cape Coral Code of Ordinances, Article III, Division 7,
§ 2-32.5(c).

23. The determination to be made by the Administrative Law Judge is whether there is just cause for the discipline imposed.
Id.

24. The Code of Ordinances, Division 7 (Discipline of Regular Employees), further states, in pertinent part:

§ 2-31.1

No disciplinary action shall be taken against an employee with regular status without cause. Disciplinary actions, in increasing order of severity, shall consist of oral reprimand, written reprimand, suspension without pay, demotion, and dismissal.

§ 2-31.2

Generally, the city shall follow a policy of progressive discipline by which less severe forms of discipline are imposed prior to resorting to the imposition of more severe sanctions for the same or similar conduct by the employee. The city, however, reserves the right to impose even the most severe discipline as an initial measure when circumstances warrant.

§ 2-31.3

One or more of the following reasons shall constitute cause for disciplinary action:

* * *

(d) Insubordination;

(e) Serious breach of discipline;

* * *

(y) Insulting, inflammatory, or abusive language or conduct toward other city employees or toward members of the public while on duty;

* * *

(hh) Actions or conduct detrimental to the interests of the city; and

(ii) Any other properly substantiated cause which adversely affects the city.

25. The City provided uncontroverted testimony that Enrico had been previously disciplined for going outside his chain of command. The nature of the prior discipline was not disclosed. The proposed discipline in the present action follows the City's progressive discipline requirement.

26. The plain language of Enrico's June 7 email, especially when considering the not-so-veiled threat in the June 6 email, could reasonably be seen as insulting, inflammatory, and/or abusive in nature. Enrico clearly tells his superiors that "if you should decide to discipline me," then this is "just the beginning of the resistance you will meet." Enrico then cites to various legal and quasi-legal documents, seemingly in an effort to show what other "resistance" the City might face.

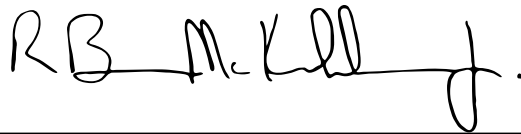
27. Though, as Enrico points out, he did not specifically threaten any bodily harm to an individual, the City proved by a

preponderance of the evidence that Enrico acted in a fashion that was both insubordinate and abusive. Further, his actions were detrimental to the interests of the City.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that cause exists for the suspension of Respondent, John Enrico, for one full work week without pay.

DONE AND ORDERED this 17th day of December, 2012, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of December, 2012.

ENDNOTES

^{1/} In his proposed final order, Enrico states that he has been employed since 2008, but there is no evidence in the record to support that fact.

^{2/} If Enrico received the email directing him to implement the system on May 18 and was leaving for vacation that very day, it is unclear why his email was written on May 23. This discrepancy was not clarified at final hearing.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.