

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALISHA FESSEL,

Petitioner,

vs.

Case No. 13-1549

CITY OF CAPE CORAL,

Respondent.

_____ /

FINAL ORDER

Pursuant to the agreement of the parties, no formal hearing was held in this case. Rather, the parties submitted the case for decision by Administrative Law Judge Lynne A. Quimby-Pennock based on a Stipulated Record filed on August 22, 2013, and submitted proposed final orders.

APPEARANCES

For Petitioner: Richard Siwica, Esquire
Egan, Lev and Siwica, P.A.
231 East Colonial Drive
Orlando, Florida 32801

For Respondent: Gail G. Roberts, Esquire
City of Cape Coral
1015 Cultural Park Boulevard
Cape Coral, Florida 33990

STATEMENT OF THE ISSUE

The issue in this case is whether the discipline imposed on Petitioner, Alisha Fessel, by Respondent, 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 letter to Petitioner, which advised Ms. Fessel of the decision to terminate her employment and provided her the ability to seek a review. On April 18, 2013, Ms. Fessel sought an appeal of the city manager's decision, and that appeal was forwarded to DOAH for assignment of an Administrative Law Judge.

A final hearing was scheduled for August 9, 2013; however, on August 8, 2013, the parties filed a joint motion seeking to cancel the hearing and requesting that the parties be allowed to submit the case on a stipulated record. Following a telephonic case conference, an Order Canceling Hearing was issued, and the parties were directed to submit the stipulated record on or before August 22, 2013. The Stipulated Record was filed on August 22, 2013. Included with the Stipulated Record were two exhibits.^{1/} Exhibit 1 was a copy of Article III, Personnel Rules and Regulations of the City's Code of Ordinances. Exhibit 2 was a copy of the agreement between the International Union of Painters and Allied Trades AFL/CIO- District Council #78, Local Union 2301 (representing the "Blue Collar" Unit) (the Union), and

the City of Cape Coral, Florida, dated October 1, 2009, through September 30, 2011.^{2/} Thereafter, the parties were ordered to file proposed final orders on or before Friday, September 6, 2013. Respondent filed its proposed final order on September 5, 2013. That same day Petitioner filed an "Unopposed Motion for a One Day Extension of Time to File Proposed Final Order." The motion was granted, and Petitioner filed her proposed final order on September 9, 2013. Each has been considered in the preparation of this Final Order.

FINDINGS OF FACT

Based on the Stipulated Record, the following Findings of Fact are 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 under the Charter.

2. Ms. Fessel was employed by the City as an administrative secretary in the City's Police Department, and she was a member of the Union.

3. Ms. Fessel had been counseled and disciplined on several occasions regarding her work performance and behavior pursuant to the City's personal rules and regulations as codified in the City of Cape Coral Code of Ordinances and the Cape Coral Police Department General Orders.

4. All disciplinary proceedings against Ms. Fessel were initiated under the City of Cape Coral Code of Ordinances, Chapter 2, Article III, Division 7, entitled, Discipline of Regular Employees, and pursuant to the collective bargaining agreement between the City and the Union.

5. On September 30, 2011, Ms. Fessel was placed on a 120-day performance improvement plan.

6. On November 2, 2012, Ms. Fessel was suspended for 40 hours.

7. On March 7, 2013, Ms. Fessel was placed on administrative leave with pay.

8. On March 12, 2013, Ms. Fessel remained on paid administrative leave while the City conducted a pre-disciplinary hearing.

9. On April 18, 2013, Ms. Fessel's employment with the City was terminated.

10. The parties have stipulated:

The underlying discipline is not being challenged; rather, Petitioner [Ms. Fessel] contends that the suspension with pay during the period March 7, 2013[,] up to and including April 18, 2013, constituted disciplinary action barring any further discipline (i.e., Fessel's termination on or about April 18, 2013) for the same actions.

CONCLUSIONS OF LAW

11. DOAH has jurisdiction over this matter based upon a contract between DOAH and the City of Cape Coral. Pursuant to the contract and related City Code provisions, 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, Div. 8, § 2-32.5(h).

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

13. 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:

(a) Incompetence or continued rendering of unsatisfactory service after instruction and/or counseling;

(b) Gross neglect of duty or specific serious failure to perform assigned duties.

14. The Code of Ordinances, Division 11 (Attendance and Leave), further states, in pertinent part:

§ 2-35.12 Administrative Leave

The City Manager may grant an employee up to a maximum of 60 days of paid leave per fiscal year when the City Manager believes said grant to be in the city's best interest.

15. The parties stipulated that Ms. Fessel had been "counseled and disciplined on several occasions regarding her work performance and behavior." Further, the parties stipulated that Ms. Fessel "was placed on administrative leave with pay on March 7, 2013." (emphasis added).

16. The City met its burden of proof by a preponderance of the evidence. The stipulated evidence proves that Ms. Fessel was placed on administrative leave with pay and, thereafter, terminated. There was no discipline imposed until the termination of her employment.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that just cause exists for the employment termination of Ms. Fessel.

DONE AND ORDERED this 13th day of September, 2013, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of September, 2013.

ENDNOTES

^{1/} Although both parties indicate that "all the Exhibits included in the City's Referral of Fessel's appeal to DOAH" were "attached to and incorporated in the Stipulated Record as Exhibits," such is not accurate. The only two exhibits "[a]ttached to and incorporated in the Stipulated Record" are listed.

^{2/} The parties agreed this was the agreement in effect during the time of this incident.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order may apply to the local circuit court for judicial relief within 30 days after rendition of the final order by the hearing officer. The proceedings in circuit court shall be commenced by the filing of a petition for writ of certiorari. City of Cape Coral Code of Ordinances, Article III, Division 8, § 2-32.5(i).