

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

EMERALD COAST UTILITIES  
AUTHORITY,

Petitioner,

vs.

Case No. 15-1889

JEROME BESS,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy in Pensacola, Florida, on August 4, 2015.

APPEARANCES

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

For Respondent: Jerome Bess, pro se  
9871 Guidy Lane  
Pensacola, Florida 32514

STATEMENT OF THE ISSUE

Whether Respondent committed the actions of conducting personal business during his scheduled work time for Petitioner as charged in the agency action letter dated March 24, 2015.

PRELIMINARY STATEMENT

By letter dated March 24, 2015, Petitioner, Emerald Coast Utilities Authority (ECUA), notified Respondent, Jerome Bess (Respondent), of its intention to terminate his employment as a Utility Service Technician III. Respondent timely filed a request for a hearing to challenge ECUA's decision. In accordance with the terms of the "Administrative Law Judge Services Contract" (the Contract), entered into between ECUA and the Division of Administrative Hearings (DOAH), ECUA forwarded the request for hearing to DOAH, which scheduled and conducted the hearing.

On April 22, 2015, Jamison Jessup (Jessup) filed a request to be recognized as Respondent's Qualified Representative. This request was granted on May 4, 2015. On July 8, 2015, approximately one month before the scheduled hearing, Jessup filed a Notice of Withdrawal. No request for continuance was made prior to the hearing.

At the final hearing, which took place as scheduled on August 4, 2015, ECUA called nine witnesses: Susan Colon, Communications Coordinator; Perry White, Senior Utility Service Technician (UST); Michael Garrison, UST Trainee; Marion "Bud" Watson, UST; James "Walter" Williams, UST; Jeremy Williams, UST II; Chris Ochampaugh, UST; Cynthia Sutherland, Director of Human Resources and Administration; and Earnest Dawson, Director of

Regional Services. ECUA's Exhibits 1 through 10 were admitted into evidence. Respondent testified on his own behalf and called E.J. Culpepper, a retired ECUA Lift Station Operator. Culpepper, identified as a Baptist preacher, was also present during the proceedings at the request of Respondent and was permitted to advise Respondent during the final hearing. Respondent offered no exhibits.

Official recognition was taken of specified portions of the Florida Statutes, as requested by ECUA. A digital audio recording was made of the proceedings and provided to Respondent and to the undersigned immediately after the conclusion of the final hearing.

Unless otherwise indicated, all statutory references are to the versions in effect at the time of the alleged violations.

#### FINDINGS OF FACT

1. ECUA provides water, wastewater, and sanitation services to customers in Escambia and Santa Rosa counties. ECUA is considered a quasi-governmental agency, and therefore, its employees enjoy procedural due process rights with regard to their continued employment.

2. As set forth in the "Human Resources Manual & Employee Handbook" (Handbook), non-exempt and non-key employees of ECUA who face possible termination are entitled to notice of the allegations against them and a pre-determination hearing

conducted by ECAU. If an employee is dissatisfied with the outcome of the pre-determination hearing, the employee is entitled to a hearing before DOAH after making a timely request. The parameters of the hearing are governed by the Contract entered into between ECUA and DOAH in accordance with section 120.65, Florida Statutes.

3. Respondent was employed with ECUA for approximately 17 years as a UST which is a non-exempt, non-key employee position. He was terminated from his position of UST III effective March 23, 2015.

4. As a UST III, Respondent's job duties on the 3:00 p.m. to 11:00 p.m. (3-11) shift included responding to reported water leaks and repairing them, and responding to calls to "turn back on" (TBO) service for customers who have been disconnected from their water service. When working on the leak truck or TBO truck, Respondent served as the lead worker on the two-man truck crew due to his years of experience and license.

5. The 3-11 shift has no scheduled break for lunch. However, those working on this shift as UST's on the leak or TBO trucks are permitted to take brief stops to purchase a meal to go or use the restroom.

February 20, 2015, Incident

6. On Friday, February 20, 2015, Respondent was assigned to work the leak truck on the 3-11 shift with Michael Garrison

(Garrison), a UST Trainee who had been employed with ECUA for approximately two months. Respondent was the lead employee on the truck and supposed to provide supervision and direction to Garrison.

7. At approximately 5:30 p.m., Garrison and Respondent discussed driving through McDonald's around 7:00 p.m. to pick up dinner. Shortly thereafter, Respondent directed Garrison to drive them to DeLuna Lanes bowling alley on Nine Mile Road. There was no pending service call at the bowling alley. Respondent told Garrison he wanted to stop to check on "his girls," referring to his bowling team. Respondent indicated he would only be a few minutes and he took the ECUA radio with him into the bowling alley at approximately 6:00 p.m.

8. At 6:20 p.m., Susan Colon (Colon), a dispatcher in ECUA's Supervisory Control and Data Acquisition department (SCADA), received a request for a service call to repair a water leak. Colon tried to reach the leak truck on its ECUA issued radio approximately six times, and each time the response showed the radio was unavailable or off. After being unable to reach the leak truck by radio, Colon attempted to contact Respondent on his personal cell phone for approximately an hour. When she called, the cell phone put her into Respondent's voice mail and she left a message for him to return her call to handle a service call.

9. After no success contacting Respondent, Colon called Walter Williams (Williams) who she believed was working with Respondent that night. Williams advised that it was his day off. Colon next telephoned Perry White (White), the UST Supervisor for the East Region, who advised her to contact the TBO truck to handle the leak.

10. White called Garrison's personal cell phone at 7:05 p.m. and asked his location. Garrison reported that he was in the truck outside the bowling alley on Nine Mile Road and had been there since approximately 6:00 p.m. White told Garrison to stay at that location until White arrived.

11. In the meantime, Colon received a call for service at a leak at another location at approximately 7:20 p.m. She again tried to reach Respondent on his radio and cell phone without success. Respondent returned the call to Colon at approximately 7:25 p.m. after exiting the bowling alley and told Colon that his radio was dead. A few minutes later, Respondent returned to the leak truck. Garrison advised Respondent that White was on his way and that, "this is not good." Respondent said that it was all right and that he intended to tell White that he was eating at the bowling alley.

12. When White arrived at approximately 7:30 p.m., he immediately placed Respondent on paid administrative leave.

White had verbally counseled Respondent only two days prior regarding the need to timely respond to radio calls.

13. Earlier on that same shift, Respondent had Garrison drive him two times to a Dodge dealership where Respondent discussed the purchase of a personal vehicle. Both stops took approximately 25 minutes combined.

#### Initial Investigation

14. The February 20 incident was referred to Human Resources Manager Stella Holland (Holland) for investigation. When Holland initially interviewed Respondent regarding the incident, Respondent told Holland that he and Garrison arrived at the bowling alley around 6:30 p.m. Several days later, Respondent retracted the statement and told Holland that he arrived closer to 7:00 p.m. Respondent's explanation, that he went into the bowling alley briefly to collect money from a bowling teammate and get something to eat, was inconsistent with Garrison's statement that he was left alone in the truck at the bowling alley for more than an hour while waiting for Respondent, and inconsistent with Colon's repeated unsuccessful attempts for more than an hour to reach Respondent.

15. During ECUA's initial investigation, other similar situations, of Respondent running personal errands during scheduled work time in the prior two weeks, came to light.

16. On February 10, 2015, while working the 3-11 shift with co-worker Bud Watson (Watson), Respondent went to his house for 30 minutes to meet his girlfriend. Respondent did not request leave or receive approval from his supervisor to conduct this personal business on ECUA time.

17. On February 11, 2015, while working the 3-11 shift on the TBO truck, Respondent took the ECUA radio and went to the bowling alley for one hour leaving Watson in the ECUA vehicle while TBO work orders were pending. Respondent was not authorized to go to the bowling alley and to conduct this personal business on ECUA time. Watson did not like being in the ECUA truck because the truck has a large ECUA emblem and anyone could call ECUA and report the truck "being in the wrong place at the wrong time."

18. On February 12, 2015, Respondent took a one-hour lunch break at Kentucky Fried Chicken. Employees working the 3-11 shift do not get a designated lunch break but are allowed to stop and pick up food provided they are readily available to respond to calls as needed.

19. On February 17, 2015, while working the 3-11 shift with Williams, Respondent told Williams he wanted to run by Liberty Lanes bowling alley. Respondent and Williams arrived at Liberty Lanes at approximately 7:00 p.m. Williams remained in the ECUA truck while Respondent went inside the bowling alley. Respondent



did not return until 7:30 p.m. During this time, service calls were pending. Williams was concerned because he knew that White had talked to Respondent earlier that same day about promptly responding to radio calls.

20. As a result of the initial investigation, on March 2, 2015, Ernest Dawson (Dawson), Director of Regional Services, issued Respondent a written Notice of Predetermination/Liberty Interest (name clearing) Hearing (NOP). This NOP detailed ECUA's findings with regard to the February 20 incident, summarized additional incidents of Respondent conducting personal business during work time, identified the alleged policy violations committed by Respondent, indicated Dawson's intent to recommend an 80-hour suspension without pay, and advised of a pre-determination hearing scheduled for March 4, 2015.

#### Supplemental Investigation

21. Later that same day, Cindy Sutherland (Sutherland), Director of Human Resources and Administration, called Respondent to advise that due to the discovery of information regarding additional misconduct, the pre-determination hearing was postponed.

22. The subsequent investigation revealed a long standing pattern and practice of Respondent conducting personal business while on ECUA's time and using ECUA's vehicle.

23. These personal activities included: multiple stops at three different bowling alleys; multiple stops at Respondent's home; multiple stops at the home of a female acquaintance of Respondent; several stops at two local Walmart stores; and a stop at a local bank downtown to obtain a loan. On each of these occasions, Respondent either drove or requested his co-worker to drive him in the ECUA truck to the desired location to conduct his personal business on ECUA time. Each time Respondent frequented these unauthorized locations, his assigned co-worker would remain in the truck. Respondent's assigned co-workers were unaware of what business he was conducting at these locations but it was not business for ECUA. The time spent conducting personal business at these locations by Respondent would range from 15 minutes to more than one and a half hours.

24. On all of these occasions, Respondent was expected to, and should have been, performing his assigned ECUA duties and responsibilities. If the truck to which Respondent was assigned had no pending work orders, Respondent should have checked with the other truck and dispatch to determine whether additional work was available. If no additional work orders were waiting, Respondent should have returned back to ECUA to clean the truck and wait for further work instructions.

25. Respondent was aware from multiple Region East meetings that ECUA vehicles should not be seen in places not authorized by the work assignments designated for the vehicle.

26. As a result of the findings of the supplemental investigation, Respondent was issued an Amended NOP by letter dated March 10, 2015. This letter advised Respondent that his predetermination hearing was rescheduled for March 13, 2015. Further, the letter notified Respondent that he was charged with the following violations: section B-13 A (4) (conduct unbecoming an ECUA employee), section B-13 A (9) (excessive tardiness), section B-13 A (17) (leaving the workstation without authorization), section B-13 A (18) (loafing), section B-13 A (19) (unauthorized use of the ECUA property or equipment), section B-13 A (21) (neglect of duty), and a section B-13 A (33) (a violation of the ECUA rules or guidelines or state or federal law), of ECUA's Handbook. Respondent was also advised that termination of his employment was recommended.

27. Respondent requested and was granted a continuance of the predetermination hearing until March 17, 2015.

#### Respondent's Explanation

28. Throughout the course of the investigation and during the predetermination hearing, Respondent consistently argued that the alleged incidents of misconduct were not serious because, "everybody does it." However when asked to identify the co-

workers he believes engaged in similar conduct, Respondent refused to do so. Respondent's position is that if there were no pending work orders, USTs were free to run any personal errands while on ECUA time and in its vehicles.

29. Although Respondent admitted repeated stops at the bowling alleys, his own home, his girlfriend's residence, Walmart, and the Dodge dealership, Respondent initially claimed that these were brief restroom or meal breaks. Respondent later acknowledged that he went to the bowling alleys to watch his teams bowl and conduct personal business with his teammates and bowling alley employees.

30. Significantly, Respondent received a one-day suspension on November 22, 2013, for taking an excessive lunch break on October 25, 2013, to attend a retirement party of another employee from a different department without authorization. On October 25, 2013, Respondent took additional time to go to the bank for his personal business without authorization and as a result of spending excess time at the retirement party and on personal business, Respondent only completed ten of the 37 work orders assigned to him that day.

31. Respondent regularly ran personal errands on ECUA time regardless of whether work orders were pending, whether his co-workers objected or expressed concern, and after receiving discipline for doing the same. Accordingly, Respondent's

explanation, that he believed he could run any personal errand he wanted while on ECUA time, as long as no work orders were pending, is simply not credible.

32. After the predetermination hearing on March 17, 2015, Respondent was provided a written summary on March 24, 2015, of ECUA's determination that he violated the above-cited policies and that he was terminated effective March 23, 2015. Respondent timely requested a hearing before DOAH.

33. At the final hearing, Respondent argued that other USTs also ran personal errands on ECUA time. In fact Garrison, a relatively new employee admitted that he made a stop to buy milk and drop it home for his baby, a stop home to grab coffee, and a stop at his old address to pick up mail. However, Garrison explained he only made such personal stops when riding with Respondent because Respondent's behavior led him to believe it was fine when they were together. Garrison did not make personal stops when working with other co-workers.

34. Watson has stopped at the Tom Thumb convenience store or Walmart while working to use the restroom or get a drink. He has not stopped for personal business other than when taking an authorized lunch break on the 7:00 a.m. to 3:30 p.m. shift.

35. Jeremy Williams ran a personal errand on ECUA time on one occasion. He stopped at Academy Sports to buy an arm brace. The Director of ECUA happened to be in the parking lot and saw

the ECUA vehicle. Jeremy Williams received a three-day suspension without pay for this incident.

36. The overwhelming credible evidence at the final hearing was that no one, other than Respondent, has engaged in an ongoing pattern and practice of making routine stops for personal business (except for comfort breaks, which are authorized) while working for ECUA and using an ECUA vehicle.

#### CONCLUSIONS OF LAW

37. DOAH has jurisdiction over the parties and the subject matter of these proceedings pursuant to sections 120.65(6) and 120.57(1), Florida Statutes.

38. As the party asserting the affirmative of a factual issue, ECUA has the burden of proof in this case to demonstrate by a preponderance of the evidence that Respondent engaged in the violations cited in the agency action letter dated March 24, 2015. Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977); see also, the Contract, ¶ 7(j).

#### Applicable ECUA Handbook Provisions

39. The terms and conditions of Respondent's employment with ECUA are governed by the Handbook, a copy of which was received by Respondent on June 25, 2012. The disciplinary guidelines, which provide examples of offenses which may lead to termination, are described in section B-13 of the Handbook.

40. Respondent's routine of making personal stops while on work time and using an ECUA vehicle, constitutes a violation of section B-13 A (4), conduct unbecoming a ECUA employee. Being parked at a bowling alley while conducting personal business for an hour and a half on February 20, 2015, while leaving a trainee in the vehicle, not responding to service calls, with the ECUA truck in clear view of the public, is an egregious example of conduct unbecoming an employee. Unfortunately, this was not a one-time occurrence but a habit maintained by Respondent, despite a corrective action regarding similar behavior, and reminders from his supervisor and co-workers that this was unacceptable.

41. Respondent's repeated failure to return from permitted comfort breaks in a timely manner constitutes a violation of section B-13 A (9), excessive tardiness. Again, this was not a one-time occurrence but happened on multiple occasions when Respondent ran personal errands lasting anywhere from 15 minutes to an hour and a half.

42. Section B-13 A (17) prohibits leaving a work station without authorization. While working for ECUA, as a UST, Respondent's "work station" was the truck to which he was assigned for a particular shift. At no time were stops at bowling alleys, Walmart, a girlfriend's house or other commercial establishments, other than for a brief comfort break, authorized. Accordingly, Respondent violated this policy.

43. Loafing is prohibited by section B-13 A (18). Loafing is the act of being idle or lolling. While engaged in personal business or on personal errands, Respondent was not productive as a UST, the position for which he was being paid. The extensive unauthorized breaks enjoyed by Respondent did not result in any productive work for the rate payers of the counties served by ECUA. Respondent engaged in loafing in violation of section B-13 A (18).

44. Respondent's violation of section B-13 A (19), unauthorized use of ECUA property or equipment, is self-evident. Respondent had no authorization to use ECUA vehicles for personal errands.

45. Similarly, it is common sense that an employee who chooses to take care of personal business, rather than productive work for his employer while on the employer's time, is guilty of neglect of duty. Respondent's actions on numerous occasions, whether or not there were pending work orders at the time of Respondent's personal stops, constitute neglect of duty. Respondent made no effort to seek productive work to stay engaged during his paid workday. Respondent violated section B-13 A (21), neglect of duty.

46. Section B-13 A (33) prohibits employees from violating ECUA rules or guidelines, or state or federal law. The above-



cited infractions all constitute a violation of ECUA's rules and guidelines.

47. Respondent's explanations for his admitted actions, that it was part of the "culture" for "everyone" to make personal stops, or that he had a "target" on his back because he expressed a desire to become supervisor, were not supported by credible evidence and are specious at best.

48. No rational employer would allow employees who are on the clock to drive around town for personal business at the employees' complete discretion. Considerations of possible liability for workers' compensation claims and negligence actions alone would preclude such a "culture." ECUA, because of past negative publicity regarding employees parking ECUA trucks at commercial establishments when no work order for that location was pending, is particularly sensitive to this exact issue. The only "culture" of USTs engaging in personal business on ECUA time developed with those who worked with Respondent as their lead and saw him do it on a regular enough basis that they believed such stops were approved when with Respondent.

#### RECOMMENDATION<sup>1/</sup>

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Executive Director of Emerald Coast Utilities Authority find that the Respondent violated section B-13 A (4) (conduct unbecoming an ECUA employee),

section B-13 A (9) (excessive tardiness), section B-13 A (17) (leaving the workstation without authorization), section B-13 A (18) (loafing), section B-13 A (19) (unauthorized use of the ECUA property or equipment), section B-13 A (21) (neglect of duty), and a section B-13 A (33) (a violation of the ECUA rules or guidelines or state or federal law), of ECUA's Handbook.

DONE AND ENTERED this 20th day of August, 2015, in Tallahassee, Leon County, Florida.



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MARY LI CREASY  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 20th day of August, 2015.

ENDNOTE

<sup>1/</sup> The Contract, paragraph 7(1), specifies that the Administrative Law Judge "will determine whether the employee has committed the violation as charged, but the ALJ will not comment on, or recommend, any disciplinary penalty."

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.