

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF CAPE CORAL,

Petitioner,

vs.

Case No. 16-2590

AUDIE LEWIS,

Respondent.

_____ /

FINAL ORDER

John D.C. Newton, II, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing in this matter on October 26, 2016, by video teleconference in Tallahassee and Fort Myers, Florida.

APPEARANCES

For Petitioner: Gail G. Roberts, Esquire
Steven D. Griffin, Esquire
City of Cape Coral
1015 Cultural Park Boulevard
Cape Coral, Florida 33990

For Respondent: Jerry Brian Von Gruben, Esquire
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3721 Kemper Street
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STATEMENT OF THE ISSUE

A. Did the Respondent, Audie Lewis, violate the Petitioner, City of Cape Coral's (Cape Coral), End User Computing Policy and ordinances of Cape Coral prohibiting an employee from

unauthorized use of equipment and conduct detrimental to the interest of the city?

B. If he did, what discipline is proper?

PRELIMINARY STATEMENT

By letter dated April 20, 2016, Cape Coral told Mr. Lewis that it intended to terminate his employment. Mr. Lewis requested a formal administrative hearing to contest this action. Cape Coral referred the dispute to DOAH for conduct of the hearing. The hearing was scheduled for July 21, 2016. After two continuances the undersigned conducted the hearing on October 26, 2016.

Cape Coral presented testimony from Kimberly Bruns, Ryan Irving, Elizabeth Merriken, and John Szerlag. Cape Coral Exhibits 1 through 14 were admitted. Mr. Lewis's Exhibits 1 and 2 were admitted. Mr. Lewis did not offer any testimony. The parties were provided an opportunity to file proposed recommended orders.

The parties ordered a transcript. Cape Coral moved for an extension of time for filing proposed recommended orders. The motion was granted. Cape Coral timely filed a proposed recommended order. Mr. Lewis did not file a proposed recommended order.

FINDINGS OF FACT

1. At all times material to this case, Cape Coral employed Mr. Lewis as a business recruitment specialist in the City's Economic Development Office. Until this matter, Mr. Lewis was a satisfactory employee. He has no history of discipline.

2. The city manager is responsible for deciding whether to terminate the employment of Cape Coral employees who are not supervised by a city department director. Mr. Lewis did not work in an office with a department director. Consequently he was under the supervision of the city manager.

3. Chapter 2, section 2-31.1 of Cape Coral's Code of Ordinances states that employees may only be disciplined for cause. It also establishes progressive discipline as the usual practice. But chapter 2, section 2-31.2 states: "The city, however, reserves the right to impose even the most severe discipline as an initial measure when circumstances warrant." Cape Coral's Administrative Regulation 46 (AR-46) page 3(J) states that every computer user must comply with all applicable policies. It cautions: "Non-compliance may result in disciplinary action up to and including discharge."

4. On April 20, 2016, the city manager terminated Mr. Lewis's employment pursuant to chapter 2, section 2-31.3 of the Code of Ordinances and AR-46, the City's End User Computing Policy. The relevant part of the Code section states:

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

* * *

(t) Unauthorized use of city personnel services, supplies, property, facilities, or equipment;

* * *

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

5. In pertinent part, AR-46, page 6(E), states:

Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by email or other form of electronic communication or displayed on or stored in the City's computers including, but not limited to, messages and material with sexual comments, obscenities, pornography, abusive or degrading language, antisocial behavior, or inappropriate comments concerning race, color, religion, sex, national origin, marital status, or disability. Any message received that contains intimidating, hostile, or offensive material should be reported immediately to management so that appropriate measures can be taken.

6. The End User Computing Policy prohibits use of the internet to view or download material that contains pornography or that is sexually explicit. Mr. Lewis knew of the policy contained in AR-46.

7. The city manager based Mr. Lewis's termination on "[u]nauthorized use of city personnel services, supplies,

property, facilities or equipment," "[a]ctions or conduct detrimental to the interests of the city," and "[v]iolation of Administration Regulation 46 End User Computing Policy."

8. Cape Coral maintains a "zero tolerance" policy for pornography. This is a core part of Cape Coral's commitment to a culture of professionalism. One reason for the policy is that the proximity of computer users to each other means one user's display of pornographic images may be viewed by other users.

9. On March 9, 2016, Cape Coral's "Intrusion Prevent/Detection System" alerted the Information Technology Services Department (ITS) that city computer "cm5465" was connected to a web server possibly associated with adult content. The alert cautioned that the connection may lead to a malware infection and recommended checking the computer to ensure it had not been compromised. The computer was assigned to and used by Mr. Lewis. There is no persuasive evidence that others used the computer.

10. On March 18, 2016, ITS' network security administrator, Elizabeth Merriken, sent the human resources director a memorandum advising her of the activity. Ms. Merriken attached a report generated by Checkpoint, a security system the city uses to monitor traffic to and from city computers through the firewall. The system also monitors URLs visited and compares them to lists of URLs for suspect sites, such as pornography

sites. It reported visits from Mr. Lewis's computer to 85 suspect sites. The system functions automatically and cannot be manipulated. The report covered traffic for Mr. Lewis's computer from March 7 through 10, 2016.

11. ITS duplicated the hard drive of Mr. Lewis's computer in order to analyze it and his internet activity. Ms. Merriken conducted a forensic analysis of the duplicate hard drive.

12. The analysis did not find any evidence of a virus or malware. An analysis using the forensic software program, "Magnet Internet Evidence Finder," found several pornographic items. It also found that a great deal of history had been deleted shortly after Mr. Lewis learned of the inquiry into his computer use. The analysis found over 100,000 pictures and more than 1,500 videos.

13. During March 8 and 9, 2016, Mr. Lewis's computer accessed pornographic websites approximately 85 times.

14. ITS contracted with DR Data Security, LLC (Data Security), to conduct further forensic analysis of the hard drive from Mr. Lewis's computer. Ryan Irving conducted the analysis for Data Security.

15. Mr. Irving conducted his analysis using standard forensic tools. They included SigCheck, Internet Evidence Finder 6.7, Winhex 18.7, IE Cache View, and SANS Investigative Forensic Toolkit 3.0. His analysis corroborated the report from the

City's analysis of March 8 and 9. It also identified similar activity between June and December of 2015. Mr. Irving recovered 54 images from Mr. Lewis's computer downloaded in December 2015. The images include topless women and nude women, alone and paired in sexually explicit poses.

16. The city manager notified Mr. Lewis of his intent to impose discipline. Cape Coral complied with its due process policies, providing Mr. Lewis notice of the charges against him and the evidence relied upon. It also gave him an opportunity to rebut or explain the information.

17. Mr. Lewis's statements during a pre-disciplinary interview acknowledging that he might have "accidentally" seen nude images while using Google to search for work-related subjects corroborate the reports of the images and visits to pornographic websites. The testimony that so many images would have been displayed "accidentally" is implausible; there is no expert testimony to support it and no testimony about what search subjects would have generated the images. A brief list of search terms and some of the sites visited demonstrates the implausibility of the "accidental visitation." They include: Debbie Davis Playboy Centerfold, images.playboy.com, teenpornmovies.ratedxblogs.com, lustfulpics.com, boobieblog.com, glamourcenterfolds.com, and spylove.com, interspersed with URLs for more prosaic sites, such as Amazon and Etsy.

18. After considering all of the information, the city manager issued a "Final Notice of Discipline" letter to Mr. Lewis, terminating his employment, stating the grounds for the termination, and advising Mr. Lewis of his right to seek review.

19. Mr. Lewis repeatedly used his city computer to view websites with pornographic images. This activity was an unauthorized use of city equipment.

20. Mr. Lewis used his city computer to display pornography.

21. Mr. Lewis used his city computer to intentionally view and download electronic material that contains pornography and was sexually explicit from the internet.

22. Mr. Lewis's activities, summarized in paragraphs 19 through 21, were willful.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties and subject matter pursuant to the contract between Cape Coral and DOAH and section 2-3.25(h) Code of Ordinances of the City of Cape Coral.

24. Cape Coral must prove its charges by a preponderance of the evidence. § 2-3.25(g), Code of Ordinances of the City of Cape Coral. "Preponderance of evidence is defined as evidence 'which as a whole shows that the fact sought to be proved is more

probable than not.' State v. Edwards, 536 So. 2d 288, 292 n.3 (Fla. 1st DCA 1988)." Dufour v. State, 69 So. 3d 235, 252 (Fla. 2011), see also Escambia Cnty. Elec. Light & Power Co. v. Sutherland, 61 Fla. 167, 193, 55 So. 83, 92 (1911).

25. Cape Coral met its burden. It proved that Mr. Lewis violated chapter 2, section 2-31.3 of the Code and the City's AR-46.

26. A key dispute in this case is whether Cape Coral may terminate Mr. Lewis's employment instead of imposing some lesser discipline in light of his employment history.

27. Viewing pornography on an employer's computer is just cause to terminate an employee, even if the employee does not have a history of discipline. Miami-Dade Cnty Sch. Bd. v. Epstein, Case No. 03-4041 (Fla. DOAH May 26, 2004; Miami-Dade Cnty. Sch. Bd. July 19, 2004). In this case, Mr. Lewis repeatedly visited pornographic websites and viewed pornographic images. Treating this as a case involving one offense does not square with the facts. This is one disciplinary action for multiple violations of Cape Coral's Code and policies. The fact that Mr. Lewis had to repeatedly type terms such as "playboy," "porn," and "lustful" to reach the sites demonstrates willful violation of the rules. There is also no uncertainty or ambiguity in the prohibitions that Mr. Lewis violated. Terminating Mr. Lewis's employment is reasonable. Cape Coral has just cause to terminate Mr. Lewis.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned finds just cause for Petitioner, City of Cape Coral, to terminate the employment of Respondent, Audie Lewis.

DONE AND ORDERED this 25th day of January, 2017, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of January, 2017.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

Chapter 2, Division 8, section 2-32.5(i), City of Cape Coral Ordinances, provides that "[a]ny party who is adversely affected by the final order of the [Administrative Law Judge] may apply to the local circuit court for judicial relief within 30 days after rendition of the final order by the [Administrative Law Judge]. The proceedings in circuit court shall be commenced by the filing of a petition for writ of certiorari."