

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF CAPE CORAL,

Petitioner,

vs.

Case No. 16-3854

HEATH CURRIER,

Respondent.

_____ /

FINAL ORDER

Pursuant to notice, a final hearing in this cause was held in Fort Myers, Florida, on October 20, 2016, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Robert Barry Burandt, Esquire
Roosa, Sutton, Burandt,
Adamski, and Roland, LLP
1714 Cape Coral Parkway, East
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STATEMENT OF THE ISSUE

Whether Respondent Heath Currier committed the violations alleged in the Final Notice of Discipline, and if so, the appropriate discipline that should be imposed.

PRELIMINARY STATEMENT

On or about May 5, 2016, City of Cape Coral (Petitioner), through Donald K. Cochran, fire chief/emergency management director, served on Heath Currier (Respondent) a Final Notice of Disciplinary Action recommending therein Respondent's termination from employment. Respondent timely filed a request for administrative hearing, and this matter was referred to the Division of Administrative Hearings for a disputed-fact hearing. The disputed-fact hearing was held on October 20, 2016.

During the hearing, Petitioner offered the testimony of Michael Russell, Brian Lauer, Kenneth Ossowicz, Timothy Clark, Grant Stalions, Chad Johnson, Ryan Corlew, and Donald Cochran. Respondent testified on his own behalf and offered testimony from Steven Jobe. Joint Exhibits 1 through 15 were admitted into evidence, with Joint Exhibits 14 and 15 admitted post final hearing by agreement of the parties. (Joint Exhibit 14 and 15 are sections 101.07 and 101.11 of Cape Coral Fire, Rescue & Emergency Management Services Rules & Regulations). Petitioner offered no exhibits in addition to the Joint Exhibits. Respondent's Exhibits 5, 7, and 11 through 13 were admitted into evidence (Though not separately marked by Respondent, Respondent's Exhibits 5, 7, and 11 are contained within the Joint Exhibits).

A Transcript of the disputed-fact hearing was filed with the Division of Administrative Hearings on December 7, 2016.

Respondent's proposed final order was filed on December 20, 2016, and Petitioner's proposed final order was filed on December 22, 2016.

FINDINGS OF FACT

1. The fire chief, on behalf of the City of Cape Coral Fire Department, is responsible for terminating the employment of employees of the fire department.

2. At all times relevant to the this proceeding, Respondent was employed by Petitioner as a firefighter. The employment position that Respondent occupies is included in the positions covered by the collective bargaining agreement between Petitioner and the Cape Coral Professional Fire Fighters Local 2424 of The International Association of Fire Fighters (Union).

3. Petitioner has the authority to monitor and regulate its employees in accordance with the laws and rules of the State of Florida, the City of Cape Coral Charter, ordinances and rules promulgated thereunder, and the collective bargaining agreement between Petitioner and the Union.

4. According to the Joint Pre-Hearing Statement, "Article 7(d) (2) of the union contract states that employees are entitled to Notice of Intended Discipline" and, according to Respondent, "Heath Currier wasn't advised that his employment was being

terminated until after the fire chief's pre-disciplinary hearing." The referenced article of the union contract was not offered into evidence. However, chapter 2, division 7 of the City of Cape Coral Ordinances (division 7), was received into evidence and this ordinance sets forth Respondent's procedural disciplinary notice rights.

5. Section 2-31.4(b) of division 7 provides in part that "[w]hen disciplinary action against an employee with regular status is contemplated by the city, the department head shall provide the employee with written notice of the intended action(s)." Section 2-31.4(c) (6) provides further that "[i]n no event shall the discipline imposed be greater than that specified in the notice of proposed disciplinary action."

6. On or about December 22, 2015, Respondent received a notice of proposed disciplinary action from Petitioner which informed him that the fire chief was considering disciplinary action including, but not limited to, "written reprimand, suspension, demotion, and/or termination of employment with the City." Following the issuance of the notice of proposed disciplinary action, an investigation was conducted which resulted in the issuance of a final notice of disciplinary action which advised Respondent that his employment with the City of Cape Coral was being terminated "effectively immediately."

7. The notice of proposed disciplinary action provided Respondent with notice that termination of his employment with the City of Cape Coral was a possible consequence resulting from his alleged misconduct, and the notice was issued in accordance with the requirements of division 7.

8. Respondent, at the time of the occurrences that provide the basis for the instant action, was a seven-year member of the Cape Coral Fire Department, and, during all times relevant hereto, worked primarily in the department's division of operations. The fire department's division of operations is divided into two battalions, "fire north" and "fire south." Respondent was assigned to the fire south division.

9. The division of professional standards is another division within the fire department, and, during all times relevant hereto, was under the supervision of then special operations battalion chief Timothy Clark. Housed within the fire department's division of professional standards is the department's special operations unit, which includes the department's dive/rescue team. Mr. Clark, in his capacity as battalion chief for special operations, had the authority to direct fire department employees in matters related to dive/rescue operations.

10. To become a member of the dive/rescue team, a firefighter must go through a competitive process that, if

successfully completed, results in the firefighter receiving additional pay in the form of a wage supplement. Members of the dive/rescue team, according to Mr. Clark, must be proficient in the operation of dive-related equipment to the point of knowing the equipment "inside and out, upside down, sideways, backwards, eyes closed, [and] blindfolded." Respondent is a member of the department's dive/rescue team.

11. At some point (the exact date is not clear in the record), Respondent was assigned to the fire station where the dive/rescue team is located. The dive/rescue team is under the direct supervision of Ryan Corlew.

12. The dive/rescue team has regular training exercises which require members of the team to perform certain tasks so as to maintain operational efficiency. Mr. Corlew, when working with Respondent, determined that Respondent's knowledge of the operational aspects of some of the dive/rescue equipment was deficient and in need of remediation.

13. Special operations battalion chief Clark was informed of Respondent's problems with the dive/rescue equipment, and armed with this information, met with Respondent to discuss the issue. Mr. Clark explained to Respondent that he was displeased that Respondent was not as proficient with the dive/rescue equipment as he should be, and that he was placing Respondent on a non-punitive three-week remedial training program. Mr. Clark

"instructed [Respondent] at that time to work with the other guys in [his] station, the lieutenant, the engineer, the firefighters, all the divers there, to work with them and train with them and have them teach [you] so that when I come back in three weeks, [you will know] this stuff inside out . . . backwards . . . [and] blindfolded."

14. Respondent explained that after he was instructed by Mr. Clark to work with the other guys at his station, he repeatedly asked ("morning, noon, and evening") his lieutenant, Mr. Corlew, for training, and each time he was refused. According to Mr. Corlew, Respondent, while at the dinner table one night, asked if Mr. Corlew could personally train him, and Mr. Corlew, as Respondent's supervisor, told Respondent to first work with firefighters Stalions and Johnson, both of whom are extremely knowledgeable about the workings of the dive equipment.

15. Mr. Corlew went on to advise Respondent that he would personally work with him once firefighters Stalions and Johnson raised Respondent's proficiency with the equipment to an acceptable level. Firefighter Stalions testified that during this same discussion at the dinner table, he offered to train Respondent, but Respondent refused and said that he wanted to be trained instead by Mr. Corlew.

16. Respondent testified that "[e]very single day [he] would take all of the dive equipment out of the compartments,

disassemble it completely, reassemble it and do that at least twice a day." In an attempt to corroborate this testimony, Respondent called Steven Jobe as a witness. Mr. Jobe testified that he "didn't necessarily see [Respondent] putting [the dive equipment] together and taking it apart."

17. Although Mr. Clark told Respondent to be ready to demonstrate his proficiency three weeks from the time of their meeting, it was actually four weeks later when Mr. Clark again met with Respondent. During the follow-up meeting, Mr. Clark gave Respondent "a simple scenario that engine 2 had come back from a call, all the equipment was trashed and everything needed to be replaced." According to Mr. Clark:

I needed [Respondent] to go in the back room, get all the stuff together and assemble a dive setup, check it out and test it and make sure it was ready to go if a call came in. He fumbled through it. It took him a long time to put stuff together. He ultimately figured a couple things out throughout the process of elimination, but there was [sic] still some things that he had wrong.

He had the weights, they weren't properly in the BCs (undefined), which is a critical safety issue, because if you lose your weights on the call, it could cause you to bolt to the surface, which could cause injury to yourself or others. So by placing the weights improperly the way he did, to me was a huge [problem]. (Hearing transcript pg. 83).

Mr. Clark went on to explain that "once we were all done, like I said, he had some issues and I knew--it was obvious that he

hadn't done what I instructed him to do[,] [s]o I asked him at the time who he had worked with over the course of that four weeks."

18. Mr. Clark explained that he asked Respondent who he had trained with during the four-week period because if the individuals that remediated Respondent were performing at or near the same level as Respondent, then Mr. Clark believed that he had a larger issue of operational preparedness that he needed to address by personally retraining all concerned.

19. In response to Mr. Clark's request for names, Respondent told Mr. Clark "the only people that I've had consistently with me are two firefighters that I've worked with," named Johnson and Stalions.

20. Soon after meeting with Mr. Clark, Respondent sent the following text message to firefighters Johnson and Stalions:

Hey guys heads up, I just had my "non punative [sic] dive gear quiz" with [C]lark and I missed a few things. He asked who I had been working with and I reluctantly gave him your names after [C]orlew told him I never went to [M]edero for help. Not sure if there will be any fallout but I wanted to let you both know ahead of time.

21. Mr. Johnson credibly testified that he was surprised to have received the referenced text message from Respondent given that he had never been asked to, nor had he ever provided any type of training to Respondent.

22. Firefighter Stalions credibly testified that after receiving the text he spoke with Respondent and "told him I didn't appreciate being pulled into it because training wise, I didn't do any formal training with him and it kind of to me felt like he was looking for kind of some backup on it." Firefighter Stalions went on to explain that he had never trained with Respondent, but certainly would have had he been asked.

23. Because Respondent did not train with either firefighter Johnson or Stalions, Respondent lied to Mr. Clark when informing him that Respondent had trained with these individuals.

24. Respondent's poor performance on his remedial test, combined with the fact that not a single witness corroborated Respondent's testimony of having disassembled and reassembled the dive equipment twice a day, every single day, makes incredible his testimony regarding self-directed remedial training.

25. Respondent testified that he "did everything [he] thought [he] could do" to comply with Mr. Clark's directions and recommendations. Respondent's assertion is, however, belied by the evidence which demonstrates that Respondent did not train on the dive equipment with firefighters Madero and Johnson, and refused a direct offer from firefighter Stalions to assist Respondent with training. It was solely the fault of Respondent

that he did not secure remedial training as directed by Mr. Clark.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2016).^{1/}

27. Petitioner bears the burden of proving by a preponderance of the evidence that "the discipline ordered was for just cause." Chapter 2, Division 8, § 2-32.5(g), City of Cape Coral Ordinances.

28. "A 'preponderance' of the evidence is defined as 'the greater weight of the evidence,' or evidence that 'more likely than not' tends to prove a certain proposition." Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

A. Insubordination and Failure to Perform Tasks

29. The May 5, 2016, Final Notice of Disciplinary Action, charges Respondent with violating section 2-31.3(d) and (w) of the City Ordinance. Subsection (d) provides that "insubordination" shall be a cause for disciplinary action. Subsection (w) provides that the "[f]ailure or refusal to perform tasks properly assigned by any person in authority" shall also be cause for disciplinary action. The City Ordinance does not define any of the referenced terms.

30. According to Black's Law Dictionary, "insubordination" means the willful or intentional "[r]efusal to obey some order which a superior officer is entitled to give and have obeyed." Black's Law Dictionary 720 (5th ed. 1979). As applied to the instant case, the definition of insubordination also encompasses the provisions of section 2-31.3(w).^{2/}

31. Mr. Clark, in his capacity as battalion chief for special operations, had the authority to direct Respondent in matters pertaining to dive/rescue operations. Mr. Clark issued to Respondent the reasonable directive to "work with the guys at his station" so that they could elevate to an acceptable level Respondent's working knowledge of the dive/rescue equipment. The evidence establishes that Respondent did not train with any of his colleagues as instructed, that he specifically refused a direct offer of assistance from firefighter Stalions, and he lied to Mr. Clark about having trained with firefighters Johnson and Stalions. These actions and omissions by Respondent show that he acted intentionally when refusing to comply with Mr. Clark's directive. Petitioner has met its burden with respect to these allegations.

B. Conduct Unbecoming a Public Employee

32. The May 5, 2016, Final Notice of Disciplinary Action, also charges Respondent with engaging in conduct unbecoming a public employee in violation of section 101.07, Cape Coral Fire,

Rescue & Emergency Management Services Rules & Regulations. The provision of section 101.11 dealing with conduct unbecoming a public employee provides as follows:

Public employees are held to a higher standard than the general population and as such shall not engage in actions that reflect unfavorably, cause embarrassment or are damaging to the CCFD and/or the City of Cape Coral. Members are representative of the City of Cape Coral both on and off duty.

33. The evidence establishes that Respondent lied to Mr. Clark about having trained with firefighters Johnson and Stalions, and then exacerbated the situation by texting Johnson and Stalions about the possibility of some "fallout" when neither of these individuals had anything to do with Respondent's sub-par performance on his non-punitive remediation quiz. Respondent's act of lying, and then attempting to involve innocent co-workers in his deception, reflects unfavorably on himself and the Cape Coral Fire Department and falls short of the high expectations found in section 101.07. See Rice v. Bright, Case No. 03-0627 (Fla. DOAH Sept. 3, 2003); Pinellas Cnty. Sheriff Nov. 10, 2003) (false statements demonstrate conduct unbecoming a public employee and constitute grounds for termination of employment). Petitioner has met its burden with respect to this allegation.

C. Just Cause Exists for Termination of Employment

34. City of Cape Coral Fire Department Chief Donald Cochran, in support of his decision to terminate Respondent's employment, testified that:

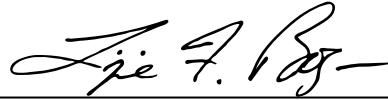
[Fire department personnel] have total access to people's homes. We don't need warrants. When people invite us in to respond to an emergency, our firefighters are there, jewelry is around, wallets are around, it's integrity issues, people leave us with their animals, their pets to lock up. Our firefighters are around an enormous amount of children, from daycares, public education, 36 schools in our community. [You] always get this questions of why do you have to be held to that higher standard . . . it comes with the badge.

35. Chief Cochran's rationale for terminating Respondent's employment is persuasive and supported by a preponderance of the evidence. Petitioner has met its burden and proved that Respondent's conduct is sufficiently egregious so as to warrant the termination of his employment with the City of Cape Coral.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that effectively immediately the employment of Heath Carrier by the City of Cape Coral is terminated.

DONE AND ORDERED this 20th day of January, 2017, in
Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of January, 2017.

ENDNOTES

^{1/} All subsequent references to Florida Statutes will be to 2016, unless otherwise indicated.

^{2/} The Final Notice of Disciplinary Action also charges Respondent with insubordination under section 101.11, Cape Coral Fire, Rescue & Emergency Management Services Rules & Regulations. The provision of section 101.11 dealing with insubordination provides as follows:

Members are required and expected to follow the lawful orders, directives, rules, or assignments of their Company Officer or a more senior Officer of CCFD without exception. Orders, directives, rules or assignments may be given to members by Supervisors via verbal or written means, and the member is expected to act civilly and responsibly in promptly carrying out such orders or directives without delay. It is the responsibility of the receiving member to verify and request clarification on the matter if there is any confusion or misunderstanding when an Officer of CCFD

gives an order, directive, rule, or assignment. Failure to carry out an order, directive, rule, or assignment, when assigned, shall be considered grounds for discipline.

Section 101.11 is materially similar to section 2-31.3(d) and (w) of the City Ordinance and is merged into the same for purposes of the analysis conducted herein.

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."