

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF CLEARWATER,

Petitioner,

vs.

Case No. 18-1884

SCOTT RHODES,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

On June 6, 2018, Administrative Law Judge Hetal Desai of the Division of Administrative Hearings (DOAH) held a final hearing in Clearwater, Florida.

APPEARANCES

For Petitioner: Owen Kholer, Esquire  
City of Clearwater  
1125 South Osceola Avenue  
Clearwater, Florida 33756

For Respondent: Scott Rhodes, pro se  
10332 Viridan Drive  
Port Richey, Florida 34668

STATEMENT OF THE ISSUE

The issue is whether Respondent, Scott Rhodes, should be terminated from employment with Petitioner, City of Clearwater (City), for violating City policies as alleged in the City's Termination and Dismissal Notice dated February 16, 2018.

PRELIMINARY STATEMENT

On February 16, 2018, the City issued a Termination and Dismissal Notice (Dismissal Notice) to Respondent, terminating his employment with the City effective February 20, 2018. Pursuant to the City's Civil Service Board Rules and Regulations, Mr. Rhodes timely appealed his termination and requested a hearing to contest the City's action. On April 12, 2018, the matter was referred by the City to DOAH to conduct a hearing. The final hearing was noticed for June 6, 2018.

A telephonic pre-hearing conference was held on May 30, 2018, and the burden of proof, the sequence of presentations and evidentiary issues were discussed. During the conference, Respondent disclosed for the first time his intent to offer exhibits at the hearing that had not been previously disclosed. The parties agreed to exchange all exhibits and the City filed its exhibits with DOAH.

At the June 6 hearing, the City presented testimony of five witnesses: Allan Craig, a former worker in the City Solid Waste/ Recycling Department (Solid Waste); Joseph Farrar, Respondent's supervisor in Solid Waste; Michelle Kutch, the City's Human Resources (HR) Benefits and Employee Relations Manager; Dieunice Deris, the City's HR Manager for Diversity and Equity Services; and Earl Gloster, the City's Director of Solid Waste and General Services. The City's Exhibits P1 through P10 were accepted in

evidence. Mr. Rhodes testified on his own behalf, and offered one exhibit, R1, that was accepted into evidence without objection.

The Transcript of the hearing was filed on August 6, 2018. A notice of filing was issued the same day directing the parties to file their respective proposed recommended orders (PROs) by August 16, 2018. The City timely filed its PRO; Respondent did not. The City's PRO was considered in preparing this Recommended Order.

### FINDINGS OF FACT

#### Parties and Jurisdiction

1. The City is a government employer governed by a City Council. A City Manager oversees the City's operations.

2. Pursuant to the Code of Ordinances of the City of Clearwater (City Code), the Clearwater Civil Service Board has adopted policies and rules regulating all aspects of the civil service employee positions within the City.<sup>1/</sup>

3. Mr. Rhodes began his employment with the City as a Solid Waste worker on September 6, 2004. He worked in the same position until his termination effective February 20, 2018.

4. Approximately 85 percent of the current Solid Waste staff is African-American. Mr. Rhodes describes himself as "white" and "not black."

5. At all times relevant, Mr. Rhodes' supervisor was Joseph Farrar, who is Caucasian. Mr. Farrar's ultimate supervisor is

Earl Gloster, an African-American. Mr. Gloster is the department head of Solid Waste and reports directly to the City Manager.

Mr. Rhodes' Disciplinary History

6. Prior to his termination, Mr. Rhodes had been involved in a number of incidents with co-workers requiring counseling or discipline.

7. In late November 2011 and early 2012, Mr. Rhodes reported he was being harassed by a co-worker in Solid Waste, Feth Benbelgacem. His complaint was investigated by the City's HR Department and a report was issued. Although the City found Mr. Benbelgacem had violated the City's Workplace Violence Policy, the report concluded:

No one was able to corroborate the specific claim that Mr. Rhodes made that Mr. Benbelgacem [threatened him]. . . . A number of those interviewed feel that Mr. Rhodes has animosity because Mr. Benbelgacem is permitted to operate the equipment which causes Mr. Rhodes to "nitpick" Mr. Benbelgacem's work performance, thereby instigating their interaction. This behavior on the part of Mr. Rhodes has been reported to the supervisors and although Mr. Rhodes has been directed to cease the behavior and worry about himself, the behavior allegedly continues.

\* \* \*

Although Mr. Rhodes has been instructed by his supervisors to stop delegating and criticizing tasks relating to Mr. Benbelgacem, the behavior seems to continue and should it not stop, the supervisor should address it through the Performance and Behavior Process.

8. In November 2016, Mr. Farrar issued Respondent a coaching and counseling form for "violence in the workplace" based on a verbal altercation Mr. Rhodes had with an African-American co-worker. The form signed by Mr. Rhodes states:

Outcome of Meeting: Mr. Rhodes understands that verbal misconduct is as serious as physical conduct. Verbal attacks can lead to physical confrontations just as this situation did. In the future, verbal attacks on a co-worker's family or loved ones will not be tolerated.

9. At some point after the November 2016 counseling, when someone did something he did not like, Mr. Rhodes would either tell that person that he was going to give that person a specific number of lashes or he would direct a co-worker to distribute a specific number of lashes to that person.

10. Mr. Rhodes also told his co-workers to "kiss the ring," implying they were subservient to him.

11. Mr. Rhodes would talk about certain co-workers being on his "hit list." When asked who was on his "hit list," Mr. Rhodes named the same African-American co-worker involved in the November 2016 incident.

12. In early 2017, Mr. Farrar overheard Mr. Rhodes saying he would give certain co-workers lashes. Mr. Farrar believed these comments were inappropriate and could have been interpreted as racially offensive. He also overheard Mr. Rhodes talking about his "list."

13. As a result, Mr. Farrar met with Mr. Rhodes and instructed him to stop making such remarks. Although Mr. Farrar did not specifically tell Mr. Rhodes these comments violated any specific policy, he did tell Mr. Rhodes "that he needed to watch what he was saying around newer people because they might not know how to take it the way people that had been around him do."

14. At the final hearing, Mr. Rhodes admitted he told other employees he would give them lashes, they were on his hit list, and they should kiss the ring, but claimed he was joking.

15. In April 2017, Mr. Farrar placed Mr. Rhodes on a "Development Plan" after repeatedly being warned by Mr. Farrar about failing to properly clock in and out, and accruing unauthorized overtime.

16. The Development Plan was to remain in effect from April 28 to October 28, 2017, and required Mr. Rhodes to meet personally with Mr. Farrar on "Payday" Fridays and comply with the City's timeclock regulations.

17. Mr. Rhodes defied orders to meet with Mr. Farrar and otherwise failed to adhere to the Development Plan.

18. As a result, Mr. Rhodes received a one-day suspension (referred to as a "decision-making leave day") and was referred to the Employee Assistance Program. The Development Plan was also revised and extended to remain in effect until March 2018.

19. Meanwhile, Mr. Rhodes continued to make the same type of inappropriate remarks referring to "lashes" and the "hit list." In October or November 2017, Mr. Farrar had a second meeting with Mr. Rhodes and again instructed him to stop making these types of remarks.

#### The Terminating Incident

20. On January 17, 2018, Mr. Farrar received a complaint from Allan Craig, an African-American Solid Waste worker, that Mr. Rhodes claimed he was the "emperor of all black people." According to Mr. Farrar, Mr. Craig reported the incident just after it was made and was visibly shocked. Mr. Farrar referred the incident to the City's Office of Diversity and Equity Services ("ODES"), a division within the HR department tasked with handling and investigating complaints of the City's anti-discrimination policies, as well as potential employee violations of state and federal employment laws.

21. Mr. Craig testified that on the day in question, Mr. Rhodes did not like something an African-American co-worker said. In turn, Mr. Rhodes told Mr. Craig to give this co-worker "50 lashes," which Mr. Craig understood to be a whipping. Mr. Craig, said, "no, we [have] to stick together." It is unclear to whom Mr. Craig is referring when he said "we"--"Solid Waste workers" or "African-Americans." Regardless, in response, Mr. Rhodes made the statement, "I'm the emperor of black people."

Mr. Craig did not respond, but instead immediately left the worksite to report the comment to Mr. Farrar.

22. Although Mr. Rhodes corroborates Mr. Craig's version of events, he disputes saying "I'm the emperor of black people." Instead he claims he told Mr. Craig "I am the emperor of Solid Waste"; and after Mr. Craig said, "no, we [have] to stick together," Mr. Rhodes replied, "Allan, even black people have to answer to somebody."

23. Mr. Rhodes saying, "I'm the emperor of black people" is more believable than him saying "Allan, even black people have to answer to somebody." The undersigned rejects Mr. Rhodes' version of events for a number of reasons.<sup>2/</sup>

24. First, Mr. Rhodes statements do not seem to flow naturally. Second, Mr. Craig's demeanor was more credible, and his version of the facts leading up to the "emperor" statement was consistent with the testimony of the other witnesses.

25. Moreover, Mr. Deris, the ODES investigator, testified that Mr. Rhodes admitted to making the statement, "I am the emperor of black people" when questioned during the investigation.

26. Mr. Gloster testified that during the pre-termination meeting he had with Mr. Rhodes, "I asked him specifically as to the comment that was made . . . that he was the emperor over all black people, and he said, yes, that he said it."



27. Even assuming Mr. Rhodes' version is correct, it is equally offensive; it still implies African-Americans at Solid Waste need to answer to him. Based on the competent and credible evidence, the undersigned finds that Mr. Rhodes made the statement, "I am the emperor of black people," and this statement was reasonably offensive to Mr. Craig.

Grounds for Dismissal

28. Based on the ODES investigation and after meeting with Mr. Rhodes, Mr. Gloster made the decision to terminate Petitioner. Thereafter, the City issued the Dismissal Notice citing numerous violations of City policy and regulations:

- City Policy 3201.2, Equal Employment Opportunity Policies (EEO);
- City Policy 3704.1, Workplace Violence Prevention Policy; and
- Relevant portions of the City's Performance and Behavior Management Program Manual (PBMP), which set standards for City workers in the areas of personal responsibility, excellence, and integrity.

29. Chapter 13, section 3, of the Civil Service Board Rules and Regulations outlines the grounds for discipline, including terminations. That section provides in pertinent part:

Reasons for Suspension, Demotion, and Dismissal--Whenever practical, employees will be given reasonable opportunity to bring their

performance and/or behavior up to acceptable standards pursuant to the procedures and rules of the City's performance and behavior management programs. However, employees may be subject to disciplinary action up to and including immediate dismissal for the following acts, including but not limited to specifically cited examples:

\* \* \*

(e) Commitment of a flagrant offense, including harassment or discrimination or abusive conduct or language toward coworkers, City officers, or the public.

\* \* \*

(l) Failure to conform to the dictates of corrective action, including but not limited to failure or inability to comply with an agreed-upon "development plan," or when the City believes that an employee is willful in refusing to adhere to establish rules, regulations, or guidelines. (emphasis added).

Violation of EEO Policy

30. The City's EEO policy states in relevant part:

It is the policy of the City of Clearwater that no person shall be unlawfully discriminated against with regard to recruitment, selection, appointment, training, promotion, retention, discipline or other aspects of employment because of any consideration of race, color, religion, national origin, age, disability, marital status, or gender (including conditions of pregnancy and sexual harassment), or genetic or family medical history information as defined by the Genetic Information Nondiscrimination Act.

31. Mr. Rhodes' "lashes" comments could reasonably be interpreted as a reference to slavery, and be racially offensive

to African-American (and other) employees. As such, Mr. Rhodes continued references to "lashes," even after being warned, violated the City's EEO policy.

32. Mr. Rhodes statement that he, a white person, was the "emperor of black people" clearly violates the City's EEO policy.

Violation of the City's Workplace Violence Prevention Policy

33. The City's Workplace Violence Prevention Policy states in relevant part:

**Policy:** The City of Clearwater will not tolerate violence, threats, harassment, intimidation, and other disruptive behavior in our workplace [.] All reports of incidents will be taken seriously and will be dealt with appropriately. Individuals who commit such acts may be removed from the premises and may be subject to disciplinary action, criminal penalties, or both.

**Definitions:** Workplace violence is any physical assault, threatening behavior, or verbal abuse occurring in the workplace. Such behavior can include oral or written statements, gestures, or expressions that communicate a direct or indirect threat of physical harm.

34. Although there was no evidence anyone believed Mr. Rhodes' "lashes" or "hit-list" statements were real threats of violence, these statements could be considered a form of intimidation, disruptive behavior, and verbal abuse under the policy.

35. These comments, however, when taken in the context of Respondent's history of verbal altercations with

co-workers, and coupled with the fact he was told that these statements may be misinterpreted, constitute violations of the City's Workplace Violence Prevention Policy.

Violation of the City's Employee Standards

36. The PBMP contains the following relevant standards and instructions:

**INTEGRITY STANDARDS**

**The following standards represent Integrity issues of such a serious nature that immediate formal discipline, up to and including termination, may be recommended.**

Violation of the City Workplace Violence Policy.

Violation of the City Equal Employment Opportunity (EEO) Policy.

\* \* \*

**EXCELLENCE STANDARDS**

We will present a professional image through actions, dress, speech and behavior.

We will strive for excellence and continuously learn and make improvements.

We will learn from mistakes, modify behavior and recommend procedural changes to improve operations and processes.

37. Again, Mr. Rhodes' statements described above when considered cumulatively and in context clearly violate the standards for employee integrity.

38. Mr. Rhodes' continued use of these comments, even after being repeatedly counseled, violates the standards for

professional image through actions and speech; continuously learning and improving; and modifying behavior.

CONCLUSIONS OF LAW

39. DOAH has jurisdiction over the subject matter and the parties pursuant to City Code, Chapter 2, Article IV, Division 2, which authorizes the Civil Service Board to contract with DOAH to provide a hearing officer (administrative law judge) "to review employee appeals resulting from alleged adverse employer action," including dismissal. See Clearwater City Code, sections 2.285(1) and (2).

40. Section 2.285(2) and (3) of the City Code addresses the procedural standards for the employee appeal hearing. It provides the undersigned "shall utilize a procedure similar to that set out in F.S. §§ 120.57(1) and 120.58," except that the "[t]echnical rules of evidence shall not apply," and each party "shall have the right to be heard publicly," to be "represented by a person of his choice," and "to present evidentiary facts."<sup>3/</sup>

41. At the conclusion of the hearing, the City Code requires the undersigned to transmit a recommended order, composed of proposed findings of fact and legal conclusions, to the Civil Service Board. See City Code section 2.285(4). The City Code makes no provision for the filing of exceptions to the proposed order, but both parties may appear before the Civil Service Board when it considers the hearing officer's proposed order.

42. The City Code is silent as to the burden or standard of proof in an appeal by a discharged employee. The default standard of proof in administrative proceedings is "a preponderance of the evidence." See § 120.57(1)(j), Fla. Stat. This is consistent with the burden imposed in other types of cases where an employer seeks to terminate an employee. See, e.g., Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990). Accordingly, the City has the burden of proving by a preponderance of the evidence that Mr. Rhodes should be terminated.

43. The preponderance of the evidence standard requires the proof against Respondent to be the greater weight of the evidence, or evidence that "more likely than not" tends to prove the allegations. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

44. As indicated in the findings of facts, the overwhelming evidence at the hearing established Respondent violated his Development Plan and made inappropriate comments to his co-workers, that could reasonably be interpreted as threatening and racist and which constitute violations of City policies.

45. Based on his argument and testimony at trial, Mr. Rhodes believed it was okay to continue making these comments because his co-workers never told him they were offended and that he was just joking. This "just joking" defense carries no weight. First, it was totally reasonable and prudent for Mr. Craig to not respond or escalate the situation, and instead report the conduct to his

supervisor. Second, despite the racial connotations, Mr. Rhodes never denied having racial animus. Finally, the fact others had not previously complained about his behavior does not make it acceptable, nor does it change the discriminatory tone of the comments. See Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 803 (11th Cir. 2010).

46. In Reeves, the court noted in a "hostile work environment" context, behavior tolerated by some employees can still be construed as unacceptable work place behavior. The test is whether a "reasonable person" would be offended by the behavior.

The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Thus, we proceed with common sense, and an appropriate sensitivity to social context, to distinguish between general office vulgarity and the conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

Id. at 811 (citations omitted).

In other words, context matters. Mr. Farrar warned Mr. Rhodes to stop and specifically noted his comments may not be accepted by newer employees. Once Mr. Craig objected to the reasonably offensive statements, the City took the necessary steps to ensure the workplace was free from humiliating and degrading comments.

47. Mr. Rhodes also argued his termination was too harsh a penalty because he had not been previously disciplined specifically for violating the EEO or Workplace Violence Prevention policies. This argument fails because the City policy explicitly allows for immediate termination (i.e., without imposing progressive discipline) for violations of these policies.

48. Moreover, Mr. Rhodes ignores the reality that he was on a Development Plan at the time of his termination for not following directions of his supervisor, had received a "coaching and counseling" form for improper interactions with a co-worker, and had been instructed by his supervisor at least twice to stop making inappropriate comments. The fact that he continued to make offensive comments also supports termination over less severe measures.

49. There was no evidence the City's decision to terminate Mr. Rhodes was arbitrary or an abuse of discretion.

50. The established facts are sufficient to warrant Respondent's termination.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Civil Service Board make a determination that the charges in the Dismissal Notice are sustained, and that Respondent be terminated as a City employee.



DONE AND ENTERED this 6th day of September, 2018, in  
Tallahassee, Leon County, Florida.

*Hetal Desai*

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HETAL DESAI  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 6th day of September, 2018.

ENDNOTES

<sup>1/</sup> The Clearwater Civil Service Board Rules and Regulations were originally approved by the City Council on May 17, 1965, and most recently revised November 13, 2017. All references to the Florida Statutes, City Code and City policies, rules and regulations are to the 2017 versions.

<sup>2/</sup> In a case such as this where the facts are in dispute, "the administrative law judge . . . has the opportunity to hear the witnesses' testimony and evaluate their credibility. Yerks v. Sch. Bd. of Broward Cnty., 219 So. 3d 844, 848 (Fla. 4th DCA 2017); see Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. & Prof'l Reg., 146 So. 3d 1175 (Fla. 1st DCA 2014) (J. Wetherell concurring) ("[I]t is solely the function of the ALJ to assess the persuasiveness of the evidence as a whole.").

<sup>3/</sup> Although the City Code suspends the technical rules of evidence, the undersigned did not consider the witness statements contained in the ODES investigative report (City Exhibit 6) or the investigation of the Complaint of Scott Rhodes (Respondent's Exhibit 1). These statements were not reliable sources of evidence given their hearsay nature. See § 120.57(1)(c), Fla. Stat.; e.g., Carter v. State, 951 So. 2d 939, 943-44 (Fla. 4th DCA 2007) (holding a police investigative report was "classic hearsay" and "[did] not fit within the business or public records exception

to the hearsay rule"); Rivera v. Bd. of Trs. of Tampa's Gen. Emp't Ret. Fund, 189 So. 3d 207, 212-13 (Fla. 2d DCA 2016). Instead, the findings of fact are based on Respondent's admissions, Mr. Deris' testimony regarding the ODES investigation, Mr. Gloster's testimony as to the results and actions taken based on the ODES investigative report and findings, Mr. Rhodes' testimony regarding his 2012 complaint, and the ultimate findings of these reports relied upon by the City in taking action.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

Civil Service Board regulations do not authorize the filing of exceptions to this Recommended Order. The Recommended Order will be considered by the Civil Service Board at a meeting to be noticed at a later time and place. At that meeting, the Civil Service Board will make a determination on the disposition of this matter and thereafter send its order and proposed penalty, if any, to the City Manager. See § 2.285(4), Code of Ordinances.