

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF CLEARWATER,

Petitioner,

vs.

Case No. 18-2111

PETRAS JAKSTAS,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held in Clearwater, Florida, on October 16, 2018, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Owen Kohler, Esquire
City of Clearwater
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Clearwater, Florida 33756

For Respondent: Edward C. Castagna, Jr., Esquire
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STATEMENT OF THE ISSUE

Whether Respondent Petras Jakstas committed the violations alleged in the Termination and Dismissal Notice, and, if so, the appropriate discipline that should be imposed.

PRELIMINARY STATEMENT

Petras Jakstas (Respondent) is employed by the City of Clearwater, Florida (Petitioner/City). Respondent was informed by the City that his employment was being terminated due to alleged violations of the Clearwater Civil Service Board Rules and Regulations and the Performance and Behavior Management Program (PBMP). Respondent filed a Notice of Appeal contesting the City's intended action. The City, pursuant to contract, referred the matter to the Division of Administrative Hearings (DOAH) for a disputed-fact hearing.

During the hearing, Petitioner offered the testimony of Madai Gutierrez, Lisa Goodrich, and Kevin Dunbar. Respondent testified on his own behalf and called no other witnesses. Petitioner's Exhibits 1 through 8 were admitted into evidence. Respondent's Exhibits 3 through 11 were also admitted into evidence.

A Transcript of the disputed-fact hearing was filed with DOAH on November 2, 2018. The parties filed a Joint Motion to Extend Deadline for Proposed Orders and the same was granted. On

November 21, 2018, each party filed a Proposed Recommended Order (PRO).

FINDINGS OF FACT

1. The City is a municipality governed by a city council. A city manager oversees the City's operations.

2. On January 22, 2007, Respondent was hired as a Parks Service Technician I. He successfully completed the Parks Service Technician Apprenticeship Program and was promoted to his current classification of Parks Service Technician II on February 2, 2008. Respondent's job responsibilities include, but are not limited to, the collection of trash and the emptying of trash receptacles.

3. Respondent is a native of Lithuania. While Respondent does not speak "perfect English," the record indicates that Respondent speaks and understands English at a level of proficiency which allows him to function in an environment where only English is spoken or written without the necessity of an interpreter.

4. The Clearwater Civil Service Board has adopted rules and regulations which govern the conduct of all City employees. Chapter 13 of the Clearwater Civil Service Board Rules and Regulations (Civil Service Rules) provides the framework for suspending, demoting, and dismissing City employees.

5. Chapter 13, section 6 of the Civil Service Rules, provides that the "City Manager or designee may discharge an employee for one or more of the causes listed under Section 3 of this Chapter or in accordance with the established performance and behavior management program . . . or for other good cause."

6. On or about March 20, 2018, Respondent received from the City a termination and dismissal notice advising that his employment with the City of Clearwater was being terminated effective "Wednesday, March 21, 2018, at the end of the day." The notice of termination and dismissal cites the following violations as cause for the termination of Respondent's employment:

Personal Responsibility Standards,

- We will follow all City policies and procedures.
- We will comply with all City and our respective Department, division, and section rules and standard operating procedures.
- We will cooperate and participate in City processes.
- We will resolve to accept personal accountability and responsibility for our actions.
- We will perform our work assignments with established standards and comply with written or verbal instruction from the supervisory or management group.

Integrity Standards,

- Violation of the provisions of Chapter 13, Section 3, of the City Civil Service Rules and Regulations.

Excellence Standards,

- We will treat everyone with dignity, respect, and courtesy.
- 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.

7. The notice of termination and dismissal, in addition to the generally referenced "Integrity Standards" violation, also specifically provides that Mr. Jakstas violated Civil Service Rules, chapter 13, section 3, to wit:

(b) Failure to perform satisfactorily within established guidelines.

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

(g) Commitment of or participation in any activity or action which undermines public confidence or otherwise significantly impairs the employees' ability to perform his/her job productively.

(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 established rules, regulations, or guidelines.

8. The gravamen of the charges against Respondent derive from his alleged violation of Civil Service Rules, chapter 13, section 3(b), (e), (g), and (l). The City's current proceeding against Respondent is as a result of Respondent's flirtatious statement to a current female City employee, which occurred while Respondent was working under a "Development Plan," which was implemented because he harassed a former City employee and used City property while doing so.

A. PERFORMANCE & BEHAVIOR MANAGEMENT PROGRAM

9. The City developed its PBMP in order "to provide a method of working with employees whose performance or behavior does not meet the City's standards." The philosophy of the program "is based upon the belief that, in most cases, employees can change behavior and improve performance when standards and expectations are clear and when employees are given opportunities to change." Whenever practicable, "the City will provide intervention, coaching, and corrective guidance or counseling . . . for employees . . . in order to bring their performance or behavior up to standard." The program recognizes, however, "that some behaviors that are serious and are direct violations of City Policy may warrant immediate disciplinary action up to and including termination."

10. According to the PBMP manual, there are three categories of performance and behavior: Personal Responsibility, Integrity, and Excellence. As to each, the manual notes that:

These categories are based on employees' willingness or ability to meet standards of behavior or performance. Willingness refers to the employees' decision to meet expectations, follow rules and policies, and perform work that meets efficiency and quality standards. Ability refers to the employees' capability and skills in performing job tasks. The first two categories, Personal Responsibility and Integrity, are considered "will do" categories because they typically involve situations wherein the employee has a choice and makes a decision about whether or not to meet the standards. The third category, Excellence, is considered a "can do" category, because it most often refers to a situation where the employee is not able to perform up to standard because of a lack of resources, skill, or capability. City of Clearwater expectations for each of these three categories are stated below.

Personal Responsibility ("Will Do" Issues)

City of Clearwater employees will be held personally accountable for the actions they take in meeting the customer service needs of the City and the community the organization serves. Employees are expected to take full responsibility for their conduct and job performance and exhibit commitment to fulfilling their responsibilities to the best of their ability.

Integrity ("Value and Ethics" Issues)

As public employees representing the citizens of Clearwater, employees are expected to commit to the highest standards of personal and professional integrity. The City expects employees to communicate openly and

continually demonstrate honesty, fairness, and respect for others. Employees should do what is ethically appropriate. Employees are expected to adhere to City policies.

Excellence ("Performance/Can Do" Issues)

City of Clearwater employees have an obligation to provide the highest quality of service and results to our customers. This commitment to excellence involves developing the job knowledge and skills needed to perform the tasks required and to continually improve the City's ability to meet the needs of the community we serve.

11. The PBMP manual generally lists 75 Personal Responsibility Standards, 14 Integrity Standards, and 41 Excellence Standards. Regarding the Integrity Standards, the PBMP manual notes in bold print that "immediate formal discipline, up to and including termination, may be recommended" for a violation of these standards. The PBMP manual does not set forth any such illumination for the other standards. As previously noted, certain PBMP standards are referenced in the termination and dismissal notice provided to Respondent by the City.

B. THE DEVELOPMENT PLAN

12. The initial step of PBMP entails supervisor coaching and counseling of employees as a strategy for helping employees to meet supervisor, department, or City expectations or standards. In instances where an employee has committed a serious offense of the PBMP standards and expectations, the City

may place an employee on a development plan, a decision-making leave without pay, or both. On October 23, 2017, Respondent was placed on decision-making leave without pay for the two-day period of October 24 and 25, 2017. On October 26, 2017, when Respondent returned to work he was placed on a development plan. Both actions resulted from an incident involving former City employee Ms. Kelsey Souto.

13. Ms. Souto previously worked for the City, and during the course of her employment Respondent developed a physical attraction to her. There is no evidence suggesting that Ms. Souto was in any way interested in Respondent.

14. Sometime around the early part of 2017, Ms. Souto relocated from Florida to Idaho. The undisputed evidence is that Respondent tracked Ms. Souto's whereabouts and began to send her letters, jewelry, and at one point, he even mailed her a rooster. Ms. Souto found Respondent's behavior to be extremely upsetting as evidenced by the Petition for Protective Order that she swore-out against Respondent wherein she requested, on or about August 24, 2017, that the District Court for the State of Idaho enjoin Respondent from engaging in "malicious harassment, stalking, [and] telephone harassment."

15. On September 28, 2017, Respondent submitted to the City a request for vacation days and included therewith a notice of hearing regarding the Protective Order that was filed against him

by Ms. Souto. The hearing was scheduled for September 29, 2017. Respondent attended the hearing in Idaho and "agreed to entry of a protection order."

16. The exact date is not clear from the record, but it is undisputed that sometime between September 28, 2017, and October 26, 2017, the City learned two things from Respondent. First, the City learned that Respondent used a City of Clearwater Parks and Recreation envelope to mail a letter to Ms. Souto as part of his campaign of harassment against her; and second, the City learned the full details of Respondent's harassment activities directed towards Ms. Souto. Given this information, on October 26, 2017, the City, pursuant to its PBMP, placed Respondent on a written development plan.

17. The development plan contains a section titled "Specific Examples of Behavior or Performance Observed (completed by Supervisor)." In this section, Respondent's supervisor noted the following with respect to the circumstances surrounding Respondent's interaction with Ms. Souto:

Approximately one year ago, your manager was contacted by the owners of the beach concessions, Mr. and Mrs. Chandler, to inform him that you were showing an interest in one of their workers, but she was not interested in you. You were persistent with this female and you had sent her a gift of a wedding ring by mail. When the Chandlers contacted your manager, they stated they did not want to make a formal complaint with the City, but wanted to speak with you about the situation and return the ring.

The City has learned that despite this female moving out of state, you have continued to pursue her. On Thursday, September 28, 2017, you turned in a vacation request to your supervisor along with a notice of hearing for a protection order filed against you in the District Court of the Fifth Judicial District of the State of Idaho. This protection order was filed by the female who formerly worked for a beach concessions and it cited malicious harassment, stalking, telephone harassment as the reasons for her petition to the court.

The petitioner described in the protection order that she met you while she worked as a manager at Barefoot Beach House on Clearwater Beach. She explained that City employees were provided free soft drinks by an established lease agreement and you as well as other City employees, would go to the restaurant for that reason. She further explained that beginning approximately five years ago, you would regularly bring her candy, gifts, and treats and she would often politely decline your offerings or put them out for all her employees. She stated that you would come in several times throughout your workday waiting in long lines, just so that she could wait on you.

The petitioner stated that she moved to Idaho in 2016 and somehow you obtained her contact information on-line and you began sending her certified letters about every other month. Additionally, she said at Christmas time she received a diamond ring and gold necklace from you of which she returned to you. Most recently, on August 23, 2017, she stated that she received notification from the post office that you had sent her a live rooster as she recognized your handwriting on the notice and card. She further described that you sent her emails and text messages, so she blocked your phone number.

On October 4, 2017, your supervisor was provided a copy of a City of Clearwater Parks and Recreation envelope [which] shows you used City material to mail her a certified letter on August 15, 2016.

When meeting with your Director, you admitted to using City materials for personal use and acknowledged it was a bad thing to do however; you did not take full responsibility of the seriousness of your inappropriate behavior and conduct which led to the protection order filed against you, stating that you "were only trying to have fun.

18. Based on the information involving Ms. Souto, the City specifically identified in Respondent's development plan certain standards and expectations that Respondent had not met, including the following: "We will treat everyone with dignity, respect, and courtesy; [w]e will present a professional image through actions, dress, speech and behavior; and [w]e will learn from mistakes, modify behavior and recommend procedural changes to improve operations and processes."

19. Reference in the development plan to these specific standards and expectations, as well as inclusion of an extensive narrative regarding his harassment of Ms. Souto, put Respondent on notice that future instances of conduct of a similar nature would not be in compliance with the terms of his development plan.

20. The development plan contains a signature line where the employee is to sign. Below the employee's signature line is the following statement: "My signature indicates I have read and

understand the Development Plan outlined above, and agree to comply with all City standards and policies, although I may not agree that a violation has occurred." Respondent signed the development plan on October 26, 2017. The development plan notes that its duration is for six months.

21. In addition to signing the development plan, Respondent also wrote the following on the plan: "I will not misuse City prop[erty] again. No mean no! Sorry I recognize my fault! I will make better choices in my life. I recognize my fault."

C. SEA BLUES FESTIVAL

22. On Saturday, February 24, 2018, Respondent was working at the Sea Blues Festival, which is a cultural event sponsored by the City. Madai Gutierrez, who is employed by the City as a recreation specialist, also worked the festival on that date.

23. Ms. Gutierrez' job responsibilities involve overseeing matters related to patron ticketing and gate operations. Her job duties do not include overseeing or otherwise supervising Respondent or workers who are similarly classified.

24. Ms. Gutierrez's credibly testified that on the day in question, while in the backstage area of the festival, Respondent summoned her to the area where he and a coworker were picking up trash. Ms. Gutierrez, thinking that Respondent had an inquiry about a matter pertaining to the event, walked over to Respondent where he told her, "You're so beautiful. You have the eyes like

an eagle." Respondent's statement to Ms. Gutierrez was a discourteous statement that lacked dignity and respect, the statement failed to comport with the development plan goal of maintaining a professional image through "speech," and by making the statement, Respondent demonstrated a failure to modify his behavior as required by the development plan.

25. Respondent's statement to Ms. Gutierrez was sufficiently similar in character to the conduct Respondent displayed towards Ms. Souto.

26. Mr. Gutierrez testified that Respondent's statement made her feel "weird and creepy," and she immediately left the area after hearing the same and went to her ticketing trailer.

27. On the day of the incident, Ms. Gutierrez reported Respondent's conduct to her supervisor. On Monday, February 26, 2018, she then prepared a written statement detailing her interaction with Respondent.

28. Respondent admits that he spoke to Ms. Gutierrez but states that it "was about work." (Tr. 200:9) In further explaining himself, Respondent testified, "I told them that I never said in this way and -- and that we were talking about -- strictly about work." (Tr. 200:16-18). In this statement, Respondent is referring to his conversation with Ms. Gutierrez on February 24, 2018.

29. At the time of his interaction with Ms. Gutierrez, Respondent was still working under the limitations of the development plan and this would certainly provide sufficient motivation for Respondent to not be truthful regarding his interaction with Ms. Gutierrez.

30. Ms. Gutierrez testified that on occasion she will instruct a City worker whose job includes responsibility for trash collection to empty an overflowing trash receptacle. However, Ms. Gutierrez specifically testified with clarity and certainty that at no time during the Sea Blues Festival did she ever instruct Respondent, or any other trash worker, to empty a trash can.

31. Ms. Gutierrez's testimony regarding what was said to her by Respondent is found to be more credible than Respondent's denial. Respondent's assertion that he had a "work-related" conversation with Ms. Gutierrez on February 24, 2018, is not credible and is rejected.

D. I NEED AN INTERPRETER

32. Respondent claims that the City knew that he needed a language interpreter but failed to provide one during the discipline determination meeting resulting from the incident involving Ms. Gutierrez. The job position occupied by Respondent is covered by the Agreement between City of Clearwater, Florida, and Communications Workers of America, Local 3179 (Fiscal Years

2017-2018) (collective bargaining agreement). Article 11, section 4 of the collective bargaining agreement provides, in part, that “[w]henver an employee who is a Union member is noticed of any meeting that could result in discipline, the employee will be granted a minimum of two (2) business days before the meeting to arrange for Union representation.” The right to union representation at any such meeting is commonly referred to “Weingarten” rights. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

33. On March 7, 2018, the City informed Respondent that a discipline determination meeting was scheduled for March 14, 2018, to discuss the alleged incident involving Ms. Gutierrez and its possible impact on his continued employment with the City. Respondent attended the meeting along with his union representative Phil Hughes of the Communications Workers of America.

34. There are no provisions in the Civil Service Rules, the PBMP manual, or the collective bargaining agreement, which require the City to provide a foreign language interpreter for an employee who is represented by his union at a disciplinary meeting. Respondent cites no authority in support of his contention that the City was obligated to provide him with such services and furthermore there is no factual basis in the record otherwise indicating that Respondent even requested such services

from the City once the current termination and dismissal proceedings commenced.

CONCLUSIONS OF LAW

35. Jurisdiction of the subject matter and the parties lies in section 2.285 of the Clearwater Code of Ordinances, which authorizes the City to contract with DOAH to review "employee appeals resulting from alleged adverse employer action," including dismissal.

36. Chapter 2, section 3(b) of the Civil Service Rules, provides that hearings conducted pursuant to section 2.285 of the Clearwater Code of Ordinances "shall utilize a procedure as outlined in Section 120.57(1), Florida Statutes." The procedure utilized herein, unless otherwise limited, comports with such requirements.

37. The Clearwater Code of Ordinances does establish a standard of proof in an appeal by a discharged employee. Ordinarily, an employer seeking to terminate an employee bears the burden of proving by a preponderance of the evidence that discipline is appropriate. See Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990). "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).

38. Respondent was charged with violating chapter 13, section (3)(1) of the Civil Service Rules, which provides, in part, that there is a "[f]ailure to conform to the dictates of corrective action, including but not limited to failure or inability to comply with an agreed upon 'development plan.'" Chapter 3, page 6 of the PBMP manual, which is incorporated by express reference into Civil Service Board Rules, provides that "[i]f the employee refuses to comply with the development plan (i.e., the employee does not follow the agreed-upon plan of action willfully rather than not following it because he or she is not able to) the supervisor, with the agreement of the department director, will contact Human Resources to discuss the situation." Accordingly, Petitioner must prove that Respondent willfully violated the terms of his development plan.

39. Neither the Civil Service Rules nor the PBMP manual provide a definition of the term "willful." A willful act is therefore best defined by Florida case law "as one that is voluntarily and intentionally performed with specific intent and bad purpose to violate or disregard the requirements of the law." Fugate v. Fla. Elec. Comm'n, 924 So. 2d 74, 75 (Fla. 1st DCA 2006).

40. As previously noted, Respondent is charged with failing to comply with the terms of his development plan in violation of chapter 13, section 3(1) of the Civil Service Rules.

41. On February 24, 2018, when Respondent told Ms. Gutierrez, "You're so beautiful. You have the eyes like an eagle[,] " he knew that his development plan was still in effect. Despite this knowledge, Respondent nevertheless stopped Ms. Gutierrez from going about the normal affairs of her workday by summoning her to his work area and ambushing her with an unsolicited, unwanted, nonwork-related, flirtatious statement that was sufficiently similar in character to the conduct Respondent displayed towards Ms. Souto. Respondent's conduct was a willful violation of his development plan in violation of chapter 13, section 3(1) of the Civil Service Rules, as charged.

42. The same evidence that establishes a violation by Respondent of his development plan also proves that Respondent failed to perform satisfactorily within established guidelines, which constitutes a violation of chapter 13, section 3(b) of the Civil Service Rules, as charged.

43. As previously noted, Respondent was also charged with violating chapter 13, section 3(e) of the Civil Service Rules. This section provides that it is a violation of the rules to commit a "flagrant offense, including harassment or discrimination or abusive conduct or language toward coworkers, City officers, or the public." Chapter 4 of the Civil Service Rules defines certain terms as used within the rules. The Civil Service Rules do not, however, define the phrase "flagrant

offense." Neither Petitioner nor Respondent cites authority suggesting how the City has previously interpreted this phrase.

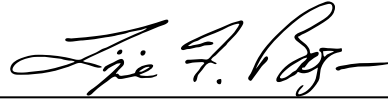
44. The Merriam-Webster Dictionary defines the term "flagrant" to mean "so obviously inconsistent with what is right or proper as to appear to be a flouting of law or morality." <https://www.merriam-webster.com/dictionary/flagrant>. The City, in its PRO, acknowledges that Respondent's statement ("You're so beautiful. You have the eyes like an eagle:") "may not be considered egregious [but certainly] is inappropriate at the workplace." The undersigned concurs with the City's position and finds that under the particular circumstances of this case, Respondent's statement to Ms. Gutierrez does not constitute a flagrant offense within the meaning chapter 13, section 3(e) of the Civil Service Rules.

45. In addition to the matters discussed above, Respondent was also charged with violating chapter 13, section 3(g) of the Civil Service Rules. The City, in its PRO, makes no argument as to this alleged violation and therefore the same is considered abandoned.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that the Civil Service Board of the City of Clearwater enter a final order terminating Mr. Jakstas' employment.

DONE AND ENTERED this 12th day of December, 2018, in
Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
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this 12th day of December, 2018.

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NOTICE OF RIGHTS

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 penalty, if any, to the City Manager. See § 2.285(4), Code of Ordinances.