

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EMERALD COAST UTILITIES
AUTHORITY,

Petitioner,

vs.

Case No. 18-3702

MICHAEL J. REITER,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings ("DOAH"), in Pensacola, Florida, on August 30, 2018.

APPEARANCES

For Petitioner: Diane Marie Longoria, Esquire
Quintairos, Prieto, Wood & Boyer, P.A.
114 East Gregory Street, 2nd Floor
Pensacola, Florida 32502

For Respondent: Michael J. Reiter, pro se
3302 East Lloyd Street
Pensacola, Florida 32503

STATEMENT OF THE ISSUE

Whether Respondent violated provisions of Petitioner's Human Resources Manual and Employee Handbook ("the Manual") on April 20 and May 30, 2018, as charged in the agency action letter dated June 25, 2018.

PRELIMINARY STATEMENT

Via a letter hand-delivered on June 13, 2018, the Emerald Coast Utilities Authority ("ECUA") notified Michael J. Reiter of allegations that he violated multiple provisions of the Manual on April 20 and May 30, 2018. The letter informed Mr. Reiter of a predetermination hearing^{1/} scheduled for June 18, 2018, at which he would have an opportunity to address the allegations.

Following the predetermination hearing, ECUA notified Mr. Reiter via a letter dated June 25, 2018, of its intention to suspend him for three workdays without pay:

In summary, the findings from the investigation confirmed you were loafing and performed an insufficient quantity of work on April 20, 2018, while claiming three hours of overtime pay. You were observed deliberately wasting time and then leading another truck on a circuitous route to a work site in a fashion which was designed to drag out your workday and thus artificially increase your overtime hours on that date. Your testimony during the hearing regarding your reason for taking a time-wasting route, via Woerner Turf Nurseries, to the worksite on Intendencia Street, was entirely self-serving and was not credible.

Additionally, the findings from the investigation confirmed you took ECUA property without authorization on May 30, 2018, when you took PVC pipe without authorization. During your testimony at the hearing, you admitted you took the PVC pipe but claimed it was salvage material to be discarded. The pipe in question clearly could have been re-used. Moreover, if members of the public observed your behavior, their opinion of ECUA would have been

diminished, as you were clearly taking the pipe to use it for a non-governmental purpose. As specified in Section B-13 A (27) [Theft or stealing] in the Human Resources Manual, the unauthorized taking of any ECUA property or equipment with the intent to permanently deprive ECUA of it is a violation of policy.

Mr. Reiter timely requested 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 DOAH, ECUA forwarded the request for hearing to DOAH.

At the final hearing, which took place as scheduled on August 30, 2018, ECUA called three witnesses: Kimberly Scruggs, ECUA's Assistant Director of Human Resources and Administrative Services; Brian J. Reid, ECUA's Director of Regional Services; and Terry Willette, private investigator.

ECUA Exhibits 1 through 10 were admitted into evidence.

Mr. Reiter testified on his own behalf and offered Exhibits 1 through 3 that were admitted into evidence.

ECUA made a digital audio recording of the proceedings and provided it to the undersigned immediately after the conclusion of the final hearing.

Unless otherwise indicated, all statutory references are to the 2017 version of the Florida Statutes.

FINDINGS OF FACT

1. Chapter 2001-324, Laws of Florida, declared the Escambia County Utilities Authority an independent special district with transferred assets and enumerated powers. Chapter 2004-398, Laws of Florida, changed the Escambia County Utilities Authority's name to ECUA. By law, ECUA provides utility services throughout Escambia County, Florida, and has the power to appoint, remove and suspend its employees, and fix their compensation within the guidelines of Escambia County Civil Services Rules.

2. ECUA's mission statement specifies that the Board and employees of ECUA "are committed to providing the highest quality service" and that "ECUA will always provide cost-effective services."

3. ECUA has adopted standards set forth in the Manual in order to govern employee conduct.

4. During all times relevant to the instant case, Mr. Reiter was a utilities service worker assigned to ECUA's patch services division ("the patch crew"); and he acknowledged on January 4, 2017, that a copy of the Manual was available to him.

5. The patch crew consists of eight people who normally work from 7:00 a.m. to 3:30 p.m., with a 30-minute lunch break and two 15-minute breaks.

6. A significant part of the patch crew's work involves filling holes left after other ECUA employees have performed utility work.

7. Mr. Reiter drives a truck that delivers sod, asphalt, and/or dirt to work areas. He begins and ends each workday at an ECUA facility on Sturdevant Street in Pensacola, Florida.

8. ECUA's management received information from an anonymous source alleging that the patch crew was loafing and abusing ECUA's overtime policy. As a result, ECUA retained a private investigator, Terry Willette, to surveil the patch crew and videotape their daily activities. From April of 2018 to some point in June of 2018, Mr. Willette routinely surveilled the patch crew for 4 to 12 hours a day.

Findings Regarding the Allegations from April 20, 2018

9. On April 20, 2018, Mr. Willette observed Mr. Reiter and a coworker leaving an ECUA facility in an ECUA truck at 4:00 p.m. and arriving at Woerner Turf on Creighton Road in Pensacola at 4:16 p.m.

10. The preponderance of the evidence does not demonstrate that Mr. Reiter deliberately extended his workday by taking a circuitous route from the ECUA facility to Woerner Turf.

11. After picking up sod, Mr. Reiter and his coworker left Woerner Turf at 4:38 p.m. and arrived at Intendencia Street in downtown Pensacola at 5:16 p.m. At this point, Mr. Willette

received a call to follow another ECUA employee and discontinued his surveillance of Mr. Reiter.

12. There was conflicting testimony regarding the shortest possible route that Mr. Reiter could have taken upon leaving Woerner Turf. Given that Mr. Reiter was driving to downtown Pensacola just before "rush hour" on a Friday afternoon, 38 minutes is not an unreasonable amount of time to drive from Creighton Road to Intendencia Street in downtown Pensacola.

13. The preponderance of the evidence does not demonstrate that Mr. Reiter deliberately extended his workday by taking a circuitous route from Woerner Turf to the worksite on Intendencia Street.

14. A "daily overtime report" for April 20, 2018, indicates Mr. Reiter worked from 3:30 p.m. to 6:30 p.m. and claimed three hours of overtime.

15. To whatever extent that ECUA takes issue with the total amount of overtime claimed by Mr. Reiter on April 20, 2018, there is no evidence as to what work Mr. Reiter performed after Mr. Willette discontinued his surveillance of Mr. Reiter shortly after 5:16 p.m. that day, and thus there is no support for a finding that Mr. Reiter dragged out his workday or artificially increased his overtime hours on that date.

Findings Regarding the Allegations from May 30, 2018

16. On May 30, 2018, Mr. Willette photographed Mr. Reiter taking PVC pipe belonging to ECUA and placing it in his personal vehicle.

17. Mr. Reiter acknowledged during his direct testimony that he took the PVC pipe without authorization from a supervisor. He testified that the PVC pipe was "spent material" and that such material is always discarded.

18. Mr. Reiter testified that he ultimately returned the PVC pipe in question.

19. The preponderance of the evidence demonstrates that Mr. Reiter took the PVC pipe without authorization.

CONCLUSIONS OF LAW

20. 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.

21. As the party asserting the affirmative of a factual issue, ECUA has the burden of demonstrating by a preponderance of the evidence that Mr. Reiter committed the violations cited in the June 25, 2018, letter. Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977).^{2/} "Proof by a 'preponderance' of the evidence means proof which leads the factfinder to find that the existence of the contested fact is more probable than its

nonexistence.” Smith v. State, 753 So. 2d 703, 704 (Fla. 5th DCA 2000).

22. ECUA alleges that Mr. Reiter violated the following Manual provisions: Section B-13 A (4), conduct unbecoming an ECUA employee; Section B-13 A (18), loafing; Section B-13 A (21), neglect of duty; Section B-13 A (26), substandard quality and/or quantity of work; Section B-13 A (27), theft or stealing; and Section B-13 A (33), violation of ECUA rules or guidelines or state or federal law.

23. Section B-13 A (4) prohibits conduct unbecoming an ECUA employee and refers to “[a]ny act or activity on the job or connected with the job which involves moral turpitude, or any conduct, whether on or off the job, that adversely affects the employee’s effectiveness as an ECUA employee, or that adversely affects the employee’s ability to continue to perform their job, or which adversely affects ECUA’s ability to carry out its assigned mission.”

24. The preponderance of the evidence demonstrates that Mr. Reiter violated Section B-13 A (4) on May 30, 2018, when he took PVC pipe belonging to ECUA without authorization.

25. Section B-13 A (18) prohibits “loafing” and refers to “[t]he continued or repeated idleness or non-productiveness during work hours which diverts the employee from performing assigned tasks.”

26. The preponderance of the evidence does not demonstrate that Mr. Reiter violated Section B-13 A (18) on April 20, 2018, when he was transporting sod from Woerner Turf to a worksite on Intendencia Street.

27. Section B-13 A (21) prohibits "neglect of duty" and refers to "[f]ailure to perform an assigned duty."

28. The preponderance of the evidence does not demonstrate that Mr. Reiter violated Section B-13 A (21) on April 20, 2018, or May 30, 2018.

29. Section B-13 A (26) refers to "[s]ubstandard quality and/or quality of work" without elaboration.

30. The preponderance of the evidence does not demonstrate that Mr. Reiter violated Section B-13 A (26) on April 20, 2018, or May 30, 2018.

31. Section B-13 A (27) prohibits theft or stealing and refers to "[t]he unauthorized taking of any material or property of [] ECUA . . . with the intent to permanently deprive the owner of possession or to sell or to use for personal gain."

32. The preponderance of the evidence demonstrates that Mr. Reiter violated Section B-13 A (27) on May 30, 2018, when he took PVC pipe belonging to ECUA without authorization.

33. Section B-13 A (33) prohibits the violation of "ECUA rules or guidelines or state or federal law" and refers to "[t]he failure to abide by ECUA rules, guidelines, directive, or state

or federal statutes." The section states such violations include, but are not limited to, "giving or accepting a bribe, discrimination in employment, or actual knowledge of and failure to take corrective action or report rule violations and employee misconduct."

34. The preponderance of the evidence demonstrates that Mr. Reiter violated Section B1-13 A (33) through his violations of Section B-13 A (4) and Section B-13 A (27).^{3/}

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Executive Director of the Emerald Coast Utilities Authority find that Michael J. Reiter violated: Section B-13 A (4), conduct unbecoming an ECUA employee; Section B-13 A (27), theft or stealing; and Section B-13 A (33), violation of ECUA rules or guidelines or state or federal law.

DONE AND ENTERED this 25th day of September, 2018, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of September, 2018.

ENDNOTES

^{1/} Non-exempt and non-key employees of ECUA alleged to have violated a provision of the Manual are entitled to notice of the allegations and a predetermination hearing conducted by ECUA. If an employee is dissatisfied with the outcome of the predetermination 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.

^{2/} The contract specifies that "ECUA has the burden of proof by a preponderance of the evidence."

^{3/} The contract between ECUA and DOAH specifies that the ALJ "will determine whether the employee has committed the violation as charged, but the ALJ will not comment on, or recommend, any disciplinary penalty."

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

Pursuant to paragraph 7(m) of the contract between ECUA and DOAH, all parties have the right to submit written argument within 10 days of the issuance of this Recommended Order with the Executive Director of the ECUA as to any appropriate penalty to be imposed. The Executive Director will then determine the appropriate level of discipline to be imposed upon the Respondent.