

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EMERALD COAST UTILITIES
AUTHORITY,

Petitioner,

vs.

Case No. 19-1625

ROBERT L. PACKER,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge W. David Watkins of the Division of Administrative Hearings (DOAH), in Pensacola, Florida, on May 29, 2019.

APPEARANCES

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

For Respondent: Robert L. Packer, pro se
2329 Silverside Loop
Pensacola, Florida 32526

STATEMENT OF THE ISSUE

Whether Respondent violated provisions of Petitioner's Human Resources Manual and Employee Handbook (Manual) on February 28, 2019, as charged in the agency action letter dated March 18, 2019.

PRELIMINARY STATEMENT

Via a letter hand-delivered on March 12, 2019, the Emerald Coast Utilities Authority (ECUA) notified Robert L. Packer of allegations that he violated multiple provisions of the Manual on February 28, 2019. The letter informed Mr. Packer of a predetermination hearing^{1/} scheduled for March 18, 2019, at which he would have an opportunity to address the allegations.

Mr. Packer did not attend the scheduled predetermination hearing, nor did he notify a member of ECUA's Human Resources Office that he would not be present at the hearing.

By letter dated March 18, 2019, ECUA notified Mr. Packer of its intention to suspend him for one (1) eight-hour day without pay on March 27, 2019. Making reference to its letter of March 12, 2019, ECUA notified Mr. Packer it was taking disciplinary action against him for the following reason:

On February 28, 2019, while servicing the dumpster at 3627½ Andrew Avenue, Sanitation truck #32G became stuck after falling through an area on the property where a septic tank is located. Riding with a senior driver and having another driver on the ground as ground guide, this incident could have been prevented by taking the safest route, backing out of the yard.

ECUA's letter of March 12, 2019, also noted two previous incidents which resulted in disciplinary action (written reprimands) being taken against Respondent in 2017. At hearing, Mr. Packer contested the validity of the two reprimands.

However, as those reprimands were not identified as aggravating factors in the March 18, 2019, agency action letter, they are not legally relevant to the determinations made herein.

Mr. Packer timely requested a hearing to challenge ECUA's decision. In accordance with the terms of the "Administrative Law Judge Services Contract" (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 May 29, 2019, ECUA called three witnesses: Rebecca Lester, employed by ECUA as a human resources generalist; Kenneth Vinson, employed by ECUA as a commercial sanitation route driver; and Keith Kyles, employed by ECUA as sanitations collections manager.

ECUA Exhibits 3 through 7 were admitted into evidence. In addition, at the request of ECUA, official recognition was taken of chapters 2001-324 and 2004-398, Laws of Florida.

Mr. Packer testified on his own behalf and offered Exhibits 1 through 4 that were admitted into evidence.

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

Unless otherwise indicated, all statutory references are to the 2018 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.

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. Mr. Packer acknowledged on April 14, 2009, that a copy of the Manual was available to him.

4. During all times relevant to the instant case, Mr. Packer was employed as a sanitation equipment operator assigned to one of ECUA's commercial sanitation routes. Although Mr. Packer had been employed for several years as a residential sanitation worker (crane operator), he had been assigned to a commercial route for only two weeks and was still in training at the time the mishap occurred.

5. The events giving rise to the proposed disciplinary action are not in dispute. As described by Mr. Packer in his written statement of March 5, 2019, in the pre-dawn hours of February 28, 2019, he "drove into establishment (to) pick up a can. Attempted to back up-slightly turned my wheel to the left. The ground gave way due to the weight of the vehicle. The ground was saturated due to rain."

6. According to Kenneth Vinson, the sanitation equipment operator who was accompanying Mr. Packer on the morning of the mishap, conditions at the site were "early morning dark, some fog, time about 5:15 a.m."

7. Mr. Vinson accompanied Mr. Packer on the morning of February 28, 2019, in order to familiarize Mr. Packer with the route. This was only the second time that Mr. Packer had been to the Custom Specialties (Custom) location, and the first occasion on which he was the driver of the sanitation truck. On the first occasion, Mr. Packer opened the entrance gate (and remained there) and observed the process while Mr. Vinson drove straight in, dumped the container, and backed out through the gate.

8. When the mishap occurred, Mr. Packer had "no knowledge of a soft spot in the ground that could cause a problem."

9. Photographs were taken of the sanitation truck and the surrounding environs at the time it was stuck at the Custom

location. Several of the photographs show an indentation in the ground, surrounded by three landscape timbers in a "U" formation. There are no signs indicating that a septic tank was buried at this location, or that soft ground presented a driving hazard.

10. ECUA vehicles are only permitted to access dumpsters on commercial properties on routes authorized by the business owners. However, nobody told Mr. Vinson (or Mr. Packer) that the sanitation truck was not authorized to take the route of egress attempted by Mr. Packer at the time of the incident; nor did the owner notify Mr. Vinson or Mr. Packer that the landscape timbers surrounded a septic tank which must be avoided.

11. While training Mr. Packer on the commercial route, Mr. Vinson never told Mr. Packer that he must enter and leave all properties in the same manner that Mr. Vinson had. Indeed, when Mr. Vinson was first assigned to the route, he taught himself how to drive it and was not trained on the route by another driver.

12. The daily route that Mr. Packer was being trained to service consisted of 120 stops, which took between eight to ten hours to complete.

13. When asked why he tried to turn the truck around to leave, rather than back out, Mr. Packer testified that the route to back out of the property was at least 70 feet, and with the

fog and darkness it would have been difficult to successfully back out of the property. Rather, in Mr. Packer's judgment, it would have been much safer to turn around and drive the truck forward off the property. Mr. Packer believed there was adequate space to turn the truck around on the property in order to drive straight out.

14. Some of the commercial properties serviced by ECUA sanitation trucks do involve turning the truck around after servicing the dumpster, and then driving straight out.

15. Mr. Packer further testified that his goal is to drive the ECUA trucks as safely as possible, and that he felt he was using due care when attempting to leave the Custom site.

16. Following the mishap, Mr. Packer later returned to the Custom location and met with the boss, Roy Reyes. Mr. Reyes informed Mr. Packer that the landscape timbers were not surrounding a septic tank, but rather sunken ground due to rain. Mr. Reyes advised that the septic tank was located elsewhere on the property.

17. ECUA sanitation truck drivers are awarded quarterly bonuses when they are accident/incident-free during the quarter, and therefore deemed to be "safe drivers." In addition to the one-day suspension without pay, Mr. Packer was also denied his quarterly bonus, of approximately \$600.00, as a result of the mishap on February 28, 2019.

18. The preponderance of the evidence demonstrates that Mr. Packer is not guilty of the offenses he has been charged with. Although it is unfortunate that Truck 32G got stuck in a mud bog on the morning of February 28, 2019, the mishap did not occur due to the negligence of Mr. Packer, or due to violation of safety practices or applicable rules or law. Rather, a series of unfortunate events led to the mishap, including: the property owner not adequately marking the hazard and informing ECUA that the hazard existed; poor visibility; Mr. Packer not being advised that he was not authorized to deviate from the route shown him by Mr. Vinson; and this being the first time Mr. Packer had actually driven the truck onto the property.

CONCLUSIONS OF LAW

19. 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.

20. As the party asserting the affirmative of a factual issue, ECUA has the burden of demonstrating by a preponderance of the evidence that Mr. Packer committed the violations cited in the March 18, 2019, 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).

21. ECUA alleges that Mr. Packer violated the following Manual provisions: Section B-13 A (4), conduct unbecoming an ECUA employee; Section B-13 A (22), negligent operation of ECUA vehicles or equipment; Section B-13 A (32), violation of safety practices; and Section B-13 A (33), violation of ECUA rules or guidelines or state or federal law.

22. 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.”

23. The preponderance of the evidence does not demonstrate that Mr. Packer violated Section B-13 A (4) on February 28, 2019, when he inadvertently got his sanitation truck stuck in a muddy bog.

24. Section B-13 A (22) prohibits the negligent operation of ECUA vehicles or equipment which may or may not result in personal injury. “Negligent operation” means a failure to operate ECUA vehicles or equipment with proper care. The

evidence does not establish that Mr. Packer was negligent in the operation of the sanitation truck, but rather that he encountered an unknown hazard while attempting to leave the site in as safe a manner as he deemed possible.

25. The preponderance of the evidence does not demonstrate that Mr. Packer violated Section B-13 A (32) on February 28, 2019, by violating any safety practices or established safety procedures. The evidence does not support a finding that Mr. Packer failed to wear safety equipment or performed any unsafe action.

26. 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." The preponderance of the evidence does not demonstrate that Mr. Packer violated Section B-13 A (33) on February 28, 2019, by violating ECUA rules or guidelines, or state or federal law.

27. The preponderance of the evidence demonstrates that Mr. Packer is not guilty of any of the offenses charged in the discipline letter of March 18, 2019.^{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 Robert L. Packer did not commit any of the violations set forth in ECUA's discipline letter of March 18, 2019.

DONE AND ENTERED this 19th day of July, 2019, in Tallahassee, Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of July, 2019.

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.