

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EMERALD COAST UTILITIES AUTHORITY,

Petitioner,

vs.

Case No. 20-0030

JAMES V. SMITH, SR.,

Respondent.

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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 March 2, 2020.

APPEARANCES

For Petitioner: Jessica Scholl, Esquire
Moore, Hill, & Westmoreland, P.A.
Post Office Box 13290
Pensacola, Florida 32591

For Respondent: James V. Smith, Sr., pro se
901 Booker Street
Cantonment, Florida 32533

STATEMENT OF THE ISSUE

Whether Petitioner must be discharged from his position as a sanitation equipment operator II because he can no longer perform the essential functions of that job, with or without a reasonable accommodation.

PRELIMINARY STATEMENT

Via a letter dated December 3, 2019, Keith Kyles, Sr., the sanitation collections manager for the Emerald Coast Utilities Authority (“ECUA”), notified James V. Smith, Sr., that he intended to recommend that Mr. Smith’s employment be terminated because he could no longer perform the essential functions of his position, with or without a reasonable accommodation. The letter informed Mr. Smith of a predetermination hearing scheduled for December 10, 2019, during which he would have an opportunity to address Mr. Kyles’s assessment of his capabilities.

Following the predetermination hearing, ECUA notified Mr. Smith via a letter dated December 12, 2019, of its intention to terminate his employment. In support thereof, the letter noted that Mr. Smith’s alleged inability to perform the essential functions of a sanitation equipment operator II, with or without a reasonable accommodation, amounted to a violation of Section B-13 A (10) of ECUA’s Human Resources Manual and Employee Handbook (“the Manual”).

Mr. Smith requested a hearing to challenge ECUA’s decision, and ECUA requested the services of DOAH as described in the terms of the “Administrative Law Judge Services Contract” (“the Contract”) entered into between ECUA and DOAH.

At the final hearing, which took place as scheduled on March 2, 2020, ECUA presented the testimony of Kimberly Scruggs, ECUA’s director of Human Resources; Ciquita Payne, ECUA’s senior Human Resources generalist; and Keith Kyles, ECUA’s sanitation collections manager. ECUA Exhibits 1 through 15 were admitted into evidence.

Mr. Smith testified on his own behalf and presented the testimony of Ms. Payne; John Gaines, an ECUA customer service representative; Robert Packer of ECUA; and Tim Dean, ECUA's lead compost technician. Mr. Smith's Exhibits 1 through 3 were deemed to be demonstrative exhibits, and the undersigned took custody of them. However, they will not serve as the basis for any findings of fact. Mr. Smith's Exhibit 4 was accepted 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 indicated otherwise, all statutory references shall be to the 2019 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 ECUA and its employees "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. For instance, Section B-11 provides that "[r]easonable accommodation is available to all disabled employees, where his or her disability affects the performance of job functions." Section B-13 A (10) of the

Manual requires ECUA employees to maintain all capabilities that are necessary for them to perform their assigned duties.

4. Mr. Smith is 52 years old and initially worked for ECUA as a sanitation equipment operator from March 1997 through October 2002. He returned to his previous position at ECUA in January 2018.

5. ECUA's description of the sanitation equipment operator II position describes the "essential job functions" as follows:

Operates a heavy duty, highly technical, and specially designed, one-person automated residential or commercial refuse collection truck equipped with a hydraulically operated container loading and waste packing mechanism in order to remove solid waste on an assigned collection route. Required to manually load yard trash, brush, or bulk waste when assigned to yard-trash duty.

Operates a heavy duty residential rear-loading, semi-automated refuse collection truck equipped with a hydraulically operated container leading and waste packing mechanism in order to remove solid waste on an assigned collection route, while acting as crew leader for the two/three person assigned crew.

6. Other "essential job functions" include activities such as manually picking up waste containers for disabled customers, climbing in and out of trucks, climbing stairs and ladders, and walking refuse containers to and from residences.

7. As for the position's physical requirements, the job description states that:

While performing the essential functions of this job the employee is regularly required to sit, stand, or walk, use hands to finger, handle, or feel, reach with hands and arms, stoop, kneel, jump, step, or crouch, and lift and/or move up to 100 pounds and occasionally required to lift over 100 pounds.

8. On June 25, 2019, Mr. Smith's right knee collided with the rear door or bumper of a refuse truck while he was dumping refuse into a landfill. He sought medical attention that day, and the resulting "work status report" from the Sacred Heart Medical Group indicated he could return to work on June 26, 2019, but was prohibited from bending at the waist, stooping, kneeling, crawling, climbing, or squatting for the next eight days.

9. ECUA learned of Mr. Smith's injury on June 25, 2019, and he was promptly placed on leave pursuant to the Family and Medical Leave Act ("FMLA"). The standardized form memorializing that action advised Mr. Smith that "[y]ou will be required to present a fitness-for-duty certificate to be restored to employment."

10. Mr. Smith's injured knee did not improve to a point at which he could return to his position as a sanitation equipment operator II, and he exhausted his 12 weeks of FMLA leave in September of 2019.¹ At that point, ECUA's Human Resources department placed him in two light-duty positions. The first was a temporary position counting inventory. That temporary position comes open for a week at the end of every ECUA fiscal year. After Mr. Smith completed that work, he was assigned to removing paper and plastic from ECUA's composting operation. Mr. Smith's tenure with the compost operation was brief because he was unable to walk or stand for long periods of time.²

¹ Mr. Smith enjoyed working for ECUA and was interested in other employment opportunities there following his accident. Because he has 20 years of customer service experience and associates degrees in culinary management and hotel and restaurant management, Mr. Smith inquired about becoming a customer service representative. However, ECUA only had one such opening between March and November of 2019 and typically receives hundreds of applications when such a position comes open. Also, ECUA's Human Resources department does not have the authority to reassign employees from one department to another. An employee interested in a position outside his or her department must apply for the position, and the department seeking to fill that opening makes the final decision as to who is hired.

² The witnesses disagreed about how long Mr. Smith worked at the compost operation. Chiquita Payne, a senior human resources generalist at ECUA, and Tim Dean, ECUA's lead compost technician, testified that Mr. Smith spent no more than a few days with the compost operation. Mr. Smith testified that he was there for 2.5 weeks.

11. Mr. Smith never returned to his position as a sanitation equipment operator II. The medical restrictions prohibiting Mr. Smith from activities such as bending at the waist, stooping, kneeling, crawling, climbing, or squatting were not lifted. A note from Dr. Juliet De Campos, Mr. Smith's attending physician at the Andrews Institute of Orthopedics & Sports Medicine, gave the following assessment of Mr. Smith:

This 52-year-old male, truck driver had an impact injury to the anterior [of] the right knee in the patellofemoral area with a fall to the ground which may have twisted his knee. He had a laceration which healed uneventfully but had recurrent swelling and giving way of his knee. X-ray showed no fracture or loose body. MRI suggested abnormal MRI and medial meniscus. What was not read was a prepatellar bursitis and contusion. The contusion has resolved but the patient still has recurrent swelling, catching, and giving way. He has had physical therapy and a knee sleeve. Exam today shows findings consistent with medial meniscus tear but no ACL injury, atrophy. Prepatellar bursitis has resolved. He continues to have recurrent swelling and instability. He has been in physical therapy which has helped but [has not restored] normal function. Within a reasonable degree of medical certainty, this injury was caused by the job injury and treatment is necessary on that basis.

The note continued by recommending that Mr. Smith have right knee surgery, and he ultimately did so on January 22, 2020.

12. Following the surgery, Mr. Smith's attending physician anticipated that Mr. Smith would have a "permanent impairment rating" and recommended that he do no stooping, squatting, or kneeling. The attending physician also recommended that Mr. Smith not lift anything over 10 pounds. Thus, the attending physician noted that "[o]ffice work would be appropriate" and counseled against Mr. Smith engaging in "commercial driving."

13. Section D-16 of the Manual contains a section on workers' compensation providing that:

Employees will return to work anytime they are medically able, with or without reasonable accommodations, within six (6) months of the date of injury. If after six (6) months from the date of injury the employee remains unable to perform the essential functions of his or her job, with or without reasonable accommodation, the employee's department director, in consultation with the Human Resources Director, shall consider the employee's prognosis and anticipated return-to-work date, the department's present and projected workload and needs, and all other relevant factors in determining whether additional leave is appropriate under the circumstances. Should the employee remain unable to perform the essential functions of his or her job, with or without reasonable accommodation, after passage of six (6) months from the date of the injury and any extension thereof, if any, he or she shall retire, resign, or be terminated.

14. Keith Kyles Sr., ECUA's sanitation collections manager, issued a letter to Mr. Smith on December 3, 2019, stating the following:

The most recent medical note in your file shows you were last seen by your treating physician, Dr. DeCampos, on November 19, 2019. Regarding your ability to return to work to perform the essential functions of your job, Dr. DeCampos stated, "No change – will need to schedule surgery."

Based on the above, it is clear you are unable to perform the essential functions of your position as a Sanitation Equipment Operator II. Moreover, a return to work date is unknown and there is no estimated date for your return to work at this time. Your continued absence, without a probable date of your return to work, creates a substantial hardship on the operational needs of the Sanitation Department and impairs ECUA's ability to properly fulfill its responsibilities to its ratepayers.

ECUA is also unaware of any reasonable accommodations which would enable you to perform the essential functions of your job. Moreover, ECUA cannot indefinitely hold your position open, as the duties which it entails simply must be performed.

We have done everything reasonably possible to accommodate your work restrictions. However, we can no longer allow your continuing inability to perform the essential functions of your job, with or without a reasonable accommodation, to create a substantial hardship and impair ECUA's ability to properly fulfill its business obligations.

15. The letter closed by notifying Mr. Smith that Mr. Kyles had scheduled a predetermination hearing for December 10, 2019, so that Mr. Smith could have an opportunity to discuss whether he could perform the essential functions of a sanitation equipment operator II, with or without a reasonable accommodation.

16. After the predetermination hearing, Mr. Kyles issued another letter to Mr. Smith on December 12, 2019, notifying him that his employment with ECUA had come to an end:

During your hearing, you provided information that your knee surgery is scheduled for December 26, 2019. After surgery, you stated that you would be required to be on crutches for 10 days, followed by an additional eight weeks off work for recovery post-surgery. Based on the information provided, I have determined your continued inability to perform the essential functions of your position, with or without reasonable accommodation, creates a substantial hardship and impairs ECUA's ability to properly fulfill its business obligations.

Your inability to perform the essential functions of your job, with or without reasonable accommodations, constitutes a violation of Section B-13 A (10) . . . of ECUA's *Human Resources Manual*

Therefore, it is with regret I notify you that your employment with ECUA is hereby terminated effective close of business December 12, 2019.

17. The preponderance of the evidence demonstrates that Mr. Smith cannot tolerate the physical demands associated with his former position as a sanitation equipment operator II, nor is there any reasonable accommodation that could be made that would allow him to perform the duties of a sanitation equipment operator II. Thus, Mr. Smith is not in compliance with Section B-13 A (10) of the Manual.

18. Mr. Smith did not meaningfully contest ECUA's argument that he could no longer perform the physical tasks associated with a sanitation equipment operator II. Instead, Mr. Smith's case focused on arguing that there are other, less demanding positions, within ECUA's Sanitation Department and that assigning him to one of those positions would be a reasonable accommodation. However, Mr. Smith failed to prove that he was capable of handling the physical demands associated with those positions.

19. For instance, Mr. Smith raised the possibility of being assigned to ECUA's "miss truck." ECUA's standard refuse trucks occasionally miss refuse pick-ups due to inadvertence on the drivers' part or residents' failure to place their garbage on the curb in a timely manner. The miss truck is not as large as a typical refuse truck and is more automated. Therefore, miss truck duty is not as physically demanding as driving a typical refuse truck.

Nevertheless, Mr. Kyles's testimony demonstrated that miss truck duty is still a physically demanding position in that the miss truck driver must be capable of transporting large refuse cans to and from residences over all types of surfaces and distances. Because ECUA's standard refuse trucks typically miss 40-50 refuse pickups a day, the preponderance of the evidence indicates that the physical demands associated with miss truck duty are not appropriate for someone with Mr. Smith's physical limitations.

20. Mr. Smith also raised the possibility of transporting ECUA's fuel trailer. ECUA obtains fuel for its refuse trucks by transporting a fuel trailer to the Alabama-Florida line, acquiring the fuel, and transporting it back to ECUA. While this work is probably not as physically demanding as operating a refuse truck, Mr. Kyles testified that a fuel trailer operator would still have to satisfy the physical requirements associated with the sanitation equipment operator II position. Mr. Smith did not present any evidence to rebut Mr. Kyles's testimony, and it is therefore accepted.

21. Finally, Mr. Smith mentioned "monitoring piles" during his direct testimony. However, he presented no details about such duty. As a result, there is no competent, substantial evidence indicating that pile monitoring would be within his physical limitations, or that it would be a reasonable accommodation.

CONCLUSIONS OF LAW

22. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.65(6) and 120.57(1), Florida Statutes.

23. The Contract provides that ECUA "has the burden of proof by a preponderance of the evidence." In the instant case, ECUA had to prove by a preponderance of the evidence that Mr. Smith, contrary to Section B-13 A (10) of the Manual, is unable to perform the essential functions of a sanitation equipment operator II, with or without a reasonable accommodation. "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).

24. As found above, the preponderance of the evidence demonstrates that Mr. Smith cannot tolerate the physical demands associated with his former position as a sanitation equipment operator II, and is thus out of compliance with Section B-13 A (10) of the Manual.

25. During the final hearing, Mr. Smith mentioned three other positions within ECUA's Sanitation Department and considered each of them to be a reasonable accommodation for him. On this point, Mr. Smith was the party asserting the affirmative of a factual issue and thus had the burden of demonstrating by a preponderance of the evidence that the other positions were reasonable accommodations. *Balino v. Dep't of HRS*, 348 So. 2d 349 (Fla. 1st DCA 1977). However, and as discussed above, Mr. Smith was unable to satisfy his burden of proof.

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 James V. Smith, Sr., is no longer qualified to perform the functions of a sanitation equipment operator II and take such action as deemed appropriate under the pertinent provisions of the Human Resources Manual and Employee Handbook.

DONE AND ENTERED this 26th day of March, 2020, 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
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this 26th day of March, 2020.

COPIES FURNISHED:

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NOTICE OF RIGHTS TO SUBMIT WRITTEN ARGUMENT

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.