

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EMERALD COAST UTILITIES AUTHORITY,

Petitioner,

vs.

Case No. 20-0378

ROBERT PACKER,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, an administrative hearing was conducted in this case on July 27 and August 6, 2020, via Zoom teleconferencing, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

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

For Respondent: Robert L. Packer, pro se
2329 Silverside Loop
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STATEMENT OF THE ISSUE

The issue in this case is whether Robert L. Packer (Respondent) violated Emerald Coast Utilities Authority (ECUA or Petitioner) personnel policies as set forth in subsections B-13 A (4), (22), (32) and (33) of ECUA's Human Resources Manual and Employee Handbook, as charged in the letter dated January 13, 2020, from Petitioner's sanitation collections manager.

PRELIMINARY STATEMENT

By letter from ECUA's sanitation collections manager dated January 13, 2020 (Notice of Suspension), ECUA notified Respondent that he would be suspended from his employment with ECUA for one eight-hour day on January 30, 2020. The Notice of Suspension stated that Respondent's suspension was based on Respondent's violations of ECUA's Human Resources Manual, subsections B-13 A (4) (conduct unbecoming an ECUA employee), (22) (negligent operation of ECUA vehicles or equipment), (32) (violation of safety practices), and (33) (violation of ECUA rules or guidelines or state or federal law). The Notice of Suspension further advised Respondent that he had 10 days from his receipt of the letter within which to submit a written request for a formal evidentiary hearing on ECUA's employment decision before an administrative law judge with DOAH.

By hand-written note to ECUA's director of human resources dated January 15, 2020, and received by ECUA's human resources and administrative services that same day, Respondent timely submitted a request for a formal hearing. On January 24, 2020, ECUA referred the case to DOAH for a formal hearing. The hearing was initially scheduled for April 7, 2020, but was twice continued and rescheduled to be heard on July 27, 2020. It was first scheduled to be held live, but was then rescheduled to be conducted via Zoom teleconferencing.

At the beginning of the hearing, Petitioner's request that official recognition be taken of chapters 2001-324 and 2004-398, Laws of Florida (under tabs 1 and 2 in ECUA's exhibit book), was granted. During the hearing, ECUA presented the testimony of five witnesses, including Respondent, and offered 14 exhibits received into evidence as Exhibits P-3 through P-16.

Respondent testified on his own behalf, and, by agreement, presented additional testimony from some of the witnesses called by ECUA through expanded cross-examination. Respondent offered six exhibits received into evidence as Exhibits R-1 through R-3, R-5, R-7 and R-8.

On August 11, 2020, DOAH received late-filed exhibits from Respondent. They were docketed but not considered.

FINDINGS OF FACT

1. Escambia County Utilities Authority was declared an independent special district with transferred assets and enumerated powers by chapter 2001-324, Laws of Florida. Escambia County Utilities Authority's name was changed to ECUA by chapter 2004-398. 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 Service Rules. *Id.*

2. Respondent was hired by Petitioner as a sanitation equipment operator in April 2009, with a start date of April 14, 2009. Respondent was promoted with a salary increase to a sanitation equipment operator II (step 2) on April 14, 2010, and received another raise on December 7, 2019, when he was transferred to ECUA's commercial division.

3. On the first day of his employment, Respondent acknowledged receipt of a copy of ECUA's Employee Handbook, which is a summary of ECUA's benefits, policies, procedures, and rules, and was advised that a copy of ECUA's Human Resources Manual is available for review by all employees.

4. On December 10, 2019, while covering another driver's route, Respondent was operating ECUA vehicle number 26B, a Half Pack Dura-Pack garbage truck designed to pick up and empty large garbage containers (dumpsters or cans).

5. Although Respondent had driven the route several times before, it was not his regular route. One of the customers on the route was Eddie Craig Express Automotive, an automotive body shop located at 6345 North Palafox Street in Pensacola.

6. Respondent serviced the Eddie Craig Express Automotive location between 4:00 and 5:00 a.m., the morning of December 10, 2019. When he arrived at the location, it was dark and there were a lot of cars in the lot where the dumpster was located. There was a truck parked at an angle to the dumpster that Respondent had to maneuver around.

7. Prior to dumping, which involved lifting the can over the garbage truck with the truck's front forks, Respondent got out of his truck and surveyed the site to make sure that the arms of the truck and the dumpster would not make contact with the building next to the dumpster.

8. Respondent then got back into the truck and dumped the can.

9. Respondent did not notice any contact with the roof or damage to the building. Although the mirrors on the left side of the garbage truck were sufficient to see the left side of the dumpster while overhead, the mirrors on the right side (where the building was located) were insufficient to view that side of the can during the dumping process.

10. In addition, because of the noise of the garbage truck, especially during the dumping process with hydraulic noises and additional engine acceleration, it is unlikely that Respondent would have been able to hear any contact that the dumpster or truck forks may have made with the adjacent building.

11. Respondent did not notice any contact with or damage to the adjacent building. After dumping the can, Respondent backed out, returning to the roadway, carefully avoiding the cars parked in the lot.

12. According to the ECUA Vehicle Claim Report of the incident, Eddie Craig, the owner of Eddie Craig Express Automotive, contacted ECUA risk management staff and reported damage to the left front roof eave on the

corner of his building that he believed was done by an ECUA sanitation truck on the morning of December 10, 2019.

13. Upon investigation at the scene on December 12, 2019, investigating ECUA employees observed wood fragments and debris below the corner of the building's damaged roof which had paint smudges matching the paint of both the dumpster and ECUA's sanitation trucks.

14. The dumpster on the site had scratches consistent with the theory that the damage to the roof eave was caused by contact with the dumpster.

15. In addition, the ECUA employees who investigated the scene observed a tire track adjacent to the building matching the tread on tires used on ECUA vehicle number 26B, and other ECUA sanitation vehicles. The location of the tire track was close enough to the building to support the conclusion that the damage to the roof was caused by an ECUA truck while dumping a can.

16. Respondent confirmed that he was the one that serviced the can at Eddie Craig Express Automotive on the morning of December 10, 2019. There were no other dump services scheduled between the time Respondent dumped the can and the investigation on December 12, 2019.

17. The preponderance of the evidence demonstrates that, despite Respondent's precaution of getting out of the truck and looking around prior to dumping the can, unfortunately, the dumpster or the green arms of the garbage truck, or both, bumped the corner of the roof of the adjacent building, bending away the flashing and knocking off pieces of wood.

18. Given the obstacles in the lot, it is quite apparent that Respondent went out of his way to service the customer that morning. However, especially in hindsight, it is equally obvious that it would have been better not to service the dumpster that day.

19. ECUA's sanitation collection manager, Keith Kyles, testified that, although not a written rule, he tells the sanitation truck drivers all the time, including Respondent, that in order to avoid accidents, they should not

attempt to service cans in precarious locations. Rather, according to the advice given by Mr. Kyles, the drivers should leave the containers in place and call in the problem so that the cans can be relocated.

20. Prior to this accident, although written up on May 3, 2017, for an unrelated incident involving failure to properly report the poor condition of a vehicle's tires, and on October 16, 2017, for failure to pick up bulk waste items, Respondent had not had an accident with an ECUA vehicle since 2013.

21. ECUA's commercial services supervisor, Ricky Fretwell, testified that Respondent is a good employee. Mr. Fretwell said that he felt bad for Respondent because of the accident. According to Mr. Fretwell, Respondent "went out of his way, but it cost him."

22. Mr. Fretwell confirmed that, because of the noise during dumping, it was quite possible that Respondent did not notice that an accident had occurred.

23. Mr. Fretwell, as one of the ECUA employees who investigated the accident scene on December 12, 2019, however, also confirmed that the angle of the tire track, the wood shards, paint scrapes, and other evidence was consistent with the conclusion that the damage occurred that morning of December 10, 2019, when Respondent serviced the site.

24. Mr. Fretwell further confirmed that, consistent with Mr. Kyles's testimony, according to unwritten protocol, instead of servicing the site that morning, Respondent should have left the dumpster in place and called it in.

CONCLUSIONS OF LAW

25. DOAH has jurisdiction over the subject matter and parties to this proceeding. *See Administrative Law Judge Services Contract* effective March 3, 2006; § 120.65(6), Fla. Stat. (2014).

26. ECUA has the burden of proof by a preponderance of the evidence. *See* paragraph 7(j), contract between ECUA and DOAH.

27. In this case, ECUA demonstrated by a preponderance of the evidence that Respondent was involved in an accident while operating an ECUA vehicle resulting in damage to the roof eave of a building located at the Eddie Craig Express Automotive location, 6345 North Palafox Street, Pensacola, Florida, between 4:00 and 5:00 a.m. on the morning of December 10, 2019.

28. Policies in the ECUA's Human Resources Manual and Employee Handbook (Manual) pertinent to the facts of this case, and referenced in the Notice of Suspension, include the following numbered paragraphs found under subsection A entitled "Disciplinary Offenses" in Manual section B-13 entitled "Discipline Guidelines":

4. Conduct unbecoming an ECUA employee:

Any 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. Conduct unbecoming an ECUA employee includes any conduct which adversely affects the morale or efficiency of the ECUA, or any conduct which has a tendency to destroy public respect or confidence in the ECUA, in its employees, or in the provision of ECUA services. The seriousness of the conduct which constitutes a "conduct unbecoming an ECUA employee" offense determines the appropriate discipline. If an employee repeatedly engages in conduct unbecoming, but the acts or conduct which are unbecoming are dissimilar to each other, cumulative discipline may be imposed.

* * *

22. Negligent operation of ECUA vehicles or equipment:

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.

* * *

32. Violation of safety practices:

The failure to adhere to or follow established safety procedures. This includes the failure to wear safety equipment and performing any unsafe action.

33. Violation of ECUA rules or guidelines or state or Federal law:

The failure to abide by ECUA rules, guidelines, directive, or state or federal statutes. This may include, but is not limited to, misuse of position, 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.

29. With regard to Respondent's alleged violation of Manual section B-13 A (4), entitled "Conduct unbecoming an ECUA employee," considering the language used defining that violation, it is concluded that Respondent's accident does not implicate that section. Section B-13 A (4) speaks in terms of "moral turpitude" and ability to perform the job, with an implied intent element. The facts show, however, that Respondent is a good employee who made an inadvertent mistake. The evidence further shows that Respondent was not aware that the accident had occurred so that his failure to report was not purposeful. In sum, a fair reading of section B-13 A (4), in view of the facts, does not implicate a violation of that section.

30. As to Respondent's alleged violation of Manual section B-13 A (22), entitled "Negligent operation of ECUA vehicles or equipment," the facts derived from the preponderance of the evidence, as outlined above, demonstrate that Respondent failed to operate ECUA vehicle number 26B with due care, resulting in an accident and property damage. Therefore, it is concluded that Respondent violated section B-13 A (22).

31. The evidence also demonstrated that Respondent violated section B-13 A (32), entitled "Violation of safety practices." Although unwritten, the safety practice of leaving cans that cannot be safely serviced, and calling them in, was not followed by Respondent, resulting in an accident.

32. Finally, as to the alleged violation of Manual section B-13 A (33), entitled "Violation of ECUA rules or guidelines or state or Federal law," it is concluded that Respondent's conduct in this instance did not violate that section. Although the title of that section seems broad, the specific examples of that section require scienter which, in this case, is not present.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is Recommended that the Executive Director of the Emerald Coast Utilities Authority find that Respondent violated ECUA Human Resources Manual and Employee Handbook sections B-13 A (22) and (32), but not sections B-13 A (4) or (33), as concluded above, and impose such discipline on Respondent as determined appropriate under the provisions of said Manual.

DONE AND ENTERED this 19th day of August, 2020, in Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 19th day of August, 2020.

COPIES FURNISHED:

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NOTICE OF RIGHT 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.