

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| STEVE J. LONGARIELLO, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | CASE NO. 95-5320 |
| |) | |
| DEPARTMENT OF EDUCATION, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case in Fort Lauderdale, Florida on June 4 and 5, 1996, before Stuart M. Lerner, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Steve J. Longariello, pro se
9999 Summerbreeze Drive, Number 422
Sunrise, Florida 33322

For Respondent: Charles S. Ruberg, Esquire
Department of Education
The Capitol, Suite 1701
Tallahassee, Florida 32399-0400

STATEMENT OF THE ISSUE

1. Whether the Department of Education (Department), through its Office of Teacher Recruitment and Retention, committed an unlawful employment practice in violation of Section 760.10(2), Florida Statutes, as alleged by Petitioner, by failing or refusing to refer Petitioner for employment because of his sex (male) and/or marital status (single)?

2. If so, what affirmative relief should Petitioner be provided?

PRELIMINARY STATEMENT

On or about July 8, 1993, Petitioner filed a unlawful employment practice complaint with the Florida Commission on Human Relations (Commission) alleging that the Department had discriminated against him because of his sex and marital status. On November 1, 1995, at Petitioner's request and without any reasonable cause determination having been made, the Commission referred the matter to the Division of Administrative Hearings (Division) for the assignment of a Division hearing officer to conduct a formal Section 120.57 hearing.

On November 17, 1995, the Department filed with the Division a Motion to Deny the Request for Hearing that Petitioner had filed with the Commission. Petitioner, on November 30, 1995, filed a response to the Department's motion. The Hearing Officer treated Petitioner's response as an amendment of his unlawful employment practice complaint (filed pursuant to Rule 60Y-5.001(7), Florida Administrative Code, which allows a complainant to amend his complaint "any time before service of a Notice of Determination" "to cure technical defects, or omissions, or to clarify and amplify allegations made therein.") As so amended, Petitioner's complaint alleged that the Department, through its Officer of Teacher Recruitment and Retention (OTRR), refused to refer Petitioner for employment as a teacher because of his sex and marital status.

The formal hearing on Petitioner's amended complaint was held on June 4 and 5, 1996. During the evidentiary portion of the hearing, a total of four witnesses testified: Petitioner; Sherry Thomas, OTRR's program director; Jerry Moore, the Department's Director of Labor Relations; and Amy Sykes, a former secretary specialist with OTRR. In addition to the testimony of these four witnesses, a total of 21 exhibits (Petitioners' Exhibits 1 through 19 and Respondent's Exhibits 1 and 2) were offered and received into evidence.

At the conclusion of the evidentiary portion of the hearing, the Hearing Officer, on the record, advised the parties of their right to file proposed recommended orders and established a deadline (twenty days after the Hearing Officer's receipt of the transcript of the hearing) for the

filing of these post-hearing submittals. The Hearing Officer received the transcript of the hearing on July 5, 1996. On July 25, 1996, the Department timely filed a proposed recommended order containing, among other things, (what are labelled as) "findings of fact." The Hearing Officer has carefully considered the Department's proposed recommended order. The "findings of fact" set forth therein are specifically addressed in the Appendix to this Recommended Order. To date, Petitioner has not filed a proposed recommended order.

FINDINGS OF FACT

Based upon the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. The Department is a state agency.
2. Petitioner is a male who is now, and was at all times material to the instant case, unmarried.
3. He is a teacher by profession.
4. Since moving to Florida in the summer of 1992, however, he has been unable to obtain a full-time teaching position.
5. Petitioner received a Bachelor of Arts degree from the State University of New York at New Paltz in December of 1984 and a Master of Arts degree (in "teaching/special education") from Manhattanville College in May of 1989.
6. Prior to moving to Florida in the summer of 1992, Petitioner was employed as: a music instructor at the Kingston Conservatory of Music in Kingston, New York (from May of 1984 to September of 1985); a business instructor at the Westchester Business Institute in White Plains, New York (from September of 1985 to June of 1986); a substitute teacher in Pelham, Eastchester, Tuckahoe and Bronxville, New York (from September of 1986 to June of 1988); a music and vocational education teacher of 11 to 15 year old special education students at a public school in New York City (from September of 1989 to March of 1990); a classroom teacher of fourth grade special education students at a public school in the Bronx, New York (from March of 1990 to June of 1990); a classroom teacher of first through third grade special education students at a public school in Yonkers, New York (from September of 1990 to June of 1991); and an integration specialist involved in the provision of educational services to special education students attending public school in and around Jacksonville, Vermont (from February of 1992 to June of 1992).
7. On October 15, 1992, the Department's Bureau of Teacher Certification issued Petitioner a Statement of Eligibility, which provided, in pertinent part, as follows:

THIS IS YOUR STATEMENT OF ACADEMIC ELIGIBILITY FOR SPECIFIC LEARNING DISABILITIES (GR, K-12), PER REQUEST OF 10-9-92, VALID UNTIL OCTOBER 15, 1994.

The State of Florida issues two types of certificates for full time teaching; a nonrenewable Temporary Certificate valid for two years and a Professional Certificate valid for five years. The attached Form CF-106a, FLORIDA TEACHER CERTIFICATION REQUIREMENTS, outlines the criteria for the issuance of these certificates. The Temporary Certificate is issued to allow time to complete requirements for the Professional Certificate.

Your application for teacher certification has been received and evaluated. Based upon current requirements, you will be eligible for a two-year nonrenewable Temporary Certificate valid for two consecutive school fiscal years covering SPECIFIC LEARNING DISABILITIES (GRADES K-12)

when:

You obtain employment with a Florida public, state supported, or nonpublic school which has an approved Florida Professional Orientation Program and your employer requests issuance of the certificate.

Your employer submits a finger print card which has been processed by the Florida Department of Law Enforcement and the Federal Bureau of Investigation. . .

Please note that if you are not employed and the issuance of your certificate is not requested by October 14, 1994, your Statement of Eligibility will expire. . . .

8. At all times material to the instant case, there was, on a statewide basis in Florida, as determined by the Department, a "critical" shortage of teachers qualified to teach students with specific learning disabilities (SLD). (There were, however, certain school districts, including the Broward, Palm Beach, Collier and Monroe County school

districts, that, because of the relatively high salaries they offered or their attractive geographic location, or for other related reasons, did not have a "critical" shortage of qualified SLD teachers.)

9. The Department's Bureau of Teacher Certification suggested to Petitioner that he take advantage of the services offered by OTRR in his efforts to obtain a teaching position in Florida.

10. OTRR assists teachers seeking employment in Florida by, among other things, providing them with an "information packet" containing: general information concerning Florida's public school system, its students and teachers; a map showing the school districts in the state; the names, addresses and telephone numbers of persons to contact regarding employment opportunities in each school district; other useful telephone numbers; salary information, by district; information concerning Florida's teacher certification process; and information about the Great Florida Teach-In, an annual event (held in late June/early July 1/) organized by OTRR at which recruiters from school districts around the state have the opportunity to meet and interview with teachers interested in obtaining teaching positions in their districts. 2/

11. In addition to this "information packet," OTRR also sends to interested teachers two forms which the teachers are instructed to fill out, sign and return to OTRR: an application to register to participate in the next Great Florida Teach-In; and a Teacher Applicant Referral form.

12. On the Great Florida Teach-In registration application form, applicants are asked to provide the following information: the date of the application; their name, address and telephone number; the date they will be able to commence work; the position(s) sought; whether they hold a valid Florida teaching certificate- if so, in what subject area(s), and, if not, whether they have applied for certification and the subject area(s) in which they expect to receive certification; whether they have taken and passed the Florida Teacher Certification Examination and, if so, which part(s); whether they hold a teaching certificate from another state and, if so, in what subject area(s); whether they have ever had a teaching certificate or license revoked, suspended, or placed on

probation and, if so, on what ground(s); whether they have ever been the subject of any disciplinary action and, if so, the nature and date of such action and why it was taken; whether they have ever been dismissed, asked to resign or not had a contract renewed and, if so, the reason(s) therefor; the total number of days they have been absent from school or work in the last three years and the reason(s) for these absences; and all colleges/universities from which they have received degrees, when they attended these institutions, when they graduated, the kind of degrees they received, the subjects they studied (major and minor), and whether their grade point average was higher than 2.5.

13. On the Teacher Applicant Referral form, applicants are asked to provide the following information: the date of the application; their name, address, telephone number and social security number; the date they will be able to commence work; the position(s) sought; whether they hold a valid Florida teaching certificate- if so, in what subject area(s), and, if not, whether they have applied for certification and the subject area(s) in which they expect to receive certification; whether they hold a teaching certificate from another state and, if so, in what subject area(s); whether they are a U.S. citizen and, if not, whether they have a resident alien work permit; and the institutions from which they have received degrees, the kind of degrees they have received, and their major course of study at these institutions.

14. On neither the Great Florida Teach-In registration application form nor the Teacher Applicant Referral form are applicants asked to provide information regarding their sex or marital status. (It may be possible, however, to ascertain an applicant's sex from the name of the applicant appearing on the form.)

15. Following the suggestion of the Department's Bureau of Teacher Certification, Petitioner contacted OTRR. He thereafter received from OTRR an "information packet," as well as a registration application form for the 1993 Great Florida Teach-In (scheduled to be held June 27 through July 1, 1993) and a Teacher Applicant Referral form.

16. Petitioner filled out and signed the Teacher Applicant Referral form on or about November 10, 1992, and

returned the completed and signed form to OTRR. On the form, Petitioner indicated, among other things, that he was interested in "Special Education Teacher Type Positions-SLD" and that he was "Florida certified [in] Specific Learning Disabilities."

17. In view of Petitioner's first and middle names (Steve Joseph), both of which he included on the form, it should have been obvious to anyone reviewing the form that it was submitted by a male. Petitioner, however, provided no information on the form suggesting that he was a single male.

18. Petitioner kept a copy of the original completed and signed Teacher Applicant Referral form he submitted to OTRR. On or about October 2, 1993, he signed the copy and sent it to OTRR.

19. At all times material to the instant case, it was the routine practice of OTRR to take the following action in connection with completed and signed Teacher Applicant Referral forms it received: Information on the forms was inputted and stored in OTRR's computer system. The forms (and copies thereof made by OTRR) were then filed in alphabetical order and by subject area. They remained on file for approximately a year, after which they were purged. When a school district contacted OTRR seeking help in its efforts to fill a particular teaching position, 3/ OTRR would pull the forms of all those applicants who, based upon the subject area of the position sought to be filled and any other criteria specified by the school district, appeared (from the information contained on their forms) to meet the needs of the school district. Copies of these forms, along with a computer printout containing the names, addresses, telephone numbers, certification status and citizenship of these applicants, were sent to the school district. On occasion, information concerning these applicants was provided to the school district over the telephone. At no time did OTRR fail to refer an applicant to a school district because the applicant was a male or was single. 4/

20. OTRR did not deviate from its routine practice in its handling and treatment of either the original Teacher Applicant Referral form that Petitioner submitted on or about November 10, 1992, or the re-signed copy of the original he submitted on or about October 2, 1993.

(Petitioner, however, has not been contacted by any school district purporting to have received his name from OTRR.)

5/

21. Petitioner also filled out and signed the registration application form for the 1993 Great Florida Teach-In and sent it to OTRR, 6/ but he did not do so in a timely manner. (The application was dated June 27, 1993, the date the 1993 Great Florida Teach-In began.) Petitioner did not attend the 1993 Great Florida Teach-In, nor did he attend the event in any subsequent year.

22. Petitioner has applied for teaching positions at public schools in Broward County (where he has resided since he moved to Florida in the summer of 1992), Dade County, Palm Beach County, Collier County, Monroe County and one other Florida county (located in the northern part of the state). He also has applied for teaching positions at at least one Florida private school, Lighthouse Point Academy, which is located in Broward County. Notwithstanding these efforts on his part, Petitioner has not received any offers of full-time, permanent employment and he remains unemployed. 7/

23. Petitioner has not taken any part of the Florida Teacher Certification Examination.

24. The Statement of Eligibility that the Department's Bureau of Teacher Certification issued Petitioner on October 15, 1992, expired on October 15, 1994.

25. The Department did not in any way discriminate against Petitioner on the basis of his sex or marital status.

CONCLUSIONS OF LAW

26. The Florida Civil Rights Act of 1992 (hereinafter referred to as the "Act") is codified in Sections 760.01 through 760.11 and 509.092, Florida Statutes. Its provisions apply "to conduct occurring on or after October 1, 1992." Chapter 92-177, Section 13, Laws of Fla.

27. Among other things, the Act makes certain acts "unlawful employment practices" and gives the Commission the authority, if it finds, following a Section 120.57

administrative hearing, that such an "unlawful employment practice" has occurred, to issue an order "prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay." Section 760.10, Fla. Stat.

28. Among the "unlawful employment practices" prohibited by the Act is that described in Section 760.10(2), Florida Statutes, which provides as follows:

It is an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of race, color, religion, sex, national origin, age, handicap, or marital status or to classify or refer for employment any individual on the basis of race, color, religion, sex, national origin, age, handicap, or marital status.

29. An "employment agency," as that term is used in Section 760.10(2), Florida Statutes, is "any person regularly undertaking, with or without compensation, to procure employees for an employer or to procure for employees opportunities to work for an employer, and includes an agent of such person." Section 760.02(8), Fla. Stat.

30. A "person," as that term is used in the Act "includes . . . the state; or any governmental entity or agency." Section 760.02(6), Fla. Stat.

31. As an agency of the state, the Department is a "person," within the meaning of Section 760.02(6), Florida Statutes. Section 20.15, Fla. Stat.

32. Among the Department's duties and responsibilities are those prescribed in Section 231.625, Florida Statutes, which is entitled "Teacher shortage recruitment and referral" and provides as follows:

(1) The Department of Education, through the Center for Career Development Services, in cooperation with teacher organizations and district personnel directors, shall expand its career information system to concentrate on the recruitment of qualified teachers in

teacher shortage areas.

(2) The Department of Education, through the Center for Career Development, shall establish a teacher referral and recruitment center which shall:

(a) Advertise teacher positions in targeted states with declining student enrollments.

(b) Advertise in major newspapers, national professional publications, and other professional publications and in graduate schools of education.

(c) Utilize a nationwide toll-free number and central post-office box.

(d) Develop standardized resumes for teacher applicant data.

(e) Conduct periodic communications with district superintendents and personnel directors regarding new applicants.

(f) Provide district access to the applicant database by computer or telephone.

(g) Develop and distribute promotional materials related to teaching as a career.

(h) Publish and distribute information pertaining to teacher salaries and benefits for beginning and continuing teachers.

(i) Publish information related to alternative certification procedures.

(j) Develop and sponsor the Future Educator of America clubs throughout the state.

(3) The teacher referral and recruitment center, in cooperation with teacher organizations and district personnel directors, shall sponsor an annual job fair in a central part of the state to match in-state educators and out-of-state educators with teaching opportunities in this

state.

33. OTRR is the "teacher referral and recruitment center" the Department established (in its Division of Human Resource Development 8/) pursuant to the mandate of subsection (2) of Section 231.625, Florida Statutes.

34. In performing its "teacher referral and recruitment" functions, OTRR acts as an "employment agency," within the meaning of Section 760.02(8), Florida Statutes, subject to the proscriptions of Section

760.10(2), Florida Statutes. If OTRR fails or refuses to furnish to a school district (requesting OTRR's assistance in filling a teaching position) the name of and other information it has on file concerning an educator (who has provided OTRR with such information for dissemination to prospective employers) because the educator is a male or is single, OTRR (and therefore the Department) commits an unlawful employment practice in violation of Section 760.10(2), Florida Statutes.

35. In the instant case, Petitioner has alleged that he was the victim of such an unlawful employment practice.

36. A complainant, like Petitioner, who claims to have been discriminated against by an "employment agency" based upon his sex and marital status bears the initial burden of establishing a prima facie case of discrimination. This burden may be met by the complainant showing that (1) he enlisted the services of the "employment agency" and was qualified for a job for which an employer was seeking referrals from the "employment agency;" (2) at the time, he was a single male; (3) despite his qualifications, he was not referred to the employer by the "employment agency;" and (4) females or married persons with similar or lesser qualifications were referred. If the complainant makes such a showing, the burden shifts to the "employment agency" to state some legitimate, nondiscriminatory reason for its failure to have referred the complainant. The reason must be clear, reasonably specific and worthy of credence. (The "employment agency," however, need not prove that its decision was actually motivated by the reason given.) If the "employment agency" articulates a reason that meets the foregoing requirements, the burden shifts back to the complainant to prove that, contrary to the explanation given by the "employment agency," his sex and marital status were the real reasons he was not referred by the "employment agency." See Florida Department of Community Affairs v. Bryant, 586 So.2d 1205 (Fla. 1st DCA 1991); Department of Corrections v. Chandler, 582 So.2d 1183 (Fla. 1st DCA 1991).

37. In the instant case, Petitioner did not meet his initial burden of making a prima facie showing of discrimination. He failed to prove that OTRR treated him less favorably than any similarly or lesser qualified female or married educator who, like Petitioner, (on the

Teacher Applicant Referral form) had expressed an interest in "Special Education Teacher Type Positions- SLD." Indeed, Petitioner's proof was insufficient to even establish that, during the relevant time frame, OTRR failed to refer him to any school district that had requested OTRR's assistance in filling "Special Education Teacher Type Positions- SLD" (much less establish that such a failure to refer constituted disparate treatment and was discriminatorily motivated, as alleged in Petitioner's amended unlawful employment practice complaint.)

38. Given the lack of evidence sufficient to support a finding that there was such a failure to refer on OTRR's (and therefore the Department's) part, Petitioner's amended unlawful employment practice complaint (the cornerstone of which is the allegation that Petitioner was the recipient of such unfavorable treatment on OTRR's part) must be dismissed.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Commission enter a final order dismissing Petitioner's amended unlawful employment practice complaint on the ground that the evidence is insufficient to establish that the Department committed the unlawful employment practice alleged therein.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 14th day of August, 1996.

Officer
Hearings
1550

STUART M. LERNER, Hearing
Division of Administrative
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-
(904) 488-9675 SUNCOM 278-9675
Filed with the Clerk of the

Hearings

Division of Administrative

this 14th day of August, 1996.

ENDNOTES

1/ In terms of advertising and filling teaching positions in Florida's public schools, the busiest months are May, June and July.

2/ OTRR does not now, nor did it at any time material to the instant case, maintain a listing of job vacancies

3/ Such contact was typically made by telephone.

4/ Petitioner, however, was led to believe otherwise based upon comments made to him by Norman MacMillian, a former employee of the Department's Bureau of Teacher Certification (who did not testify at the final hearing in the instant case because Petitioner was unable to locate him). These comments were made during a conversation in which Petitioner complained to MacMillian about his inability to obtain a teaching position in Florida.

5/ OTRR does not, nor did it at any time material to the instant case, maintain records of requests received by OTRR from school districts and action taken by OTRR in response to these requests. Accordingly, no such records were offered into evidence at the final hearing in this case. Furthermore, at hearing neither party presented the testimony of anyone who specifically recalled what particular action, if any, OTRR took in connection with either the Teacher Applicant Referral form Petitioner originally submitted to OTRR or the re-signed copy he subsequently submitted. The Department, however, did adduce evidence concerning OTRR's customary practice. Such evidence was sufficient to establish a presumption, which Petitioner failed to overcome or negate, that OTRR acted in conformity with that practice in connection with its handling and treatment of the materials it received from Petitioner. See *Progressive American Insurance Company v. Kurtz*, 518 So.2d 1339, 1340-41 (Fla. 5th DCA 1987); Section 90.406, Fla. Stat. ("[e]vidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove that the conduct of the organization on

a particular occasion was in conformity with the routine practice").

6/ On the form, in response to the question, "Have you ever been dismissed, asked to resign or had your contract not renewed?," Petitioner stated as follows: "I have never had a regular appointed teacher contract. The contracts were considered regular substitute teacher and expired at the end of the year."

7/ Petitioner has also filed unlawful employment practice complaints against Lighthouse Point Academy and the Broward, Dade, Palm Beach, Collier and Monroe County school districts alleging that these prospective employers discriminated against him on the basis of his sex and marital status.

8/ The Division of Human Resource Development is one of five divisions within the Department. Section 20.15(2)(a), Fla. Stat.

APPENDIX TO RECOMMENDED ORDER

The following are the Hearing Officer's specific rulings on the "findings of facts" proposed by the Department in its proposed recommended order:

1. Accepted as true and incorporated in substance, although not necessarily repeated verbatim, in this Recommended Order.

2. First and second sentences: Accepted as true and incorporated in substance; Third sentence: Rejected as a finding of fact because it is more in the nature of a statement of law than a finding of fact.

3-6. Rejected as findings of fact because they are more in the nature of statements of law than findings of fact.

7. First, second and third sentences: Accepted as true and incorporated in substance; Fourth sentence: Rejected as a finding of fact because it is more in the nature of legal argument than a finding of fact.

8. To the extent that this proposed finding states that Petitioner initially submitted a completed and signed Teacher Applicant Referral form to OTRR in October (rather than November) of 1992, it has been rejected because it

lacks sufficient evidentiary/record support. Otherwise, it has been accepted as true and incorporated in substance.

9. First and second sentences: Accepted as true and incorporated in substance; Third sentence: Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

10. Accepted as true and incorporated in substance.

11. First sentence: Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer; Remaining sentences: Accepted as true and incorporated in substance.

12. First sentence: Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer; Second sentence: Accepted as true and incorporated in substance.

13. Accepted as true and incorporated in substance.

14. Second sentence: Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer; Remaining sentences: Accepted as true and incorporated in substance.

15. Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

16. First and second sentences: Not incorporated in this Recommended Order because they would add only unnecessary detail to the factual findings made by the Hearing Officer; Third sentence: Accepted as true and incorporated in substance.

17. First sentence: Accepted as true and incorporated in substance; Second sentence: Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

18. Accepted as true and incorporated in substance.

19. Last sentence: Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer; Remaining sentences: Accepted as true and incorporated in substance.

20. First, third and fourth sentences: Accepted as true and incorporated in substance; Remaining sentences: Not incorporated in this Recommended Order because they

would add only unnecessary detail to the factual findings made by the Hearing Officer.

21. Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

22. First sentence: Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Office; Second and third sentence: Rejected as findings of fact because they are more in the nature of arguments concerning the state of the evidentiary record than findings of fact; Fourth sentence: Accepted as true and incorporated in substance.

23. First sentence: Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

24. Third sentence: Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer; Remaining sentences: Accepted as true and incorporated in substance.

25. First sentence: Rejected as a finding of fact because it is more in the nature of argument concerning the state of the evidentiary record than a finding of fact; Second and third sentences: Accepted as true and incorporated in substance.

26. First and second sentences: Not incorporated in this Recommended Order because they would add only unnecessary detail to the factual findings made by the Hearing Officer; Third and fourth sentences: Rejected as findings of fact because they are more in the nature of arguments concerning the state of the evidentiary record than findings of fact.

27. Accepted as true and incorporated in substance.

28. Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

29. Accepted as true and incorporated in substance.

30. First sentence: Accepted as true and incorporated in substance; Remaining sentences: Not incorporated in this Recommended Order because they would add only unnecessary detail to the factual findings made by the Hearing Officer.

31. First, second and third sentences: Not incorporated in this Recommended Order because they would add only unnecessary detail to the factual findings made by the Hearing Officer; Fourth, fifth and sixth sentences:

Rejected as findings of fact because they are more in the nature of legal arguments than findings of fact.

32. First and third sentences: Not incorporated in this Recommended Order because they would add only unnecessary detail to the factual findings made by the Hearing Officer; Second sentence: Accepted as true and incorporated in substance.

33. Last sentence: Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer; Remaining sentences: Accepted as true and incorporated in substance.

34. Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

35. First sentence: Accepted as true and incorporated in substance; Second sentence: Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

36. Accepted as true and incorporated in substance.

COPIES FURNISHED:

Steve J. Longariello
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Sunrise, Florida 33322

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this recommended order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period of time within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| STEVE J. LONGARIELLO, |) | |
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| Petitioner, |) | |
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| vs. |) | CASE NO. 95-5320 |
| |) | |
| DEPARTMENT OF EDUCATION, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

FINAL ORDER DENYING RESPONDENT'S MOTION FOR SANCTIONS

On or about July 8, 1993, Petitioner filed a unlawful employment practice complaint with the Florida Commission on Human Relations (Commission) alleging that the Department of Education (Department) had discriminated against him because of his sex and marital status. On November 1, 1995, at Petitioner's request and without any reasonable cause determination having been made, the Commission referred the matter to the Division of Administrative Hearings (Division) for the assignment of a Division hearing officer to conduct a formal Section 120.57 hearing.

On November 17, 1995, the Department filed with the Division a Motion to Deny the Request for Hearing that Petitioner had filed with the Commission. Petitioner, on November 30, 1995, filed a response to the Department's motion. The Hearing Officer treated Petitioner's response as an amendment of his unlawful employment practice complaint (filed pursuant to Rule 60Y-5.001(7), Florida Administrative Code, which allows a complainant to amend his complaint "any time before service of a Notice of Determination" "to cure technical defects, or omissions, or to clarify and amplify allegations made therein.") As so amended, Petitioner's complaint alleged that the Department, through its Officer of Teacher Recruitment and Retention (OTRR), refused to refer Petitioner for employment as a teacher because of his sex (male) and marital status (single).

The formal hearing on Petitioner's amended complaint was held on June 4 and 5, 1996. At the suggestion of both parties, the hearing was held in Fort Lauderdale, Florida.

A transcript of the hearing was prepared (at the Department's request) and filed with the Division. On July 25, 1996, the Department filed a proposed recommended order, as well a motion requesting that the Hearing Officer, pursuant to Section 120.57(1)(b)5, Florida Statutes, "enter an Order assessing against the Petitioner [the Department's] costs for travel [to the hearing site in Fort Lauderdale] and transcripts [of the formal hearing] and any additional sanctions deemed appropriate" in view of, what the Department argued in its motion was, "Petitioner's bad faith pursuit of an unfounded claim." On August 6, 1996, Petitioner filed a response in opposition to the Department's Motion for Sanctions.

The Hearing Officer issued his Recommended Order in this case on August 14, 1996. In his Recommended Order (which is incorporated by reference in this Final Order), the Hearing Officer recommended that the Commission "enter a final order dismissing Petitioner's amended unlawful employment practice complaint on the ground that the evidence is insufficient to establish that the Department committed the unlawful employment practice alleged therein." Remaining for disposition is the Department's Motion for Sanctions.

Section 120.57(1)(b)5, Florida Statutes, provides as follows:

All pleadings, motions, or other papers filed in the proceeding must be signed by a party, the party's attorney, or the party's qualified representative. The signature of a party, a party's attorney, or a party's qualified representative constitutes a certificate that he or she has read the pleading, motion, or other paper and that, to the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the hearing officer, upon motion or the officer's own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the

amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

"[T]his statutory provision proscribes the filing of papers for an improper purpose, including filing for a frivolous purpose. Its objective is similar to that of its federal counterpart, Rule 11, Federal Rules of Civil Procedure, which . . . is 'designed to discover dilatory or abusive tactics and to streamline the litigation process. The rule is aimed at deterrence, not fee shifting or compensating the prevailing party.'" 1/ Department of Health and Rehabilitative Services v. S.G., 613 So.2d 1380, 1384 (Fla. 1st DCA 1993), citing Mercedes Lighting and Electrical Supply, Inc. v. Department of General Services, 560 So.2d 272 (Fla. 1st DCA 1990). In determining whether a paper has been filed for an "improper purpose," the hearing officer "should not delve into an attorney's or party's subjective intent or into a good faith-bad faith analysis. Instead if a reasonably clear legal justification can be shown for the filing of the paper in question, improper purpose cannot be found and sanctions are inappropriate." Mercedes Lighting and Electrical Supply, Inc. v. Department of General Services, 560 So.2d at 278.

In the instant case, while the proof Petitioner presented at the formal hearing in this case was insufficient to meet his burden of proving the claim of discrimination he had made against the Department in his amended unlawful employment practice complaint, it appears that, given his status as a single male, his masculine first and middle names, Steve Joseph, both of which he included on the forms he sent to OTRR, the information he provided on these forms regarding his qualifications to teach students with specific learning disabilities (SLD), the "critical" shortage of qualified SLD teachers that existed statewide at the time, the absence of written records maintained by OTRR concerning any action it may have taken with respect to the forms Petitioner submitted, his failure to hear from any prospective employer purporting to have received his name from OTRR, and the comments made to him by Norman MacMillian, a former Department employee, regarding the Department's discriminatory practices, Petitioner had a reasonably clear legal justification for filing his amended unlawful employment practice complaint with the Division, at least to the extent that it alleged that he was discriminated

against by the Department because of his sex. Accordingly, sanctions should not be imposed against him, pursuant to Section 120.57(1)(b)5, Florida Statutes, for filing this amended complaint.

In view of the foregoing, the Department's Motion for Sanctions, which seeks the imposition of such sanctions, is hereby DENIED.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 14th day of August, 1996.

—
STUART M. LERNER, Hearing
Officer
Division of Administrative
Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-

1550

(904) 488-9675 SC 278-9675

Filed with the Clerk of the
Division of Administrative
Hearings
this 14th day of August, 1996.

ENDNOTE

1/ While "it is the hearing officer under [S]ection 120.57(1)(b)5 [Florida Statutes] who has the authority to administer the sanctions prescribed by this section," (Department of Health and Rehabilitative Services v. S.G., 613 So.2d 1380 at 1384), under Section 760.11, Florida Statutes, it is the Commission which is authorized, "in its discretion, [to] allow the prevailing party [in an administrative proceeding on an unlawful employment practice complaint] a reasonable attorney's fee as part of the costs" (which authority must be exercised by the Commission, according to the provisions of Section 760.11, "in a manner consistent with federal case law involving a Title VII action." Under existing federal case law, in a

Title VII action, a plaintiff may "not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so," but such an assessment may be made even though [the plaintiff's action was] not brought in subjective bad faith." *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 98 S.Ct. 694, 700 (1978). This standard is not unlike that which must be applied in determining whether sanctions should be imposed under Rule 11, Federal Rules of Civil Procedure. See *Simons v. Southwest Petro-Chem, Inc.*, 28 F.3d 1029 (10th Cir. 1994).

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the district court of appeal in the appellate district where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

| | | |
|--------------------------|---|------------------|
| STEVE J. LONGARIELLO, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | CASE NO. 95-5320 |
| |) | |
| DEPARTMENT OF EDUCATION, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

FINAL ORDER DENYING RESPONDENT'S MOTION FOR SANCTIONS

On or about July 8, 1993, Petitioner filed a unlawful employment practice complaint with the Florida Commission on Human Relations (Commission) alleging that the Department of Education (Department) had discriminated against him because of his sex and marital status. On November 1, 1995, at Petitioner's request and without any reasonable cause determination having been made, the Commission referred the matter to the Division of Administrative Hearings (Division) for the assignment of a Division hearing officer to conduct a formal Section 120.57 hearing.

On November 17, 1995, the Department filed with the Division a Motion to Deny the Request for Hearing that Petitioner had filed with the Commission. Petitioner, on November 30, 1995, filed a response to the Department's motion. The Hearing Officer treated Petitioner's response as an amendment of his unlawful employment practice complaint (filed pursuant to Rule 60Y-5.001(7), Florida Administrative Code, which allows a complainant to amend his complaint "any time before service of a Notice of Determination" "to cure technical defects, or omissions, or to clarify and amplify allegations made therein.") As so amended, Petitioner's complaint alleged that the Department, through its Officer of Teacher Recruitment and Retention (OTRR), refused to refer Petitioner for employment as a teacher because of his sex (male) and marital status (single).

The formal hearing on Petitioner's amended complaint was held on June 4 and 5, 1996. At the suggestion of both parties, the hearing was held in Fort Lauderdale, Florida.

A transcript of the hearing was prepared (at the Department's request) and filed with the Division. On July 25, 1996, the Department filed a proposed recommended order, as well a motion requesting that the Hearing Officer, pursuant to Section 120.57(1)(b)5, Florida Statutes, "enter an Order assessing against the Petitioner [the Department's] costs for travel [to the hearing site in Fort Lauderdale] and transcripts [of the formal hearing] and any additional sanctions deemed appropriate" in view of, what the Department argued in its motion was, "Petitioner's bad faith pursuit of an unfounded claim." On August 6, 1996, Petitioner filed a response in opposition to the Department's Motion for Sanctions.

The Hearing Officer issued his Recommended Order in this case on August 14, 1996. In his Recommended Order (which is incorporated by reference in this Final Order), the Hearing Officer recommended that the Commission "enter a final order dismissing Petitioner's amended unlawful employment practice complaint on the ground that the evidence is insufficient to establish that the Department committed the unlawful employment practice alleged therein." Remaining for disposition is the Department's Motion for Sanctions.

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of these requirements, the hearing officer, upon motion or the officer's own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

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In the instant case, while the proof Petitioner presented at the formal hearing in this case was insufficient to meet his burden of proving the claim of discrimination he had made against the Department in his amended unlawful employment practice complaint, it appears that, given his status as a single male, his masculine first and middle names, Steve Joseph, both of which he included on the forms he sent to OTRR, the information he provided on these forms regarding his qualifications to teach students with specific learning disabilities (SLD), the "critical" shortage of qualified SLD teachers that existed statewide at the time, the absence of written records maintained by OTRR concerning any action it may have taken with respect to the forms Petitioner submitted, his failure to hear from any prospective employer purporting to have received his name from OTRR, and the

comments made to him by Norman MacMillian, a former Department employee, regarding the Department's discriminatory practices, Petitioner had a reasonably clear legal justification for filing his amended unlawful employment practice complaint with the Division, at least to the extent that it alleged that he was discriminated against by the Department because of his sex. Accordingly, sanctions should not be imposed against him, pursuant to Section 120.57(1)(b)5, Florida Statutes, for filing this amended complaint.

In view of the foregoing, the Department's Motion for Sanctions, which seeks the imposition of such sanctions, is hereby DENIED.

DONE AND ENTERED in Tallahassee, Leon County, Florida,
this 14th day of August, 1996.

Officer STUART M. LERNER, Hearing
Hearings Division of Administrative
1550 The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-
(904) 488-9675 SC 278-9675
Hearings Filed with the Clerk of the
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ENDNOTE

1/ While "it is the hearing officer under [S]ection 120.57(1)(b)5 [Florida Statutes] who has the authority to administer the sanctions prescribed by this section," (Department of Health and Rehabilitative Services v. S.G., 613 So.2d 1380 at 1384), under Section 760.11, Florida Statutes, it is the Commission which is authorized, "in its discretion, [to] allow the prevailing party [in an administrative proceeding on an unlawful employment practice complaint] a reasonable attorney's fee as part of the costs" (which authority must be exercised by the Commission, according to the provisions of Section 760.11, "in a manner consistent with federal case law involving a Title VII action." Under existing federal case law, in a Title VII action, a plaintiff may "not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so," but such an assessment may be made even though [the plaintiff's action was] not brought in subjective bad faith." Christianburg Garment Co. v. Equal Employment Opportunity Commission, 98 S.Ct. 694, 700 (1978). This standard is not unlike that which must be applied in determining whether sanctions should be imposed under Rule

11, Federal Rules of Civil Procedure. See *Simons v. Southwest Petro-Chem, Inc.*, 28 F.3d 1029 (10th Cir. 1994).)

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