

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LULA D. HANNAH,)
)
 Petitioner,)
)
 vs.) Case No. 01-4447
)
 DEPARTMENT OF HEALTH,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on February 4, 2002, in Tallahassee, Florida, before the Division of Administrative Hearings by its Administrative Law Judge, Suzanne F. Hood.

APPEARANCES

For Petitioner: Lula D. Hannah, pro se
4611 Givins Lane
Tallahassee, Florida 32303

For Respondent: Stephen W. Foxwell, Esquire
Department of Health
4052 Bald Cypress Way
BIN A02
Tallahassee, Florida 32399-1703

STATEMENT OF THE ISSUE

The issue is whether Respondent committed unlawful employment acts against Petitioner in violation of Section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

Petitioner Lula D. Hannah (Petitioner) filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) on or about March 4, 1999. Said charge alleged that Respondent Department of Health (Respondent) discriminated against Petitioner based on her race and retaliated against her for filing a prior grievance. Specifically, the charge alleged as follows: (a) Respondent failed to promote Petitioner to an Administrative Assistant I position on two occasions; and (b) Respondent demoted Petitioner from a staff assistant position to an administrative secretary position, giving Petitioner's technical assistance responsibilities to white females serving as a program management specialist and/or operational management consultant manager.

On October 5, 2001, FCHR entered a Notice of Determination: No Cause. This notice advised Petitioner that she could request an administrative hearing by filing a Petition for Relief.

On November 9, 2001, Petitioner filed a Petition for Relief with FCHR. The petition included the same allegations raised in the Charge of Discrimination with the additional allegation that Respondent failed to hire Petitioner for the position of management review specialist.

On November 15, 2001, FCHR referred the Petition for Relief to the Division of Administrative Hearings.

The Division of Administrative Hearing issued an Initial Order on November 19, 2001. The parties filed a Joint Response to Initial Order on November 26, 2001.

On November 27, 2001, Respondent filed an Answer to Petition.

The undersigned filed a Notice of Hearing on November 28, 2001. The notice scheduled the formal hearing for February 4, 2002.

On December 27, 2001, Respondent filed a Motion in Limine. The motion alleged that Respondent did not hire anyone to fill the management review specialist position until May 14, 1999, two months after Petitioner filed her Charge of Discrimination. The motion sought to exclude any evidence about the management review specialist position because Petitioner did not include allegations about that position in her Charge of Discrimination and because FCHR has not had an opportunity to investigate the new allegations.

On January 10, 2002, the undersigned issued an Order granting Respondent's Motion in Limine.

On January 22, 2002, Respondent filed a unilateral Response to Order of Pre-Hearing Instructions. This response did not contain any proposed stipulated facts.

On January 22, 2002, Petitioner furnished Respondent with copies of her proposed exhibits. On January 23, 2002, Respondent filed Respondent's Position on Petitioner's Exhibits.

On January 23, 2002, Respondent filed a Motion to Strike. Said motion objected to a proposed stipulated fact contained in Petitioner's unilateral Response to Pre-Hearing Instructions. Petitioner filed her Response to Pre-Hearing Instructions on January 28, 2002.

On January 28, 2002, Petitioner filed a Motion Not to Strike. The undersigned granted Respondent's Motion to Strike by order dated January 29, 2002.

On January 29, 2002, Petitioner filed her Response to Respondent's Position on Exhibits.

On January 29, 2002, Petitioner filed a Motion in Limine. The motion sought to admit evidence relating to Petitioner's allegations about Respondent's failure to hire Petitioner for a management review specialist position. Petitioner admits in her motion that she did not apply for the position until after she filed her Charge of Discrimination. To the extent that Petitioner's Motion in Limine seeks reconsideration of the Order dated January 10, 2002, it is hereby denied. However, the undersigned has considered, in the Findings of Facts below, evidence presented by Petitioner showing that her duties and responsibilities as a staff assistant were divided between three

white females in professional staff positions, including a management review specialist position, in May 1998.

During the hearing, Petitioner testified on her own behalf and presented the testimony of two additional witnesses.

Petitioner offered Exhibit Nos. P1-P7, P9-P16, P18, and P27, which were accepted into evidence.

Respondent presented the testimony of four witnesses. Respondent offered Exhibit Nos. R1-R31 (including R21A and R21B), which were accepted into evidence.

The parties did not file a transcript of the proceeding. Respondent filed its Proposed Recommended Order on February 15, 2002. Petitioner filed her Proposed Recommended Order on February 25, 2002.

FINDINGS OF FACT

1. Respondent is an employer as defined in Section 760.02(7), Florida Statutes.

2. Petitioner is an African-American female. She is a member of a protected class for purposes of determining a violation of the Florida Civil Rights Act of 1992.

3. Petitioner began working for the Department of Highway Safety and Motor Vehicles in April 1977 as a Clerk Typist I. She was promoted to Clerk Typist II in July 1977. From 1979 to 1988, Petitioner worked for the Department of Highway Safety and Motor Vehicles as a clerk typist specialist.

4. Petitioner began working for the Department of Education in May 1988 as a clerk typist specialist. The Department of Education promoted her to secretary specialist in November 1989, administrative secretary in May 1993, and staff assistant in October 1996. Most of Petitioner's work with the Department of Education involved the federal Child and Adult Care Food Programs.

5. In October 1997, the Legislature transferred the administration of the Child Care Food Program from the Department of Education to Respondent. The specific language of Chapter 97-260, Section 3, Laws of Florida, provided that Respondent should give employees being transferred a preference in hiring for comparable positions.

6. Phil Reeves is Respondent's Bureau Chief for the Bureau of Child Nutrition Programs. He has held that position since the Bureau's inception in October 1997.

7. Mr. Reeves assessed the Child Care Food Program after it was transferred to Respondent. He determined that the program was deficient in making timely payments of monies to program recipients. Mr. Reeves decided that the program needed to operate more efficiently.

8. Respondent hired Petitioner as a career service staff assistant with a pay grade of 13. Initially, Mr. Reeves supervised Petitioner's work in the Child Care Food Program.

9. Respondent prepared Petitioner's initial position description based on her duties and responsibilities as a staff assistant with the Department of Education. The initial position description, which was effective on October 1, 1997, states as follows in relevant part:

The employee in this position performs administrative work for the Child and Adult Care Food Program. The work requires a high degree of initiative, independence, judgment, accuracy and understanding of office administration. The incumbent complies with and monitors compliance (when applicable) of the mandatory requirements in Section 215.422, Florida Statutes, and Chapter 3A-24, Florida Administrative Code. The incumbent is responsible for the following tasks:

Assists in organizing the Child and Adult Care Food Program requirements and procedures based on Federal Regulations Part 226, including, but not limited to:

- a. reviewing and noting any deficiencies on sponsor applications and amendments, and routing the applications for corrective action or approval;
- b. disseminating program requirements;
- c. logging in outreach and program needs as they occur for needs and assessments; and
- d. notifying sponsors of annual reimbursement rates.

Collects data, transcribes or compiles, formats, types and edits criteria and standards, technical handbooks, statistical reports, outreach and needs assessment results, memoranda and monitoring reports.

Performs administrative duties related to the total operation of the Child and Adult Care Food Program:

- a. prepares drafts of memoranda and correspondence for administrative decisions and policies, and
- b. compiles data for administrative decisions.

Assists with technical assistance by:

- a. logging all technical assistance activities including staff development;
- b. scheduling technical assistance for sponsors through appropriate staff;
- c. providing training and technical assistance to new staff and sponsors;
- d. reviewing activities, comparing to standards and compiling and summarizing findings for area specialists; and
- e. providing staff with new or revised assignments.

Responds to correspondence and inquiries for information. Disseminates information on the Child and Adult Care Food Program.

Coordinates staff activities including employment workpapers and travel requests for personnel.

Performs other related duties as assigned.

10. On or about February 9, 1998, Respondent updated Petitioner's position description. Petitioner's actual duties and responsibilities remained the same, but Petitioner's direct supervisor became Dale Kishbaugh, an Operations and Management Consultant Manager. The change in Petitioner's supervisor was the result of a reorganization of the bureau.

11. One of the changes that Mr. Reeves decided to make early in 1998 was to hire an Administrative Assistant I (AAI). Mr. Reeves wanted the AAI to report directly to him and to

assist him with professional duties. The person in the new AAI position would generally be responsible for bureau administrative functions, including purchasing and personnel, representing Mr. Reeves at meetings, functioning as the office proofreader, and functioning as the bureau's correspondence liaison with Respondent's division office and the Office of the Secretary.

12. On or about February 13, 1998, Mr. Reeves submitted a Request for Recruitment Assistance form to Respondent's Bureau of Personnel and Human Resource Management. The form provided the following information for advertising the new position: full time, career service, pay grade 15, open competitive opportunity.

13. Respondent advertised the new AAI position on February 16, 1998. The advertisement stated that the closing date for the position was February 27, 1998.

14. The Department of Management Services (DMS) is responsible for developing and issuing class specifications. The class specifications for AAI positions include factors that require independent work assisting management in providing analysis and research on a variety of administrative matters. Persons in AAI positions perform a variety of duties including, but not limited to the following: (a) representing the supervisor at meetings to furnish or obtain information;

(b) providing input and recommendations for the budget;
(c) performing fiscal, personnel, purchasing, statistical, reporting and other major office functions; and (d) reviewing and coordinating implementation of statutes, rules, regulations, policies, and procedures.

15. According to DMS's class specifications, persons in AAI positions must have knowledge of administrative principles and practices, office procedures and practices, methods of data collection, and effective communication principles and techniques. Additionally, they must have the ability to prepare correspondence and administrative reports, to understand and apply applicable rules and policies, to utilize problem-solving techniques, to plan and coordinate work assignments, to communicate effectively, and to maintain effective working relationships with others.

16. The position description for the AAI position at issue here states as follows:

Under general supervision, acts as assistant to the Chief, Bureau of Child Care Food Services by performing many highly complex administrative and technical duties pertaining to all section of the bureau. This position works independently in making decisions and obtaining solutions to routine problems, issues and other matters that fall within established office policies and procedures, guidelines, rules and laws relating to personnel, budget, and fiscal activities, purchasing, correspondence, and document tracking/control, travel control

and coordination, and other administrative duties.

Performs administrative activities in regard to everyday operation of the program which do not require action by the Chief. Distributes overflow clerical work as necessary to assure equitable workloads and completion of projects. Assigns and monitors deadlines to ensure completion of assignments and provides technical assistance as required. Maintains log of all incoming assignments, routing to appropriate staff with or without review of the Chief, exercising own judgment as necessary. Develops and implements procedures and methods for the orderly processing of paperwork among the various sections for review and approval by the Chief. Serves as the office proofreader on all correspondence requiring the Chief's signature.

Serves as the personnel liaison for the Bureau. Prepares and maintains current tables of organization, functional statements, position descriptions, performance standards and appraisals, letters of agency staffing, and other administrative documents. Prepares all recruiting, advertising, and selection letters for employment decisions, interview schedules, and requests for payroll action.

Reviews, analyzes, and provides alternatives to the Chief and management team on: current office practices, section make-up, work flow issues, and staffing needs. Serves as lead support person for ad hoc committees. Revises and prepares new programmatic forms as directed.

Attends administrative support meetings to assist with providing appropriate departmental procedures. Performs general service functions such as training for office staff in such areas as correct

correspondence preparation, travel voucher preparation, new administrative procedures, and other administrative areas requiring in-service training. Performs special assignments, researches potential problems, prepares necessary reports and recommends solutions.

Responsible for establishing and overseeing the maintenance of a central file for Child Care Food Service, following prescribed departmental guidelines. Maintains various policy, regulation, and directive manuals, assuring that these stay current. Instructs others in filing procedures, retention schedules, and storage of records accordingly. Researches, files, and retrieves information upon request. Routes information to appropriate central files.

Receives, checks for accuracy, records, and maintains all leave and attendance forms, supply requisitions, travel vouchers, and other requests requiring expenditure of funds to be approved by the Chief. Monitors budget reports in order to assign budget codes to purchase and supply requisitions, travel vouchers, reimbursement vouchers, and Information Resource Requests (IRR). Tabulates and tracks biweekly OPS timesheets and records.

Keeps Chief's and management team's calendar, makes appointments, exercising own judgment in individual situations. Makes travel arrangements, including transportation and lodging reservations. Prepares travel reimbursement vouchers.

Assists with telephone calls and routes to appropriate staff. Answers routine inquiries concerning the bureau and in-house procedures.

Supervises the work of the section and provides leadership, direction, and support. Plans and organizes the work of staff to

ensure assignments are completed on time. Reviews and reports on work performed, conducts performance appraisals, and performs other general supervisory duties.

17. In anticipation of reviewing the applications for the new AAI position, Mr. Reeves created a document entitled "Administrative Assistant I Scoring Methodology Initial Applicant Ranking." Mr. Reeves used a similar document obtained from another supervisor as a model and modified it to conform to the duties and responsibilities for the new AAI position.

18. The initial applicant-ranking document allocated 80 percent of the weight to work experience in the following areas: (a) ability to plan and organize meetings; (b) skill in organizing files and records; (c) knowledge of departmental personnel rules and regulations; (d) knowledge of travel procedures such as scheduling and processing; (e) knowledge of correct spelling punctuation and grammar, which received double weight; (f) skill in typing; (g) ability to prioritize, organize and schedule work assignments, which received double weight; (h) ability to work independently, which received double weight; (i) ability to work with others; and (j) ability to identify needed training for support staff and preparation of training materials.

19. The initial applicant-ranking document allocated 20 percent of the weight to quality of the application. The

applications were to be evaluated in regards to organization, lucidity, cover letter, appearance, typographical errors, errors in punctuation and grammar.

20. Respondent received approximately 90 applications for the new position. It was not practical to interview all of the applicants. Therefore, Mr. Reeves used his scoring methodology to rank the applications, eventually deciding to interview the top six candidates.

21. Petitioner was one of the applicants. Her application consisted of the five-page state application with no attachments. She received a score of 81 in the initial applicant-ranking process. Mr. Reeves did not grant Petitioner an interview because her score was not among the six highest-ranking candidates.

22. Faye B. Oaks, a white female, was another of the applicants. Ms. Oaks attached 11 pages of documentation to the five-page state application. The attachments included her resume, several certificates, and letters of commendation/appreciation from her former employer, State Comptroller Gerald Lewis. Ms. Oaks's work experience included, but was not limited to, working as a Clerk Typist III, Secretary III, Executive Secretary, AAI, AAIL, and AAILL, Personal Secretary I, and Program Assistant.

23. Ms. Oaks received a perfect score of 100 in the initial applicant-ranking process. Mr. Reeves granted her an interview.

24. In anticipation of conducting the interviews, Mr. Reeves developed an interview-ranking document. In addition to the categories of work experience set forth in the initial applicant-ranking document, Mr. Reeves added the following categories for consideration during the interviews: (a) strengths; (b) weaknesses; (c) why an applicant believes he or she is the best candidate; (d) whether the applicant is willing to accept minimum salary; and (e) other.

25. Mr. Reeves interviewed Ms. Oaks on March 26, 1998. She was exceptionally well qualified. After checking her references, Mr. Reeves ultimately selected Ms. Oaks to fill the new position. On March 30, 1998, Mr. Reeves sent Ms. Oaks a letter confirming the offer of employment, starting at the minimum annual salary of \$20,295.

26. Mr. Reeves filled the AAI position in a fair and just manner. He succeeded in hiring the best qualified applicant for the job when he employed Ms. Oaks.

27. Ms. Oaks accepted the position at the minimum salary. Soon thereafter, Mr. Reeves learned that additional monies were available to fund the position. Therefore, Mr. Reeves gave

Ms. Oaks a seven percent increase above the minimum starting salary.

28. Ms. Oaks started to work as an AAI with a pay grade of 15 on April 17, 1998. Her starting salary was \$835.23 bi-weekly. At that time, Petitioner was making \$884.19 bi-weekly in her position as a staff assistant with a pay grade of 13.

29. After hiring Ms. Oaks, Mr. Reeves learned that Petitioner was unhappy because Mr. Reeves had not granted Petitioner an interview. Mr. Reeves and Petitioner discussed Petitioner's concerns. During the discussion, Mr. Reeves attempted to explain the reasons why he did not interview Petitioner.

30. Ms. Oaks served in the AAI position for approximately five months. She decided to quit work for personal reasons.

31. In the meantime, Mr. Reeves became aware that Petitioner was performing duties outside the class specification for a staff assistant. For example, Petitioner occasionally interpreted program policy and provided program information to contracting agencies. Mr. Reeves correctly determined that professional staff should handle these duties.

32. In May 1998, Mr. Reeves reorganized the Bureau of Child Food Services for the second time. Mr. Reeves made several changes in the Bureau, one of which was to transfer

Petitioner to the audit section of the Child Care Food Program. After learning about the transfer, Petitioner and her union representative met in June 1998 with her new supervisor, Ken Sasser, Respondent's audit administrator. Subsequently, Petitioner and the union representative met with Mr. Reeves in July 1998. On both occasions Petitioner complained that Respondent had demoted her because Respondent had removed Petitioner's technical assistance duties and replaced them with the job responsibilities of an administrative secretary.

33. On or about July 27, 1998, Respondent updated Petitioner's staff assistant job description for the second time. Mr. Sasser prepared the job description, which states as follows in relevant part:

The employee in this position performs administrative support work for the Audit Section of the Bureau of Child Care Nutrition Services. The work requires a high degree of initiative, independence, judgement, accuracy and understanding of office administration. The incumbent complies with and monitors compliance (when applicable) of the mandatory requirements in Section 215.422, Florida Statutes, and Chapter 3A-24, Florida Administrative Code. The incumbent is responsible for the following tasks:

Compiles and analyzes the following data for administrative decisions:

- Assists the Audit Administrator with the preparation of the annual audit schedule.
- Maintains the Audit Log Book.
- Prepares a monthly status report of the numbers of audits completed and the numbers

of audit reports issued for the Audit Administrator and the Bureau Chief.

- Maintains the Continuing Professional Education (CPE) documentation of all audit staff and ensures that the Government Auditing Standards CPE requirements are met.
- Maintains a permanent file of all final audit reports issued by the Section.
- Maintains a file of all audit working papers for all audits issued, ensures that the record retention requirements are met, and ensures that the old audit working papers are destroyed according to the Department of Health and the Department of State requirements.
- Maintains a file of the summary of audit closure memorandums and ensures that the closure memorandum for each audit is attached to the permanently maintained copy of each final audit.
- Maintains a file of all USDA memorandums and other related correspondence and informs the Audit Administrator of any issues that may affect the standard audit procedures or the requirement for audits.
- Coordinates the collection and presentation of data as related to Single Audit Act requirements.

Reviews, analyzes and prepares drafts of memoranda and correspondence including the draft and final audit reports.

Interprets established Department policy and provides information for the resolution of problems related to the various administrative reports and documents used by the Section including travel authorization, travel vouchers, personnel reports, leave reports, purchase requisitions, purchase orders, receiving reports, monthly invoice transmittals, travel checks, payroll checks, etc., as appropriate.

Acts as the Section's day-to-day liaison to the Bureau Chief's Administrative Assistant

I and with other departmental offices as necessary. Investigates, researches and resolves problems associated with the section's administrative operations.

Coordinates the work of OPS positions including the preparation and distribution of the audit working papers to the appropriate audit staff on a timely basis, copying necessary files for the audit staff, and filing of audit section documents.

Performs other related duties as assigned.

34. Respondent eliminated some of Petitioner's responsibilities when her position description was updated the second time. For example, Respondent eliminated Petitioner's technical assistance duties. The new AAI position description indicates that Ms. Oaks was responsible for providing technical assistance as required.

35. Some of Petitioner's duties changed only because Petitioner's new supervisor was the audit administrator and Petitioner's work necessarily involved work performed in the audit section. These duties include, but are not limited to, preparing reports related to audits, collecting data, preparing drafts of memoranda and correspondence, and interpreting policy related to administrative reports such as travel vouchers, personnel reports, and purchase orders.

36. Respondent also assigned Petitioner some new duties relating to specific work in the audit section. The new duties include, but are not limited to, maintaining certain audit

files, documenting the audit staff's CPR, acting as liaison to the new AAI, and coordinating work of OPS employees.

37. Petitioner's updated position description contains few, if any, duties that are usually performed by an administrative secretary (pay grade 12). An administrative secretary in the audit section is primarily responsible for typing, processing, and distributing compliance audit reports. An administrative secretary also performs the following duties: (a) originates printing requests; (b) acts as the office receptionist and answers the telephone when needed; (c) processes and distributes administrative reports such as travel vouchers, personnel reports, and purchase orders; (d) acts as liaison to sections responsible for travel, purchasing, accounts payable, and personnel; (e) opens and distributes mail; and (f) assists with preparation of budget reports.

38. Under the new position description, some of Petitioner's duties overlapped with the duties of the new AAI (a white female) and an Assistant Secretary position. However, each of these positions contains duties and responsibilities which are unique depending on the specific work to be performed.

39. Petitioner was not demoted in July 1998. She did not experience a loss in pay, a change in pay grade, a change in class title, a change in position number, or a change in work

location. Instead, the change in Petitioner's position description appropriately reflected her specific duties and responsibilities under the new organization of the Bureau of Child Care Food Services and specifically under the supervision of her new supervisor. The updated position description contains duties and responsibilities that are consistent with the types of duties usually performed by staff assistants.

40. Upon the departure of Ms. Oaks, Mr. Reeves sought to advertise the position again. Respondent issued a new job announcement with a closing date of September 19, 1998.

41. Respondent received approximately 60 applications for the AAI position. The applicants included the following:

(a) Teresa Ann Hall, a white female, who submitted a three-page resume in addition to the standard state application;

(b) Petitioner, who submitted the standard state application with a two-page resume; and (c) Sarah Crooms, an African-American female, who was one of Petitioner's co-workers.

42. Ms. Hall began working for the state in 1993 as an OPS administrative secretary. Since that time, she has worked as a senior clerk, an OPS clerk typist, a senior word processing systems operator, and an administrative secretary.

43. To rank the applications for the second time, Mr. Reeves used the initial applicant-ranking document that he had utilized previously with the addition of personal computer

skills as a category. Under the established scoring methodology, Ms. Hall's application received a total score of 92. Petitioner's application received a total score of 76.

44. Petitioner's score of 76 included a score of 13 on the category labeled "Quality of Application/Résumé." As to Petitioner's application, she misspelled the word "grammar" and provided inconsistent dates of employment. As to her résumé, Petitioner misspelled "Tallahassee" one time, "compiles" two times, and "inquiries" one time. Petitioner used inconsistent and inappropriate verb tenses on her résumé.

45. Petitioner's score of 76 was above average in the applicant pool. However, it was not sufficiently high to rank in the top five of the group, which Mr. Reeves intended to interview. The same was true of Ms. Crooms' application. Even so, in an effort to maintain office morale, Mr. Reeves granted courtesy interviews to Petitioner and Ms. Crooms.

46. Mr. Reeves used a slightly modified interview-ranking document. He added a category for personal computer skills and a question as to an applicant's leave balances to this document.

47. Mr. Reeves interviewed Petitioner on October 26, 1998. She received an interview score of 103. On Petitioner's interview ranking document, Mr. Reeves stated "SEE RESUME" in regards to the category for "knowledge of correct spelling, punctuation, grammar, and proofreading."

48. Mr. Reeves interviewed Ms. Hall on October 10, 1998. Mr. Reeves gave Ms. Hall an interview score of 122.

49. After the interviews, Ms. Hall was the leading candidate. Mr. Reeves checked Ms. Hall's references and offered her the job with a ten percent increase to her salary, which is customary for promotions.

50. When Ms. Hall began working as an AAI on November 20, 1998, her starting salary was \$900.61 bi-weekly. At that time, Petitioner's salary was \$922.65 bi-weekly.

51. Ms. Hall received an additional promotion in December 2000. Another of Respondent's bureau chiefs hired her as an AAI.

52. Mr. Reeves sincerely believed that he hired the most qualified applicant after reviewing the applications and conducting the second interviews. Although portions of the application and interview process were unavoidably subjective, Mr. Reeves relied heavily on objective factors such as "Quality of Application/Resume." This was an important category to Mr. Reeves because the new AAI would serve as the Bureau's proofreader and prepare documents for Mr. Reeves' signature.

53. There is no persuasive evidence that Petitioner was better qualified than Ms. Hall. Additionally, there is no evidence that Mr. Reeves based any hiring decision on the race of the applicants.

54. Petitioner worked under Mr. Reeves' direct or indirect supervision in the Child Care Food Program until Respondent transferred the program's audit section to Respondent's Office of the Inspector General in 2000. At the time of the hearing, Petitioner was still working for Respondent as a staff assistant in select exempt service.

CONCLUSIONS OF LAW

55. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. Sections 120.569, 120.57(1), and 760.11(4), Florida Statutes.

56. Section 760.10(1), Florida Statutes, makes it unlawful for an employer to refuse to hire or promote any person because of such person's race. Section 760.10(7), Florida Statutes, makes it unlawful for an employer to retaliate against employees for opposing any practice which is an unlawful employment practice. Petitioner asserts that Respondent violated both of these statutes.

57. The legislative scheme contained in the Florida Civil Rights Act of 1992, as amended, Chapter 760, Part I, Florida Statutes, incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, et seq. FCHR and the Florida courts have

determined that federal discrimination law provides guidance for construing the Florida Civil Rights Act of 1992, as amended.

Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

58. The Supreme Court established and later clarified the burden of proof in discrimination cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). Under McDonnell Douglas, Petitioner has the initial burden of proving a prima facie case of racial discrimination. Bryant, 586 So. 2d at 1209.

59. In the instant case, Petitioner's prima facie case of racial discrimination consist of proving the following: (a) she belongs to a racial minority; (b) she applied and was qualified for the AAI positions; (c) Respondent rejected Petitioner on both occasions despite her qualifications; and (d) Respondent hired a person outside the protected class, with equal or lesser qualifications. Petitioner met this burden in regards to her applications for the AAI positions.

60. After a complainant satisfies the initial burden, the employer

. . . need only articulate--it need not prove--the existence of a legitimate, nondiscriminatory reason for its action.

The plaintiff then retains the burden of persuading the court that the offered reason is a pretext and that a discriminatory reason more likely motivated the employer in its actions.

Texas Department of Community Affairs v. Bryant, 586 So. 2d at 1209.

61. The petitioner always retains the ultimate burden of persuasion. Texas Department of Community Affairs v. Burdine, 450 U.S. at 254-256.

62. In this case, Respondent provided persuasive evidence that Mr. Reeves hired Ms. Oaks and Ms. Hall because he believed they were the best qualified candidates. Evidence in the record supports Mr. Reeves' decisions. Moreover, it is clear that Mr. Reeves questioned Petitioner's ability to act as the proofreader for the bureau based on the number of spelling mistakes, typographical errors, and/or grammatical errors in her application and resume.

63. On the other hand, Petitioner has not presented persuasive evidence that Respondent's reasons for hiring Ms. Oaks and Ms. Hall were a pretext to mask race discrimination. Petitioner has not met her ultimate burden of persuasion of racial discrimination based on Respondent's failure to promote her to the AAI positions.

64. Petitioner alleges that Respondent committed racial discrimination and/or engaged in retaliatory conduct by demoting

her or by assigning her to a position with less responsibility. Petitioner did not meet her prima facie burden of proving discriminatory or retaliatory demotion/assignment.

65. In order to make a prima facie case of discriminatory demotion/assignment, Petitioner must prove the following: (a) she is a member of a racial minority; (b) she was qualified for the position she held; (c) she suffered an adverse employment action such as demotion and/or assignment to a position of less responsibility; and (d) she was replaced by someone of comparable qualifications not a member of her protected class. See Sturniolo v. Sheaffer, Eaton, Inc., 15 F.3d 1023, 1025 (11th Cir. 1994); Underwood v. Northport Health Services, 57 F. Supp. 2d 1289, 1300 (M.D. Ala. 1999).

66. In order to make out a prima facie case of retaliation, Petitioner must show the following: (a) she engaged in a statutorily protected activity; (b) she suffered an adverse employment action such as demotion and/or assignment to a position with less responsibility; and (c) the demotion/reassignment was causally related to the protected activity. See Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1388 (11th Cir. 1998).

67. Rule 60K-14.001, Florida Administrative Code, contains the following definitions:

(15) Demotion--Moving an employee from a position in one class to a different position in another class having a lesser degree of responsibility and a lower pay grade.

68. Section 110.203, Florida Statutes, contains the following definitions:

(19) "Demotion" means the changing of the classification of an employee to a class having a lower maximum salary; or the changing of the classification of an employee to a class having the same or a higher maximum salary but a lower level of responsibility as determined by the Department of Management Services.

69. Respondent did not demote Petitioner because there was no change in her class title or pay grade. Petitioner was and continues to be a staff assistant with a pay grade of 13. The duties she performs are consistent with the work performed routinely by staff assistants.

70. The question remains whether Petitioner suffered an adverse employment act when Respondent transferred Petitioner to the audit section and updated her position description. Record evidence indicates that Petitioner's new position description did not result in an assignment with less responsibility.

71. When Respondent updated Petitioner's position description in July 1998, Respondent did not change Petitioner's class title, pay grade, or position number. It is true that some of Petitioner's former duties were assigned to a white

female in another class (AAI) with a higher pay grade. However, the new AAI position contains many duties with a degree of responsibility much higher than the duties ever performed by Petitioner.

72. Some of the duties remained unchanged when Respondent updated Petitioner's position description. Other staff assistant duties, specifically tailored to work in the audit section, were added to Petitioner's position description. Few, if any, of the new duties are similar to the duties of employees in a different class (Administrative Secretary) with a lower pay grade. Under the new position description, Petitioner continues to perform the work of a staff assistant, modified only to reflect the specific work to be performed under the bureau's reorganization plan. Petitioner's duties changed somewhat but they did not involve less responsibility.

73. To the extent that Petitioner proved her prima facie case of discriminatory or retaliatory assignment to a position with less responsibility, Respondent presented a legitimate nondiscriminatory reasons for updating Petitioner's position description. First, Respondent presented evidence that Petitioner had been performing some duties that should have been performed by professional staff. Second, Respondent presented evidence that from the bureau's inception, Mr. Reeves intended to reorganize the bureau to make it more efficient. Third,

Respondent presented evidence that it updated Petitioner's position description to reflect the specific duties of a Staff Assistant in the audit section under the second reorganization plan.

74. On the other hand, Petitioner presented no persuasive evidence that Respondent's reasons for transferring her to the audit section and updating her position description were a mere pretext for a discriminatory or retaliatory action. The greater weight of the evidence indicates that Respondent did not discriminate against Petitioner based on her race or retaliate against her due to her complaints to Mr. Reeves.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED:

That Respondent enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 15th day of March, 2002, in Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
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1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of March, 2002.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.