

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES S. BROWN, JR.,)
)
 Petitioner,)
)
 vs.) Case No. 03-1108
)
 ALACHUA COUNTY SHERIFF'S)
 DEPARTMENT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for formal hearing, as noticed, before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings in Gainesville, Florida, on January 20, 2004.

APPEARANCES

For Petitioner: Matthew J. Wells, Esquire
Post Office Box 5606
Gainesville, Florida 32627-5606

For Respondent: Linda G. Bond, Esquire
Allen, Norton & Blue, P.A.
1669 Mahan Center Boulevard
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STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Petitioner was demoted to an inferior employment position and, if so, whether the demotion was motivated by reasons of racial discrimination, as he has charged.

PRELIMINARY STATEMENT

This cause arose in February 2000 when Stephen M. Oelrich in his official capacity as Sheriff of Alachua County (Sheriff, Respondent) promoted the Petitioner James S. Brown, Jr. (Brown), from the position of deputy sheriff to sergeant. The promotion was subject to a one-year probationary period. After two investigations of alleged incidents of wrongful conduct, in November 2000, prior to the conclusion of the probationary period, the Sheriff determined that the Petitioner had committed certain policy violations. Consequently, he demoted the Petitioner back to his former position as deputy sheriff.

The Petitioner has alleged that the demotion was because of the Petitioner's race (black). The Petitioner filed a charge of discrimination with the Florida Commission on Human Relations (Commission) and ultimately, after the Commission made a finding of no cause, the case was transmitted to the Division of Administrative Hearings.

The cause came on for hearing as noticed. The Petitioner presented one witness (himself), and no exhibits. The Respondent presented six witnesses and had the Respondent's Exhibits numbered 1, 3, 6, 7, and 14 admitted into evidence. Upon concluding the proceeding, a transcript was ordered which was filed May 14, 2004, with the Division. In conjunction with their request for an extended period of time to file proposed

recommended orders, the Proposed Recommended Order filed by the Respondent was timely filed. However, no proposed recommended order has been received from the Petitioner. The Proposed Recommended Order filed by the Respondent has been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner, James S. Brown, Jr., is a black male deputy sheriff, employed by the Sheriff of Alachua County. He has been employed by the Sheriff for approximately 17 years. He was assigned to "uniform patrol" during his employment, but for the majority of his employment time he was assigned to the narcotics division. Sheriff Stephen Oelrich promoted the Petitioner to sergeant in February 2000 and assigned him to a road patrol position and duty. The Sheriff believed at that time that Brown was qualified to serve as a sergeant. The Petitioner, like all other similarly promoted employees, was required to serve a one-year probationary period following the promotion.

2. Sheriff Oelrich is the elected Sheriff of Alachua County, Florida, and has served in that position for 11 years. It is his responsibility to make final employment decisions, including promotions, suspensions, demotions, and terminations. He has had a goal and practice of promoting qualified African-Americans to positions of responsibility including having black

captains in charge of patrolling and criminal investigation, as well as promoting black females to lieutenancy's assigned to patrol duties. Additionally, the Respondent Sheriff conducts internal investigations upon receipt of complaints. The internal investigations concerning the Petitioner in this case were initiated because of complaints received by professional standards personnel of the Sheriff's Department, from either external or internal sources or informants.

Majestic Oaks Apartments Complaint

3. On or about November 2000, the Respondent's Office of Professional Standards received an internal memorandum from Sergeant Clifton Reynolds, a black male. The memorandum concerned a complaint he had received from a person at the Majestic Oaks Apartments in Gainesville, Florida. The complaint alleged that the Petitioner was attempting to use his position with the Sheriff's Department to obtain an apartment for a former girlfriend, Athena Brown, who had a criminal history. The criminal history would have precluded her from renting the apartment under the policies and rules of the apartment owner.

4. The Respondent's chief inspector, Charlie Lee, initiated an investigation into the matter. He assigned the investigation responsibility to Lieutenant Joel DeCoursey. Eventually he assigned the case to inspector Norman Atkins due to workload considerations. Inspector Atkins conducted the

majority of the investigation and interviewed Kimberly Figard, Brenda Raulson, Athena Brown, as well as the Petitioner.

5. The Petitioner purportedly went to the Majestic Oaks Apartment Complex to take a child support order that would verify Athena Brown's income. Kim Figard was the secretary at the office at Majestic Oaks. According to her testimony, the Petitioner identified himself as a deputy sheriff and offered to perform extra patrols around the apartment complex in return for Athena Brown's being allowed to rent an apartment, in spite of her criminal history, which would ordinarily render her ineligible for an apartment.

6. Chief Inspector Lee did not instruct Investigator Atkins to make any particular finding in the Petitioner's case. In fact, when Investigator Atkins informed Chief Inspector Lee that the investigation might go nowhere, Inspector Lee told Investigator Atkins, "if you ain't got nothing, you ain't got nothing." Ultimately, however, Investigator Atkins believed that there was a preponderance of evidence that the allegations against the Petitioner should be sustained. Ultimately, the Respondent relied upon evidence collected during the investigation to reach a "sustained finding" that the Petitioner went to the Majestic Oaks Apartments and identified himself as a deputy sheriff, attempting to use the status of his office or position, to assist, and with the expectation, that

Athena Brown, the mother of his child, would obtain an apartment she might not otherwise qualify for. The evidence relied upon by the Respondent included the results of a polygraph examination that the Petitioner volunteered to take and which indicated deception on the part of the Petitioner. The investigator ultimately found the Petitioner to be untruthful as to his version of the Majestic Oaks Apartments events and ultimately it was concluded that the Petitioner violated the Respondent's policy regarding conduct unbecoming an employee and regarding truthfulness.

7. The Respondent uses polygraph tests while conducting other internal investigations and has done so both before and after the internal investigation related to the Petitioner. The Respondent follows a point system with regard to imposing disciplinary action. Each level of violation is assigned points that are carried over if there are future violations. "Carry-over points" can increase the severity of subsequent discipline.

8. Upon reviewing the investigatory findings and recommendations, based on that point system, Sheriff Oelrich believed the results to be accurate. He had no reason to believe that the investigation or the results contained any racial bias. In fact, complaints of a racially biased investigation are themselves routinely investigated as a potential disciplinary matter.

9. The initial recommended discipline for the Petitioner for the violations with regard to the Majestic Oaks Apartments incident, was fifteen days' suspension without pay and a six-month extension of the probationary period. The Sheriff met with the Petitioner on December 21, 2000, however, and agreed to reduce his discipline to eight days' suspension without pay and a six-month extension of his probationary period. The Respondent still wanted to retain the Petitioner in a leadership role because of his past good performance.

The second investigation

10. Chief Inspector Lee received information also from Deputy Billy Ray Hunter, which revealed that several members of a drug task force Hunter was assigned to had expressed concern that the Petitioner was associating with a known felon. Gainesville Police Department Detective Jeff Nordberg was also a part of that task force. Deputy Hunter reported that the Petitioner had ignored Nordberg's request to cease associating with an individual later determined to be Andrew Maddox. Upon receipt of the information, the Respondent interviewed one of the drug task force's confidential informants and then initiated an internal investigation into the allegations.

11. Chief Inspector Lee conducted the investigation. During the course of the investigation, Lee interviewed Deputy Sheriff Hunter, a confidential source identified as FDLE-205,

Federal Probation Officer Beverly Stiefvater, Detective Jeff Nordberg, Lieutenant Mike Thompson, and Andrew Maddox.

12. The Petitioner and Detective Nordberg of the Gainesville Police Department had previously worked together in a narcotics unit. The Petitioner was a drug investigator at the time and had not yet been promoted to sergeant. Nordberg had been a narcotics officer with the Drug Enforcement Administration (DEA).

13. Detective Nordberg knew Andrew Maddox to be the focus of several drug investigations that year, which led to convictions of other individuals. While Nordberg was with the DEA, the Petitioner called him and advised him that he was "riding around" with Maddox and that Maddox was "showing him some things." Nordberg understood the Petitioner to mean that he was obtaining information from Maddox, because Nordberg knew that Maddox was the focus of a drug investigation and he asked the Petitioner to call him when Maddox was no longer present.

14. Nordberg told the Petitioner in a subsequent telephone call, that the DEA was making controlled drug purchases and that he believed that Maddox was supplying the cocaine in question. Nordberg advised the Petitioner of the information because he was unsure what role Maddox was trying to play by associating with the Petitioner and with drug dealers. Nordberg received information from another drug dealer that the "word on the

street" was that the Petitioner and Maddox were "tight."

Nordberg advised the Petitioner in the same manner in which he would expect another law enforcement officer to advise him in a similar situation.

15. Nordberg contacted the Petitioner a second time to advise him about the "word on the street" regarding the Petitioner and Maddox. The Petitioner advised Nordberg to take whatever action he needed regarding Maddox and that he would try to give them whatever information he could.

16. Because of the information he was receiving on the street regarding the Petitioner's relationship with Maddox, Nordberg advised Richard Brooks, another of the Respondent's employees, because he wanted the Respondent to know what was going on. However, he did not want to file a formal complaint against the Petitioner.

17. Federal Probation Officer Beverly Stiefvater, Maddox's probation officer, knew the Petitioner through his formal assignment in the drug unit. On one occasion, Maddox advised Stiefvater concerning contact he had with the Petitioner. She called the Petitioner and he advised her that he did not intend to use Maddox in any official manner. On another occasion, she observed an Alachua County Sheriff's Office patrol vehicle parked in front of Maddox's business. Maddox advised Stiefvater that the vehicle belonged to the Petitioner and that the

Petitioner was at his business to lift weights. The Petitioner made no effort to contact Stiefvater, Maddox's probation officer, while she was present at Maddox's place of business or afterward to advise her of contact he was having with the Petitioner. Stiefvater became concerned about the Petitioner's presence at Maddox's place of business, because of a certified law enforcement officer, she questioned the ethical and moral correctness of "hanging out with convicted felons." She also discussed the Petitioner's presence at Maddox's place of business with other DEA officers working on the case against Maddox.

18. The Petitioner and his wife accompanied Maddox to an automobile auction so that Maddox could assist the Petitioner's wife in purchasing a vehicle through the use of Maddox's automobile dealer's license. While at the auction, Maddox pointed out persons he believed to be drug dealers from other counties and advised the Petitioner how the drug dealers were outfitting vehicles to transport drugs, according to the Petitioner. The Petitioner, however, did not provide a written report of any of the information received from Maddox to any person in his chain of command. Although he had obtained information from other sources, the Petitioner did not attend an auction with any of his other sources.

19. When the Petitioner sought promotion to sergeant, Lieutenant Mike Thompson wrote a letter of support on his behalf to the Sheriff. Thompson had supervised the Petitioner for approximately 12 years and found him to be an excellent employee. After receiving information that the Petitioner was having contact with Maddox, including using Maddox to purchase vehicles or a vehicle and spending time at Maddox's business, he advised the Petitioner about the Respondent's policy regarding associating with known felons. The Petitioner expressed to Thompson that he did not care what other people thought.

20. On one occasion while Petitioner was assigned to patrol, the Petitioner came to Thompson's office and called Maddox so that he could provide information to Thompson regarding drug dealing. Maddox told Thompson that he would call back to provide the information but failed to ever do so. Thompson, as the Petitioner's supervisor, never received any drug violation-related information from Maddox either directly or indirectly through the Petitioner's efforts.

21. The Respondent's policy states that "Employees while on duty will avoid regular or unnecessary association with persons they know or should know are racketeers, sexual offenders, drug dealers, or convicted felons if not authorized or required due to the nature of the assignment. Association with known offenders or their families, as mentioned above,

while off duty is not authorized unless specifically approved by the Sheriff."

22. The Respondent expects its employees and officers who receive information that may be useful for a law enforcement purposes to document that information in writing, for submission to the appropriate agency personnel. The Petitioner did not present any evidence that any employee received information from him or through his efforts and he failed to properly document any information obtained from Maddox or otherwise.

23. After interviewing the identified witnesses and considering all of the information, the investigator concluded that the Petitioner had violated the Respondent's policy regarding association with a known felon and regarding conduct unbecoming an employee. The investigator provided the Sheriff with the disciplinary recommendation based upon the carry-over points from the previous investigation. The Sheriff thereupon reasonably concluded that the information in the investigative report was true and correct.

24. The Sheriff thereupon demoted the Petitioner because of his concern about the Petitioner's leadership skills and his ability to provide direction to subordinate deputies regarding proper contact with known felons in view of the deficient example he was found to have demonstrated regarding his own such association. The Sheriff was also concerned that the Petitioner

had been warned about the relationship with Maddox and did not appear to have heeded those warnings. The Petitioner appeared, at best, to be conducting some sort of investigation on his own (although that has not been persuasively demonstrated) and he failed to document his actions or any information he may have received. Sheriff Oelrich also considered that an outside agency had also contacted the Petitioner regarding his contact with Maddox. The Sheriff advised the Petitioner at the time of the demotion that he was demoting him because of his failure to document any information he received from Maddox. There is no persuasive evidence that the Sheriff decided to demote the Petitioner because of any motivation related to the Petitioner's race.

Comparative Employee Discipline

25. The Petitioner has identified the following white persons as being similarly situated comparators: Sergeant Darrell Bassinger, Lieutenant David Clark, Deputies Mark Galanos, Brian Davis, Jason Lee, Retired Lieutenant Danny Pascucci, and Records Clerk Susan Marks. However, he did not present any additional documentary evidence to support his testimony. His testimony in this regard is hearsay and cannot be the basis of a finding of fact. When the Petitioner was presented with documentary evidence regarding these other employees, his testimony was shown to differ significantly from

the documents. For example, he testified that Deputy Kenny Holt was investigated for conduct unbecoming an officer and had received "a couple of days off" for an incident that occurred at Ironwood Golf Course. In actuality, Deputy Holt was charged with criminal conduct and not conduct unbecoming an officer. Deputy Holt received a 20-day suspension without pay, a one-year probation and was required to go to alcohol rehabilitation. The Petitioner also misstated the Respondent's policy regarding associating with a known criminal, as well as who was present during Lieutenant Mike Thompson's interview during the internal investigation.

26. In fact, Deputy Kenny Holt, a white male, is not similarly situated to the Petitioner because Holt was not a sergeant at the time of the imposition of his discipline. Furthermore, Deputy Holt violated the Respondent's policy prohibiting criminal conduct and received a 20-day suspension without pay and a one-year disciplinary probation. Deputy Holt did not have a violation for conduct unbecoming an officer or for associating with a known offender. The Petitioner has never received a 20-day suspension without pay for any single violation.

27. Lieutenant Don Tyson, a white male, is not similarly situated to the Petitioner because there was not a sustained finding of a policy violation against him as the result of his

investigation. Lieutenant Tyson also did not have any carry-over points and was not a probationary employee. He also did not have multiple violations established against him.

28. Records Clerk Susan Marks, a white female, is not similarly situated to the Petitioner. Ms. Marks was not a sergeant, not a supervisor, and is not even a certified law enforcement officer. The Petitioner produced no evidence to show that Ms. Marks had any multiple policy violations or that she had any disciplinary carry-over points at the time of the investigation as to her. The Respondent learned about Ms. Marks involvement with a known felon after the felon was shot in the Respondent's parking lot in mid-2003. The Respondent then initiated an internal investigation following that shooting. Prior to the shooting incident, the Petitioner believed that Ms. Marks had a relationship with a known felon, but did not file a complaint and did not provide evidence that any other person had filed a complaint regarding Ms. Mark's association. The Petitioner produced no evidence to persuasively establish that the Petitioner had any knowledge of any such relationship by Ms. Marks prior to that shooting incident.

29. Neither Sergeant Darrell Bessinger nor Lieutenant David Clark, also white males, engaged in identical or similar conduct as the Petitioner. They were not charged with the same violations as the Petitioner, and did not have any disciplinary

carry-over points. The Petitioner speculated but did not provide any persuasive evidence to the effect that Bessinger or Clark were probationary employees, at the time of any discipline of them.

30. Brian Davis, a white male, is not similarly situated to the Petitioner. There is no evidence that he was a probationary employee nor that he had multiple violations or had any disciplinary carry-over points, as did the Petitioner. Mr. Davis was not a supervisor at the time of his discipline, as was the Petitioner.

31. Deputy Michael Galanos, a white male, is not similarly situated to the Petitioner. The Petitioner produced no persuasive evidence that Galanos was a supervisor and did not show that Galanos had multiple violations or disciplinary carry-over points. The Respondent initiated an internal investigation regarding Deputy Galanos for associating with a known felon. After the initial portion of that investigation revealed that there might be criminal implications, the Respondent began a criminal investigation. Because the criminal investigation took priority, the internal investigation would have been re-activated only after the completion of the criminal investigation. That did not occur because Galanos took a leave of absence or resigned before the completion of the criminal

investigation and has never been rehired. There was therefore no reason to conclude the internal administrative investigation.

32. Danny Pascucci, a white male, is also not similarly situated, as an employee, to the Petitioner. The Petitioner produced no evidence that Pascucci was probationary in his position as lieutenant. The Petitioner did not establish that any complaints had been filed against Pascucci, that he had multiple policy violations, or that he had any disciplinary carry-over points. The Petitioner produced no evidence that Pascucci's relationship with a documented confidential source was not authorized.

33. The Petitioner did not identify any white deputies who had sustained findings of conduct unbecoming an officer who received more favorable discipline than he received.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2003)

35. In order for the Petitioner to meet his initial burden of proving a prima facie case of race discrimination, the Petitioner must show that he is:

1. a member of a protected class;
 2. was qualified for the position he held or sought;
 3. suffered an adverse employment action;
- and

4. was treated less favorably than others similarly situated outside the protected class, who received more favorable treatment.

See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1995);
McDonnell-Douglas v. Green, 411 U.S. 792, 804 (1973)

36. In determining whether employees are similarly situated for purposes of establishing a prima facie case, the courts consider whether the employees involved are accused of the same or similar conduct and are disciplined in different ways. Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 (11th Cir.), opinion modified by 151 F.3d 1321 (11th Cir. 1998). Moreover, in order to be similarly situated, "the quantity and quality of the comparator's misconduct must be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." Henry v. City of Tallahassee, 216 F. Supp. 2d 1299, 1316 (Northern District Fla. 2002) citing Maniccia, 171 F.3d 1364. (11th Cir. 1999).

37. As stated by the court in Maniccia, 171 F.3d at 1368-1369 "The most important factors in the disciplinary context are the nature of the offense committed and the nature of the punishments imposed Further, Title VII does not take away an employer's right to interpret its rules as it chooses, and to make determinations as it sees fit under those rules." Maniccia v. Brown, 171 F.3d 1364, 1368-69 (11th Cir. 1999),

rehearing denied, (quoting Jones, 137 F.3d at 1311); See also Nix v. WLCY Radio/Rahall Comms., 738 F.2d 1181, 1187 (11th Cir. 1984).

38. Specifically, the inquiry is limited to "whether employees are similarly situated for purposes of establishing a prima facie case," not whether an employee can construct a situation in which he could conceivably be similarly situated. A relevant inquiry is whether comparatory employees committed the same or nearly identical acts and whether the discipline imposed is the same or nearly identical. The inquiry must be confined to what the employer actually did in imposing discipline on a comparative employees, not what the employer in each of such situations "should have done." See Jones, supra, 137 F.3d at 1311; cf. Anderson v. WBMG-42, 253 F.3d 561, 567 (11th Cir. 2001).

39. When the same supervisor or employment decision-maker hires and fires an employee within a short period of time, the employer is generally entitled to an inference of non-discrimination in the disciplinary decision made. See Smith v. Florida Dept. of Transp., 1999 WL 33216741, *4 (Middle District Fla. 1999). In Bradley v. Harcourt, Brace and Co., 104 F.3d 267, 270-71 (9th Cir. 1996), the court drew a strong inference of non-discrimination when the same "actor" hired and then fired the plaintiff, and both actions occurred in a short time period.

The court likewise held in Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996)(approving a "same actor" inference after noting that several circuit courts have approved the same). In Evans v. Technologies Applications & Service Co., 80 F.3d 954, 959 (4th Cir. 1996), it was recognized that there was a powerful inference in favor of an employer to the effect that the employer's failure to promote a plaintiff was not motivated by disciplinary animus where the employer who failed to promote the plaintiff was the same decision-maker who had recently hired the plaintiff.

40. In the present case, the Respondent does not dispute that the Petitioner is a member of a protected class and that he suffered an adverse employment action. The Petitioner, however, could not establish a prima facie case of race discrimination because, for the reasons demonstrated in the above Findings of Fact, he was unable to show that a person outside of his protected class engaged in conduct nearly identical to his conduct and received disciplinary treatment that was more favorable than that that he received. The comparative employees, were not established to be similarly situated, for the reasons demonstrated in the above Findings of Fact.

41. Even if such a petitioner establishes a prima facie case of race discrimination, the Respondent had a legitimate,

non-discriminatory, business reason for demoting the Petitioner from the position of sergeant back to that of deputy sheriff.

42. In November 2000, the Respondent received the formal complaint alleging that the Petitioner was misusing his position as a law enforcement officer by attempting to use his influence as an officer to assist the mother of one of his children in obtaining an apartment at the apartment complex, when she was not really qualified, due to her criminal record. The investigation in that matter sustained a finding that not only had he misused his position in that regard, but was also untruthful during the investigation of the matter. Even so, the Respondent extended his probationary period for six months and only suspended him for 8 days without pay, a lesser penalty than could have been imposed under the Respondent's prevailing policy. Although the Respondent relied upon the results of a polygraph examination, the Petitioner voluntarily underwent that polygraph examination and the record demonstrates that the Respondent uses polygraph examinations in internal investigations of other employees, both before and after the occurrence in question and that the use of the polygraph was not in any way based upon the Petitioner's race. While the purported results of the polygraph examination are not and cannot be employed in determining the truthfulness of the Petitioner's version of the events at issue in this proceeding,

they could be used in an evidential way as demonstrating part of the Respondent's motivation in electing the disciplinary action taken.

43. It is also true, that prior to the conclusion of the investigation of the Majestic Oaks Apartments' incident, the Respondent received a second formal complaint concerning the Petitioner's association with a known felon. Following an internal investigation of that second complaint, it was concluded by the Respondent that the Petitioner had violated the Respondent's policy concerning unauthorized association with a known felon. In light of the disciplinary action imposed in the Majestic Oaks incident and the newly sustained allegations as to the second formal complaint regarding association with a known felon, the Respondent elected to demote the Petitioner and return him to his prior position as deputy. The Respondent determined that the association by the Petitioner with a known felon, his possession of prior carry-over disciplinary points, and including his disregard of both Detective Nordberg's and Lieutenant Thompson's warning comments concerning his association with the known felon, showed he did not possess the leadership skills necessary for a sergeant. He was deemed to lack an understanding of how his conduct affected the agency's reputation and how it provided a poor example of proper conduct

of a law enforcement officer in such situations to his subordinates, in his role as sergeant.

44. These facts taken together, show that the Respondent did have a legitimate, non-discriminatory, business reason for demoting the Petitioner back to his position as a deputy sheriff. It is inconceivable that the Respondent would promote the Petitioner and then less than one year later, while he was still a probationary employee (as the probation was extended because of these disciplinary events) and would then demote him simply because of his race. Although the decision to return him to his deputy position occurred two weeks before the expiration of his original probationary period, the six-month extension of that probation period would have caused his probation to end on August 31, 2001. Thus, there is no question that he was still a probationary employee at all times pertinent hereto when the discipline and employment actions in question were imposed.

45. Because the Respondent established a legitimate, non-discriminatory reason for the employment action taken, the burden then shifted to the Petitioner to demonstrate by "significantly probative evidence" that discrimination was more likely a motive behind the decision to demote him from sergeant to deputy.

Clark v. Huntsville City Board, 717 F.2d 525, 527 (11th Cir. 1983). The Petitioner must not only show that the stated reason was false, but also that discrimination was the true reason

behind the decision. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 515 (1993); Halperin v. Abacus Technology Corp., 128 F.3d 191, 201 (4th Cir. 1997). The ultimate burden of persuasion always remains with the Petitioner. Id., 509 U.S. at 511.

46. Here the evidence does not demonstrate that the Respondent's employment action was a pretext for racial discrimination. The record shows because of the leniency or reduction in the degree of discipline imposed concerning the first investigated misconduct, as well as the Respondent's testimony about the high regard he had for the Petitioner prior to the second investigation, that the Respondent, even after sustaining of the findings as to the first investigation, still wanted the Petitioner to serve in a leadership role. After the second investigation concluded with sustainable results, the Respondent reluctantly concluded that the Petitioner should not serve in a leadership role and imposed the demotion. This desire to show the Petitioner leniency until a second violative incident was proven to the Respondent's satisfaction (with attendant carry-over disciplinary points) clearly shows that there was no discriminatory animus in the employment decision made. This results in an unavoidable conclusion that the Petitioner has failed to demonstrate that the employment decision made and the legitimate, business reason asserted for it was a pretext for a decision made by through racial bias.

Moreover, there was not any persuasive demonstration that any of the elements or circumstances of the investigation, as to either disciplinary incident, occurred or were conducted with an element of racial bias or animus on the part of any witness or investigator, nor that the Respondent knew of any such animus prior to making his decision.

47. In summary, the Petitioner did not establish a prima facie case because he did not demonstrate that any similarly situated persons outside his protected class received disciplinary treatment that was more favorable. Even if one assumes a prima facie case showing, in light of the employer's demonstration of the legitimate, non-discriminatory, business reason for the employment action taken, including the Respondent's reliance on the validity of the facts produced by the two investigations, which concluded that the wrongful conduct leading to the disciplinary actions had indeed been engaged in by the Petitioner, the Petitioner failed to demonstrate that the asserted reason for the disciplinary action taken was pretextual.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Florida Commission on Human Relations dismissing the charge of discrimination and petition for relief in its entirety.

DONE AND ENTERED this 30th day of July, 2004, in Tallahassee, Leon County, Florida.



P. MICHAEL RUFF
Administrative Law Judge
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Filed with the Clerk of the
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this 30th day of July, 2004.

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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.