

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LINCOLN E. NICHOLSON,                    )  
  )  
      Petitioner,                            )  
  )  
vs.    )     Case No. 03-1788  
  )  
CITY OF SUNRISE,                         )  
  )  
      Respondent.                         )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on July 18, 2003, at sites in Tallahassee and Fort Lauderdale, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether, in connection with Respondent's employment of Petitioner, Respondent unlawfully discriminated against Petitioner on the basis of his race or national origin.

PRELIMINARY STATEMENT

In a Charge of Discrimination dually filed with the U.S. Equal Employment Opportunity Commission ("EEOC") on September 17, 2001, and with the Florida Commission on Human Relations ("FCHR") on September 27, 2001, Petitioner Lincoln Nicholson, who is a black man from Jamaica, alleged that Respondent City of Sunrise, which employs Petitioner as a Gas Service Person I, had unlawfully discriminated against him by selecting a white man to fill a more senior position for which Nicholson also had applied. The EEOC investigated Petitioner's claim and, on May 31, 2002, issued a notice stating that it was unable to conclude whether an unlawful employment practice had occurred. The FCHR issued a Notice of Dismissal and Right to Sue on April 16, 2003. Thereafter, Petitioner filed a Petition for Relief with the FCHR. The agency promptly referred the matter to the Division of Administrative Hearings.

At the final hearing, which took place as scheduled on July 18, 2003, Petitioner testified on his own behalf and called two additional witnesses, both of them employees of Respondent:

John Dillavou and Alistair MacLeod. Petitioner moved exhibits numbered 1 through 6, 8, 9, and 11 into evidence. The City of Sunrise presented its employees Harry Zehender and James Harris as witnesses and offered exhibits numbered 1 through 7, which were admitted into evidence.

The final hearing transcript was filed on July 30, 2003, and after that each party filed a Proposed Recommended Order before the deadline established at the close of the hearing, which was August 26, 2003.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2003 Florida Statutes.

#### FINDINGS OF FACT

##### Introductory Facts

1. Petitioner Lincoln Nicholson ("Nicholson") is a black man who was born in Jamaica.

2. Respondent City of Sunrise, Florida (the "City"), is a municipality located in Broward County. The City operates its own natural gas utility.

3. Nicholson began working for the City in its Gas Department as a Gas Service Person I ("GSP-I") on August 7, 2000. As of the date of the final hearing, Nicholson was still employed by the City in that capacity.

4. Nicholson contends that not only is he qualified for employment as a Gas Service Person III ("GSP-III"), which is a

more senior, higher-paid position in the City's Gas Department than the one he presently holds, but also that he actually has been performing the functions of a GSP-III. Nicholson claims that but for his race or national origin, the City would have either hired him as a GSP-III or promoted him to that position. He charges that the City has committed acts of intentional employment discrimination by refusing to offer him the higher-ranking position.

5. The City admits that Nicholson meets the minimum qualifications for hire as a GSP-III but denies the allegations of intentional discrimination; it maintains that it filled the position for which Nicholson applied with a better (or at least equally) qualified candidate, namely, the City employee who had previously held the position.

#### The Material Historical Facts

6. On September 13, 1999, the City posted a notice advertising its intention to hire a qualified person to work as a GSP-III in the City's Gas Department. According to the notice, the job would entail "supervisory and technical work" in the areas of "cathodic protection, corrosion and leak control on a natural gas distribution system."

7. The notice identified the minimum qualifications for the position, the relevant one, for present purposes, being this:

--Must possess a Cert[ificate] of Competency as a Master or Journeyman Gas Fitter from the Central Examining Board of Plumbers of Broward County or equivalent.

8. The position in question had opened up a few weeks earlier, when the incumbent, a longtime employee of the City named Roger Black, took a job as a Utility Operator Trainee in the City's Utilities Department. Although this move resulted in a reduction in salary for Mr. Black and hence was technically a "demotion," the evidence shows (and it is found) that Mr. Black transferred voluntarily and that his performance as a GSP-III had always been rated at least satisfactory.

9. On or about October 11, 1999, an individual named Douglas Blau applied for the GSP-III position. Mr. Blau was well qualified for the position—indeed, he was arguably over-qualified<sup>1</sup>—and via memorandum dated April 14, 2000, Gas Department Director Harry Zehender recommended to Personnel Director James Harris that Mr. Blau be hired. The City then began "processing" Mr. Blau's application.

10. Meanwhile, on April 17, 2000, Nicholson applied for the job. Nicholson had approximately 25 years' experience working in the field of natural gas distribution, although, at the time of applying for the GSP-III position, he had been working outside that field for about a year and a half. The evidence leaves no doubt, however—and the City stipulated—that

Nicholson met all the minimum qualifications for employment as a GSP-III.

11. Nicholson interviewed for the position with Alistair MacLeod, the Gas Department's Supervisor. At some point, either during the interview or later, Mr. MacLeod told Nicholson that the GSP-III position had been filled by another applicant, meaning Mr. Blau, who had been recommended for employment but not yet offered the job.<sup>2</sup> Because Mr. Blau was the putative successful applicant for the GSP-III post, Nicholson was asked if he were interested in taking a more junior position as a GSP-I. Nicholson responded affirmatively; was offered the job on July 11, 2000; accepted the City's offer; and, as mentioned, began working for the City as a GSP-I on August 7, 2000.

12. Around the time Nicholson came to work for the City, Mr. Black applied for his old job back.<sup>3</sup> The City did not interview Mr. Black because he was known to the personnel responsible for making the decision to hire. He was not offered the position because Mr. Blau was still in line to receive it.

13. On or about September 14, 2000, Mr. Blau informed the City that he was no longer interested in the GSP-III position.

14. The next week, on September 22, 2000, Nicholson submitted a supplement to his application for the GSP-III position.<sup>4</sup> The City did not interview Nicholson because he was

known to the personnel responsible for making the decision to hire.

15. About ten months later, the City chose Mr. Black, who is white, to fill the vacant GSP-III position—the very position that Mr. Black had vacated nearly two years earlier, in August 1999. He returned to his former position on July 21, 2001.<sup>5</sup>

#### Mr. Black's Qualifications

16. Nicholson argues that Mr. Black should have been disqualified from consideration for the GSP-III position because he did not, Nicholson alleges, possess a valid Certificate of Competency as a Master Gas Fitter. In support of this contention, Nicholson proffered a copy Mr. Black's certificate numbered 91-CMGF-562-X, which specifies an expiration date of August 31, 1992, together with a letter from the Broward County Records Custodian dated July 14, 2003, which attests that Mr. Black's Certificate of Competency No. 91-CMGF-562-X is active for the period from August 2, 2002 through August 31, 2004. From these papers Nicholson infers that Mr. Black's Certificate of Competency as a Master Gas Fitter must have been inactive between August 31, 1992 and August 2, 2002—and hence "invalid" when he returned to his old job as GSP-III in July 2001.

17. The City, however, as part of its Composite Exhibit 1, put into evidence a copy of Mr. Black's Certificate of Competency No. 91-CMGF-562-X from the mid-1990s, showing an

expiration date of August 31, 1996. This, of course, does not prove that Mr. Black's certificate was active in July 2001, but it does falsify Nicholson's inference that Mr. Black failed to renew his certificate for ten straight years. As a result, the undersigned declines to infer that Mr. Black's certificate was, more likely than not, inactive as of July 21, 2001.

18. Further, the notice that the City posted regarding the available GSP-III position stated that a Certificate of Competency as a Master Gas Fitter "or [its] equivalent" was required. The undersigned agrees with the City that an inactive certificate reasonably can be deemed the equivalent of an active certificate for the purpose of meeting this qualification, since, as the City proved, a GSP-III does not need to possess the authority conferred by the Broward County certificate in order to perform the job; rather, the City is interested in employing persons who have the underlying knowledge and experience necessary to obtain such a certificate.<sup>6</sup> Thus, the undersigned finds alternatively that the City, as it suggests, reasonably could have determined, without intending to discriminate unlawfully, that Mr. Black at least possessed the equivalent of a Broward County Certificate of Competency as a Master Gas Fitter.

19. In sum, Mr. Black was, in fact, a qualified applicant for the GSP-III position.



Is Nicholson Better Qualified Than Mr. Black?

20. Nicholson contends that he was the superior applicant vis-à-vis Mr. Black, for two reasons that the undersigned considers worthy of note. The first is Nicholson's claim that he is (and at all times material has been) responsible for "cathodic protection," which is a method of corrosion control, while Mr. Black has been assigned to other duties. Describing cathodic protection as the major function of a GSP-III, Nicholson contends that he is de facto doing the job without the benefits of the title, whereas Mr. Black, who has the title and attendant benefits, is not doing the job.

21. It is found that Nicholson is, in fact, responsible for cathodic protection and that this function historically has been undertaken primarily by a GSP-III rather than a GSP-I such as Nicholson. However, the evidence also persuasively establishes that all Gas Department service personnel are expected to perform a variety of tasks, including cathodic protection. Presently, the fact that Nicholson is qualified and able to perform cathodic protection frees Mr. Black to handle other functions. On this record, the undersigned is not persuaded that Nicholson necessarily does a better job of cathodic protection than Mr. Black would do or that Mr. Black is incapable of doing the work. Instead, the evidence shows that

the City is attempting to make the highest and best use of its employees.

22. The second plausible basis for Nicholson's contention that he is better qualified than Mr. Black is that Nicholson has more years of experience in the field of natural gas distribution—some 25 years versus about 12 for Mr. Black as of the time the decision to hire was made. If all experience-years were necessarily equal, then Nicholson would have a point. But, obviously, all experience-years are not necessarily equal. In this instance, the undersigned finds that the City reasonably viewed Mr. Black's 12 years' service in the City's Gas Department, which included a number of years working as a GSP-III, as more relevant experience than Nicholson's.

23. The undersigned is ultimately not persuaded that Nicholson was necessarily the better qualified candidate, as compared to Mr. Black, but instead finds that the City, as it suggests, reasonably could have decided, without intending to discriminate, that Mr. Black was at least equally qualified, if not more so.

#### Ultimate Factual Determinations

24. The City's proffered reasons for hiring Nicholson as a GSP-I rather than a GSP-III, and for later selecting Mr. Black to fill the vacant GSP-III position after Mr. Blau, the putative successful applicant, removed himself from consideration, are

legitimate, nondiscriminatory reasons for the decisions in question. By putting forward these legitimate, nondiscriminatory reasons, the City obviated the need to determine whether Nicholson presented a prima facie case of discrimination in connection with either of these decisions.

25. The undersigned is not persuaded, and therefore does not find, that the grounds asserted by the City for its employment decisions are actually a pretext for unlawful discrimination.

26. In sum, Nicholson has not established by the greater weight of the evidence that the City discriminated unlawfully against him when it hired Nicholson as a GSP-I or when it later chose Mr. Black, instead of Nicholson, to fill the GSP-III position for which Nicholson had also applied.

#### CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

28. It is unlawful for an employer to discharge or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment, based on the employee's race, gender, or national origin. See § 760.10(1)(a).

29. Federal laws against discrimination may properly be used for guidance in evaluating the merits of claims arising under Section 760.10, Florida Statutes. See Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Dept. of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

30. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), the Supreme Court of the United States articulated a burden of proof scheme for cases involving allegations of discrimination under Title VII, where, as here, the plaintiff relies upon circumstantial evidence of discriminatory intent. The McDonnell Douglas decision is persuasive in this case, as is St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07 (1993), in which the Court reiterated and refined the McDonnell Douglas analysis.

31. Pursuant to this analysis, the plaintiff (Petitioner here) has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA), aff'd, 679 So. 2d 1183 (1996) (citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)). If, however, the plaintiff succeeds in making a prima facie case, then the burden shifts to the defendant (Respondent here) to

articulate some legitimate, nondiscriminatory reason for its complained-of conduct.

32. Once the defendant "responds to the plaintiff's proof by offering evidence of the reason for the [decision that aggrieved the plaintiff], the fact finder must then decide whether the [challenged decision] was discriminatory" without regard for the rebuttable presumption of discrimination that arises from a prima facie showing, which presumption drops from the case. U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 714-15, 103 S.Ct. 1478, 1481-82 (1983). That is to say, where "the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." Id. at 715, 103 S.Ct. at 1482.

33. If the defendant carries the burden of rebutting the plaintiff's prima facie case, then the plaintiff must demonstrate that the proffered reason was not the true reason but merely a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-03; Hicks, 509 U.S. at 506-07.

34. In Hicks, the Court stressed that even if the trier of fact were to reject as incredible the reason put forward by the defendant in justification of its actions, the burden nevertheless would remain with the plaintiff to prove the ultimate question whether the defendant intentionally had

discriminated against him. Hicks, 509 U.S. at 511. "It is not enough, in other words, to dis believe the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." Id. at 519.

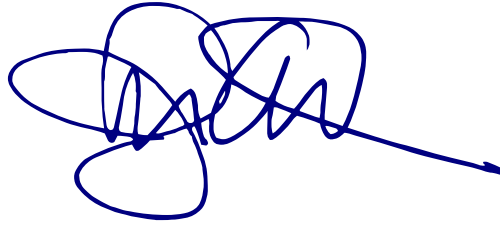
35. In the present case, because the City offered evidence of legitimate, nondiscriminatory reasons for the decisions at issue, it is not necessary to decide whether Nicholson actually made out a prima facie case of discrimination either with respect to the City's initial decision to hire him as a GSP-I or its subsequent decision to promote Mr. Black, rather than Nicholson, to the GSP-III position that remained open in July 2001. The undersigned has before him all the evidence he needs to determine whether the City intentionally discriminated against Nicholson. See Aikens, 460 U.S. at 715, 103 S.Ct. at 1482.

36. For the reasons set forth in the Findings of Fact, the undersigned trier of fact is not persuaded by the greater weight of the evidence that the City intentionally discriminated against Nicholson when it hired him as a GSP-III or when it selected someone else for the GSP-III position.<sup>7</sup>

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the FCHR enter a final order dismissing Nicholson's Petition for Relief.

DONE AND ENTERED this 19th day of September, 2003, in  
Tallahassee, Leon County, Florida.



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JOHN G. VAN LANINGHAM  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 19th day of September, 2003.

ENDNOTES

<sup>1/</sup> For example, Mr. Blau holds a bachelor's degree in electrical engineering, while the GSP-III position requires only a high school diploma.

<sup>2/</sup> In January 2000, a second GSP-III slot, out of three budgeted positions at that rank, became available when the person then occupying the position transferred out of the Gas Department. That particular vacancy did not last long, however, because in mid-March 2000 another City employee was demoted to the recently opened GSP-III position in a disciplinary action following his misconduct in the workplace. While there is some conflict in the evidence as to whether Nicholson was told there were two GSP-III openings, the dispute is ultimately immaterial, because Nicholson did not attempt to make out a prima facie case of discrimination based on the City's decision to demote another City employee to GSP-III. There is little or no evidence, for example, concerning the demoted employee's qualifications, much

less any persuasive evidence that Nicholson was better qualified than he.

<sup>3/</sup> Mr. Black submitted his application for the GSP-III position on July 27, 2000.

<sup>4/</sup> Nicholson claims to have applied for the job yet again in November 2000. Although there is no documentary evidence corroborating such claim, the undersigned does not necessarily disbelieve Nicholson's testimony in this regard, but he concludes that it is immaterial whether Nicholson applied again in November 2000. This is because there is no dispute that, as of September 22, 2000, Nicholson's application for the job of GSP-III was active.

<sup>5/</sup> On September 18, 2000, Mr. Black had been placed in the position of Utility Mechanic I, a job for which he had applied on July 17, 2000—ten days before he would apply for the GSP-III position. The transfer to Utility Mechanic I was classified as a voluntary demotion, apparently because Mr. Black was required to be on probationary status for six months. There is no persuasive evidence, however, that this transfer was the result of disciplinary action or poor performance on Mr. Black's part.

<sup>6/</sup> It is not necessary to consider whether a revoked or suspended certificate would be an "equivalent" credential because there is no basis in the evidence for drawing the inference that Mr. Black's certificate ever fell into either category.

<sup>7/</sup> Having resolved the dispute on the merits in the City's favor, it is not necessary to address the City's affirmative defense that Nicholson's claim, to the extent it was based on the initial decision to hire him as a GSP-III, is time barred.

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.