

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MARINO M. GREEN, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 05-3149  
 )  
 DEPARTMENT OF HEALTH, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Notice was provided and on January 27, 2006, a formal hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569, 120.57(1), and 760.11(7), Florida Statutes (2005). The hearing location was the offices of the Division of Administrative Hearings, the DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida. The hearing was conducted by Charles C. Adams, Administrative Law Judge.

APPEARANCES

For Petitioner: Marino M. Green, pro se  
3023 Golden Pond Boulevard  
Orange Park, Florida 32073

For Respondent: Stephen M. Foxwell, Esquire  
Department of Health  
4052 Bald Cypress Way, Bin A-02  
Tallahassee, Florida 32399-1703

STATEMENT OF THE ISSUE

Did Respondent engage in unlawful employment practices against Petitioner in violation of Section 760.10(1) and (7), Florida Statutes, in effect at the time of the alleged acts, contrary to the Florida Civil Rights Act of 1992 (the Act)?

PRELIMINARY STATEMENT

On January 31, 2005, the Florida Commission on Human Relations (FCHR) received an employment complaint of discrimination from Petitioner. It named Respondent as the alleged employer responsible for discrimination. The basis of the claim was race in relation to the failure to promote and retaliation for complaining about the choice by Respondent not to promote Petitioner, to the extent that Petitioner was terminated for complaining.

The race referred to in the employment complaint of discrimination was Black, in the sense that Petitioner claimed to be within that protected class.

FCHR investigated the complaint finding that Respondent was indeed an employer within the meaning of the Act. FCHR also found that the complaint of discrimination was timely and other jurisdictional requirements had been met. In view of the Investigative Memorandum provided by the Office of Employment Investigations within FCHR, it was determined by FCHR that no cause existed to believe that an unlawful employment practice occurred.

This decision was made on July 21, 2005. Petitioner was separately noticed of the determination finding no cause, advising Petitioner of his right to petition for relief within 35 days of the date of the Notice of Determination: No Cause. The notice was dated July 21, 2005.

Consistent with his opportunity Petitioner filed a Petition for Relief with FCHR, which was received by that agency on August 25, 2005.

The Petition for Relief continued to refer to alleged discrimination based upon race, in that Petitioner was alleged to be a black male. It referred to the position of Biological Administrator II (BA II) to which Petitioner was denied promotion. It also referenced a position referred to as Bio Response Team (BRTR), a supervisory position that Petitioner was alleged not to have been hired to fill. That latter position was one not referred to in the earlier employment complaint of discrimination. The Petition for Relief referred to a white male being hired in the BA II position and a white non-Hispanic male being hired to fill the BRTR position.<sup>1/</sup> The Petition for Relief continued to advance the allegation that Petitioner having filed a complaint within the Respondent's grievance process, Respondent allegedly retaliated against Petitioner by terminating him from employment.

On August 30, 2005, the Division of Administrative Hearings (DOAH) received the Petition for Relief and a request that an administrative law judge be assigned to conduct necessary proceedings to resolve the dispute between the parties. Stephen F. Dean, Administrative Law Judge, was assigned to conduct those proceedings in DOAH Case No. 05-3149.

The case was noticed to be heard by video-teleconference between Jacksonville and Tallahassee, Florida, on November 14, 2005.

Petitioner moved to continue the hearing scheduled for November 14, 2005. Respondent replied to the motion. On November 8, 2005, an order was entered requiring the parties to provide dates for rescheduling. An order was entered rescheduling the hearing for January 27, 2006.

Petitioner filed a "Petition for Determination" arguing that FCHR had failed to conciliate or determine reasonable cause in the case. Respondent answered that motion and by its answer opposed the motion. On January 5, 2006, an order was entered denying "Petition for Determination" based upon the conclusion that the relief requested was beyond the jurisdiction of the forum, referring to DOAH.

After the January 5, 2006 order was entered, the present administrative law judge was substituted for Stephen F. Dean, Administrative Law Judge, in recognition that Administrative Law

Judge Dean would be retired before this case could be concluded at DOAH.

Petitioner moved to continue the hearing scheduled January 27, 2006. The motion was opposed in writing. On January 25, 2006, a telephone hearing was conducted to consider the motion. On that same date an order was entered denying the motion to continue.

At hearing Petitioner testified in his own behalf. Petitioner's Exhibits numbered 4 through 9, 11, 13 through 16, 18, 19, 25 through 29, 31 and 45 were admitted as evidence. Petitioner's Exhibits numbered 1 through 3, 10, 12, 17, 20 through 24, 30, 32 through 44, 46 through 48, and 50 through 54 were denied admission. Petitioner's Exhibit numbered 56 was not offered but remained with exhibits that have been identified.

Respondent presented Dr. Dean Willis, Susanne Crowe, Dr. David Stuart Beall, Carroll David Fulgher and Dr. Ming S. Chan as its witnesses. Respondent's Exhibits numbered 1 through 8, and 10 were admitted as evidence. Respondent's Exhibit numbered 9 was denied admission.

The exhibits by the parties both those admitted, denied admission, and left with the record, are transmitted with this Recommended Order.

There was an indication that a transcript might be ordered and filed for consideration by the administrative law judge. Later a decision was made not to order the transcript. Petitioner filed a

"Notice of Intent to File a Recommended Order." This pleading was responded to in writing by Respondent. Having considered the Notice of Intent and response, a post-hearing scheduling conference was held by telephone on February 21, 2006, and a post-hearing scheduling order entered following that conference.

The parties filed proposed recommended orders which have been considered in preparing the Recommended Order.

FINDINGS OF FACT

1. Petitioner as an "aggrieved person" filed a complaint with FCHR. § 760.02(10), Fla. Stat. (2005).

2. Given the posture of this case, Respondent is an "employer" employing 15 or more employees in each of 20 or more calendar weeks within the period contemplated by Petitioner's complaint. It is so inferred. § 760.02(7), Fla. Stat. (2005)

3. Petitioner's race as he describes it, and it is found, is Black.

4. In October 2003 Petitioner began employment with Respondent in its Bureau of Laboratory Services, Jacksonville, Florida, as a Medical Laboratory Scientist III (Scientist III). His status was as a probationary employee. He remained in that status throughout his employment with Respondent.

5. Before beginning employment with Respondent, Petitioner had earned a bachelor of science in microbiology in 1982 from the University of Alabama. In 1989 he earned a master's of science in

microbiology from that same institution. In 1996 he was awarded a Ph.D. in microbiology from the University of Alabama.

6. Upon achieving his master's degree, Petitioner served as a research assistant for the University of Alabama at Birmingham from September 1, 1989 through December 31, 1992. Part of that employment overlapped his employment as a graduate researcher from September 1, 1992 through May 29, 1996, at the University of Alabama in Tuscaloosa, Alabama. There was overlapping service at the University of Alabama at Tuscaloosa in the period of September 2, 1992 through April 29, 1996, when Petitioner had a position as a teaching assistant.

7. Between September 5, 1996 and February 25, 2000, Petitioner worked as a research fellow for the National Institute of Health at the University of Florida in Gainesville, Florida, where, as he indicated in an employment application, "Petitioner was responsible for developing new recombinant Interferon Gamma ligands and receptors for the treatment of viral disease and cancer (accomplished). Responsible for supervision [sic] (two) graduate students in molecular techniques."

8. Following the work with the National Institute of Health, Petitioner took a position with ELISA Technologies, Inc., in Gainesville, Florida, as a laboratory director for the period March 1, 2000 through February 5, 2003, in which his application for a job position indicated that Petitioner was: "Responsible for

directing laboratory testing of customer samples and supervising a five-member staff. Responsible for developing, performing, and directing new test development for the CDC and WHO (accomplished). All other research and development projects (accomplished)."

9. Petitioner next worked at Jacksonville University in Jacksonville, Florida, as a adjunct assistant professor from what is perceived the date of January 6, 2003 through his employment with Respondent in its Bureau of Laboratory Services. While serving as an adjunct assistant professor Petitioner in his job application recounts that he was: "Responsible for teaching nursing and biology majors microbiology courses. Responsible for teaching general-clinical laboratory techniques."

10. In his role as Scientist III with Respondent, Petitioner was expected to meet the following expectations:

1) Will learn DNA fingerprinting methods for salmonella and tuberculosis as well as 16S sequencing. Will learn techniques sufficiently to act as a back-up as needed.

Timeframe: November - January

2) Will oversee development of universal procedural manual for all testing in molecular section. Will produce master copy by end of February.

Timeframe: November - February

3) Will oversee the development and documentation of quality control, quality assurance and proficiency testing procedures



in the molecular section. Will incorporate all into a single document by the end of March.

Timeframe: November - March

4) Will eventually be responsible for the ordering of all equipment and reagents for the molecular section. Duties to include monthly reconciliation reports.

Timeframe: November - April

5) Will represent the molecular section in the development of BOLIMS. Will become familiar with reporting and date management of all reports generated in the molecular section.

Timeframe: November - Ongoing

6) Will act as back-up for BT testing. Will learn all procedures once security clearance has been granted.

Timeframe: January - Ongoing

7) Will assist in implementation of VNTR-MIRU and PCR testing for malaria.

Timeframe: January - Ongoing

The months reflected in this statement of expectations began in November 2003 and extended into 2004.

11. In his role as a Scientist III Petitioner had no supervisory duties. He was given projects to do. He was provided an appraisal task form in relation to his responsibilities. Petitioner also worked on a QA/QC manual (quality assurance and quality control).

12. Initially Petitioner was supervised by Dennis Nolan. Mr. Nolan left his employment with Respondent to take another position. Dr. Dean Willis, who has a doctorate in public health, became Petitioner's supervisor with Mr. Nolan's departure.

13. The interaction between Petitioner and other members of the laboratory at Jacksonville is reflected in the Petitioner's Exhibits numbered 4, 5, 6, 11, 19, 25, 26, 27, 28, 29, 31 and 45. This series of e-mails are an indication of Petitioner's participation in the organization and inclusion in the efforts of that organization in carrying forward its duties.

14. Petitioner during his employment in the Scientist III position worked on a malaria project. In addition he worked on a whooping cough test.

15. Earlier in his employment Petitioner underwent a performance appraisal or review of his work.

16. In February 2004 when Mr. Nolan resigned from the laboratory in Jacksonville, his position as BA II, an SES-classified position in the personnel system in Florida government, came open. In that month Respondent advertised to fill the position. In that solicitation Petitioner was the only applicant to replace Mr. Nolan. As a consequence the position was re-advertised.

17. The initial advertisement for BA II position closed on February 16, 2004. The second advertisement for that position closed on March 15, 2004. The information concerning the position was the same in both instances.

18. Dr. Willis as the responsible person at the Jacksonville laboratory, decided to re-advertise the position to try and attract additional applicants. The position was re-advertised and more candidates expressed an interest by applying for the position. Petitioner was among the applicants applying during the re-advertisement. Unlike the circumstance in the first advertisement, on this occasion there was the expectation that someone would be hired for the BA II position. Ultimately Dr. Ming S. Chan, Chief of Laboratory Services, also referred to as a Bureau Chief for Respondent at its Jacksonville office, condoned the re-advertisement. Dr. Chan holds a Ph.D. in chemistry.

19. Among the candidates for the BA II position, four had their applications considered and were interviewed for the position. Petitioner was among the candidates whose applications were reviewed and who underwent an interview. The applications were considered and interviews conducted by Dr. Willis and by Susanne Crowe, another BA II at the Jacksonville laboratory. She holds a master's in health and an undergraduate degree in biology.

20. Ms. Crowe was chosen to interview candidates for the available BA II position as a person who was in a similar position within the organization.

21. The result of the process for ranking the candidates whose applications were considered and who underwent an interview for the job placement was that Dr. David Stuart Beall, a non-Hispanic white male, was selected to fill the BA II position as the top ranked candidate, with Petitioner placing second among the four finalist.

22. The other two persons interviewed for the BA II were interviewed by phone. It is not perceived that any advantage was created for those persons interviewed by phone compared to the live interviews afforded Petitioner and Dr. Beall, given the ranking of the candidates.

23. When Dr. Beall applied for the BA II position he was working for the Center for Disease Control and Prevention (CDC) and was housed in the offices of the Bureau of Laboratory Services in Jacksonville, Florida. Dr. Beall decided to apply for the BA II position without prompting from anyone employed by Respondent. He was not given any special training to allow him to gain the BA II position nor allowed any other form of preference that could be considered discriminatory when compared to the opportunities made available to Petitioner. The office that Dr. Beall was placed in before he became an employee with Respondent in the BA II position,

was based upon space available and not in furtherance of a preference that aided Dr. Beall in gaining the BA II position.

24. By comparison to Petitioner in the application process, the details within the Petitioner's application, which have already been described as to education and work history, the following information was provided by Dr. Beall in his application for the BA II position. He graduated from the University of Florida in 1986 with a bachelor of science in microbiology and cell science. He received a masters in microbiology and cell science from that institution in 1992. He earned a Ph.D. in microbiology and cell science in 1995 from the University of Florida.

25. Dr. Beall served as a graduate assistant at the University of Florida from June 1, 1989, through August 1, 1995. During that time, as he indicated in his application he:

Executed several lab projects including the study of ethanol fermentation by recombinant *Escherichia coli* expressing *Zymomonas mobilis* *pdc* and *adhb* genes for the conversion of xylose and other biomass carbohydrates to fuel ethanol. Also isolated and genetically engineered several novel strengths of *Erwinia* for the production of fuel ethanol from waste plant biomass.

26. From November 1, 1996, through March 31, 1999, Dr. Beall worked as a post-doctorial research associate with the CDC. During that time as the application described he:

Designed and executed experiments that resulted in the identification of several differentially expressed gene products that are associated

with the induction of latency in Mycobacterium . Incorporated design improvements to the shift-down model for MTB growth. Part of this with TB lead to the issuance of a U.S. for an assay to detect antigens associated with latent tuberculosis infections. Attempted to identify Mycobacterium tuberculosis virulence factors using RNA subtractive hybridization. Trained new laboratory technicians how to work safely inside a BSL-3 containment facility.

27. From April 5, 1999, through April 30, 2000, Dr. Beall worked as a guest researcher for the CDC, during which time he as the application described:

Helped organize and contributed work to several lab projects including the development of novel assays for bacterial meningitis detection in clinical samples using TaqMan and Light Cycler technologies and the sequencing of the variable loop regions of the porA gene from several hundred clinical isolates of Neisseria meningitidis.

28. From August 4, 2000, until March 12, 2004, Dr. Beall acted as a visiting professor of biology at the University of North Florida in Jacksonville, Florida, during which time as his application relates:

My duties involve instruction of approximately three to four hundred students in lecture and laboratory sections per semester along with organizing and coordinating the presentation of each course, A's materials and tests. Additionally, I provide recommendations for students entering professional programs and mentor students for their senior presentations. Beyond my teaching responsibilities I help administer and the development of the Masters

degree program as well as participate search committees to fill vacancies. This past summer semester I developed and instructed the Pathogenic Bacteriology course.

29. The applications for the BA II position executed by Petitioner and Dr. Beall had a section which called upon the applicants to set forth in their own words the knowledge/skills/abilities that they believed they would bring to the position. In that context Petitioner said about himself:

Knowledge and skills needed to isolation [sic] and identification [sic] (biochemical and Molecular procedures) pathogenic and medically important bacteria and some viruses. Knowledge and skills needed to identify Mycobacterium tuberculosis complex (biochemical and Molecular procedures). Experience in supervising testing staff and directing basic and applied research projects. Working and written knowledge of CLIA, CAP, GMP, and ISO 2000 requirements for QA/QC. Ability to generate, analyze, present and publish (independently and collaboratively) data in referred scientific Journals. Ability to implement, direct, and complete simple and complex projects.

30. In contrast, Dr. Beall related his knowledge/skills/abilities as being:

My formal training has afforded me a wide range of technical skills. My graduate school projects focused on the genetic engineering and development of novel, environmental benign methods of producing fuel ethanol from waste plant material. These studies relied heavily on knowledge of molecular biology, bacterial genetics, and cellular physiology. My postdoctoral training as an ASM/NCID fellow at the Centers for Disease Control and Prevention in Atlanta provided me invaluable experience in fields of Public Health and bacterial

pathogenesis. This work involved the development of model growth systems and nucleic acid based assays for detecting pathogenic bacteria such as *N. meningitidis*, *H. influenzae*, and *M. tuberculosis*. There I adapted traditional assays for use with the latest generation PCR machines TaqmanA, A and Light CyclerA, A. I have also trained and supervised numerous laboratory personnel in the techniques of molecular biology and advanced laboratory safety practices. I managed and supervised the projects of a variety of associates including visiting researchers, lab technicians, and student interns.

31. The occupation profile related to the BA II position, for which the candidates contended, indicated in the way of Examples of Work:

Plans laboratory services according to statewide program needs. Consults with county health officers and staff regarding laboratory procedures and program planning related to laboratory testing. Coordinates state and federal laboratory services in outbreaks or situations when testing by specialized laboratory units is required. Consult to physicians and private hospital laboratories. Plans and participates in special research projects. Performs comparative evaluation of new and existing laboratory procedures. Prepares reports and provides information to the director, assistant director and program office.

32. Further, the occupation profile set out examples of job characteristics when it stated:

Provide Consultation and Advice to Others

Providing consultation and expert advice to management or other groups on technical, systems-related, or process related topics.



Communicating With  
Other Workers

Providing information to  
fellow workers, and subordinates.  
This information can be exchanged  
face-to-face, in writing, or via  
telephone/electronic transfer.

Documenting/Recording  
Information

Entering, transcribing, recording,  
storing, or maintaining information  
in either written form or by  
electronic/magnetic recording.

Getting Information Needed  
To Do The Job

Observing, receiving, and otherwise  
obtaining information from all  
relevant sources.

Developing and  
Building Teams

Encouraging and building mutual  
trust, respect, and cooperation  
among team members.

Analyzing Data  
or Information

Identifying underlying principles,  
reasons, or facts by breaking down  
information or data into separate  
parts.

Updating and Using  
Job-Relevant Knowledge

Keeping up-to-date and knowing  
one's own jobs' and related jobs'  
and related jobs' functions.

Communicating With Persons  
Outside Organization

Communicating with persons outside  
the organization, representing the  
organization to customers, the  
public, government, and other  
external sources. This information  
can be exchanged face-to-face, in  
writing, or via telephone/electronic  
transfer.

Establishing and  
Maintaining Relationships

Developing constructive and  
cooperative working relationships  
with others.

Developing Objectives  
and Strategies

Establishing long range objectives  
and specifying the strategies and  
actions to achieve these objectives.

33. Within BA II position examples of knowledge, skills, and abilities were to the following effect:

Coordination	Adjusting actions in relation to others' actions
Reading Comprehension	Understanding written sentences and paragraphs in work related documents
Critical Thinking	Using logic and analysis to identify the strengths and weaknesses of different approaches
Speaking	Talking to others to effectively convey information
Judgment and Decision Making	Weighing the relative costs and benefits of a potential action
Time Management	Managing one's own time and the time of others
Implementation Planning	Developing approaches for implementing an idea
Management of Personnel Resources	Motivating, developing, and directing people as they work, identifying the best people for the job
Identification of Key Causes	Identifying the things that must be changed to achieve a goal
Visioning	Developing an image of how a system should work under ideal conditions
Administration and Management	Knowledge of principles and processes involved in business and organizational planning, coordination, and execution. This may include strategic planning, resource allocation, manpower modeling, leadership techniques, and production methods.

English Language	Knowledge of the structure and content of the English language including the meaning and spelling of words, rules of composition, and grammar
Mathematics	Knowledge of numbers, their operations, and interrelations including one or more of the following: arithmetic, algebra, geometry, calculus, statistics, and their applications
Chemistry	Knowledge of the composition, structure, and properties of substances and of the chemical processes and transformations that they undergo. This includes uses of chemicals and their interactions, danger signs, production techniques, and disposal methods
Economics and Accounting	Knowledge of economic and accounting principles and practices, the financial markets, banking, and the analysis and reporting of financial data
Law, Government and Jurisprudence	Knowledge of laws, legal codes, court procedures, precedents, government regulations, executive orders, agency rules, and the democratic political process

34. The job description for BA II stated that the employee "must be licensed or eligible for a clinical/public health laboratory license at the supervisor level." Petitioner held a clinical laboratory technician's license issued by the State of Florida, Department of Health, Division of Medical Quality Assurance. He did not, and neither did Dr. Beall, hold a license

as a clinical/public health laboratory licensee at the supervisory level.

35. Both Petitioner and Dr. Beall met the education requirements for BA II that called upon the candidate to have a masters or equivalent work experience. Both candidates had Ph.D.s.

36. The candidates for the BA II position were scored in relation to their applications through a matrix. Within the matrix was the consideration of education, experience, to include years of experience, supervisory experience, and management experience. There was a potential score for veterans' preference. Neither candidate, Petitioner nor Dr. Beall was entitled to veterans' points. There was a score for licensure in a supervisors or directors capacity, as to eligibility as well as licensure. There was a score for writing ability and a score for public health lab experience. The matrix scores for Dr. Beall and Petitioner respectively are found within Respondent's Exhibits numbered 5 and 6 admitted as evidence. In the last analysis, Dr. Beall received a 68 on his application. Petitioner received a 61. The differences in the scores pertain to a two point difference for ability to communicate in writing, in which Dr. Beall received a score of 8 out of 10 and Petitioner received a score of 6 out of 10 possible points. Dr. Beall received 10 points maximum for having worked at least three years in a public health lab, where as Petitioner did not receive points in that category. Apparently the basis for

assigning the points for public health lab experience was in relation to Dr. Beall's experience with the CDC referred to in his application. Petitioner scored 15 points for work experience and Dr. Beall received 10 points.

37. Petitioner and Dr. Beall were interviewed by Dr. Willis and Ms. Crowe, with each interviewer assigning scores for the interview to the respective candidates. Dr. Willis assigned Dr. Beall a score of 73.5 and Petitioner a score of 65 for the interview. Ms. Crowe assigned Dr. Beall a score of 72 and Petitioner a score of 64 for the interview. The scores in relation to the interviews were averaged. That average was added to the score received for the application review, the result being that Dr. Beall received an overall score of 138.25 and Petitioner a score of 125.50 when finally concluded. In fact, the chart reflecting these scores and averages is such that the actual score for Dr. Beall by that process could have been somewhat higher than is reflected in the chart. The chart is Respondent's Exhibit numbered 7 admitted as evidence.

38. Ms. Crowe in her testimony established that Petitioner was disorganized during his interview session to obtain the BA II job.

39. The ranking of the candidates for the BA II position was first assigned on April 13, 2004. Petitioner was not satisfied with the outcome in which he was not offered the job. He refers to

an April 14, 2004 discussion pertaining to the interview score he received aside from the assignment of points during the application evaluation. Petitioner's Exhibit numbered 14 admitted as evidence is constituted of an e-mail sent from Petitioner to Dr. Willis, the subject being the April 14, 2004 discussion of the interview score. It also refers to a meeting on the morning May 4, 2004, between Petitioner and Dr. Willis on the decision that had been reached to hire Dr. Beall. The emphasis in this communication related to Petitioner's background and his complaints about the score received in the interview. At the end of this communication Petitioner described how he stood on professional principle and was seeking reciprocation of those principles in what he refers to as "this grievance process and in the future." In the e-mail to Dr. Willis Petitioner referred to, "elimination of a candidate based on race is especially frightening when the minority candidate is more qualified than the individual offered the position." The e-mail was sent from Petitioner to Dr. Willis on May 18, 2004, as amended on that same date by a separate E-mail. On May 24, 2004, Dr. Willis acknowledged receipt of the E-mail.

40. The effect of Petitioner's complaints about the scoring directed to Dr. Willis led to further review by Dr. Willis. The outcome was that 5 points Dr. Beall received for management experience in relation to his application were deducted, while 15 points were added for eligibility for licensure as a director.

This adjustment is reflected in the scoring matrix previously described. Petitioner was not assigned any points for management experience and received the same 15 points for eligibility to be licensed as laboratory director that were assigned to Dr. Beall in his application. This outcome is also reflected in the scoring matrix previously described.

41. The decision to hire Dr. Beall for the BA II position was not based upon race or a decision contrary to Petitioner's race.

42. Sometime in the latter part of May 2004, Dr. Beall assumed the BA II position and became Petitioner's supervisor by virtue of being hired in the position.

43. At about the same time Petitioner made an internal complaint, a complaint within the Respondent Agency claiming discrimination on the basis of race, pertaining to the manner in which Dr. Beall was selected for the BA II position to the exclusion of Petitioner. The internal complaint which Petitioner filed was with Respondent's EEOC Office.

44. Petitioner was not satisfied with the internal process for resolving his complaint of discrimination through the Respondent and decided to file a complaint with FCHR, which forms the basis for the present case.

45. After Dr. Beall became Petitioner's supervisor he reviewed Petitioner's work. He observed that Petitioner was aloof, difficult, recalcitrant, obstructive, and had a questionable

demeanor. He found Petitioner's work to be unorganized. He met several times with Petitioner to address the question of organization. Responses required from Petitioner to Dr. Beall were not prompt or clear when made. There was a problem about failure to contact Dr. Beall as supervisor when Petitioner decided to take leave. Petitioner claimed to have been at work when he was not at work, as Dr. Beall perceived the situation.

46. Dr. Willis, who supervised Dr. Beall at that time, was aware of Dr. Beall's concerns about Petitioner's performance, in particular, his lack of cooperation and the inability to find Petitioner at the office, in that Petitioner would leave the premises without advising Dr. Beall.

47. By comparison, during the time that Dr. Willis supervised Petitioner there was a situation concerning a county health department and tests for rabies. Petitioner became involved and gave a response to the inquiry by the county health agency that Dr. Willis considered to be inaccurate or misleading. This led to a situation in which the person within the Bureau of Laboratory Services who properly should have responded to the county agency inquiry, being addressed by Petitioner in a manner that Dr. Willis found troubling, as to Petitioner's ability to work with other persons within Respondent agency.



48. Eventually Dr. Beall recommended that Petitioner be dismissed from his position before completing his probationary period. The reason for this recommendation related to Petitioner's demeanor, to include his willingness to cooperate while undergoing the review of his work. There were issues with reports rendered by Petitioner, considered to be lacking in professionalism, problems with attendance and leave and a lack of progress in the list of expectations that have been referred to earlier. Dr. Willis concurred with the recommendation that Petitioner be dismissed. Linda Boutwell, who was personnel officer within the Bureau of Laboratory Services in Jacksonville, was also consulted concerning the dismissal. Concerning the disposition of Petitioner's employment, Carroll David Fulgher was consulted as an employee of Respondent's Office of Human Resources in Tallahassee. It was explained to Mr. Fulgher that Petitioner tended to ignore his supervisor Dr. Beall and to do what Petitioner preferred, contrary to the wishes of his supervisor. It was explained to Mr. Fulgher that the quality of Petitioner's work was not satisfactory and that difficulties were experienced in relation to Petitioner's attendance and leave. Following discussion with Mr. Fulgher, it was suggested that the matter be considered by the Bureau Chief, Dr. Chan. Mr. Fulgher prepared a letter dismissing Petitioner from his employment. This letter was dated October 13, 2004. It was signed by Dr. Chan indicating his agreement with the choice to

dismiss Petitioner. Respondent's Exhibit numbered 10 is a copy of that letter. It was presented to Petitioner, thus terminating his employment with Respondent.

49. The supervision of Petitioner, to include supervision by Dr. Beall, evidenced no discriminatory intent based upon race, nor was the choice to dismiss Petitioner one motivated by any desire to retaliate against Petitioner for his complaint concerning the decision to hire Dr. Beall in preference to Petitioner for the BA II position.

#### CONCLUSIONS OF LAW

50. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding in accordance with Sections 120.569, 120.57(1), and 760.11(7), Florida Statutes (2005).

51. Petitioner is an "aggrieved person" within the meaning of Section 760.02(10), Florida Statutes (2005). Respondent is an "employer" within the meaning of Section 760.02(7), Florida Statutes (2005).

52. As Petitioner's employer Respondent is accused of an unlawful employment practice for failing to promote (hire) to the BA II position as a black male, instead hiring Dr. Beall, a non-Hispanic white male to the BA II position. This action is allegedly in violation of Section 760.10(1)(a), Florida Statutes (2003), which makes it unlawful for an employer:

To . . . fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race. . . .

53. In addition, Petitioner has accused Respondent of retaliation for discharging Petitioner from his position as a Scientist III because Petitioner complained when he was not hired for the BA II position. By his action Respondent is accused by Petitioner of violating Section 760.10(7), Florida Statutes (2004), which states:

It is an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

54. The provisions of Chapter 760, Florida Statutes, related to this case are comparable to those of Title VII of the Civil Rights of 1964, 42 U.S.C. §§ 2000e, et seq. Consequently, those cases which interpret Title VII are applicable to Chapter 760, Florida Statutes. School Board of Leon County v. Hargis, 400 So. 2d 103 (Fla. 1st DCA 1981); Brand v. Florida Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994); and Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

55. In filing his complaint of discrimination with FCHR Petitioner has complied with a time requirement set out in Section 760.11(1), Florida Statutes (2004). In turn, Petitioner has timely complied with the time requirement set forth for filing his Petition for Relief in association with his request for an administrative hearing as called for in Section 760.11(7), Florida Statutes (2005).

56. Concerning the failure to hire or promote Petitioner to the BA II position, while choosing Dr. Beall, Petitioner is alleging disparate treatment based upon his race. Petitioner bears the burden of proof to establish those claims as recognized in McDonnell Douglass 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).

57. Petitioner must meet the initial burden of establishing a prima facie case of discrimination. Should Petitioner meet that initial burden, the burden then shifts to Respondent to articulate a legitimate, non-discriminatory explanation for its decision to hire Dr. Beall and not Petitioner. Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). The nature of Petitioner's burden is one of production not persuasion. It need only be shown that Petitioner's decision in its hiring choice for BA II was non-discriminatory. Alexander v. Fulton County, Georgia, 207 F.3d 1303 (11th Cir. 2000). Where Respondent meets its burden

of production, then Petitioner must be persuasive in his effort to demonstrate that Respondent's proffered reason for choosing Dr. Beall is a pretext for intentional discrimination against Petitioner.

58. Going forward, to establish a prima facie case of racial discrimination based upon the disparate treatment of not hiring Petitioner for the BA II position, while favoring Dr. Beall for that job, Petitioner must show: (1) that he is a member of a protected minority; (2) that he was qualified and applied for the promotion to BA II; (3) that he was rejected despite those qualifications; and (4) that someone equally or less qualified to fill the position and not a member of a protected minority was promoted. Lee v. GTE Florida, Inc., 226 F.3d 1249, 1253, (11th Cir. 2000), relying upon Taylor v. Rynon 175 F.3d 861, 866 (11th Cir. 1999).

59. Petitioner as a black male is member of a protected minority, who applied for and was qualified to fill the BA II position. He was rejected despite the qualifications and Dr. Beall, not a member of the protected minority, was placed in the BA II position with equal qualifications.

60. Notwithstanding the prima facie showing concerning the treatment Petitioner received in relation to the BA II position, Respondent's explanation of its decision to promote to hire Dr. Beall is not a matter of pretext. There was a legitimate

reason articulated for re-advertising the BA II position due to the lack of competition in the first advertisement, with the expectation that more applicants would improve the process for hiring. Concerning the second advertisement Petitioner was not discriminated against on any basis, race included, when being considered for the BA II position under the process established for assessing applications and interviewing other candidates. Respondent's reasons for ranking Dr. Beall first and Petitioner second and choosing Dr. Beall for the position based on that ranking, does not evidence any form of discriminatory intent in the hiring process. Respondent having met its burden of production of proof that the decision it reached to hire Dr. Beall and not Petitioner was non-discriminatory, it was left to Petitioner to be persuasive in proving that the proffered reason was pretext for intentional discrimination. Petitioner has failed to offer proof that establishes the explanation given by Respondent constitutes pretext for intentional discrimination.

61. Petitioner also alleges retaliation when Respondent decided to separate him from his employment as a Scientist III, to terminate the employment, a decision which Petitioner alleges was motivated by his complaint when Petitioner was not hired/promoted to the BA II position. To prove a prima facie case of retaliation Petitioner must show: (1) he engaged in statutorily protected expression; (2) he suffered an adverse employment action; and

(3) the adverse employment action was causally related to the protected activity. See Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1388 (11th Cir. 1998). In the event that Petitioner established a prima facie case of retaliation, it is incumbent upon Respondent to present evidence of a legitimate non-discriminatory reason for terminating Petitioner's employment with Respondent.

62. Petitioner proved that he engaged in protected activity when complaining about the failure to promote or to hire him for the BA II position. Beyond that time he was separated from his employment in the Scientist III position, terminated, an employment action adverse to his interest. There was no connection between the complaint and the termination. There was no prima facie showing of retaliation. Moreover, Respondent had a legitimate reason for the separation that terminated Petitioner's employment. Respondent engaged in the process of evaluating Petitioner's performance as a probationary employee without discriminatory intent directed to Petitioner based upon race; rather, the basis for deciding the issue was in relation to his performance as a probationary employee. This process was as recognized in Chapter 110, Florida Statutes (2004), in particular in view of the discussion of probation as reflected in Section 110.227, Florida Statutes (2004).

RECOMMENDATION

Upon consideration of the facts found and the conclusions of law reached, it is

RECOMMENDED:

That a final order be entered dismissing Petitioner's claims of discrimination and retaliation based upon race.

DONE AND ENTERED this 28th day of March, 2006, in Tallahassee, Leon County, Florida.



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CHARLES C. ADAMS  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 28th day of March, 2006.

ENDNOTE

1/ Petitioner did not advance his request for relief in relation to the BRTR position calling for a disposition of that subject.

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.