STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WALTER BOOTH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-1579
	)	
CITY OF GAINESVILLE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge Don W. Davis of the Division of Administrative Hearings (DOAH) held a formal hearing in this cause in Gainesville, Florida, on June 21, 2007. The following appearances were entered:

APPEARANCES

For Petitioner: Walter Booth, pro se
2810 Northeast 13th Street
Gainesville, Florida 32609

For Respondent: Daniel M. Nee, Esquire
City of Gainesville
200 East University Avenue, Suite 425
Gainesville, Florida 32601-5456

STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner was subjected to an unlawful employment practice by Respondent due to Petitioner's race in violation of Section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

Petitioner filed a Charge of Discrimination against Respondent with the Florida Commission on Human Relations (FCHR) on August 15, 2007, alleging his suspension from employment with Respondent for a period of five days without pay was disparate treatment taken against him as the result of Petitioner's race.

On or about February 19, 2007, the FCHR issued its determination: No Cause.

On or about March 25, 2007, Petitioner filed a Petition for Relief with the FCHR. Subsequently, on or about April 5, 2007, the case was forwarded to DOAH for formal proceedings.

During the final hearing, Petitioner testified in his own behalf, presented testimony of one other witness and offered five exhibits of which four were admitted into evidence. Respondent presented testimony of two witnesses and 17 exhibits which were admitted into evidence.

No transcript of the final hearing was provided. Both parties were offered the opportunity to file proposed findings of facts and proposed conclusions of law. Both parties availed themselves of that opportunity. The Proposed Recommended Order of each party has been reviewed and considered in the preparation of this Recommended Order.

References to Florida Statutes are to the 2006 Edition unless otherwise noted.

FINDINGS OF FACT

1. Respondent employed Petitioner, an African-American male, on May 6, 1996, as a Code Enforcement Officer. Almost ten years later, on March 28, 2006, Respondent suspended Petitioner for five days for violating City of Gainesville Personnel Policy 19, Rule 19, by providing a false sworn affidavit attesting that a particular property was in compliance with an Order of the Code Enforcement Board when the property was not in compliance. Additionally, the Petitioner received a written warning and counseling regarding a violation of City of Gainesville Personnel Policy 19, Rule 13, which consisted of neglecting to perform a required re-inspection of a property for a period of several months.

2. Petitioner's work as a Code Enforcement Officer involved "responsible inspection work enforcing compliance with the City Codes and Ordinances pertaining to zoning, housing, landscaping, street graphics, lot clearance, junk vehicles, and related codes and ordinances."

3. On December 30, 2004, Petitioner received a complaint regarding violations of the housing code at 220 South East 1st Street, Gainesville, Florida. After inspecting the property further on January 5, 2005, Petitioner issued the owner a notice of violation allowing the owner until February 5, 2005 to remove

non-operational vehicles and junk, trash and debris from the property.

4. Petitioner re-inspected for compliance on May 16, 2005, when he found the property to be in non-compliance with the notice. Respondent states that Petitioner referred the case to the City of Gainesville Code Enforcement Board, and it was docketed as case number CEB2005-106.

5. The City of Gainesville Code Enforcement Board is a quasi-judicial board created by the City of Gainesville pursuant to Florida Statutes Chapter 162 and City Code of Ordinances Chapter 2. The Code Enforcement Board is charged with hearing cases of alleged violations of the City's Code.

6. The Code Enforcement Board heard the case on June 9, 2005, found the owner guilty of the violation, and allowed the owner until July 13, 2005 to bring the property into compliance.

7. On August 11, 2005, Petitioner made notes in the file to the effect that the matter had gone to the Code Enforcement Board and that he would "inspect for compliance with [the] order when time is up." No other case-related activity was noted by the Petitioner in the time period between the Enforcement Board hearing on June 9, 2005, and Petitioner's alleged January 4, 2006 inspection which led to the Affidavit of Compliance issued by Petitioner on January 6, 2006.

8. On January 4, 2006 Petitioner noted in the file that the property was in compliance and later executed the Affidavit of Compliance before a licensed Notary Public after being duly sworn. Petitioner swore under oath in that Affidavit that the corrective action ordered by the Board had been taken.

9. In February 2006, a new complaint regarding the above-referenced property was made to the Code Enforcement Division. The new complaint was reported by multiple sources.

10. Code Enforcement Supervisor David Watkins investigated the February 2006 complaint. Watkins found the property not in compliance and deduced that Petitioner filed the affidavit a month earlier with the knowledge that the compliance sworn to in the Affidavit had not been achieved. Watkins' determination is corroborated by photographic evidence presented at the final hearing and establishes that the property was not in compliance at the time of Petitioner's affidavit.

11. Watkins summarized his investigation and findings in a detailed Supervisory Report. He also learned from an interview with the owner of the 220 South East 1st Street property that the owner did not believe he had come into compliance with the order.

12. Petitioner's false affidavit misrepresenting the facts of case number CEB2005-106 permitted the violator to evade the

penalty prescribed by the Code Enforcement Board of $250 a day for a period of 175 days or an accumulated fine of $43,750.

13. Petitioner was issued an Employee Notice on March 28, 2006 for violation of City of Gainesville Personnel Policies and Procedures, Policy 19, Rules 19 and 13, resulting in a five-day suspension without pay.

14. Policy 19, Rule 19, prohibits "immoral, unlawful, or improper conduct or indecency, whether on or off the job which would tend to affect the employee's relationship to his/her job, fellow workers' reputations or goodwill in the community." The minimum disciplinary action provided for a first violation of Rule 19 is instruction and five day suspension or dismissal." Policy 19, Rule 13 prohibits "productivity or workmanship not up to required standard of performance." The minimum disciplinary action provided for a first violation of Rule 13 is "written instruction & cautioning."

15. Pursuant to the established procedure, Petitioner challenged the suspension through the three-step grievance process and was afforded the opportunity to present evidence and argument to the division manager, department head, and the City Manager's Office. The disciplinary action was sustained at each level.

16. Petitioner compared his case to a case handled by a white code enforcement officer where that officer was not

disciplined. In response to Petitioner's allegations, Watkins reviewed the case referenced by Petitioner to determine possible existence of violations similar those committed by the Petitioner. No evidence was discovered by Watkins to support Petitioner's allegations.

17. The allegations raised by Petitioner against his fellow code enforcement officer were not supported at the final hearing through proof of execution of a false affidavit by a similarly situated white employee. The City has had no cases of similar offenses within the memory of current management and no record of past cases.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of these proceedings. §§ 120.56(9) and 120.57(1), Fla. Stat.

19. Chapter 760, Florida Statutes, the "Florida Civil Rights Act of 1992," provides security from discrimination based upon race, color, religion, sex, national origin, age, handicap, or marital status.

20. The adverse effectuation of an employee's compensation, conditions and privileges of employment on the basis of race is an unlawful employment practice.

21. The burden of proof rests with Petitioner to show a prima facie case of employment discrimination. After such a

showing by Petitioner, the burden shifts to Respondent to articulate a nondiscriminatory reason for the adverse action. If Respondent is successful and provides such a reason, the burden shifts again to Petitioner to show that the proffered reason for adverse action is pre-textual. School Board of Leon County v. Hargis, 400 So. 2d 103 (Fla. 1st DCA 1981).

22. Also, provisions of Chapter 760, Florida Statutes, are analogous to those of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq. See Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). Petitioner must show that: (a) he belongs to a racial minority; (b) he was subjected to an adverse employment action; (c) he was qualified for his position; and (d) Respondent treated similarly situated employees outside the protected class more favorably. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997). Petitioner has not met his initial burden of proof and cannot show that Respondent's suspension of Petitioner from employment was a pretext for intentional discrimination because he did not show that Respondent treated "similarly situated" employees outside his protected class more favorably. See Abel v. Dubberly, 210 F.2d 1334, 1339 (11th Cir. 2000) where the court stated, "absent some other similarly situated but differently disciplined worker, there can be no disparate treatment."

23. Petitioner offered no evidence of other similarly situated but differently disciplined workers. Respondent's policy is applied in a consistent manner to all employees without regard to the employee's race.

24. The testimony and other evidence produced by Petitioner are not sufficient to establish that racial discrimination by Respondent toward Petitioner occurred. Petitioner failed to show that Respondent's basis for his termination was pre-textual in any way.

RECOMMENDATION

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

RECOMMENDED:

That a Final Order be entered dismissing the Petition for Relief.

DONE AND ENTERED this 19th day of July, 2007, in Tallahassee, Leon County, Florida.

Don W. Davis

DON W. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of July, 2007.

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.