STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUSIE M. WALTON BANKS, Petitioner, vs. CIVIGENICS/COMMUNITY EDUCATION CENTERS, Respondent.	)	Case No. 08-4875

RECOMMENDED ORDER

A hearing was held pursuant to notice, on September 1, 2, and 24, 2009, in Gainesville, Florida, and on October 21, 2009, via video-conferencing with sites in Gainesville and Tallahassee, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Ted Nichols, Esquire
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For Respondent: Richard N. Margulies, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Employment Complaint of Discrimination filed by Petitioner on February 20, 2008.

PRELIMINARY STATEMENT

On February 20, 2008, Petitioner, Susie M. Walton Banks, filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR) which alleged that Respondent, Civigenics/Community Education Centers, violated Section 760.10, Florida Statutes, by discriminating against her on the basis of race and gender. The Employment Complaint of Discrimination alleged that Petitioner was subject to disparate treatment and was involuntarily demoted.

The allegations were investigated and on August 25, 2008, FCHR issued its Determination: No Cause and a Notice of Determination: No Cause. A Petition for Relief was filed by Petitioner on September 26, 2008.[1/]

FCHR transmitted the case to the Division of Administrative Hearings on or about September 30, 2008. A Notice of Hearing was issued setting the case for formal hearing on December 11, 2008. Motions for continuance were granted and the case was ultimately set for hearing on September 1 and 2, 2009. The hearing commenced but was not completed on those dates, resumed

on September 24, 2009, and continued until its conclusion on October 21, 2009.

At hearing, Petitioner testified on her own behalf. Petitioner's Exhibits numbered 1A-B, 2A-G, 3A-G, 4A-J, 6A-B, 7A-E, 8A-D, 9A-G, 10, 11A-F, 12A-G, 13A-D, 14A, 15A-C, 16A and 17A-B were admitted into evidence. Petitioner's Exhibits numbered 11G and 18 through 20 were rejected. Respondent presented the testimony of Michael Walker and Dan Eberline. Respondent's Exhibits numbered 1 through 21 were admitted into evidence.

A seven-volume Transcript was filed on November 6, 2009. The parties filed a Joint Motion for Extension of Time to submit proposed recommended orders, which was granted. The parties timely filed Proposed Recommended Orders.

FINDINGS OF FACT

1. Petitioner is an African-American female who was hired by Respondent on August 2, 2004, as the Program Director of Respondent's Substance Abuse Treatment Program located at Lancaster Correctional Institution (LCI) in Trenton, Florida.

2. Respondent, Civigenics Community Education Centers (Civigenics), is an employer within the meaning of the Florida Civil Rights Act. Civigenics is a provider of offender in-prison treatment services. Under contracts with the Florida

Department of Corrections (DOC), Respondent provides substance abuse programs designed to reduce recidivism of inmates.

3. DOC has contracts with various providers throughout Florida to provide such substance abuse services in its correctional facilities. At the time Petitioner was hired by Respondent as the Program Director at LCI, that program was one of 11 of Respondent's programs under contract with DOC. These 11 programs were under the direction of Michael Walker, State Director for Respondent.

4. Respondent provides treatment services under two types of programs: Modality 1 and Modality 2. Modality 1 is an intensive outpatient program for inmates. Inmates in a Modality 1 program are involved with the program for half a day, then have a work assignment the other half of the day. A modality 2 program is a residential program in which the inmates are involved in the program all day long, six-to-seven days a week. Of Respondent's 11 programs, only two are Modality 2 programs. One of the Modality 2 programs is at Gainesville Correctional Institution (GCI). At the time Petitioner was employed by Respondent as Program Director of the program at LCI, the program was a Modality I program.

5. Dan Eberline is a correctional program administrator for DOC. Mr. Eberline's responsibilities include contract management, oversight, auditing and follow-up as the liaison

between DOC and Respondent. Mr. Eberline has been employed with DOC for 20 years and worked with Petitioner since 2001, when she was clinical director for a Modality 2 program at another private company. Under Respondent's contract with DOC, Mr. Eberline must approve of the hiring of all Program Directors. He interviewed Petitioner and a white male for the LCI position, and approved of Petitioner's hiring in 2004. When hired, she replaced a white male as the Program Director at LCI. Petitioner was already in the Program Director position when Mr. Walker became State Director of Respondent in 2005. Of the 11 Program Directors, six were women of which three were African-American women. Two of the African-American women were hired by Mr. Walker.

6. Petitioner holds a bachelor's degree from the University of Florida in sociology, and a Master of Arts in Addictive Disorders from the Breining Institute, which is a distance-learning program under the Florida Certification Board. She is a Certified Addictions Professional from the Certification Board for Addiction Professionals of Florida and is a member of the Addiction Advisory Board.

7. At any given time, approximately 70 inmates were enrolled in the program at LCI. The inmates at LCI were youthful offenders, ranging from 18-to-24 years old.

8. As Program Director at LCI, Petitioner supervised a staff of three counselors and an administrative assistant. As Program Director, Petitioner was responsible for ensuring that her staff was properly trained in group therapy, individual therapy, and for making psychosocial assessments of the inmates under their care. She was also responsible for ensuring the accuracy of the database and of certain reports that the program provided to DOC.

9. During the time period in question, there were two contracts between Respondent and DOC. The first contract was in effect from October 2001 through October 2006. The second contract became effective October 2006, with an ending date of September 30, 2011.

10. Beginning in the year 2000, DOC standardized all of Respondent's programs as to the performance measures used, the maintenance of files, reports, and training. According to Mr. Eberline, his fundamental role was to monitor the contract and then to compare the contract with the delivery of services.

11. To measure the effectiveness of Respondent's Modality 1 and Modality 2 programs, Mr. Eberline conducted audits of each program's files and reports. He monitored each program in routine and special site visits, and in a comprehensive annual audit, to ensure that each program was meeting contract standards. Mr. Eberline would, in turn, provide reports of

those audits to his supervisor, Kim Riley. The reports are provided to the Florida Legislature for purposes of receiving funding.

12. The most critical standard each program must meet is a successful completion rate for inmates who participate in Respondent's programs. This standard of measure is used by DOC to determine the effectiveness of treatment. In the second contract (beginning October 2006), the successful completion rate was specified at 80 percent for Modality 1 programs and 60 percent for Modality 2 programs.

13. The first contract (ending October 2006) did not specify a completion rate of 80 percent. However, the preponderance of the evidence established that while not codified in the earlier contract, there was nonetheless an expectation that each Modality 1 program, such as at LCI, would meet an 80 percent successful completion rate standard. An 80 percent successful completion rate was considered standard in the industry, discussed at staff meetings, was part of a program director's training, and referenced in Mr. Eberline's program reports.

14. The completion rate standard measures the number of inmates enrolled in a Modality 1 program who completed the program after a recommendation from the clinical staff. These inmates were discharged or coded as having completed the

treatment program. Not all inmates, however, complete the program for a number of reasons. For example, an inmate may be unable to participate in and have to withdraw from the program because he must go to court, for a medical or mental health reason, or because the inmate must go into protective confinement.

15. Additionally, an inmate may receive a Disciplinary Report (DR) from prison staff and be discharged from the program for behavior that is not considered "related to the program." That is, the DR is for behavior that the treatment program is not designed to impact. The inmate is considered to be administratively discharged (coded ADM) if the program director determines the behavior can be further addressed through the program.

16. Conversely, an inmate may receive a DR for behavior that is considered program related (e.g., behavior that the treatment program is designed to impact) such as a positive drug screen, a threat of violence, or one of the other "cardinal" rule violations. Also, an inmate may be unsuccessfully discharged for other behaviors considered "major" rule violations such as sexually acting out, assault, fighting, threats of violence, or breaking confidentiality of inmates. The inmate would receive an unsuccessful discharge from the

program (coded UNS) because the program has not been successful in impacting the inmate's behavior.

17. DOC electronically maintains information regarding DRs issued to inmates on the Offender Based Information System (OBIS). The Program Director for each program reviews the information on OBIS, in a read-only format, about an inmate's DRs which states the nature of the DR, and what type of behavior or conduct was involved. The Program Director can read the DR as well as the narrative of the DOC employee who issued the DR, to find out what actually occurred.

18. The determination as to whether a disciplinary infraction which results in an inmate's dismissal from the program is or is not related to the program and properly coded as an ADM or UNS discharge, is the responsibility of the Program Director. It is also the Program Director's responsibility to ensure that the reports used to calculate the completion and discharge rate for inmates enrolled in the program are correct.

19. While the data reflecting the coding determination might be entered by support personnel, only the Program Director can make the coding determination because of his or her training and certification. According to Mr. Eberline, it would be unethical to leave such a determination to a person who is neither qualified nor licensed to make that decision.

20. Every month, a report which lists those inmates who have successfully completed the program, and those inmates who received an ADM discharge or a UNS discharge, is submitted to DOC. This report, called a "PPC41" is used to calculate the completion rate. The Program Director must sign off on the PPC41 before it is sent to Mr. Walker, and in turn to Mr. Eberline. It is the Program Director's responsibility to ensure that the document is sent and that the information contained in the PPC41 is accurate.

21. At hearing, Petitioner testified that her administrative assistant was the person who made the coding determinations, and entered them into the computer system. Petitioner signed off on these reports, but did not make an independent review of their content. She simply verified that they were being sent to Mr. Walker and Mr. Eberline.

22. Prior to the hearing, Mr. Walker and Mr. Eberline were not aware that Petitioner was allowing clerical staff to determine the codes on the PPC41s. Both Mr. Walker and Mr. Eberline expressed concern and disapproval that Petitioner did not review the PPC41s for content and that the coding was done by her assistant. Since this information was revealed to them during the hearing, it could not have been the basis for the employment actions taken by Respondent. It may, however, explain some of the errors which will be discussed.

23. Under the formula utilized by Respondent and DOC to measure the completion rate, the number of inmates who successfully complete the program are first identified. From that number, the number of inmates who are coded as ADM (administrative discharge) are factored out or subtracted. That number is then compared to the number of inmates who are coded as UNS (unsuccessful discharge). These two numbers are then compared to the number of inmates who have successfully completed the program. The administrative discharges do not impair or lower a program's completion rate. The more discharges that are coded as ADMs, the higher the program's completion rate. For that reason, if an inmate's discharge is improperly or incorrectly coded as an ADM rather than UNS, an incorrect completion rate will result.

24. The Program Director submits the monthly PPC41s to DOC throughout the course of the fiscal year. These monthly reports provide a monthly snapshot as to whether or not a program is meeting the contractual standard. The monthly report may identify the need to intensify services or change the format by which the program is providing treatment to inmates to better impact their behavior. Consequently, the completion rate may vary from month to month, with a final completion rate calculated at the end of each fiscal year.

25. At the end of each fiscal year, DOC tabulates all of the discharge information reflected in each program's PPC41s, audits the discharge codes, and calculates a final completion rate for all programs. These calculations are made in Tallahassee without involvement of Mr. Walker or Mr. Eberline, and without any knowledge of the identity of the particular program director at any particular facility.

26. In April 2005, an annual comprehensive audit of the program at LCI was conducted by Mr. Eberline. LCI's completion rate was determined to be 54.4 percent. Mr. Eberline's monitoring report noted, "This is a low completion rate when compared to similar Modality I programs. The youthful offender inmates are a difficult population to work with, however, a formal plan to increase the completion rate is encouraged."

27. LCI was issued its first Corrective Action Plan (CAP) to address several items. On June 14, 2005, Mr. Eberline determined that all elements of the CAP were met.

28. In April 2006, Mr. Eberline conducted the annual comprehensive audit of the program at LCI. The audit revealed that the completion rate for the program had gone down from 54.4 percent to 52 percent. While no CAP was required, Mr. Eberline's report included the following: "The past twelve month program completion rate is 52 percent adjusted for administrative discharges as compared to 54.4 percent last year.

It is recommended that an internal institutional review be initiated to provide suggestions on how to improve this program completion rate."

29. In response to these comments, Mr. Walker convened an institutional review of this situation. He brought together security, classification, administrative staff, Petitioner and himself in an effort to determine how Respondent could more positively impact the completion rate in the program at LCI.

30. In December 2006, Mr. Eberline conducted a routine follow-up visit to LCI. His report of the visit notes that the Warden was concerned with the program completion rate of 48 percent for fiscal year 2005-2006.[2/] His report also noted that because there were deficiencies in basic file format, additional training was required to ensure that "staff is following acceptable file format."

31. As a result of those comments, Mr. Walker discussed with Petitioner file format and the proper order of documents in the files.

32. Mr. Eberline conducted a routine site visit at LCI in February 2007. He was concerned that LCI's completion rate had dramatically increased from 48 percent to over 80 percent in just five months. Mr. Eberline, Mr. Walker, and the Assistant Warden were all concerned with this sudden dramatic increase in completion rates. Mr. Eberline suspected that the ADM coding

might have been overused resulting in a manipulation of the code so as to artificially increase the completion rate of the program.

33. Using the OBIS system, Mr. Eberline, Mr. Walker, and Petitioner reviewed and analyzed the coding determinations for those files, in excess of 40, in which a clinical decision had to have been made. Once the discharge codes were re-evaluated, the completion rate dropped to 60 percent.

34. It was at this time that Mr. Eberline brought up concerns to Mr. Walker about Petitioner's performance in regard to program completion rates, and the need for a change in leadership. Mr. Eberline was being questioned by his supervisor at DOC about steps he was taking to address the low completion rate at LCI. In turn, Mr. Walker was hearing these same questions and concerns from Mr. Eberline.

35. At Mr. Eberline's request, Mr. Walker wrote a second CAP which was put in place on February 20, 2007. This CAP was directed at Petitioner and concerned "client discharges being inappropriately coded as ADM 83."

36. Mr. Eberline conducted a follow-up review on May 21, 2007. His report concluded that training had been completed with staff and, as a result, the assignment of proper discharge codes was being used and reported. His report notes that the completion rates would continue to be monitored.

37. On the same date, Mr. Eberline conducted a comprehensive, annual audit of Lancaster. The annual audit covered nine months from July 1, 2006, through April 14, 2007. Annual audits did not necessarily coincide with the fiscal year (July 1 through June 30). During this audit, it was determined that the completion rate at LCI was 67.4 percent at that point in the fiscal year. The completion rate for fiscal year 2006-2007 for LCI was calculated by DOC to be 65.2 percent.

38. At that point, the 80 percent standard had been codified in the contract between Respondent and DOC. Mr. Eberline recommended in his audit report that "continued effort be focused on improving the completion rate up to and exceeding the performance measure specified in the contract."

39. In April 2007, Civigenics was bought by Community Education Centers. On May 4, 2007, a meeting was held by Mr. Eberline and Mr. Walker of all Program Directors, including Petitioner. At this meeting, Mr. Eberline discussed data entry concerns and completion rates. Mr. Eberline expressed his increasing concern about the overuse of administrative discharge codes. He also informed Mr. Walker that the contract was in jeopardy because of the low completion rate.

40. In July 2007, Mr. Walker believed that the program at LCI would not reach the contractual standard of 80 percent. He felt that 70 percent was "reachable." He approached

Mr. Eberline, who informed him that the matter would have to be addressed to Kim Riley, Chief of the Bureau of Substance Abuse Programs at DOC.

41. Mr. Walker then wrote a letter to Ms. Riley, requesting an adjustment in the contract performance measure for LCI to be reduced from 80 percent to 70 percent. The letter stated in part:

> This program provides services to a male Youthful Offender population which has a high degree of need for confinement for the safety and security of the institution. We wish to request an adjustment of 10% which would then require that we maintain a program completion rate of at least 70% within this program servicing this special population.

42. Mr. Walker had never made a similar request for any of the other programs under his supervision. Petitioner was aware of Mr. Walker's request to lower the standard.

43. On July 16, 2007, a special meeting was convened at LCI to discuss continuing concerns about the program's completion rate. The meeting was attended by the prison warden and other prison administrators, Mr. Walker, Mr. Eberline, Petitioner and one of her staff. Mr. Eberline made it clear that since the completion rate was directly tied to legislative funding, the program at LCI was in jeopardy of being shut down.

44. Following the special meeting, Mr. Eberline wrote a report which read in pertinent part:

> The special needs of the youthful offender inmate being served by the substance abuse modality I program were discussed. Disciplinary action resulting from inmate behavior issues was determined to be the primary reason for an inmate's unsuccessful discharge. The inmate's resistance to treatment was also a contributing factor. The number of low ranking mandatory inmates available for enrollment was discussed and will be reviewed for remedy. All were in agreement that little could be done to impact the institution's disciplinary system dealing with enrolled inmate's behavior issues.
>
> It is recommended that the program director and staff review options on how to impact program participant's behavior through a more intensive treatment regiment. The program is requested to review and restructure the readiness group service delivery to identify motivated inmates for program enrollment.
>
> A (CAP) Corrective Action Plan will be required to address these concerns and recommendations. The CAP shall be submitted on or before August 13, 2007.

45. Mr. Walker sent an e-mail to Petitioner instructing her as follows: "In addition to your regular end of the month PPC 41 report, please order an additional PPC 41 report which covers your program components from July 1, 2006 through June 30, 2007. Ensure that all data is accurate. . . ."

46. In response, Petitioner created a chart in which she calculated the completion rate to be 84.10 percent for July 2006 to June 2007. This conflicts with the completion rate calculated by DOC which shows a 65.2 percent for the same time

period. The preponderance of the evidence indicates that Petitioner's calculation of a completion rate of 84.10 percent is inaccurate. The completion rates for the program at LCI as calculated by DOC were 47.7 percent for 2005-2006 and 65.2 percent for 2006-2007.

47. Mr. Walker began receiving criticism from Mr. Eberline and Mr. Walker's supervisor, Ms. Worthington, about the low completion rate at LCI. He was told that if he was not able to increase the completion rate at LCI, that they, DOC, would find someone who would.

48. In early September 2007, Mr. Eberline conducted a routine visit to LCI and again found miscoding errors. Mr. Walker verbally informed Petitioner that staff performance ratings would be reviewed and would be associated with meeting the 70 percent completion rate as specified in the contract and that, should this standard not be met, staff would be placed on probationary status and additional corrective actions taken. This admonition was contained in writing in the CAP that Mr. Walker prepared in early September.

49. At some point between early September and early October, Mr. Eberline recommended to Mr. Walker that Petitioner be removed as Program Director because of the program's consistent lack of meeting the performance standards, the need for multiple CAPs, and miscoding issues.

50. Mr. Walker discussed this with his supervisor, Ms. Worthington. He recommended that Petitioner not be terminated. There were two open counselor positions, one of which was located in Gainesville. Mr. Walker offered Petitioner a demotion to a counselor position and made an effort to keep her salary as high as possible.

51. Mr. Walker had to get approval from Mr. Eberline for this transfer; Mr. Eberline reluctantly approved the transfer. Ms. Worthington agreed with Mr. Walker's recommendation.

52. On October 4, 2007, Petitioner was removed as Program Director and replaced by Vernon Burgess, a white male, who was at that time the Program Director at GCI. The program at LCI was still under the CAP, which was ultimately successfully completed in November 2007.

53. On November 19, 2007, the program at LCI was closed. When the program at LCI closed, Mr. Burgess resumed his former position as Program Director at GCI. All of the other employees in the program at LCI were laid off.

54. On December 18, 2007, Petitioner wrote a letter to Mr. Walker requesting a written explanation regarding her demotion. Petitioner wrote that she had not been given an opportunity to address the adverse actions taken against her. Her letter did not raise any allegation of discrimination on the basis of race or gender.

55. Mr. Walker met with Petitioner in December 2007. Mr. Walker informed her that if she had an issue with her demotion, that there was a grievance procedure she could pursue if she felt she needed to do so.

56. Petitioner did not file a grievance with Respondent. Petitioner filed a Charge of Employment Discrimination with FCHR which gave rise to this proceeding.

The Gainesville Program

57. Respondent operates a Modality 2 program at Gainesville Correctional Institution (GCI). In 2006, an audit was conducted at GCI by Mr. Eberline at about the same time he conducted the annual comprehensive audit at LCI. The program at GCI had declined from the prior year's completion rate of 71 percent to 51 percent. The performance standard for a Modality 2 program was 60 percent, in contrast to the higher standard for Modality 1 programs.

58. As a result of this drop in completion rates, a special meeting took place including Mr. Eberline, Mr. Walker, Mr. Burgess, the Program Director at GCI, and the prison administration. This special meeting was similar to the special meeting held at LCI to address improving completion rates. Unlike Modality 1 programs, there are no administrative discharge codes in a Modality 2 program. Thus, there was no

issue relating to overuse of the ADM code, but there was a completion rate issue.

59. The meeting focused on taking immediate steps to improve the completion rate, focusing on inmates at risk for obtaining disciplinary reports. By the time the meeting was held, the completion rate had begun to improve. Mr. Walker instituted a CAP for the GCI program although Mr. Eberline did not require one. The completion rate for GCI improved in approximately a three-month period.

60. According to DOC's calculation, GCI had a completion rate of 79.1 percent for fiscal year 2006-2007. This exceeded the contract standard of 60 percent.

61. All of Respondent's Program Directors have the same access to the OBIS system, must meet the same reporting standards, receive the same training, and must meet contractual standards set forth in the contract between DOC and Respondent.

CONCLUSIONS OF LAW

62. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat. (2009).

63. Section 760.10(1), Florida Statutes, states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of race or sex (gender).

64. In discrimination cases alleging disparate treatment, the Petitioner generally bears the burden of proof established by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under this well established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination.[3/] When the charging party, i.e., Petitioner, is able to make out a prima facie case, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991) (court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion, and need only persuade the finder of fact that the decision was non-discriminatory. Id.; Alexander v. Fulton County, Georgia, 207 F.3d 1303 (11th Cir. 2000). The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. "The employee must satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Department of Corrections v. Chandler, supra at 1186;

Alexander v. Fulton County, Georgia, supra. Petitioner has not met this burden.

65. To establish a prima facie case regarding Petitioner's allegation that Respondent failed to promote her because of her race, Petitioner must prove that: (1) she is a member of a protected class; (2) she was subject to an adverse employment action; (3) Respondent treated similarly situated employees, who are not members of the protected class, more favorably; and (4) she was qualified for the job or benefit at issue. See McDonnell, supra; Gillis v. Georgia Department of Corrections, 400 F.3d 883 (11th Cir. 2005).[4/]

66. Petitioner meets the first and second elements in that she is African-American and was demoted. As for the fourth element, Petitioner was presumably qualified as she was hired for the Program Director job. However, Petitioner did not prove the third element, that similarly situated employees who are not members of the protected class were treated more favorably.

67. Petitioner asserts that she was treated less favorably than her white male counterpart, Mr. Burgess. First, Petitioner alleges that Mr. Burgess was treated more favorably when the completion rates for his program at GCI was below contractual standards compared to how Petitioner was treated when the program at LCI was not meeting completion rate standards. Secondly, when Petitioner was demoted and transferred to GCI,

Mr. Burgess was moved to the LCI Program Director position, which he held briefly until that program's closure.

68. At both LCI and GCI, special meetings were convened in an effort to redirect the efforts in these programs to reach the desired result of higher completion rates. The completion rate program problems at GCI were rectified quickly, whereas the problems at LCI, where Petitioner was Program Director, were long-term and spanned more than two fiscal years.

69. The preponderance of the evidence established that Petitioner was demoted from her position as Program Director at LCI because for nearly three years, the program at LCI was the lowest performing of Respondent's 11 programs under contract with DOC. The low completion rate at LCI was the reason Mr. Walker requested DOC to lower the contractual standard from 80 percent to 70 percent. Despite this lower standard, LCI still did not achieve the contractual standard.

70. Mr. Eberline, who is an employee of DOC, not of Respondent, insisted to Mr. Walker and Mr. Walker's supervisor, Ms. Worthington, that Petitioner be removed from the Program Director position or DOC would terminate the contract with Respondent as legislative funding would be lost.

71. Despite Mr. Eberline's insistence, Mr. Walker essentially "went to bat" for Petitioner and instead of firing her as Mr. Eberline wanted, transferred Petitioner to a

counselor's job. He also made an effort to keep her salary as high as possible, and has encouraged her to apply for at least one other Program Director job. While this was a demotion, Petitioner is still employed with Respondent in her field. In contrast, her former co-workers at LCI were laid-off when that program closed.

72. Applying the McDonnell analysis, Petitioner did not establish a prima facie case of race or sex discrimination in regard to her allegations that Respondent demoted her because of her race or sex.

73. Even assuming that Petitioner had demonstrated a prima facie case, Respondent demonstrated a legitimate, non-discriminatory reason for her demotion: that the program over which she was Program Director consistently did not meet the appropriate completion rate standards, despite training and opportunities for improvement through corrective action plans.

74. Petitioner believes that the completion rates relied upon by Respondent were erroneous and that they were, in reality, higher. The "official" completion rates were calculated by DOC. There is no competent evidence that they are incorrect. Petitioner did not come forward with specific evidence that the reasons given by Respondent are a pretext for discrimination. She did not show that a discriminatory reason

more likely than not motivated the decision, or that the proffered reason given by Respondent is not worthy of belief.

75. Moreover, the important issue is whether Respondent intentionally discriminated against Petitioner in taking the action of demoting and transferring her. Thus, even if there were errors in the percentages calculated by DOC, there is no evidence that Respondent manipulated those numbers for the purpose of discriminating against Petitioner because of her race or gender. See also Department of Corrections v. Chandler, supra at 1187, quoting Nix v. WLCY Radio/Rahall Communications, 738 F.2d 11811, 1187 (11th Cir. 1984) ("The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.").

76. Finally, whether or not Respondent followed its internal procedures regarding Petitioner's demotion is not relevant unless its actions are based upon unlawful discrimination. There is no competent evidence that Respondent based its actions regarding Petitioner on discriminatory reasons.

77. In summary, Petitioner has failed to carry her burden of proof that Respondent engaged in unlawful discrimination toward her on the basis of her race or gender.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 26th day of January, 2010, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of January, 2010.

ENDNOTES

1/ Petitioner also filed an employment charge of discrimination against the Florida Department of Corrections. That case was also transmitted to DOAH and assigned Case No. 08-4878. On October 30, 2008, Administrative Law Judge T. Kent Wetherell, II, entered a Recommended Order of Dismissal. A Final Order of Dismissal was issued by FCHR on January 12, 2009.

2/ The official completion rate as calculated by DOC was 47.7 percent for fiscal year 2005-2006.

3/ FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand v. Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

4/ In its Proposed Recommended Order, Respondent asserts that it is not necessary or appropriate to address whether or not Petitioner established a prima facie case, as the case was heard in full. Respondent asserts that the only relevant inquiry is the ultimate factual issue of intentional discrimination. In support of this position, Respondent cites federal cases in which a motion to dismiss was made as to whether a prima facie case had been made, and the motion denied by the federal court. The undersigned has reviewed the cases cited by Respondent as authority for this proposition and has determined that it would not be appropriate in the instant case, in which the undersigned has only recommended order authority, to bypass the analysis as set forth in McDonnell.

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.