STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT A. BOODY, III,[1]	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-3098
	)	
FLORIDA HIGHWAY PATROL,	)	
	)	
Respondent.	)	
______________________________	)	

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted by video teleconference on September 4, 2009, between West Palm Beach and Tallahassee, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Cathleen Scott, Esquire
Cathleen Scott, P.A.
Jupiter Gardens
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Jupiter, Florida 33458

For Respondent: Sandra Coulter, Esquire
Florida Highway Patrol
Neil Kirkman Building
2900 Apalachee Parkway, A432
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether Respondent committed one or more unlawful employment practices against Petitioner as alleged in the subject Petition for Relief.

PRELIMINARY STATEMENT

On or about November 14, 2008, Petitioner, Robert A. Boody, III (Respondent or Mr. Boody), filed a Complaint of Discrimination against Respondent, his former employer. Following its investigation, by documents dated April 30, 2009, the Florida Commission on Human Relations (FCHR) issued a "Notice of Determination: No Cause" (the Notice) and a "Determination: No Cause" (the Determination). The Notice was forwarded to the parties in care of their respective counsel by certified mail. Thereafter, Petitioner filed a Petition for Relief that was dated June 4, 2009, and date-stamped by the FCHR as being received on June 5.[2]

Succinctly stated, Petitioner, a K-9 officer, contends that Respondent fired him because he had a medical condition and because he took anabolic steroids for his medical condition. He further alleges that Respondent illegally seized medical records pertaining to him and that it unlawfully disclosed those medical records. Petitioner also contends that Respondent retaliated against him by prohibiting him from working off-duty while he

was assigned to administrative duties and by taking away his K-9.[3]

Respondent asserts that it fired Petitioner because it concluded that Petitioner unlawfully obtained anabolic steroids, a Class III controlled substance that cannot be lawfully obtained without a lawful prescription. Respondent denies that it illegally obtained Petitioner's medical records or that it unlawfully disclosed those records. Respondent denies that it retaliated against Petitioner.

Parallel to this proceeding, Petitioner brought action against Respondent before the Public Employees Relation Commission (PERC). Following a hearing in that proceeding, a PERC hearing officer concluded that Petitioner had lawfully obtained the anabolic steroids and that Respondent was not justified in terminating his employment. While the hearing officer's recommended order was entered as an exhibit, no final order by PERC was offered as an exhibit. However, the parties advised that the PERC order is on appeal, which suggests that PERC has indeed acted on the recommended order. At any rate, the PERC proceeding has not run its course.

At the final hearing, Petitioner testified on his own behalf and presented the additional testimony of Michael Olaciregui, a former employee of the Respondent who was terminated under circumstances similar to the circumstances that

lead to Petitioner's termination. Petitioner offered the following pre-marked exhibits, each of which was admitted into evidence as Petitioner Exhibits 1, 2, 6, 7, 10, 13, 14, 16, 17, 18, 20, 23, 24, 27, and 28, respectively. Respondent recalled Petitioner during its case in chief and offered one exhibit, which was admitted into evidence as Respondent Exhibit 1. In addition to the foregoing, the parties offered one Joint Exhibit, consisting of the testimony of Dr. Richard Marques before the PERC hearing officer. The parties stipulated that Dr. Marques' testimony could be used as evidence in this proceeding before DOAH.

Unless otherwise noted, all statutory references are to Florida Statutes (2009). References to rules are to the rules in effect as of the entry of this Recommended Order. The relevant statutes and rules have not changed since the date of the events at issue.

A Transcript of the proceedings, consisting of one volume, was filed on October 21, 2009. Each party filed a Proposed Recommended Order, which has been duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Petitioner was an employee of Respondent with permanent status in the state career service system. Petitioner began his employment with

Respondent on February 26, 2001, and was assigned to the Lake Worth area until his employment was terminated on January 30, 2009.

2. During his tenure with Respondent, Petitioner worked as a K-9 officer as the handler of a dog trained to detect drugs. Petitioner was frequently involved with high-risk traffic stops. Petitioner received a "meets standards rating" on his most recent performance evaluation. Prior to the events that led up to this proceeding, Petitioner had no history of being disciplined by Respondent.

3. Dr. Richard Marques specializes in internal medicine and treats a broad spectrum of medical issues including endocrine problems. He has been Petitioner's physician for eight years.

4. Prior to September 2003, Petitioner began to experience fatigue, irritability, and low energy. Petitioner testified that he slept up to 16 hours some days. During that time, and at all times relevant to this proceeding, Petitioner was working his assigned duties. Those duties included a 40-hour shift plus occasional overtime, primarily on weekends.

5. At the request of Dr. Marques, on September 12, 2003, Petitioner presented for blood work at LabCorp, an independent, reputable, testing lab. From the results of the testing, Dr. Marques determined that Petitioner suffered from low

testosterone levels or a condition known as hypogonadism. Dr. Marques recommended that Petitioner seek treatment for his testosterone deficiency from a physician or facility specializing in problems of the endocrine system. Dr. Marques did not recommend a particular physician or facility to Petitioner. Instead, Dr. Marques left that decision to Petitioner. Dr. Marques contemplated at the time of his recommendation that Petitioner would be examined in a hospital or other medical facility by a doctor specializing in the endocrine system. Dr. Marques testified that there are two types of hypogonadism, with one type originating from the adrenal gland and the other originating from the pituitary gland. Testing of the type an endocrinologist would do in a testing facility such as a hospital is required to determine the source of the testosterone secretion. Dr. Marques referred Petitioner for further evaluation because he does not do the type of testing that an endocrinologist does.

6. After reading an advertisement in a magazine for a facility named PowerMedica in January 2004, Petitioner sought treatment from that facility. After reviewing PowerMedica's website, Petitioner concluded that it was a licensed medical facility and submitted a form medical history. In response to his submittal, someone purporting to be from PowerMedica

instructed Petitioner to submit a blood sample for analysis by LabCorp. Petitioner complied with that request.

7. Thereafter, Petitioner received a telephone call from someone at PowerMedica who purported to be a doctor. Following that telephone conversation, Petitioner received at his home via Federal Express a shipment that contained testosterone, which is an anabolic steroid. An anabolic steroid is, pursuant to the provisions of Section 893.03(3)(d), a Schedule III controlled substance. Section 893.13(6)(a), Florida Statutes, provides as follows:

> (6)(a) It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. Any person who violates this provision commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

8. At no time relevant to this proceeding did Petitioner enter the building that housed PowerMedica, nor was he physically examined by anyone associated by PowerMedica.

9. Petitioner followed up with Dr. Marques while Petitioner was taking the anabolic steroids. Dr. Marques considered Petitioner’s treatment to be appropriate.

Dr. Marques saw no signs that Petitioner was abusing the anabolic steroids, and noted that Petitioner's condition improved.

10. Petitioner stopped receiving anabolic steroids from PowerMedica in October 2004.

11. Dr. Marques wrote a note on September 22, 2003, reflecting, in relevant part, the following: ". . . given the severity of his high viral titer,[4] I have asked him to change his night shift duty to day time." After Petitioner requested that he be reassigned to day-time duty and presented that note to his superiors, Respondent reassigned Petitioner to day duty. At all times relevant to this proceeding, Petitioner was able to perform his job duties. Other than the request for a change from the night shift to the day shift, Petitioner did not tell Respondent that he was having difficulties performing his duties. At no time prior to his interview on July 10, 2008, which will be discussed below, did Petitioner tell Respondent that he was taking anabolic steroids, that he suffered from low testosterone levels, or that he suffered from hypogonadism. At no time did Petitioner request that he be evaluated to determine whether he was fit for duty.

12. In early 2005, it became public knowledge in south Florida that the U.S. Food and Drug Administration (USFDA), working in conjunction with the Broward County Sheriff's Office

(BCSO), was investigating PowerMedica based on allegations that it had unlawfully sold steroids and Human Growth Hormones. As part of its investigation, the USFDA seized records pertaining to PowerMedica's customers. There was no evidence that any information seized by the BCSO or the USFDA was illegally seized. The joint investigation culminated in the closure of PowerMedica's operations.

13. In March 2008, a sergeant and a lieutenant employed by Respondent and assigned to its Professional Compliance Bureau met with a sergeant employed by BCSO. During that meeting, the BCSO sergeant showed Respondent's employees a list containing PowerMedica's customers. That list contained Petitioner's name.

14. At Respondent's request, in April 2008, the USFDA provided copies of records to Respondent that had been seized from PowerMedica. That information provided details as to Petitioner's dealings with PowerMedica.

15. On July 10, 2008, Petitioner was subjected to a formal interview by representatives of the Respondent. In that interview, Petitioner admitted his dealings with PowerMedica and, while denying any wrongdoing, admitted the material facts set forth above pertaining to those dealings. Petitioner declined to divulge the underlying condition for which he sought treatment. Further, Petitioner acknowledged that Dr. Marques had informed him that his insurance company would likely not pay

for his treatment from PowerMedica or for similar treatment. Specifically, Petitioner admitted that he obtained testosterone without being examined by a PowerMedica physician, he admitted that he knew about the investigation and subsequent closure of PowerMedica, and he admitted that he knew the reasons for the closure of PowerMedica. Petitioner admitted that he never volunteered to come forward to Respondent or any other law enforcement agency to discuss his dealings with PowerMedica. Petitioner referred to himself as a victim of PowerMedica's fraudulent practices, but he admitted that he never advised Respondent prior to his interview that he had been a victim of PowerMedica.

16. On September 9, 2008, Respondent assigned Petitioner to administrative duty that was to be served at Petitioner's residence from 8:00 a.m. to 4:00 p.m. Monday through Friday. The letter advising Petitioner of this assignment and setting the parameters for the assignment, included the following, beginning at the second full paragraph:

> You will remain on administrative duty until further notice. This action is being taken based upon the fact you are under investigation by this agency. You are to turn in all of your assigned division equipment including uniforms, badges, firearms, any department identification, and other division property.
>
> Your approval to work off-duty police employment (ODPE) and/or any type of agency secondary employment has been withdrawn for

> the duration of the administrative duty. Your eligibility to resume OPDE/secondary employment will be reviewed by your troop commander at the conclusion of the administrative duty assignment.
>
> Your failure to comply with this directive will subject you to disciplinary action.

17. On November 14, 2008, Petitioner filed his Complaint of Discrimination with the Florida Commission on Human Relations. After that date, but before his termination, Petitioner requested permission to be able to work as a driver for Federal Express during hours other than the hours he was serving his administrative duties. Respondent denied that request. While Petitioner asserts that the denial was in retaliation for his filing the Complaint of Discrimination, that assertion is based on supposition. Petitioner presented no direct evidence to support his assertion and any circumstantial evidence is insufficient to establish the assertion.

18. By letter dated January 14, 2009, and received by Petitioner on January 20, 2009 (the termination letter), Respondent terminated Petitioner's employment. Approximately 20 days after his termination, Respondent retrieved from Petitioner the dog that Petitioner had handled for approximately three years. Petitioner asserts that Respondent took his dog in retaliation for his amending his Complaint of Discrimination to include a claim of retaliation relating to the denial of the request to work part-time for Federal Express. Again,

Petitioner's assertion is based on supposition and is not supported by direct or circumstantial evidence.

19. The termination letter, which is part of Petitioner's Exhibit 11, sets forth extensive factual allegations pertaining to Petitioner's dealings with PowerMedica as the basis for the termination. The letter also set forth the statute and policies that Petitioner had allegedly violated. The letter cited the following as "Aggravating Circumstances":

> This case is aggravated because through your training, work experience, and knowledge of the law you are held to a higher standard of reasonableness and conduct. You should have been well aware of the stigma attached to the type controlled substances you purchased and used, especially

20. Petitioner points to Respondent's characterization of anabolic steroids as having a "stigma" as evidence that Respondent discriminated against him based on his disability. That argument is without merit. The greater weight of the credible evidence established that Respondent terminated Petitioner's employment based on its determination that Petitioner had unlawfully obtained and consumed a Schedule III controlled substance without obtaining a lawful prescription and because he failed to come forward with information about PowerMedica after he knew that PowerMedica was being investigated by the USFDA and the BCSO. Petitioner did not

establish that Respondent’s articulated reasons for its employment decision were pretexts for an unlawful employment practice. Indeed, there was no evidence that as of the date of the termination letter, Respondent knew the nature of Petitioner’s medical condition, or that it had any reason to perceive him as being disabled.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the subject matter parties to this case pursuant to Sections 760.11(7), 120.569, and 120.57(1), Florida Statutes.

22. Section 760.11(7), Florida Statutes, provides as follows:

> (7) If the commission determines that there is not reasonable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, the commission shall dismiss the complaint. The aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause and any such hearing shall be heard by an administrative law judge and not by the commission or a commissioner. If the aggrieved person does not request an administrative hearing within the 35 days, the claim will be barred. If the administrative law judge finds that a violation of the Florida Civil Rights Act of 1992 has occurred, he or she shall issue an appropriate recommended order to the commission prohibiting the practice and recommending affirmative relief from the

> effects of the practice, including back pay. Within 90 days of the date the recommended order is rendered, the commission shall issue a final order by adopting, rejecting, or modifying the recommended order as provided under ss.120.569 and 120.57. The 90-day period may be extended with the consent of all the parties. In any action or proceeding under this subsection, the commission, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action. In the event the final order issued by the commission determines that a violation of the Florida Civil Rights Act of 1992 has occurred, the aggrieved person may bring, within 1 year of the date of the final order, a civil action under subsection (5) as if there has been a reasonable cause determination or accept the affirmative relief offered by the commission, but not both.

23. Section 760.10(1)(a), Florida Statutes, provides, in relevant part, as follows:

> (1) It is an unlawful employment practice for any employer:
>
> (a) To discharge . . . or otherwise discriminate against any individual with respect to compensation, terms, conditions or privileges of employment, because of such individual's . . . handicap . . . .

24. The issue as to whether Respondent had just cause to terminate Petitioner's employment is for PERC to resolve. The issue in this proceeding is whether the decision to terminate Petitioner's employment was motivated by unlawful discrimination. See Damon v. Fleming Supermarkets, Inc., 196

F.3d 1354, 1361 (11th Cir. 1999); Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991); and Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984).

25. The burden of proof for a claim of an unfair employment action based on an alleged disability is based on the framework set forth in McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973). See Durly v. APAC, Inc., 236 F.3d 651, 657 (11th Cir. 2000). In order to establish a prima facie case of the alleged discrimination, Petitioner must demonstrate that he is a qualified individual with a disability and was discriminated against because of that disability.

26. In order to meet the definition of disabled, Petitioner must show that he was substantially limited in a major life activity as a result of a physical or mental impairment, has a record of such impairment, or is perceived as having such impairment.

27. 42 U.S.C. § 12102 defines the following terms, in relevant part applicable to this proceeding, as follows:

> (1) Disability. The term "disability" means, with respect to an individual—
> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment (as described in paragraph (3)).
> (2) Major life activities.

(A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions. For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment. For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability. The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.

(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

> (C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.
> (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
> (E) (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--
> (I) medication . . .

28. In construing the foregoing definitions, the undersigned concludes that Petitioner's low testosterone levels or hypogonadism is an impairment that has been successfully treated with medication. In the absence of such medication, the effects of Petitioner's hypogonadism substantially limited certain of Petitioner's major life activities. It impaired the function of his endocrine system, sapped his energy, and caused irritability. The undersigned concludes that Petitioner is a person with a disability.

29. As reflected by the Findings of Fact, Petitioner failed to prove that Respondent terminated his employment because he had hypogonadism or because he took testosterone or anabolic steroids. The record is very clear that Respondent fired Petitioner because of its determination that Petitioner obtained and consumed a Schedule III drug without a valid prescription and because he failed to come forward with

information about PowerMedica after he knew that PowerMedica was being investigated by the USFDA and the BCSO. The record is also very clear that Respondent's articulated reason for its employment decision was not a pretext for unlawful discrimination.

30. In order to establish a prima facie case of retaliation, Petitioner would have to show that (1) he filed a Charge of Discrimination; (2) he suffered an adverse employment action; and (3) the adverse action was causally related to the protected expression. See Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1453 (11th Cir. 1998). In his claim for retaliation, proved that he filed a Charge of Discrimination, but he failed to meet his burden as to the remaining prongs. Petitioner failed to establish that he suffered an adverse employment action when Respondent refused his request for permission to work for Federal Express because he failed to establish that he had a right to work off-duty while he worked full-time for Respondent, albeit on administrative duty. Petitioner also failed to establish that he suffered an adverse employment action when Respondent took his dog from him after his termination of employment because there was no showing that Petitioner owned the dog or had any right to retain possession of the dog. Finally, Petitioner failed to prove that any

employment action taken by Respondent against him was motivated by his disability or a perceived disability.

31. Petitioner failed to establish that the manner in which Respondent obtained information pertaining to Petitioner's dealings with PowerMedica or the manner in which it maintained those records established that Respondent harbors animosity towards Petitioner. There is no reasonable basis to conclude that Respondent could not act on information obtained by the BCSO and the USFDA during the course of a lawful investigation.

32. Petitioner seems to argue that the manner in which Respondent obtained his medical records and its disclosure thereof constitute an independent cause of action. If that is Petitioner's argument, the argument is moot as to this proceeding because the undersigned is without jurisdiction to rule on such an independent claim.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order adopting the Findings of Fact and Conclusions of Law contained in this Recommended Order. It is further RECOMMENDED that the final order dismiss the Petition for Relief with prejudice.

DONE AND ENTERED this 23rd day of November, 2009, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of November, 2009.

ENDNOTES

[1]/ In its referral to the Division of Administrative Hearings, the Florida Commission on Human Relations spelled the Petitioner's last name as "Booty." The style of this proceeding reflects that his last name is correctly spelled "Boody."

[2]/ The Petition for Relief appears to have been filed on the 36th day following the entry of the Notice and the Determination. Section 760.11(7), Florida Statutes, requires that a Petition for Relief be filed within 35 days of a Determination of No Cause. No argument has been made that the filing was untimely and no such determination will be made by the undersigned due to the provisions of Florida Rules of Civil Procedure 1.090(e), and Florida Administrative Code Rule 28-106.103, which add five days to established deadlines if notice of the deadline is provided by U.S. mail.

[3]/ This is intended to be a summary only. Any question as to the scope of Petitioner's Petition should be resolved by reading the entire pleading.

[4]/ Dr. Marques did not explain the significance of his phrase "the severity of his high viral titer."

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.