STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PETA-GAYE MORRIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-1797
	)	
AIRTRAN AIRWAYS, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge Edward T. Bauer for final hearing by video teleconference on July 9, 2010, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Peta-Gaye Morris, pro se
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Lauderhill, Florida 33351

For Respondent: Patricia J. Hill, Esquire
Colin A. Thakkar, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent committed an unfair labor practice by discriminating against Petitioner on the basis of race and retaliating against Petitioner, in violation of the Florida Civil Rights Act, of 1992, as amended, Section 760.10 et seq., Florida Statutes (2008).

PRELIMINARY STATEMENT

In February 2009, Petitioner Peta-Gaye Morris filed a Charge of Discrimination with the Florida Commission on Human Relations ("FCHR"). On July 31, 2009, after conducting an investigation into Petitioner's allegations, the FCHR issued a "no cause" determination, finding the accusations of racial discrimination and retaliation to be without merit. Petitioner elected to pursue administrative remedies, timely filing a Petition for Relief with the FCHR on or about August 28, 2009. The FCHR transmitted the Petition for Relief to the Division of Administrative Hearings ("DOAH") on September 2, 2009, and the matter was assigned DOAH Case No. 09-4764.

On December 22, 2010, an Order Closing File was entered in DOAH Case No. 09-4764 after Petitioner failed to respond to an Order to Show Cause that required her to explain her failure to comply with an Order Compelling Responses to Interrogatories. Subsequently, on April 5, 2010, Administrative Law Judge Patricia Hart entered an Order Re-Opening File and Requesting Response, which re-opened the instant cause as DOAH Case No. 10-1797. This matter was later transferred to the undersigned, who scheduled a final hearing for July 9, 2010.

At the hearing, Petitioner testified on her own behalf. During its case, Respondent called five witnesses: Kellye Terrell, Jerome Ferrell, Dan Mellgren, Everton Harris, and

Eduardo Baez. Respondent's Exhibits 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, and 37 were received into evidence. Exhibit 6 was also introduced, with the exception of page 163.

The final hearing transcript was filed with the DOAH on July 29, 2010.[1] Each party filed Proposed Recommended Orders, which were considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2008 Florida Statutes.

FINDINGS OF FACT

1. On September 28, 2005, Respondent AirTran Airways hired Petitioner, who is Black, as a customer service agent. During her entire term of employment, Petitioner was assigned to Respondent's station in Fort Lauderdale, Florida.

2. Between January and June of 2006, Petitioner was issued five attendance warnings. During the same period, Petitioner was issued two written warnings that related to other violations of company policy.[2] Nevertheless, on August 6, 2007, Petitioner was promoted to the position of station supervisor.

3. Several months after her promotion, Petitioner was issued a "final warning" and suspended for three days. This occurred after an internal fraud investigation revealed that on several occasions, Petitioner received insufficient funds from

customers in connection with round-trip and business class upgrades.

4. Following the "final warning," Petitioner's employment was uneventful until February or March of 2008. At that point, Dan Mellgren, who had been employed with Respondent for approximately eight years, transferred to Fort Lauderdale from Chicago and assumed the position of station manager. Petitioner's claims of racial discrimination and retaliation relate solely to Mr. Mellgren.

5. As explained during the final hearing, a station supervisor, the position held by Petitioner, is subordinate to one or more duty managers. In turn, duty managers report to the station manager, and the station manager reports to the director of the southern region.

6. Mr. Mellgren admits that upon taking over as the Fort Lauderdale station manager, he made the decision that "swipe cards," which were limited in number (four or five) and permitted parking in a preferred lot closer to the terminal, would be distributed based on seniority. In addition, one swipe card was reserved for a supervisor who frequently ran work-related errands.

7. As a result of Mr. Mellgren's change in policy, Petitioner lost her swipe card and was thereafter required to park in the regular employee lot. Although Petitioner claims

that the reassignment of swipe cards was racially motivated, there is no credible evidence supporting the allegation.

8. According to Petitioner, Mr. Mellgren committed other discriminatory acts. For example, Petitioner claims that she was not permitted to bring her children to the weekly staff meetings (which took place on her day off), while at least one white employee was permitted to do so. In contrast, Mr. Mellgren testified that all employees, including Petitioner, were authorized to bring well-behaved children to a staff meeting if said meeting occurred on the employee's day off. Mr. Mellgren further testified that at no time did he prevent Petitioner from bringing her children to a staff meeting. The undersigned accepts Mr. Mellgren's testimony as credible with respect to this issue.

9. As an additional allegation of discriminatory conduct, Petitioner claims that Mr. Mellgren required her, on one occasion, to work eight hours without a lunch break. While Mr. Mellgren did not deny that this occurred, he explained that in the airline industry, customer service agents and supervisors will occasionally miss lunch breaks during peak hours. Any such missed lunch break is recorded in an "exception log," which enables the employee to obtain additional compensation. The undersigned accepts Mr. Mellgren's explanation concerning the

incident and concludes that any deprivation of a lunch break was due solely to busy conditions at the airport.

10. Petitioner further alleges that shortly after Mr. Mellgren's transfer to Fort Lauderdale, Mr. Mellgren forged her name on a security badge sign-out form. Mr. Mellgren testified, credibly, that this did not occur.

11. Pursuant to AirTran Airways policy, which is outlined in the "AirTran Crew Member Handbook," an employee who is experiencing harassment based upon race or other protected classification is directed to handle the situation by first confronting the harasser politely. If the harassment continues, or if the aggrieved employee believes that a confrontation could result in harm, the employee should contact a supervisor or manager. If the complaint involves the employee's supervisor or manager, the employee is directed to take the complaint to the next level of management or to the human resources department.

12. Petitioner admits that she did not report her issues with Mr. Mellgren to AirTran's human resources department or to a level of management superior to Mr. Mellgren. Petitioner did, however, report at least some of her problems with Mr. Mellgren to Everton Harris, a duty manager whom Petitioner trusted.[3] There is no evidence that Mr. Harris communicated Petitioner's concerns to the human resources department, a superior, or anyone else.

13. It is undisputed that on March 27, 2008, Petitioner arrived at the Fort Lauderdale station after attending training in Atlanta. Petitioner noticed that one of the gates was busy, so she decided to assist two AirTran customer service agents (Eduardo Baez and Donna Heghinian) who were working the counter. Shortly thereafter, in violation of AirTran policy, a revenue passenger (i.e., a paying customer) was bumped from a flight to accommodate a non-revenue flight attendant employed with Spirit Airlines.

14. In the following days, AirTran's Internal Audit and Fraud Department investigated the incident to determine the identity of the employee responsible for replacing the revenue customer with the non-revenue flight attendant. During the investigation, statements were obtained from Mr. Baez and Ms. Heghinian, both of whom implicated Petitioner as the responsible party. Petitioner also provided a statement in which she vehemently denied responsibility.

15. The findings of the investigation were subsequently provided to Ms. Kellye Terrell, an Employee Relations Manager with AirTran. Ms. Terrell is African-American.

16. After reviewing the findings, Ms. Terrell determined that Petitioner should be separated from her employment with AirTran due to two violations of company policy.[4] Ms. Terrell

drafted a termination letter, which was provided to Petitioner on April 7, 2008.

17. Although the termination letter was actually signed by Mr. Mellgren, it should be noted that Mr. Mellgren did not participate in the decision to terminate Petitioner. In addition, Mr. Harris, the only person to whom Petitioner communicated any of her complaints regarding Mr. Mellgren, did not participate in Petitioner's termination.

18. At the time of Petitioner's termination, neither Ms. Terrell, nor any other decision-maker was aware of any complaints made by Petitioner to Mr. Harris concerning Mr. Mellgren.

19. The undersigned finds that Respondent's decision to terminate Petitioner was based upon a good faith belief that Petitioner violated company policy by bumping a revenue passenger, as well as Petitioner's previous disciplinary history.

20. Petitioner offered unrebutted testimony that her position was filled by a Caucasian female.[5]

21. The undersigned determines, as a matter of ultimate fact, that the evidence in this case is insufficient to establish that Respondent discriminated against Petitioner on the basis of her race.

22. The undersigned also finds, as a matter of ultimate fact, that the evidence is insufficient to establish that Respondent retaliated against Petitioner.

CONCLUSIONS OF LAW

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

24. The Florida Civil Rights Act of 1992 ("FCRA") is codified in Sections 760.01 through 760.11, Florida Statutes. When "a Florida statute [such as the FCRA] is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994). Therefore, the FCRA should be interpreted, where possible, to conform to Title VII of the Civil Rights Act of 1964, which contains the principal federal anti-discrimination laws.

Employment Discrimination Claim

25. Section 760.10, Florida Statutes, provides, in relevant part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or 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, color, religion, sex, national origin, age, handicap, or marital status.

26. Complainants alleging unlawful discrimination may prove their case using direct evidence of discriminatory intent. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "only the most blatant remarks, whose intent could be nothing other than to discriminate," satisfy this definition. Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(internal quotations omitted), cert. denied, 529 U.S. 1109 (2000). Often, such evidence is unavailable, and in this case, Petitioner presented none.

27. As an alternative to relying exclusively upon direct evidence, the law permits complainants to profit from an inference of discriminatory intent, if they can adduce sufficient circumstantial evidence of discriminatory animus, such as proof that the charged party treated persons outside of the protected class (who were otherwise similarly situated) more favorably than the complainant was treated. Such circumstantial evidence, when presented, constitutes a prima facie case.

28. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973), the U.S. Supreme Court articulated a scheme for analyzing employment discrimination claims where, as here, the complainant relies upon circumstantial evidence of discriminatory intent. Pursuant to this analysis, the complainant has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (Fla. 1996). If, however, the complainant succeeds in making a prima facie case, then the burden shifts to the accused employer to articulate a legitimate, non-discriminatory reason for its complained-of conduct. This intermediate burden of production, not persuasion, is "exceedingly light." Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994). If the employer carries this burden, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 516-518 (1993). At all times, the "ultimate burden of persuading the trier of fact that the [charged party] intentionally discriminated against" him remains with the complainant. Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1258 (11th Cir. 2001).

29. To establish a prima facie case of employment discrimination, Petitioner is required to show that she "(1) is a member of a protected class; (2) was qualified for the position; (3) was subject to an adverse employment action; and (4) was replaced by someone outside the protected class, or, in the case of disparate treatment, shows that other similarly situated employees were treated more favorably." Taylor v. On Tap Unlimited, Inc., 282 Fed. Appx. 801, 803 (11th Cir. 2008) ("Taylor established a prima facie case for racial discrimination. She was a qualified member of a protected class; she was terminated; and she was replaced by an individual outside of her protected class"); Bryan v. McKinsey & Co., Inc., 375 F.3d 358, 360 (5th Cir. 2004).

30. It is undisputed that Petitioner belongs to a protected class. As such, Petitioner satisfied the first prong of a prima facie case of employment discrimination.

31. With respect to the second prong, Respondent argues that Petitioner was not qualified for the position she held at the time of her termination by virtue of her March 27, 2008, misconduct. The undersigned disagrees, as Petitioner "need only make the minimal showing that she possesses the basic skills necessary for performance of [the] job." Gregory v. Daly, 243 F.3d 687, 696 (2d Cir. 2001) (internal quotation marks and

citations omitted). As recently observed in Bowdish v. Federal Express Corp., 699 F. Supp. 2d 1306, 1317 (W.D. Okla. 2010):

> Defendant's contention that Plaintiff cannot establish satisfactory job performance because he was terminated for misconduct conflates the second element of Plaintiff's prima facie case with the question of pretext, and is contrary to binding precedent . . . . [A]n employer cannot defeat a plaintiff's *prima facie* case . . . by articulating the reasons for the adverse employment action because the plaintiff in such a situation would be denied the opportunity to show that the reasons advanced by the defendant were pretextual.

(Internal quotation marks and citations omitted); see also Guerrero v. Fire Department, City of New York, 2009 U.S. Dist. LEXIS 52937, *23 (S.D.N.Y. June 2, 2009) (rejecting defendant's contention that due to misconduct, plaintiff could not show that he was qualified for his position); Hawn v. Executive Jet Mgmt., Inc., 546 F. Supp. 2d 703, 717 (D. Ariz. 2008) ("Defendant argues that the misconduct itself renders the Plaintiffs unqualified for the positions. The Court does not however come to the same conclusion . . . . [U]nder such a regime, the remainder of the *McDonnell Douglas* framework, and the prima facie case for that matter, would be rendered superfluous."). As Petitioner possessed the basic skills necessary to perform the position of station supervisor, she has established the second prong of a prima facie case, notwithstanding the allegations of misconduct.

32. Petitioner has also established the third element of a prima facie case, as her termination constitutes an adverse employment action.[6]

33. Finally, with respect to the fourth prong of the test, Petitioner's testimony that she was replaced by a white employee was unrebutted by the Respondent. Accordingly, Petitioner established a prima facie case of employment discrimination, and a burden of production shifted to Respondent to articulate a legitimate, non-discriminatory reason for the termination.

34. Relying on the "work rule" defense, Respondent proffered a legitimate non-discriminatory reason for Petitioner's termination: Respondent believed that on March 27, 2008, Petitioner violated company policy when she replaced a revenue passenger with a non-revenue flight attendant, and that Petitioner subsequently provided dishonest statements concerning the incident.

35. As Respondent articulated a legitimate non-discriminatory reason for the termination, Petitioner was required to establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 516-518 (1993). To show pretext, Petitioner must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons

for its action that a reasonable factfinder could find them unworthy of credence." Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997) (citation omitted).

36. Throughout the proceedings, Petitioner attempted to show that she was innocent of the alleged misconduct and that the prohibited behavior was actually committed by another employee. Significantly, however, whether Petitioner was innocent of the March 27, 2008, misconduct is not the correct inquiry. Instead, the relevant issue is whether Respondent actually believed, at the time Petitioner was terminated, that she had committed the misconduct. Schaffner v. Glencoe Park District, 256 F.3d 616, 622 (7th Cir. 2001) ("The issue is not whether Schaffner worked well with others, but whether the Park District honestly believed that she did not. In order to rebut the Park District's articulated reason, Schaffner must present evidence that it did not believe its own assessment"); Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991) (inquiry is limited to whether employer believed employee was guilty of misconduct, and if so, whether that was the reason behind discharge; that employee did not actually engage in misconduct is irrelevant); Nix v. WLCY Radio, 738 F.2d 1181, 1187 (11th Cir. 1984) (holding that "an 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"); Breunlin v. Village of Oak Park, 2008 U.S. Dist. LEXIS 34924, *11-12 (N.D. Ill. 2008) ("The only relevant inquiry is whether the employer . . . honestly believed the reason it offers.").

37. The undersigned finds that Petitioner failed to demonstrate that the proffered reason for her termination was a pretext for discrimination. After carefully considering the exhibits and testimony presented during the final hearing, the undersigned has no doubt that at the time of Petitioner's termination, Respondent believed in good faith that Petitioner had committed two significant violations of company policy in connection with the March 27, 2008, incident. Accordingly, Petitioner did not satisfy her ultimate burden of persuading the undersigned that Respondent intentionally discriminated against her because of her race.

Retaliatory Discharge Claim

38. The undersigned now turns to Petitioner's retaliation claim, in which she alleges that she was terminated as a result of her complaints to Mr. Harris regarding Mr. Mellgren.

39. Subsection 760.10(7), Florida Statutes, provides, in pertinent part:

> 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.

40. Petitioner's retaliation claim under the Florida Civil Rights Act must also be appropriately analyzed with the same framework as used in analyzing retaliation claims under Title VII. Gant v. Kash N' Karry Food Stores, 2010 U.S. App. LEXIS 16504, *4 (11th Cir. August 4, 2010). Pursuant to this framework, an employee must first establish a prima facie case of retaliation. Bryant v. Jones, 575 F.3d 1281, 1307-08 (11th Cir. 2009). If a prima facie case is shown, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions. Id. at 1308. If the employer articulates a legitimate, non-discriminatory reason, the burden of production shifts to the employee to offer evidence that the alleged reason of the employer is a pretext for illegal discrimination. Id.

41. To establish a prima facie case of retaliation, Petitioner must demonstrate that: (1) she participated in a protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the participation in the protected activity and the adverse employment action. Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008). To satisfy the third prong of the test, which

requires a causal connection between the protected activity and the adverse decision, Petitioner "must show that the decision-makers were aware of the protected conduct, and that the protected activity and adverse actions were not wholly unrelated." Shannon v. BellSouth Telecomms., Inc., 292 F.3d 712, 716 (11th Cir. 2002). Close proximity in time between the protected activity and the adverse employment action "is insufficient to create a genuine issue of fact as to causal connection when there is unrebutted evidence that the decision-maker did not have knowledge that the employee engaged in protected conduct." Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 799 (11th Cir. 2000); see also Sanchez v. Sungard Availability Services LP, 362 Fed. Appx. 283, 288 (3d Cir. 2010) ("Moreover, because the individuals who were responsible for deciding to discharge Sanchez were unaware of his complaints of discrimination, Sanchez has failed to establish a causal connection between his termination and his alleged reporting the discrimination.").

42. There is no question that Petitioner's termination constitutes an adverse employment action. Even assuming, however, that Petitioner's informal complaint to Mr. Harris regarding Mr. Mellgren constituted protected conduct, the evidence demonstrates that the decision-maker who terminated Petitioner's employment had *no knowledge* of the complaint.

Accordingly, the third prong of the test was not satisfied, and Petitioner failed to establish a prima facie case of retaliation.

43. Furthermore, even if Petitioner could establish a prima facie case of retaliation, Petitioner has failed to present any evidence that Respondent's proffered reason for her termination was mere pretext.

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. Further, it is RECOMMENDED that the final order dismiss the Petition for Relief.

DONE AND ENTERED this 18th day of August, 2010, in Tallahassee, Leon County, Florida.

Edward T. Bauer
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of August, 2010.

ENDNOTES

[1] When the instant cause was referred to DOAH, an error occurred that caused Ms. Morris' last name to be misspelled "Morros" in the case style. As a result, the transcript of the final hearing refers to the Petitioner as "Morros." Following the final hearing, the Division of Administrative Hearings corrected the misspelling.

[2] In particular, Petitioner was reprimanded after she failed to follow the chain of command while dealing with an unruly passenger. Petitioner also received a written warning for failing to ensure that minors flying by themselves had the required paperwork at check-in.

[3] Petitioner was aware of AirTran's procedures concerning the handling of harassment complaints. In 2006, Petitioner filed a sexual harassment complaint against a fellow employee that was investigated by AirTran's human resources department. The investigation was closed after the allegations could not be substantiated.

[4] In particular, Ms. Terrell concluded that Petitioner violated rule number seven of the Airtran Rules of Conduct, which prohibits dishonesty, and rule number twenty-eight, which involves "unauthorized bookings, transactions, or other misuse of the Company's reservations system." During the final hearing, Ms. Terrell emphasized that pursuant to AirTran disciplinary policy, supervisors are held to a higher standard of accountability than non-managerial employees.

[5] Respondent asserts in its Proposed Recommended Order that there is no evidence that Petitioner was replaced by an individual outside of her protected class. However, Petitioner testified that she was replaced by a Caucasian female whom Mr. Mellgren had promised the position. Petitioner's testimony with respect to this issue is found on page 30 of the final hearing transcript.

[6] As detailed in the Findings of Fact, the undersigned found no credible evidence that Mr. Mellgren forged Petitioner's signature or that Petitioner was prohibited from bringing her

children to staff meetings, while white employees were permitted to do so. Although the evidence demonstrated that Petitioner was required to work without a lunch break on one occasion and suffered the loss of a preferred parking spot, neither complaint constitutes a legally cognizable adverse employment action in this context. See Freire v. Keystone Title Settlement Services, 2009 U.S. Dist. LEXIS 121190, *18-19 (D. Md. December 29, 2009) (holding that deprivation of one lunch break did not rise to the level of an adverse employment action), aff'd, 2010 U.S. App. LEXIS 15817 (4th Cir. July 29, 2010); Byrne v. Alabama Alcoholic Beverage Control, 635 F. Supp. 2d 1281, 1294 fn. 11 (N.D. Ala. 2009) ("[T]he other actions about which she complains -- to include . . . the retraction of an assigned parking space -- also are the sorts of tribulations not so extraordinary as to rise to the level of an adverse employment action"); see also Piercy v. Maketa, 480 F.3d 1192, 1203 (10th Cir. 2007) (holding that actions amounting to a "mere inconvenience" do not constitute an adverse employment action).

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.