STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIS LITTLES, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-0274
	)	
CITY OF ORMOND BEACH,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on April 20, 2011, in Ormond Beach, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: David W. Glasser, Esquire
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116 Orange Avenue
Daytona Beach, Florida 32114

For Respondent: Mark E. Levitt, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent, the City of Ormond Beach (the "City"), committed unlawful employment practices contrary to section 760.10, Florida Statutes (2009),[1/] by discriminating

against Petitioner based on his race or by discharging Petitioner from his employment in retaliation for engaging in protected conduct.

PRELIMINARY STATEMENT

On or about June 17, 2010, Petitioner Willis Littles, Jr. ("Petitioner") filed with the Florida Commission on Human Relations ("FCHR") an Employment Complaint of Discrimination against the City. Petitioner alleged that he had been discriminated against pursuant to chapter 760, Florida Statutes, and Title VII of the Federal Civil Rights Act as follows:

> I am an African American. I was unfairly disciplined, subjected to different terms and conditions because of my race. Additionally, I was terminated in retaliation for complaining about the discriminatory treatment. During my employment with the City of Ormond Beach I reported disparate treatment from Mr. Larry Haigh (Supervisor) to the Department Head (Mr. Kevin Gray). Mr. Haigh treated the white employees more favorably than the black employees. I also reported this to the Human Resources Manager (Lorenda Volkee). Mr. Gray told me he was placing me on a 180 day performance evaluation. Five months later (July 2009), I was terminated. The reason given was I didn't call in or respond to a call out to work. This is not a true statement. Mr. Haigh never told me I had to come to work he said I had pager duty.

The FCHR investigated Petitioner's Complaint. In a letter dated December 13, 2010, the FCHR issued its determination that

there was no reasonable cause to believe that an unlawful employment practice occurred.

On January 18, 2010, Petitioner timely[2/] filed a Petition for Relief with the FCHR. On January 21, 2011, the FCHR referred the case to the Division of Administrative Hearings ("DOAH"). The case was scheduled for hearing on April 20, 2011, on which date the hearing was convened and completed.

At the hearing, Petitioner testified on his own behalf and presented the testimony of DeWitt Fields, Eric Riley, and Richard Hernandez, all of whom were at one time or another Petitioner's co-workers with the City. Petitioner's Exhibits 1 through 5 were admitted into evidence. Respondent presented the testimony of Lawrence Haigh, Petitioner's direct supervisor, and Kevin Gray, who at the time of Petitioner's dismissal was the City's environmental systems manager. Respondent's Exhibits 21 through 25, 30 through 34, and 36 were admitted into evidence.

The two-volume transcript of the proceeding was filed on May 11, 2011. On May 20, 2011, Respondent filed a Motion for Extension of Time, seeking an extension of the time for filing proposed recommended orders to June 3, 2011. The motion was granted by order dated May 25, 2011. Respondent filed a Proposed Recommended Order on June 3, 2011. Petitioner's Proposed Recommended Order was filed after the close of business on June 3, 2011, and therefore was not recorded on the DOAH

docket until June 6, 2011. Respondent did not object to this technically late filing, and the undersigned has considered both parties' Proposed Recommended Orders in the drafting of this recommended order.

FINDINGS OF FACT

1. The City is an employer as that term is defined in subsection 760.02(7), Florida Statutes.

2. Petitioner, a black male, was employed by the City on August 28, 2001, and assigned to the streets section of the public works department. On October 1, 2003, Petitioner was transferred to the stormwater maintenance section of the public works department, where he worked until his dismissal on July 8, 2009.

3. At the time of his dismissal, Petitioner's job classification was Maintenance Worker II. He reported directly to stormwater supervisor Larry Haigh, who in turn reported directly to environmental systems manager Kevin Gray. At most times, there were eight or nine employees in the stormwater section, including Darren D'Ippolito, a Maintenance Worker IV who worked as second in command to Mr. Haigh and therefore had supervisory authority over Petitioner. Mr. Gray described Mr. D'Ippolito as a "lead worker" who reported directly to Mr. Haigh.

4. Mr. Haigh described the stormwater section's duties as follows:

> We try to keep anything from flooding, whether it's roads, houses, parking lots, businesses. And we keep all the drains clear and clean during rainstorms, hurricanes. We sandbag City buildings, doorways, you know, keep water out. We take care of streets that are-- that have flooding issues. We go back and find out why they have those issues, and then we fix those issues.

5. Petitioner's primary assignment in the stormwater section was to operate the reach-out mower, which is a large tractor with an extended boom that is used to mow and remove vegetation from the slope angles on swales and ditches throughout the City. The reach-out mower is in daily use because the City has a contract with the Florida Department of Transportation to maintain local rights-of-way.

6. The reach-out mower has an enclosed, air-conditioned cab with a radio, and is therefore considered a desirable assignment within the stormwater section. Many other assignments in the section involve working outside in all manner of weather.

7. The City had no formal job title for "reach-out mower operator." The mower was merely one of the many duties to which a Maintenance Worker II could be assigned.

8. During the course of his employment with the City, Petitioner was placed on performance probation three times. The last such probation, called a "conditional evaluation" by the City, was put in place on December 31, 2008, as the result of an unsatisfactory annual evaluation.

9. The City's employee performance evaluation document is broken into eight categories: appearance; attendance; interpersonal skills; communication skills; achievement of objectives and job knowledge; use and care of equipment; work productivity; and compliance with rules and regulations. In each category, the supervisor rates the employee on a scale of one to five, with "one" meaning below the acceptable standards and "five" meaning that the employee exceeds standards. A score of "three" means that the employee meets the acceptable standard. A score of "two" means that the employee's performance falls between meeting standards and below standards. A score of "four" means that the employee's performance falls between meeting standards and exceeding standards. The employee's overall performance score is calculated by adding the point totals for all eight categories (giving double weight to the scores for "achievement of objectives and job knowledge" and "work productivity"), then dividing the total score by ten.

The overall performance is then judged according to the following scale:

5.00 to 4.41	Outstanding
4.40 to 3.71	Excels
3.70 to 2.91	Meets Standards
2.90 to 1.91	Improvement Needed
1.90 to 0.00	Unsatisfactory

10. On his December 31, 2008, evaluation, Petitioner received the following scores and comments:

> Appearance: 5
> "Willis is always neat and clean and in the uniform provided to him."
>
> Attendance: 1
> "Willis has used 65 hours of unscheduled personal leave time during this ratings period. This abuse of unscheduled personal leave has become a pattern since FY 05/06, FY 06/07 and FY 07/08."
>
> Interpersonal Skills: 1
> "Willis does not relate to other coworkers effectively and makes little effort to establish rapport. Wills [sic] seems to let his emotions affect interpersonal relationships. Willis needs to work on getting along better with his coworkers."
>
> Communication Skills: 2
> "Willis' verbal or written communications usually contain necessary information, but most of the time are not accurate. We have been working with Willis to try and change this problem."
>
> Achievement of Objectives & Job Knowledge: 2
> "Willis understands the goals and objectives of this Department. Willis only handles what he is assigned to do. If Willis is on the Reach-out mower, he's fine. If not, Willis requires constant direction and supervision."

> Use and Care of Equipment: 4
> "Willis generally maintains equipment and promptly reports any deficiencies to his supervisor."
>
> Work Productivity: 1
> "Willis has no initiative whatsoever. This has been a problem in the past and has not changed. Willis will only do work assigned to him and nothing more. Willis handles few tasks without direct supervision."
>
> Compliance with Rules and Regulations: 3
> "Willis is in violation of the City's attendance policy."

11. Petitioner's score for his overall performance was 2.2, which placed him in the category of "Improvement Needed." Mr. Gray placed Respondent on a 180-day "conditional evaluation" probation, during which Petitioner would receive a written evaluation every 30 days. In a memorandum to Petitioner dated December 31, 2008, Mr. Gray explained the process as follows:

> Willis, on December 31, 2008, you were provided with your Annual Employee Performance Evaluation. In your evaluation five (5) areas of "improvement needed" or "below standards" were noted:
>
> 1. Attendance Pattern for use of unscheduled personal leave abuse.
>
> 2. Interpersonal Skills Pattern of inability to relate to co-workers.
>
> 3. Communication Skills Pattern of insufficient verbal communication skills.
>
> 4. Achievement of Objectives & Job Knowledge Pattern of non-"Reach-out Mower" related activities.

> 5. Work Productivity Pattern of lack of initiative to complete any work not specifically assigned but warranted.
>
> During this 180 day conditional you will be evaluated by three (3) different superiors every thirty (30) days. The first evaluation will be completed by a Maintenance Worker IV, the second will be completed by the Stormwater Supervisor and the third evaluation will be completed by a Maintenance Worker IV. This succession will be followed for the remaining three (3)-- thirty (30) day evaluations.
>
> It is imperative that you realize that during your six (6), thirty (30) day evaluation period [sic] the supervisor responsible will be required to visually observe your work habits and demeanor regarding the above listed five (5) areas of concern. I will be reviewing all six (6), thirty (30) day evaluations prior to presenting them to you. During the evaluation process the immediate supervisor responsible for that evaluation will be present, along with myself. If during any of the evaluation periods you feel the need to discuss any areas of concern, please feel free to notify your immediate supervisor and myself.
>
> Additionally, it is to be noted that if during any one (1) of the six (6) Employee Performance Evaluations you receive a rating of "Unsatisfactory" [it] may result in additional disciplinary action, up to and including termination.

12. At the hearing, Mr. Gray testified that he appointed three evaluators at Petitioner's request because Petitioner did not believe that his immediate superiors, Mr. Haigh and Mr. D'Ippolito, would give him a fair evaluation. Petitioner

requested that a second Maintenance Worker IV, Ray Back, be appointed to evaluate his performance.[3/]

13. Petitioner testified that Mr. Haigh and Mr. D'Ippolito were best friends from high school. Mr. D'Ippolito persistently "nitpicked" Petitioner's job performance whenever Petitioner was not on the reach-out mower. Mr. D'Ippolito would tell Mr. Haigh that Petitioner's work was too slow, and criticize him for "petty stuff" such as failing to sweep out the shop or take out the garbage. Petitioner believed that he was taken off the reach-out mower at the time of his evaluation to afford his superiors an opportunity to hypercriticize his performance.

14. Petitioner felt that Mr. D'Ippolito was harassing him by following him around and watching him perform his work assignments. In fact, it was part of Mr. D'Ippolito's supervisory job to observe Petitioner's performance.

15. Petitioner believed that Mr. D'Ippolito's attitude towards him was rooted in racial prejudice, though he never heard Mr. D'Ippolito say anything that could be construed as racist. At the hearing, a former stormwater section employee, DeWitt Fields, testified that he heard Mr. D'Ippolito use the word "nigger" repeatedly.

16. Mr. Fields, who is black and worked for the City during 2006 and 2007, stated that he had a meeting with Mr. Haigh and Mr. Gray to complain about Mr. D'Ippolito's

apparent belief that because he was a supervisor, he could say anything he pleased. Mr. Haigh said to Mr. Fields, "You're black. Don't you use that word?" Mr. Fields denied using the word. Mr. Fields was unsure whether Mr. D'Ippolito was disciplined. Mr. Fields testified that he resigned from the City because of his perception that he had been wronged by the racism in the stormwater department.

17. Neither party questioned Mr. Haigh or Mr. Gray about Mr. Fields' allegations regarding Mr. D'Ippolito.[4/] Mr. Fields testified that another Maintenance Worker II, Richard Hernandez, a Caucasian Hispanic male, witnessed Mr. D'Ippolito use the word "nigger" and that Mr. Hernandez provided a written statement to his superiors, but neither party questioned Mr. Hernandez about those events when he testified at the final hearing. Petitioner's failure to seek corroboration of Mr. Fields' story from witnesses who were present and testifying at the hearing, coupled with Mr. Fields' status as a disgruntled former City employee who only vaguely explained the circumstances of his departure, leads the undersigned to discount the credibility of Mr. Fields' allegations.

18. Petitioner had no first-hand knowledge of the incident involving Mr. Fields. Petitioner simply observed that Mr. D'Ippolito seemed to treat Petitioner and another black employee, Greg Lewis, differently than he treated the white

employees. For example, when a storm was approaching, Petitioner and Mr. Lewis were always assigned to make sandbags or perform other manual jobs such as "digging and fetching." Petitioner stated that he was not given the same opportunities as white workers to learn to run the backhoe or perform other non-manual tasks.

19. However, Petitioner also conceded that he spent upwards of 90 percent of his working hours operating the reach-out mower. Within the stormwater section, this was considered a plum assignment. Mr. Gray testified that other employees, including Mr. Lewis and Mr. Hernandez, had requested the reach-out mower assignment.[5/] The tone of Petitioner's testimony, not to mention the substance of Mr. Haigh's testimony[6/] and the written performance evaluations, establish that Petitioner was unhappy whenever he was required to do anything other than operate the reach-out mower.

20. Petitioner claimed that he heard Mr. Haigh make a racist remark in the workplace. In August 2008, during the NFL preseason, Mr. Haigh was holding forth to some employees in the front of the shop regarding the Jacksonville Jaguars game he had watched the previous evening. Mr. Haigh was unaware that Petitioner was close enough to hear his comments. According to Petitioner, Mr. Haigh stated that he did not see any football

that night, just "a bunch of monkeys running up and down the field."

21. Mr. Haigh flatly and credibly denied ever having made such a statement.

22. Petitioner testified that he complained to Mr. Haigh about Mr. D'Ippolito's harassment and nitpicking of his job performance, but that Mr. Haigh did nothing to address the problem because of his longstanding friendship with Mr. D'Ippolito. Petitioner testified that he complained to Mr. Gray about the fact that Mr. Haigh and Mr. D'Ippolito were treating him differently because he was black, and that Mr. Gray accused him of "playing the race card." Petitioner stated that on one occasion, Mr. Gray told him that he needed to "man up" and handle matters on his own.

23. Petitioner testified that, unlike many of the other employees in the stormwater section, he did not "sit and just run my mouth." Petitioner said what needed to be said regarding the work at hand, but he did not engage in much social chat with his co-workers. Petitioner believed that his natural reticence led to Mr. Haigh's finding that Petitioner lacked rapport with his fellow employees.

24. In May 2009, just before the Memorial Day weekend, a large "no name" storm approached Volusia County. On May 21, 2009, Volusia County enacted a countywide state of emergency.

25. On Wednesday, May 20, 2009, prior to the formal declarations of emergency, the City began preparations for the storm. The stormwater section began preparing sandbags for residents, checking "hot spots" in the City's drainage system to be sure the drains were open and clear, taking levels on lakes and ponds, using the pump station to lower the level on the City creek to ensure adequate water storage, and fueling the City's vehicles and equipment for use during and immediately after the storm. Mr. Gray testified that the stormwater section performed the "main thrust" of the City's emergency preparations.

26. On either Thursday, May 21 or Friday, May 22, 2009,[7/] Mr. Gray convened a meeting of all employees in the stormwater section. Mr. Gray told all the employees that they should expect a call to come to work over the Memorial Day weekend. He instructed the employees to check their rain gear and to be sure their cell phones and pagers had fresh batteries.

27. Each employee of the stormwater section, including Petitioner, was issued a pager. During routine periods, employees took turns having "pager duty" for seven days at a time. The employee on pager duty received an extra dollar per hour for being on call, and was the first person called in to respond to problems occurring outside of normal working hours. During emergencies such as major storms, everyone in the stormwater section was placed on pager duty. If an employee was

paged, he was expected to call in and then to report to work unless excused by his superior.[8]/ Petitioner was well aware of the City's pager policy, as he had earlier agitated for a more equitable distribution of "pager duty" and the extra pay that it entailed.[9]/

28. At the meeting, Mr. Gray specifically invoked the universal pager duty requirement for the upcoming weekend. Every employee of the stormwater section was required to carry his pager and to call in to work if paged.

29. On Saturday, May 23, 2009, the rainfall continued unabated, causing the City to enact its own local state of emergency. Mr. Haigh paged all of the stormwater employees. When they returned his call, he told them all to come in to work. All of the stormwater section's employees, including Petitioner, worked that Saturday. At the end of the day, Mr. Gray told the stormwater employees "to go home, get some sleep, but to have their pagers on in the event we had to go into the next mode."

30. Petitioner testified that he had never heard Mr. Gray say that the stormwater employees should expect to work on Saturday. He came in only because an employee in a different section told him that employees were expected to work on Saturday. Petitioner further testified that he and Mr. Lewis worked late on Saturday. By the time Petitioner returned to the

station and prepared to go home, no supervisors remained at the workplace. Petitioner stated that no one told him to report to work on Sunday or told him that he had pager duty on that day.

31. On Sunday, May 24, 2009, Mr. Haigh again paged all of the stormwater employees, including Petitioner. All of the employees except Petitioner answered the first page and came in to work. Mr. Haigh paged Petitioner several more times and received no response. Mr. Haigh also telephoned Petitioner's home, where he lived with his parents. Petitioner's father answered the phone and told Mr. Haigh that Petitioner had not come home on Saturday night and he did not know where Petitioner was. Later in the day, Mr. Haigh sent Mr. Lewis to Petitioner's house to see if Petitioner was home. Petitioner did not respond to any of Mr. Haigh's pages and did not report to work on Sunday.

32. Petitioner testified that after the long work day on Saturday, he went out of town to relax on Sunday, spending the day with his fiancée in Daytona Beach. Though he did not realize it at the time, Petitioner did not have his pager with him on Sunday.

33. The Memorial Day holiday was observed on Monday, May 25, 2009. It was a holiday for City employees. At 7 a.m., Mr. Haigh began paging all of the stormwater employees for the third time. Every employee except Petitioner responded to the

page, and all of those who responded came in to work with the exception of Mr. Hernandez, who asked Mr. Haigh if he could be excused from reporting in order to take care of a family matter. Mr. Haigh gave Mr. Hernandez permission to stay home.

34. Petitioner testified that he had a telephone conversation with Mr. Lewis on Monday morning. Mr. Lewis told Petitioner that he was at work. Petitioner stated that this was his first inkling that stormwater employees had been called in to work on Sunday or Monday.

35. At about 10:30 a.m., Petitioner phoned Mr. Haigh, who made it very clear that he was upset with Petitioner for failing to call in or show up on either Sunday or Monday. Mr. Haigh asked Petitioner whether he had noticed that it rained 20 inches over the weekend. Petitioner stated that he had been in Daytona, and it didn't seem that bad there.

36. Mr. Haigh stated that Petitioner told him a story about having to help a relative put her furniture on blocks because her house was about to flood. Petitioner testified that his aunt's house was indeed flooded during the storm, but he did not help with her furniture and denied having told this story to Mr. Haigh. Mr. Haigh's testimony is credited on this point.

37. Petitioner asked Mr. Haigh if the stormwater employees were working. Mr. Haigh answered in the affirmative, but told Petitioner not to bother coming in because they were wrapping

things up at the station. Mr. Haigh then reported to Mr. Gray that Petitioner had failed to return numerous pages and did not report to work on Sunday.

38. Petitioner testified that it was only after his conversations with Mr. Lewis and Mr. Haigh on Monday that he realized he did not have his pager. He speculated that he either misplaced it or lost it on the job Saturday. He never found it.

39. Mr. Gray made the decision to recommend that Petitioner's employment with the City be terminated. In a June 24, 2009, memorandum[10/] to Assistant City Manager Theodore MacLeod, Mr. Gray wrote as follows, in relevant part:

> . . . Since his Conditional Evaluation, Mr. Littles has been assigned to operate the "Reach-Out Mower" and does a satisfactory job most of the time. The problem that has arisen is when he is not mowing. Several years of evaluations reflect that his interpersonal skills when working with other employees are less than satisfactory. Mr. Littles consistently receives low marks on:
>
> 1. Attendance
> 2. Interpersonal Skills
> 3. Communication Skills
> 4. Achievement of Objectives & Job Knowledge
> 5. Work Productivity
>
> During Mr. Littles' seven plus years of employment he has been placed on a thirty (30) day, a sixty (60) day and a one hundred eighty (180) day conditional Performance

Evaluation status for several or all the above listed areas.

The latest incident happened when he was unavailable during the recent storm and in direct violation of Administrative Policy 53, Compensation During Declared Emergency. Expectations for duty, including reporting requirements before, during and after the emergency event are quite clear and conveyed to all Public Works employees.

On May 23, 2009, the City of Ormond Beach enacted a local state of emergency for the May 2009 Unnamed Storm. The administrative policy states employees are required to report or call in during a declared emergency.

On Sunday, May 24, 2009, Larry Haigh, Stormwater Supervisor attempted to call Mr. Littles at his home at 9:29 a.m. and spoke to his father, Mr. Littles, Sr., who stated "he didn't come home last night. Try his pager." Mr. Haigh then attempted to contact Mr. Littles via pager to report to work. Mr. Haigh made three attempts (9:30 a.m., 10:08 a.m. and 3:27 p.m.) to contact Mr. Littles. Mr. Littles did not respond to any [of] the pages. Mr. Littles was issued a new battery for his pager on Friday, May 22, 2009.

Mr. Littles finally made contact with Mr. Haigh on Monday, May 25, 2009, at 9:57 a.m....

The Public Works staff is repeatedly informed that they must answer all after-hour calls and/or pages, especially during hurricane season or in this case the Declared Emergency. Mr. Littles is paid to carry the after-hour pager under GEA contract.[11/]

In addition, Mr. Littles repeatedly avoids the chain of command procedures and bypasses Mr. Haigh and responds directly to myself without informing Mr. Haigh, who is his immediate supervisor. My response to Mr. Littles in almost all cases is "have you checked with Larry" or "you need to check with Larry."

Mr. Littles is currently on a conditional status for substandard evaluations and since this is the fifth month of that time, it is felt that there should be marked improvement in the five (5) items listed above. Mr. Littles in my opinion and the opinion of his immediate supervisors has shown little or no improvement in any area except for attendance.

Recently, during the May 2009 storm event, Mr. Littles and another employee were sent to an address that had received structure flooding to assist the homeowner in correctly sand bagging her property. When Mr. Haigh went to follow up on the operation with the homeowner, the homeowner made the comment "if these guys are temporary labor, I would not ever bring them back."

On another recent occasion, Mr. Littles disabled one of the fuel keys the department uses for miscellaneous and diesel fueling at the Fleet Facility. Mr. Littles is fully aware of the proper fueling operations but in this instance he punched in numbers that were not required, which resulted in the key being disabled. In this emergency, this key was necessary for the fueling of the numerous stormwater pumps in operation. When Mr. Haigh asked the question, "who punched the numbers in the fuel system," Mr. Littles stated he didn't know. Mr. Haigh contacted Peggy Cooper, Fleet Systems Specialist to have the key reactivated and requested information on who had placed the personal fuel key with the miscellaneous key. It appeared that it was

> Mr. Littles who had punched in the numbers 5957 on May 27, 2009, and was the last person to use the fuel keys.[12/]
>
> There are several additional instances that are troubling to me regarding Mr. Littles and should not be occurring from a seven year employee. His job knowledge and ability to perform his duties at this point should be satisfactory at minimum.
>
> I am therefore requesting that Mr. Littles employment with the City of Ormond Beach be terminated.

40. At the hearing, Mr. Gray testified that he made the decision to recommend termination despite the fact that Petitioner still had one month to go on his 180-day conditional evaluation period. Mr. Gray noted that the last evaluation in June 2009 was the worst of the five that Petitioner received during his probation, and that Petitioner's failure to report on Sunday, May 24, was the final straw.

41. Mr. Gray stated that if an employee were not on probation, failure to respond to a superior's page would call for a verbal or written reprimand if it were a first offense. However, Petitioner was on his third probation in seven years. Moreover, Petitioner had already received a written warning for failing to respond to radio and pager messages from Mr. Haigh on December 24, 2008.[13/]

42. Mr. Gray testified that he discussed the recommendation with Mr. MacLeod, the City official who would

make the final decision on Petitioner's termination. Mr. Gray testified that they did not talk about Petitioner's allegations of racial discrimination because he was unaware of any such allegations.

43. After receiving Mr. Gray's written recommendation, Mr. MacLeod informed Petitioner of his right to a predetermination conference at which he could present any information in his own defense. The predetermination conference was held on July 2, 2009. Petitioner attended the conference, accompanied by his GEA-OPEIU representative Mike Haller. Attending with Mr. MacLeod was the City's interim Human Resources Director, Jayne Timmons. Petitioner was afforded the opportunity to defend his actions over the Memorial Day weekend and as to the other incidents discussed in Mr. Gray's recommendation memorandum.

44. After the conference, Mr. MacLeod made the decision to support Mr. Gray's recommendation. By letter dated July 7, 2009, Mr. MacLeod informed Petitioner that his employment with the City was terminated, effective July 8, 2009. The letter informed Petitioner of his right to appeal the determination to the City's Human Resources Board or, in the alternative, to utilize the grievance procedures under the GEA-OPEIU's collective bargaining agreement with the City.

45. Petitioner did not appeal to the Human Resources Board, nor did he file a grievance under the collective bargaining agreement.

46. At the hearing, Petitioner sought to explain the incident referenced in Mr. Gray's termination letter regarding the disabling of the fuel key. He essentially blamed the problem on Mr. Lewis, who had either forgotten his key or could not get his key to work. Petitioner lent his fuel key to Mr. Lewis, who could not make it work. Petitioner then tried, and could not make it work. The next thing Petitioner heard about the matter, Mr. Haigh was accusing him of intentionally disabling the fuel pump.

47. Even if Petitioner's story regarding the fuel key is accepted, it does not establish that his superiors were wrong to discipline him. Petitioner concedes that he was involved in the incident that disabled the fuel key. When Mr. Haigh first looked into the matter, Petitioner denied knowing anything about it, which necessitated further investigation. Petitioner's lack of candor alone warranted discipline, particularly because it led to the waste of Mr. Haigh's time and that of Peggy Cooper, the fleet systems specialist who determined that Petitioner was the culprit.

48. Petitioner testified that he was placed on the 180-day probation shortly after he went to City Hall to complain "about

how I was unfairly treated, and all these bad evaluations that I had been getting from year to year, and I'm seeing guys that. . . pretty much, ain't doing anything. They just getting by. [I called it] favoritism from Mr. Haigh." [14/] He implied that the probation was in retaliation for his complaint.

49. As noted at Finding of Fact 22, supra, Petitioner claimed that he brought his allegations of racial discrimination to Mr. Gray, who accused him of "playing the race card" and advised him to "man up." Mr. Gray credibly denied that Petitioner raised any issues of discrimination with him until Petitioner turned in his written comments on the December 31, 2008, evaluation. Petitioner's comments included the following: "For the last seven years I've been working with the City of Ormond Beach, I have experienced nothing but harassment, hostile & offensive blatant discriminatory behavior on the part of management . . ." Petitioner also requested a meeting with the City's Human Resources Director and the City Manager to discuss his comments.

50. Mr. Gray testified that he did not read Petitioner's statement as alleging racial discrimination, given Petitioner's history of complaining about general "favoritism" in the stormwater section, but that he nonetheless forwarded Petitioner's meeting request to the City Manager and the Human Resources Director. At that point, the matter was out of

Mr. Gray's hands. Mr. Gray had no idea what resulted from the meeting or whether it ever occurred.[15/]

51. Mr. Gray recalled Petitioner coming to him to complain about Mr. D'Ippolito, but not because of any racial animus. Petitioner's complaint, as also voiced to Mr. Haigh, involved the fact that Mr. D'Ippolito was "spying" on him. The testimony at the hearing, including Petitioner's, established that Petitioner refused to accept that Mr. D'Ippolito had supervisory authority over him and was supposed to be watching his work. The attempts by Mr. Gray and Mr. Haigh to explain this fact to Petitioner fell on deaf ears.

52. Mr. Gray also recalled that Petitioner complained to him about favorable treatment received by Mr. Hernandez. The gist of Petitioner's complaint was that Mr. Hernandez would not get dirty. Petitioner complained that other workers, including Mr. Hernandez, came in from their day's work as clean as when they went out, whereas Petitioner was required to do the dirty jobs.

53. Mr. Gray testified that he had no response to this complaint. Some jobs in stormwater require the worker to get dirty and others do not. Moreover, said Mr. Gray, some workers are able to "work clean" and others are not. Finally, Mr. Gray was somewhat puzzled by the complaint because Petitioner's regular assignment, operating the reach-out mower, was one of

the "cleanest" jobs in the stormwater section. Mr. Gray noted that performing maintenance on the machine involved oil and grease, but that the operational aspects of the reach-out mower did not involve getting dirty.

54. At the hearing, Petitioner testified that his complaint to Mr. Gray about Mr. Hernandez was not confined to the question of getting dirty. Petitioner stated that after receiving his own poor evaluation in December 2008, he complained to Mr. Gray about Mr. Hernandez receiving an outstanding evaluation in spite of having spent all year on the job doing nothing but studying to become a police officer. Petitioner testified that Mr. Hernandez was assigned to operate the Vac-Con, a machine that clears storm drains, and that the Vac-Con truck just sat in front of the public works department while Mr. Hernandez studied. Petitioner stated that Mr. Haigh was aware that Mr. Hernandez was studying on the job and did nothing about it. Mr. Hernandez sat there reading in front of the other employees and took his books with him when riding out on a job. Petitioner did not know whether Mr. Hernandez was ever disciplined for studying on the job.

55. Mr. Hernandez testified that when he was in the police academy he did bring his books in and read them on the job. Mr. Haigh was unaware that Mr. Hernandez was studying on the job until Petitioner and a co-worker complained to someone at City

Hall. At that point, Mr. Haigh counseled Mr. Hernandez to "knock it off" and confine his studying to the lunch hour. Mr. Hernandez complied with Mr. Haigh's instruction and that was the end of the matter. Mr. Hernandez' version of these events is more credible than Petitioner's.

56. At the hearing, Petitioner attempted to make a case of disparate treatment as between himself and Mr. Hernandez, focusing on the fact that Mr. Hernandez did not come into work on Monday, May 25, 2009, and received no discipline, whereas Petitioner's failure to come to work the previous day was deemed the "final straw" and cause for his dismissal.

57. In making this case, Petitioner disregards the fact that Mr. Hernandez answered Mr. Haigh's page and requested that he be allowed to remain at home. Unlike Petitioner, Mr. Hernandez was excused from reporting to work. Mr. Haigh was not pleased that Mr. Hernandez asked for the day off, but had no cause to discipline Mr. Hernandez. Mr. Haigh pointed out, "I knew where he was," meaning that he could call Mr. Hernandez in to work if the situation changed. Mr. Haigh had no idea where Petitioner was or how to contact him.

58. Mr. Hernandez' employee performance evaluation for 2008 resulted in an overall score of 4.5, "outstanding" on the City's scoring scale. On each of the eight evaluation criteria, Mr. Hernandez received either a "4" or "5." His superiors

included no negative comments or suggestions for improving his performance. Given Mr. Hernandez' overall job performance, it is understandable that the episodes complained of by Petitioner did not result in formal discipline of Mr. Hernandez or greatly affect his performance evaluation.

59. The evidence at the hearing amply established that Petitioner was at best a marginal employee for the City. Mr. Haigh testified that the other employees in the stormwater section did not like to partner with Petitioner because he would not work. For most of the day, Petitioner operated the reach-out mower alone, but when he came into the office to make out his daily reports, Petitioner did not get along with his fellow employees. Mr. Haigh testified that it was hard to make sense of Petitioner's written reports.

60. Mr. Haigh stated that when Petitioner was not on the reach-out mower, he required direction at all times. If a supervisor did not tell him what to do, Petitioner would do nothing. Mr. Haigh described his shock when a homeowner complained to him about the poor job a presumed "day laborer" had done, only to realize that the homeowner was talking about Petitioner.

61. At the time of his dismissal, Petitioner was five months into the third performance-related probation of his seven years with the City. After the events of the Memorial Day

weekend, it was not unreasonable for Mr. Gray to conclude that further efforts to improve Petitioner's job performance were futile.

62. Petitioner offered no credible evidence that the City's stated reasons for his termination were a pretext for race discrimination.

63. Petitioner offered no credible evidence that the City discriminated against him because of his race in violation of section 760.10, Florida Statutes.

64. The greater weight of the evidence establishes that Petitioner was terminated from his position with the City due to poor job performance throughout the seven years of his employment.

65. The greater weight of the evidence establishes that the City did not retaliate against Petitioner for his complaint to Mr. Gray about discrimination. The evidence established that Mr. Gray properly forwarded Petitioner's complaint to the City Manager and Human Resources Director. Though the record was unclear as to the outcome of the City's investigation, the fact remains that Petitioner continued to work for the City for another six months after his complaint. Aside from Petitioner's intuitions regarding some kind of "strategy" to fire him, there was no evidence that Petitioner's supervisors were acting in less than good faith in their attempts to shepherd him through

the probationary period and encourage him to improve his performance and save his job. The evidence established that Petitioner was the author of his own misfortune.

CONCLUSIONS OF LAW

66. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

67. The Florida Civil Rights Act of 1992 (the "Florida Civil Rights Act" or the "Act"), chapter 760, Florida Statutes, prohibits discrimination in the workplace.

68. Subsection 760.10, Florida Statutes, states the following, 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.
>
> * * *
>
> (7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization 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.

69. The City is an "employer" as defined in subsection 760.02(7) which provides the following:

> "Employer" means any person[16/] employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

70. Florida courts have determined that federal case law applies to claims arising under the Florida's Civil Rights Act, and as such, the United States Supreme Court's model for employment discrimination cases set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims arising under Section 760.10, Florida Statutes. See Paraohao v. Bankers Club, Inc., 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002); Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

71. Under the McDonnell analysis, in employment discrimination cases, Petitioner has the burden of establishing by a preponderance of evidence a prima facie case of unlawful discrimination. If the prima facie case is established, the burden shifts to the employer to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer rebuts

the prima facie case, the burden shifts back to Petitioner to show by a preponderance of evidence that the employer's offered reasons for its adverse employment decision were pretextual. See Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

72. In order to prove a prima facie case of unlawful employment discrimination under chapter 760, Florida Statutes, Petitioner must establish that: (1) he is a member of the protected group; (2) he was subject to adverse employment action; (3) the City treated similarly situated employees outside of his protected classifications more favorably; and (4) Petitioner was qualified to do the job and/or was performing his job at a level that met the employer's legitimate expectations. See, e.g., Jiles v. United Parcel Service, Inc., 360 Fed. Appx. 61, 64 (11th Cir. 2010); Burke-Fowler v. Orange County, 447 F. 3d 1319, 1323 (11th Cir. 2006); Knight v. Baptist Hospital of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003); Williams v. Vitro Services Corp., 144 F.3d 1438, 1441 (11th Cir. 1998); McKenzie v. EAP Management Corp., 40 F. Supp. 2d 1369, 1374-75 (S.D. Fla. 1999).

73. Petitioner has failed to prove a prima facie case of unlawful employment discrimination.

74. Petitioner established that he is a member of a protected group, in that he is a black male. Petitioner was

subject to an adverse employment action in that he was terminated from his position as a Maintenance Worker II with the City. Petitioner was qualified to perform the job of Maintenance Worker II. The evidence established that Petitioner's job performance had ranged from acceptable to unsatisfactory throughout the term of his employment.

75. As to the question of disparate treatment, the applicable standard was set forth in Maniccia v. Brown, 171 F.3d 1364, 1368-1369 (11th Cir. 1999):

> "In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 (11th Cir.), opinion modified by 151 F.3d 1321 (1998) (quoting Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997)). "The most important factors in the disciplinary context are the nature of the offenses committed and the nature of the punishments imposed." Id. (internal quotations and citations omitted). We require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges. See Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir.1989) ("Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples."). (Emphasis added.)[17/]

76. The only specific evidence Petitioner offered of disparate treatment was the City's treatment of Mr. Hernandez, who was subjected to no discipline whatever for missing work on the same weekend that Petitioner's absence was considered the "final straw" leading to his termination. However, unlike Petitioner, Mr. Hernandez answered Mr. Haigh's page summoning him to work, and received permission to stay home and take care of a family matter. Also, Mr. Hernandez did not have Petitioner's general history of lackluster job performance or his specific history of failing to respond to pages and radio calls from his superiors. As to this point of comparison, there was no "nearly identical" misconduct on the part of Mr. Hernandez and Petitioner. In fact, Mr. Hernandez committed no misconduct at all.

77. Petitioner also complained that Mr. Hernandez received an excellent 2008 evaluation despite having spent the entire year doing nothing but studying for the police exam, with the full knowledge of Mr. Haigh. The more credible evidence established that Mr. Hernandez studied on the job for a time but was ordered to "knock it off" as soon as Mr. Haigh became aware of it. This single instance of misbehavior by a generally excellent employee does not compare to the checkered career of Petitioner as a City employee.

78. Petitioner's general complaint that the white employees received better work assignments than the black employees was belied by the fact that Petitioner spent more than 90 percent of his working days operating the reach-out mower, one of the most coveted assignments in the stormwater section.

79. Having failed to establish this element, Petitioner has not established a prima facie case of employment discrimination.

80. Even if Petitioner had met the burden, the City presented evidence of legitimate, non-discriminatory reasons for Petitioner's termination. The precipitating event leading to Petitioner's dismissal was his failure to report on Sunday, May 24, 2009, but this was merely the last in a long series of performance issues that had resulted in Petitioner's being placed on three separate "conditional evaluation" probation periods during his employment with the City. Petitioner was well into a 180-day probation period when he failed to respond to Mr. Haigh's numerous pages during the May 2009 storm. Petitioner violated a known policy of his employer regarding pagers, and not for the first or even the second time. When he finally reported to Mr. Haigh on Monday morning, Petitioner was less than forthcoming in trying to justify his failure to respond to Mr. Haigh's repeated pages.

81. In order to prove a prima facie case of retaliation under chapter 760, Florida Statutes, Petitioner must establish that: (1) he engaged in statutorily protected activity; (2) an adverse employment action occurred; and (3) the adverse action was causally related to Petitioner's protected activity. See Gupta v. Florida Board of Regents, 212 F.3d 571, 587 (11th Cir. 2000); Raney v. Vinson Guard Service, Inc., 120 F.3d 1192, 1196 (11th Cir. 1997); Russell v. KSL Hotel Corp., 887 So. 2d 372, 379 (Fla. 3d DCA 2004).

82. Petitioner has failed to prove a prima facie case of retaliation.

83. Petitioner established that he is a member of a protected group, in that he is a black male. Petitioner engaged in statutorily protected activity, in that he complained of "discrimination" in the comments he made to his annual performance evaluation of December 31, 2008.[18/] Petitioner was subject to an adverse employment action insofar as he was terminated.

84. Petitioner did not establish a causal relationship between the adverse employment action and his protected activity. The Eleventh Circuit Court of Appeals construes the "causal link" requirement broadly: "a plaintiff merely has to prove that the protected activity and the negative employment

action are not completely unrelated." EEOC v. Reichhold Chemicals, Inc., 988 F.2d 1564, 1571-1572 (11th Cir. 1993). See also Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001); Olmsted v. Taco Bell Corporation, 141 F.3d 1457, 1460 (11th Cir. 1998).

85. However, even under this generous standard, Petitioner failed to establish a causal relationship between the termination of his employment and his comments on his evaluation. When Mr. Gray reviewed Petitioner's comment that he had been subject to "discrimination" and wanted a meeting with the city manager and the human resources director, he immediately forwarded the request to the appropriate City personnel. While the record did not establish the outcome of Petitioner's meeting with the City Manager and the Human Resources Director, Petitioner did not allege that no meeting occurred.

86. Six months passed between the evaluation comments and Petitioner's dismissal, an amount of time significant enough to militate against finding a causal link between the comments and Petitioner's dismissal. See Miller-Goodwin v. City of Panama City Beach, 385 Fed. Appx. 966, 974 (11th Cir. 2010), (citing Drago v. Jenne, 453 F.3d 1301, 1308 (11th Cir. 2006)) (three-month period between a protected activity and an adverse

employment action not sufficiently proximate to show causation on a retaliation claim).

87. Even if it were concluded that Petitioner established a prima facie case of retaliation, the City produced abundant evidence that the adverse employment action was taken for a legitimate, non-discriminatory reason. See Conclusion of Law 80, supra.

92. Petitioner wholly failed to prove that the City's reasons for dismissing him were pretextual.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that the City of Ormond Beach did not commit any unlawful employment practices and dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 5th day of October, 2011, in Tallahassee, Leon County, Florida.

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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of October, 2011.

ENDNOTES

[1/] Citations shall be to Florida Statutes (2009) unless otherwise specified. Section 760.10, Florida Statutes, has been unchanged since 1992.

[2/] On January 28, 2011, the City filed a Motion to Dismiss the Petition Based on Untimeliness, noting that January 18, 2011, was the 36th day following December 13, 2010, and that the Petition therefore was not timely filed under section 760.11(7), Florida Statutes. At the hearing, it was established that January 17, 2011, the 35th day after December 13, 2010, was Martin Luther King, Jr. Day, a state holiday. Because the Petition could not have been filed on the 35th calendar day following the FCHR's finding of no reasonable cause, the undersigned ruled that the filing on the 36th day was timely.

[3/] Mr. Back submitted the first conditional probationary evaluation of Petitioner on February 13, 2009. Mr. D'Ippolito submitted the second conditional probationary evaluation of Petitioner on March 13, 2009. In light of Petitioner's allegations regarding Mr. D'Ippolito, it is notable that Mr. D'Ippolito's evaluation was significantly more positive about Petitioner's job performance than was that of Mr. Back.

Mr. D'Ippolito gave Petitioner an overall score of 3.70 versus an overall score of 3.0 by Mr. Back. Mr. D'Ippolito wrote:

> Willis has shown noticeable improvement in several areas during this rating period. The effort that Willis is showing now is the same effort that we will need to see from now on. Willis has a tendency to go back into putting in little effort when it comes to section goals and objectives once he is off probation. The number one goal for Willis would be to continue his good efforts and not fall into old, effortless habits of the past.

When asked at the hearing about the positive evaluation by Mr. D'Ippolito and the relatively negative evaluation by Mr. Back, Petitioner stated, "I saw all through that." He stated that the evaluation scores were part of a larger "strategy," aimed apparently at getting rid of Petitioner.

The February and March 2009 conditional probationary evaluations were the only ones actually entered into evidence. Mr. Gray testified that all of Petitioner's probationary evaluations were acceptable except for the last one, which had an overall score of 2.4. This evaluation was completed in June 2009 by Mr. D'Ippolito and reflected Petitioner's failure to appear for work during the May 2009 storm days, discussed in detail infra.

[4/] The City correctly argued that the events involving Mr. Fields were well outside the 365-day time limit established by section 760.11, Florida Statutes. The undersigned allowed Mr. Fields' testimony as part of Petitioner's effort to show a longstanding pattern of administrative indifference to allegations of racial discrimination.

[5/] After Petitioner's termination, Mr. Hernandez was assigned to operate the reach-out mower.

[6/] In particular, Mr. Haigh testified that a major reason for assigning Petitioner to the reach-out mower was it enabled Petitioner to work alone and kept him away from the other employees, with whom Petitioner did not get along. Mr. Haigh added that Petitioner did a good job with the mower and seemed to enjoy it.

[7/] Mr. Gray recalled that the meeting was held on Thursday afternoon. Mr. Haigh testified that the meeting was held on Friday afternoon. Despite their differing recollections as to the date of the meeting, the two men agreed as to what occurred at the meeting.

[8/] The City's Administrative Policy 53, "Compensation During Declared Emergency," required all City employees to report to work during an enacted state of emergency.

[9/] The evidence established that Petitioner was an inveterate complainer about various aspects of the job, and it cannot be doubted that his persistent disgruntlement played some role in his negative performance evaluations. However, the evidence did not establish that Petitioner's complaints had to do with allegations of racial discrimination until, at the earliest, his written comments on the December 31, 2008, evaluation. Even then, it required an inference to determine that the "discrimination" cited in the comment was racial discrimination. See Findings of Fact 49 and 50, infra.

[10/] When questioned about the one month gap between the events of the Memorial Day weekend and his recommendation that Petitioner's employment be terminated, Mr. Gray stated that the storm fell in the middle of a grading period in Petitioner's 180-day probation and he wanted to wait for the next written evaluation before taking final action.

[11/] The GEA, or General Employees Association, is the Ormond Beach local of the Office and Professional Employees International Union (OPEIU).

[12/] On June 19, 2009, Petitioner received a separate employee counseling form that notified him of "disciplinary action pending investigation" regarding the incidents with the fuel key and the resident who needed assistance with sandbagging.

[13/] At the hearing, Petitioner attempted to downplay this incident, but even in his version of events Petitioner conceded that he did not have his radio with him. Mr. Haigh's written warning noted that Petitioner had been counseled in the past about failing to respond to radio messages while on the job.

[14/] Despite his clear resentment of many, if not most, of his co-workers, Petitioner steadfastly maintained that he got along

"with pretty much everybody" and that the allegations that he lacked rapport with his fellow workers were overblown.

[15/] Mr. Haigh likewise testified that Petitioner's comment on the December 31, 2008, evaluation was the first indication he had that Petitioner believed discrimination was occurring in the stormwater section. Mr. Haigh testified that Petitioner "never made a racial comment in the whole time he was in my department." Mr. Haigh asked Petitioner what he meant by his written comment, but Petitioner said nothing. Mr. Haigh said, "Willis doesn't explain things." At the hearing, Petitioner offered no information regarding the outcome of his meeting with the city manager and human resources director.

[16/] "Person" includes "any governmental entity or agency." S. 760.02(6), Fla. Stat.

[17/] The Eleventh Circuit has questioned the "nearly identical" standard enunciated in Maniccia, but has recently reaffirmed its adherence to it. Escarra v. Regions Bank, 353 Fed. Appx. 401, 404 (11th Cir. 2009); Burke-Fowler, 447 F.3d at 1323 n.2.

[18/] Because of the ambiguity of Petitioner's "discrimination" claim, the City contends that Petitioner never engaged in a statutorily protected activity in that he never complained of racial discrimination during the relevant time period. The undersigned has concluded that it is fair, though not necessary, to infer that Petitioner intended his comment to address racial discrimination. In other words, for purposes of meeting the retaliation criteria of section 760.10(7), the undersigned finds it fair to infer that Petitioner was engaged in protected activity, but also finds that it was reasonable for Mr. Gray not to make the same inference.

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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.