STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JERRY W. BRATCHER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-2999
	)	
CITY OF HIGH SPRINGS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

On August 18, 2011, a duly-noticed hearing was held in Tallahassee and Gainesville, Florida, via video teleconference, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jerry W. Bratcher, pro se
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For Respondent: Timothy M. Warner, Esquire
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STATEMENT OF THE ISSUE

The issue is whether the Respondent committed an unlawful employment practice under section 760.10, Florida Statutes

(2010), by discriminating against Petitioner on the basis of age or sex, or by retaliating against Petitioner, and if so, what remedy should be ordered.

PRELIMINARY STATEMENT

On December 13, 2010, Petitioner filed a complaint with the Florida Human Relations Commission (Commission), alleging that the City of High Springs (City) had discriminated against him based upon his age or gender in three actions: laying him off from his position; failing to recall him; and in giving his position to a younger, less qualified man. As discussed below, he also made some allegations of retaliation. On May 10, 2011, the Commission issued a Notice of Determination of No Cause, and on June 11, 2011, Petitioner filed a Petition for Relief. On June 15, 2011, the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was noticed for video teleconference hearing on August 18, 2011, in Tallahassee and Gainesville, Florida, locations. At hearing, Petitioner moved to exclude the testimony of Respondent's witnesses, saying he had not received a witness list in accordance with the Order of Pre-hearing Instructions. Respondent stated the list had been provided eleven days before the hearing. Upon Petitioner's acknowledgment that he knew all of the witnesses, and that he

had "no problem" with anything they were going to say, the undersigned found that any failure to provide the list did not prejudice the Petitioner, and denied the motion. Petitioner was advised that a motion for continuance might be entertained if there was testimony from any of the witnesses that was a surprise.

Petitioner testified and presented the testimony of six other witnesses. Petitioner's Exhibits numbered 1 through 5 as well as numbers 7 and 8 were admitted into evidence. Petitioner's Exhibit numbered 6, a copy of an internet letter to a newspaper editor criticizing the City's handling of several personnel actions not involving Mr. Bratcher, was found not relevant and was not admitted. Respondent also objected to the introduction of two audio tapes of portions of meetings of the City Commission of High Springs on the grounds of relevancy and because the excerpts were taken out of context. The tapes were admitted. Respondent was advised that to the extent Respondent felt the excerpts were misleading, the undersigned would accept as late-filed exhibits other portions of those tapes, or the entire tapes, as necessary to reveal the proper context of Petitioner's excerpts. No such late-filed exhibits were received.

Respondent presented the testimony of three witnesses, and Respondent's Exhibits numbered 1 through 11 were admitted.

The two-volume Transcript of the proceedings was filed with the Division on September 13, 2011. Both parties timely submitted Proposed Recommended Orders.

FINDINGS OF FACT

1. The City of High Springs is a Florida municipality that employs over 15 employees.

2. During fiscal year 2009-2010, the City of High Springs had three supervisory positions in Public Works. A Streets, Parks, and Cemeteries Superintendent, and an Utilities Superintendent each reported to the department head, the Public Works Director.

3. During the summer and early fall of 2010, the City was dealing with revenue shortfalls when preparing the 2010-2011 budget. The Commission chose to address these budgetary concerns in part by reorganizing city government and eliminating some staff positions.

4. In budget meetings leading up to the adoption of the 2010-2011 budget, the Commission heard testimony that stated the city was "top-heavy" and urged the elimination of purely managerial positions in favor of having supervisors who could do the actual work as well as supervise.

5. Petitioner and most other employees of the City of High Springs understood that under the City Charter, the City Commission did not have authority to direct the hiring or

removal of any specific city employee, with the exception of a few charter officers, such as the City Manager and City Attorney.

6. On September 9, 2010, the City Commission of High Springs voted to cut the existing Public Works Department in half to create two new departments: Public Utilities and Public Works. The new departments were to have separate superintendents that would directly report to the City Manager, effective October 1, 2010. Some facilities maintenance functions were to be added to the old Streets, Parks and Cemeteries functions along with some new administrative duties to create the responsibilities of a new Public Works Superintendent. Some new administrative duties were to be added to the Public Utilities Superintendent. This new structure would allow elimination of the position of Public Works Director, which previously had been the department head over both of these areas.

7. Although the authority of the City Commission was to eliminate positions, as opposed to individuals serving in those positions, the City Commissioners knew which individuals were serving in the Public Works supervisory positions at the time they voted to eliminate positions. They were aware that Petitioner Jerry Bratcher was the Streets Superintendent,

Mr. Don Deadwyler was the Utilities Superintendent, and Ms. Laverne Hodge was the Public Works Director.

8. Commissioners and the City Manager were aware that under the City Charter, it is the responsibility of the City Manager to hire and fire city employees consistent with applicable personnel rules.

9. After the Commission vote, and prior to September 17, City Manager James Drumm was considering which of the three existing Public Works supervisors would remain as the two new department heads. Although the Commission had voted to eliminate the position of Public Works Director, Mr. Drumm believed he could retain Ms. Hodge by placing her in one of the new positions. At this time, Mr. Bratcher was a 56-year-old male, Mr. Deadwyler was a 71-year-old male, and Ms. Hodge was a 58-year-old female.

10. Petitioner Bratcher was the lowest-paid of the three Public Works supervisors: Ms. Hodge was paid the greatest amount; Mr. Deadwyler was paid about $6,000 less than Ms. Hodge; and Mr. Bratcher was paid about $18,000 less than Ms. Hodge.

11. Petitioner had more seniority with the City of High Springs than Ms. Hodge. He had worked nearly 14 years for the City, while Ms. Hodge had been employed only about 6 and one-half years. Mr. Deadwyler also had more seniority with the City of High Springs than Ms Hodge.

12. Ms. Hodge and Mr. Deadwyler both held water and waste water certifications issued by the State that allowed them to operate the City's water and wastewater treatment facilities. Mr. Bratcher did not hold such certifications.

13. On September 17, 2010, City Manager Drumm notified Petitioner by letter that he had been selected for layoff after reviewing the personnel files, education, technical skills, administrative skills, State licenses, certificates, and work experience of all three of the existing Public Works supervisors, as well as the financial impact on the operations of the two new departments. The effective time of the layoff was 4:00 P.M. on October 1, 2010.

14. On September 27, 2010, the City Commission approved the budget and also placed City Manager Drumm on administrative leave with pay pending a hearing to be held on October 21, 2010, to consider his termination. The Commission also appointed Deputy City Clerk Jenny Parham as Acting City Manager at that time.

15. The day following the Commission's action placing City Manager Drumm on administrative leave, Ms. Hodge notified Acting City Manager Parham in writing that she was offering "to be laid off, voluntarily" from her position as the City of High Springs Director of Public Works, effective 5:00 p.m. on September 30, 2010.

16. Sometime after Ms. Hodge notified Acting City Manager Parham that she would accept a voluntary layoff, Ms. Parham telephoned Petitioner to ask if he would be interested in returning to work as the Public Works Superintendent if that was made available to him. Petitioner said he would. Ms. Parham had called Petitioner to understand what options were available to her in filling the positions in the new structure.

17. On September 29, 2010, Acting City Manager Parham notified Ms. Hodge that she accepted Ms. Hodge's offer to be voluntarily laid off the following day.

18. City of High Springs Personnel Policy 5.2 provides that if an appropriate job becomes available within 18 months after layoff, the former employee will be notified. An appropriate job is one for which the laid-off employee has adequate job-related skills.

19. Petitioner had adequate job-related skills to serve as the Public Works Superintendent.

20. It was Acting City Manager Parham's understanding of City Personnel Policy 5.2 that it only required a laid-off employee to be notified of any advertised position. If the position was not advertised, but was instead filled by the transfer of an existing employee, she believed no notification was required. It was further her understanding that the Policy does not require that a laid-off employee be rehired after

notification, but instead requires only that a former employee who applies will be treated as any other applicant and must compete with other applicants for the position.

21. If Ms. Parham was to staff the new organizational structure on October 1, she had to make some decisions in light of Ms. Hodge's layoff. She logically decided to make Mr. Deadwyler the new Utilities Superintendent, as he was the only person remaining with the City with water and wastewater treatment facility certifications. As for the Public Works Superintendent position, Mr. Bratcher had effectively been gone for two weeks. While Ms. Parham might have rescinded the layoff, which had not yet taken effect, she instead considered that everything had been "settled" and did not want to take such a major step in her position as interim City Manager. More importantly, at this point Ms. Parham was aware of rumors that Mr. Drumm was coming back. She did not know if he would in fact return.

22. Mr. David Benton was the only person other than Petitioner in Public Works that had both supervisory experience and knowledge of that department. Mr. Benton was a 39-year-old man who was not a high school graduate. He did not have a FEMA certification at the time he was placed in the position. Mr. Benton did not have state water or wastewater certifications. Mr. Benton had less education, less experience,

and fewer certifications than Petitioner, but he was qualified to hold the position. He was a good employee with broad experience. Mr. Benton was transferred from his position to fill the Public Works Superintendant position on an interim basis.

23. On October 1, 2010, when Acting City Manager Parham transferred Mr. Benton into the Public Works Superintendent position, Petitioner was on his last day of employment with the City and could have been similarly transferred into that same position if his layoff had been rescinded.

24. Petitioner was as qualified or more qualified than Mr. Benton to hold the position of Public Works Superintendent. Not only were the responsibilities of the new position substantially similar to those of his position before the reorganization, he had performed maintenance of park facilities in his earlier position as Recreation Director.

25. After October 1, Acting City Manager Parham had a meeting with City employees to explain the new organization. She was asked, "Since Laverne Hodge quit, does that mean Jerry will be returning?" or words to that effect. Ms. Parham replied that it would be up to the next City Manager to make that decision. Ms. Parham knew that City Manager Drumm had earlier chosen to lay off Petitioner. She believed that there was a

possibility that Mr. Drumm would be restored to his duties as City Manager, as she had heard rumors to that effect.

26. Mr. Drumm's employment with the City terminated on October 21, 2010.

27. Some weeks later, Petitioner set up an appointment with Acting City Manager Parham to find out what was to be done to permanently fill the Public Works Superintendent position. During Petitioner's meeting with Ms. Parham, she stated that she had heard that Petitioner had personally contacted City Commissioners asking them to fire Mr. James Drumm and Ms. Laverne Hodge. Petitioner told Ms. Parham at this meeting that he believed he had been discriminated against by sex and age and that now he thought he would be retaliated against because Ms. Parham believed he had been telling the City Commissioners that they should fire Mr. Drumm and Ms. Hodge. He assured Ms. Parham that he had not done that.

28. Petitioner had not personally contacted City Commissioners to ask them to fire Mr. James Drumm or Ms. Laverne Hodge.

29. On November 17, 2010, Ms. Parham notified Mr. David Mastellar, a utilities service worker, by letter that he would be laid off effective December 3, 2010.

30. On November 30, 2010, Ms. Parham was made permanent City Manager to fill out the remaining term of former City Manager Drumm.

31. Mr. Benton was made permanent Public Works superintendent effective December 6, 2010.

32. Ms. Hodge made the statement, "I'm going to have his job" or words to that effect, referring to Mr. Bratcher. Her statement that she did not "recall it right now" was not credible. Her testimony that she would need to know the circumstances under which it was said, or the context in which it was said, was clearly evasive. However, the statement was not said in conjunction with any of the alleged acts of discrimination at issue, but was said much earlier before Petitioner was moved from his position as Recreation Director. The statement, and Ms. Hodge's overall testimony, reflect some personal hostility towards Petitioner, but do not indicate that this hostility was in any way predicated upon Petitioner's gender or age. Further, Ms. Hodge did not make any of the personnel decisions under challenge.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes.

34. The Florida Civil Rights Act, sections 760.01–760.11 and 509.092, Florida Statutes (2010), is patterned after federal law contained in Title VII of the Civil Rights Acts of 1964, and Florida courts have determined that federal discrimination law should be used as guidance when construing its provisions. See Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

35. Section 760.11(1) provides that an aggrieved person may file a complaint with the Commission within 365 days of the alleged violation. Petitioner timely filed that complaint, and following the Commission's initial determination, timely filed his Petition for Relief requesting this hearing.

36. Respondent is an employer as that term is defined in section 760.02(7). In taking personnel actions, Mr. Drumm and Ms. Parham acted as agents of the City.

37. Petitioner has the burden of proving by a preponderance of the evidence that the Respondent committed an unlawful employment practice. Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

38. Section 760.10(1)(a) provides that it is an unlawful employment practice for an employer 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."

39. The City Commission did not have authority to direct the hiring or removal of any specific city employee, with the exception of a few charter officers such as the City Manager and City Attorney.

40. Under the City Charter, it was the responsibility of the City Manager to appoint and dismiss city employees consistent with applicable personnel rules.

Sex Discrimination Claim

41. In McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court of the United States established the analysis to be used in cases alleging claims under Title VII that rely on circumstantial evidence to establish discrimination. This analysis was later refined in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

42. Under McDonnell-Douglas, Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If a prima facie case is established, Respondent must articulate some legitimate, non-discriminatory reason for the action taken against Petitioner. It is a burden of production, not persuasion. If a non-discriminatory reason is offered by Respondent, the burden then

shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination. As the Supreme Court stated, before finding discrimination "[t]he factfinder must *believe* the plaintiff's explanation of intentional discrimination." Hicks, 509 U.S. at 519.

43. In order to establish that he suffered a prima facie case of discrimination by disparate treatment, Petitioner had to demonstrate that he: 1) was a member of a protected class; 2) was qualified for the position; 3) suffered an adverse employment action; and 4) was replaced by a person outside his protected class or was treated less favorably than a similarly-situated individual outside his protected class. Maynard v. Bd. Of Regents, 342 F.3d 1281 (11th Cir. 2003).

44. Petitioner demonstrated a prima facie case of sex discrimination. Although he is a male, under Title VII he can still be considered as a member of a protected class, as discussed in McDonald v. Santé Fe Trail Transp. Co., 427 U.S. 273 (1976), a case that reversed the Fifth Circuit and applied the law to a "reverse discrimination" case involving two white males. Petitioner established that he was well qualified for his position. He suffered an adverse employment action, in that he was laid off from his employment in anticipation of the staff reorganization. Finally, he was treated less favorably than a supervisor who was not laid off, and who was female.

45. Respondent articulated a legitimate, non-discriminatory reason for the layoff. Respondent met that burden of production with Mr. Drumm's testimony that as City Manager he had decided that the two supervisors who held state licenses for water and waste-water facilities should be the employees to fill the new positions.

46. Petitioner had the ultimate burden to show that the "state licenses" reason asserted by the City was pretextual, and nothing but an excuse for discrimination. However, a reason is not pretext for discrimination "unless it is shown both that the reason was false, and that discrimination was the real reason." Hicks, 509 U.S. at 515. Petitioner failed to meet this burden.

47. Petitioner did demonstrate that more money would have been saved by the City if either of the other supervisors had been laid off, that he had more seniority than the other supervisors, and that he was qualified to hold the job. These facts suggest that a different decision-maker might well have come to a different conclusion. Respondent's assertion that state licensure was the actual reason for the selection was plausible, however, and there was no evidence that the true motive for the layoff was actually discrimination.
Mr. Deadwyler was also a male, yet he was given one of the positions. The decision to lay off Petitioner might have been wrong, or unfair, or the product of petty politics, but there

was no evidence that Respondent's decision had anything to do with Petitioner's gender.

48. The law is not concerned with whether an employment decision is fair or reasonable, but only with whether it was motivated by unlawful animus. As stated in Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984), "[t]he 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."

Age Discrimination Claim

49. The Florida Civil Rights Act of 1992 similarly prohibits age discrimination. Federal law prohibits age discrimination through the Age Discrimination in Employment Act (ADEA). 29 U.S.C. § 623. Federal case law interpreting the ADEA is cited in age discrimination cases arising under the Florida law. Brown Dist. Co. of W. Palm Beach v. Marcell, 890 So. 2d 1227 (Fla. 4th DCA 2005).

50. The order and allocation of proof described in McDonnell-Douglas Corp. v. Green, supra, has also been applied in circumstantial age discrimination cases. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); City of Hollywood v. Hogan, 986 So. 2d 634 (Fla. 4th DCA 2008). The Petitioner must first make a prima facie showing of discriminatory treatment. He does that by proving: 1) the

Petitioner is a member of a protected class, being at least forty years of age; 2) the Petitioner is otherwise qualified for the position sought; 3) the Petitioner was rejected for the position; and 4) the position was filled by a worker who was substantially younger than the Petitioner.

51. Petitioner demonstrated a prima facie case of age discrimination in the City's selection of the new Public Works Superintendent. He is over the age of 40 and was well qualified to fill the position. He was not given the position. The position instead was given to a man less than 40 years old.

52. Respondent then had the burden to articulate a legitimate, non-discriminatory reason for not offering the position to Petitioner. Respondent met this burden. Ms. Parham testified that she considered Petitioner's layoff to be "settled" and that she thought Mr. Drumm might be returning. She concluded that Mr. Benton was the only remaining person in Public Works that had any supervisory experience and she considered that he had broad experience with the City.

53. City Personnel Policy 5.2 requires a laid-off employee to be notified if an appropriate job becomes available within 18 months of that employee's layoff. The policy does not require a laid-off employee to be rehired after notification, but instead requires only that a former employee who applies will be treated

as any other applicant. The former employee must compete with other applicants for the position.

54. At the time Ms. Parham made her decision, she may have been correct in her conclusion that the duty to notify did not apply to Petitioner, either because Petitioner was actually still employed or because the position had not been advertised, but as Acting City Manager, Ms. Parham could have rescinded Petitioner's layoff and given him the position.

55. However, even if Ms. Parham's action to instead place Mr. Benton in the position was a poor business decision or was based on a misunderstanding of the situation, this would not constitute age discrimination.

56. Again, as with the sex discrimination claim earlier, the quality of Ms. Parham's decision-making is not at issue. As noted in Chapman v. AI Transport, 229 F.3d 1012, 1030 (11th Cir. 2000), the legal system does "not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the ADEA does not interfere. Rather our inquiry is limited to whether the employer gave an honest explanation of its behavior." (Citations omitted.)

57. As the Supreme Court noted in Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993), when a Petitioner alleges

disparate treatment, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." That is, the Petitioner's age must have actually played a role in the employer's decision-making process and had a determinative influence on the outcome. Id. There is no evidence indicating that age discrimination played a role in Ms. Parham's decision-making process.

Retaliation Claim

58. While the checkbox for alleging a claim of retaliation in Petitioner's original filing with the Commission was not checked, his submissions to the Commission did contain allegations under a title of "Retaliation" that, taken in a light most favorable to the Petitioner, might be held to constitute a claim of retaliation, and the undersigned allowed testimony addressing that issue at hearing. Cf. Scholz v. RDV Sports, Inc., 710 So. 2d 618 (Fla. 5th DCA 1998)(Title VII plaintiff cannot bring claims in a lawsuit that were not included in EEOC charge).

59. Section 760.10(7), provides in relevant 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."

60. The evidence at hearing showed that Petitioner informed Ms. Parham that he felt he had been discriminated against on the basis of age and sex. He notified her of this in their meeting that took place some weeks after Petitioner's layoff and the selection of Mr. Benton to fill the position on an interim basis on October 1, 2010. These statements could constitute opposition by Petitioner to an unlawful employment practice. However, the only testimony or documentary evidence upon which a finding can be based at best shows only "retaliation" based upon Ms. Parham's erroneous belief that Petitioner had been directly telling City Commissioners that they should fire Mr. Drumm and Ms. Hodge. Even if this were Ms. Parham's reason for making Mr. Benton's position permanent on December 6, 2010, it would not constitute retaliation under the Florida Civil Rights Act.

RECOMMENDATION

Upon consideration of the above findings of fact and conclusions of law, it is

RECOMMENDED:

That a final order be entered dismissing Petitioner's complaint.

DONE AND ENTERED this 28th day of September, 2011, in Tallahassee, Leon County, Florida.

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of September, 2011.

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.