

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DASYAM RAJASEKHAR,

Petitioner,

vs.

Case No. 13-1507

DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondent.

RECOMMENDED ORDER

On June 24 and 25, 2013, a duly-noticed hearing was held in St. Augustine, Florida, before F. Scott Boyd, an administrative law judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Dasyam Rajasekhar, pro se
Carriage House, Room 43
2297 Whitney Avenue
Hamden, Connecticut 06518

For Respondent: Francine Ffolkes, Esquire
Kara Gross, Esquire
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

The issue is whether the Respondent committed an unlawful employment practice under section 760.10, Florida Statutes (2011), by discriminating against Petitioner on the basis of his

national origin, or by retaliating against him, and if so, what remedy should be ordered.

PRELIMINARY STATEMENT

On October 5, 2012, Petitioner filed a complaint with the Florida Commission on Human Relations (Commission), alleging that the State of Florida, Department of Environmental Protection, had discriminated against him based upon his national origin, and had retaliated against him. On March 25, 2013, the Commission issued a Notice of Determination of No Cause, and on April 23, 2013, Petitioner filed a Petition for Relief. The matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge on April 25, 2013.

The case was noticed for final hearing on June 24 and 25, 2013, in St. Augustine, Florida. Petitioner testified on his own behalf and offered 65 exhibits, P-1 through P-65, which were admitted into evidence. Respondent presented the testimony of three witnesses and offered 13 exhibits, R-1 through R-13, which were admitted. At the final hearing, without objection, certain exhibits were authorized to be late-filed by July 9, 2013, with any objections to these exhibits to be filed by July 16, 2013, and responses to objections by July 23, 2013. In response to Respondent's request for additional time, and without objection

by Petitioner, the date of August 1, 2013, was set for the submission of Proposed Recommended Orders.

After hearing, over 200 pages of exhibits were offered by Petitioner and additional time to file objections and responses was granted. On July 17, 2013, Respondent filed objections to some of these post-hearing exhibits. Petitioner's Exhibits P-66 through P-73 are admitted. Respondent's objections to the remainder of the documents are sustained, as discussed below.

Petitioner filed a Motion for Special Independent Counsel for Investigation and for the Department of Environmental Protection to Get to Work, as well as a Request to Respond to Respondent's Proposed Recommended Order, which were denied on August 6, 2013. Petitioner then filed Exceptions to Respondent's Proposed Recommended Order, and an Order striking these was filed on August 15, 2013. Petitioner filed a Request for maps and other communications relating to flow ways on August 20, 2013, which is denied, as discussed below. On August 26, 2013, Petitioner filed Notice of a public records request that had been filed with the Department of Environmental Protection pertaining to maps and communications relating to flow ways. The five-volume Transcript of the proceedings was filed with the Division of Administrative Hearings on July 17, 2013. Both parties timely submitted Proposed Recommended Orders, which were considered.

FINDINGS OF FACT

1. The Department of Environmental Protection (DEP or the Department) is an agency of the State of Florida. The Guana Tolomato Matanzas National Estuarine Research Reserve (Reserve) in Ponte Vedra, Florida, is a part of the Department, managed under the Coastal and Aquatic Managed Areas Program (CAMA). The Reserve is essentially an institution for research and education, often involving partnerships with universities and other government entities. The Department has more than 15 employees.

2. In July 2011, approval was granted to create a new position for an Environmental Specialist I to provide for the Geographic Information Systems (GIS) needs of long-term monitoring, modeling, and mapping projects at the Reserve.

3. Dr. Michael Shirley is the director of the Reserve, a position he has held since 2007. He has been an employee with the DEP or its predecessor agencies since 1990. Dr. Shirley is also the regional administrator for the East Coast of Florida Aquatic Preserve Program, and in that capacity is responsible for overseeing the management of the Aquatic Preserves on the East Coast of Florida. Dr. Shirley is responsible for some 44 employees, including 34 at the Reserve. Since Dr. Shirley knew a lot about GIS from his research background, he was excited about the prospect of having a new GIS position at the Reserve.

4. Dr. Shirley was very involved in filling the new GIS analyst position. He reviewed the approximately 20-30 applications for the position, helped select individuals to interview, and participated in interviews. Six applicants were ultimately chosen for interview by telephone or in-person by the selection team. While the testimony was not entirely clear as to the national origin of all of these individuals, one of them had a national origin from China and one, Petitioner Mr. Dasyam Rajasekhar, had a national origin from India.

5. Mr. Rajasekhar's application and resume indicated that he held a master's degree in forestry from Stephen F. Austin University, was experienced in GIS, Remote Sensing, and Geo-Spatial analysis, and that he held a GIS Professional Certification.

6. Mr. Rajasekhar did an excellent job in the interview. On his own initiative, he gave a PowerPoint presentation, which Dr. Shirley later made available to other staff. Dr. Shirley testified that he was "very excited" about the prospect of Mr. Rajasekhar's coming on board and stated that, "his resume, his credentials, were by far the best of the applicants we had received." All of the members of the interview team supported him for the position. The team made a unanimous recommendation to the CAMA director, who had final approval authority, that Mr. Rajasekhar be hired.

7. In October 2011, Mr. Rajasekhar was hired as an Environmental Specialist I at the Reserve by the DEP. On November 7, 2011, he acknowledged access to several Department administrative policies, including DEP 435, entitled "Conduct of Employees" and DEP 436, entitled "Discrimination and Harassment." Mr. Rajasekhar was a probationary employee for the first year, as are all new hires, which meant that he could be dismissed without cause and that he did not have the right to grieve or appeal Department actions. After the initial year, a probationary employee becomes a permanent career service employee. This information was contained in DEP 435.

8. Mr. Rajasekhar's GIS analyst position was supposed to be supervised by the watershed coordinator, but this position had not yet been filled, so Mr. Joseph Burgess, the resource management coordinator for the Reserve, reporting to the assistant director, Ms. Janet Zimmerman, was named as Mr. Rajasekhar's immediate supervisor. Mr. Burgess, Ms. Zimmerman, and Dr. Shirley were thus all three supervisors of Mr. Rajasekhar, moving up his chain of command, and none of them was a probationary employee. Mr. Burgess did not have any experience in GIS, so any detailed oversight of Mr. Rajasekhar's work product was conducted by Dr. Shirley.

9. Mr. Rajasekhar's Position Description indicated that among other duties, he was to apply GIS tools and products to

address resource conservation issues, develop inundation models to reflect the impact of projected sea level rise on local natural communities and public infrastructure, and develop GIS maps for National Estuarine Research Reserve System (NERRS) initiatives such as habitat mapping and change.

10. Mr. Rajasekhar had excellent skills in performing "high-end" geospatial analysis. He could look at satellite imagery and turn it into a product. Mapping products were used in every one of the Reserve's programs and were important in making decisions on land-use and the protection of Reserve resources. They were also very important to the grants obtained by the Reserve. Mr. Rajasekhar was well-qualified to do his job.

11. One grant project, in place before Mr. Rajasekhar was employed, was from the University of Florida (UF) to map changes that would occur in wetlands due to sea level rise. Dr. Shirley was one of the Co-Principal Investigators on the project. Co-principal investigator status is conferred on the people who write the grant proposal. Another major Reserve grant was from the National Oceanic and Atmospheric Administration (NOAA), which funded 40 percent of the Reserve. It is very important for the Reserve to maintain these grant relationships, because these partnerships provide funds as well as visiting personnel to allow research to continue.

12. On December 26, 2011, the Reserve hired Ms. Andrea Small as its Watershed Coordinator, reporting to Mr. Burgess. Under the new staffing plan, the GIS analyst was supposed to report to the watershed coordinator. As a new employee, Ms. Small was in probationary status.

13. While Mr. Rajasekhar's ability to do high-end geospatial analysis was never in question, issues soon arose involving other tasks he was supposed to perform. He took longer than most employees in using basic computer programs, such as Microsoft Office programs, and staff complained to Dr. Shirley that he would keep asking them to perform the same basic tasks for him. Dr. Shirley's response generally was:

He's new. Help him, because we help everyone. Let's get him -- you know, get him moving in the right direction.

As time went on, the pattern did not change, and some staff members concluded that Mr. Rajasekhar was always going to ask them to perform certain tasks for him, so they took the position that they would show him something once, but then insist that he do it for himself the next time.

14. Within the first three months of his employment, Mr. Rajasekhar made an appointment to meet with Dr. Shirley. At the meeting he firmly stated that he needed a pay raise. Dr. Shirley testified that in tone it was "more strong than 'asked,' but not quite a demand." Dr. Shirley thought that the

request was badly timed. State government was laying off workers, he had several other deserving employees who had not had a raise in several years, and Mr. Rajasekhar was still on probation. Raises had to be approved at the deputy secretary level, and Dr. Shirley felt that although Mr. Rajasekhar had good geospatial analysis skills, he could not justify putting him in for a raise.

15. Dr. Shirley explained why the timing was bad and why he felt he could not make the case for giving Mr. Rajasekhar a raise just then. Mr. Rajasekhar took out a notebook and indicated to Dr. Shirley that he was writing down, "[y]ou will not give me a pay raise." Dr. Shirley felt that exaggerated effort at documentation was meant to infer some sort of discrimination on Dr. Shirley's part. Dr. Shirley explained that he was not treating Mr. Rajasekhar differently from anyone else. He told Mr. Rajasekhar that if any employee came in after only three months on the job, he would decline to put him in for a raise. Dr. Shirley told him that if he believed that this was some sort of discrimination, they needed to contact the Bureau of Personnel Services and talk to them. This seemed to de-escalate the situation, and Mr. Rajasekhar stopped writing. Mr. Rajasekhar said that he did not want to call the Personnel office, and indicated to Dr. Shirley that he understood the situation.

16. When a ranger needed maps relating to a prescribed fire for resource management, Mr. Rajasekhar told the ranger that this was "low-end" GIS work, that the ranger could do it himself, and that Mr. Rajasekhar would show him how to do it. Dr. Shirley testified that the ranger was unfamiliar with GIS software and that this was part of Mr. Rajasekhar's job. The Reserve had a limited number of employees and everyone needed to help everyone else to accomplish the Reserve's mission. Dr. Shirley felt that morale and teamwork were suffering. However, Mr. Rajasekhar ultimately completed the burn maps.

17. Mr. Rajasekhar also had difficulty completing other more sophisticated tasks assigned to him. He asked Dr. Shirley to run Kappa statistics for him. Kappa statistics are commonly used in GIS work to correlate computer images with known reality in the habitat. Mr. Rajasekhar had indicated on his resume that he had developed a field sampling protocol to calculate Kappa statistics. Yet, Mr. Rajasekhar approached Dr. Shirley at one point and asked if Dr. Shirley would do the Kappa statistics on a project. When Dr. Shirley asked Mr. Rajasekhar why he was asking the director of the Reserve to do the statistics, Mr. Rajasekhar replied, "[i]t needs to be done by a Ph.D." Dr. Shirley testified that Mr. Rajasekhar later went to the research coordinator and asked the same question, but that ultimately Mr. Rajasekhar ended up doing the statistics himself.

18. Mr. Rajasekhar's presentation at his employment interview and his credentials indicated that he could work with pollution loading coefficients and determine how water flowed and affected estuarine water quality. But, when Dr. Shirley asked him to conduct such an analysis, he replied that this work required a Ph.D.-level hydrologist. One of the first mapping projects Mr. Rajasekhar produced for Dr. Shirley involved flow ways, the way water flows through a watershed. Dr. Shirley was using the map in a meeting with Flagler County officials when he realized that Mr. Rajasekhar had indicated that in one canal water was flowing in opposite directions. When this was called to Mr. Rajasekhar's attention, he simply removed the arrow directions and started referring to the maps as "flow lines" rather than "flow ways." The maps then didn't show the information that was needed, which Dr. Shirley explained to Mr. Rajasekhar.

19. Mr. Rajasekhar stated in his applicant profile, "[e]stuarine scientists would rate my knowledge of estuarine ecology at an experienced professional level." Yet in working on a project in which a vendor was going to take satellite imagery, when it was necessary for Mr. Rajasekhar to determine the time of low tide, he asked Mr. Burgess how he could do this. Mr. Burgess had to show him how to read the NOAA tide chart. Within the same period of time, Mr. Rajasekhar also asked Dr. Shirley the same

question, who showed him the same thing. In later conversations between Mr. Burgess and Dr. Shirley, they realized this had happened and discussed how odd this was, if Mr. Rajasekhar was an experienced professional of estuarine ecology.

20. When asked to do a project, Mr. Rajasekhar would often say that in order to do it properly, he would need a certain amount of money, or new software, or additional hard drive space. Dr. Shirley would have to repeatedly explain that the Reserve was unfortunately on a limited budget and that a product would still be valuable if done under less-ideal conditions. Rather than delay the project, he would tell Mr. Rajasekhar that the analysis should be performed with the best technology practically available, and for Mr. Rajasekhar to annotate the data to indicate the level of accuracy.

21. In early January, the Reserve was hosting a tour of the watershed for UF personnel working on the sea level rise project. The UF participants came over in two vans with lots of the students who were working on the project. The trip required four-wheel drive vehicles, and given the large number of people from UF and the limited number of vehicles, there was only enough room for a few Reserve personnel to visit the watershed. Dr. Shirley chose himself, as Director, Ms. Emily Montgomery, the coastal training program coordinator and a co-principal investigator on the grant, and Ms. Small, the watershed

coordinator, who was giving the tour of Pringle Creek, one of her acquisition projects.

22. Mr. Rajasekhar subsequently approached Dr. Shirley and said that he felt he had been excluded from the trip.

Dr. Shirley explained why so few Reserve personnel could participate and why he had selected the ones that he did.

23. In late January, when Dr. Shirley was on the road visiting a preserve site, the UF team asked Dr. Shirley which "tiles" of LIDAR data were missing for Pellicer Creek, because they had decided to pick up the cost of filling in the missing pieces. The UF people were going to meet with the vendor that afternoon, so they wanted the information as soon as possible. Dr. Shirley e-mailed Mr. Rajasekhar to ask which tiles were still missing based on the map that Mr. Rajasekhar had shown him a month earlier. Mr. Rajasekhar's response only described background information regarding the map. Dr. Shirley replied that he only needed the number of tiles that were still missing. Again, Mr. Rajasekhar was argumentative and evasive: he gave explanations, but not the number of tiles that were missing. This dialogue went on for four or five e-mails. Ms. Small, who had been copied on all of the e-mails, finally e-mailed Mr. Rajasekhar to explain that all Dr. Shirley wanted to know was whether or not the imagery had been acquired and the number that

were still missing. Mr. Rajasekhar finally provided that information to Dr. Shirley.

24. Ms. Small and Mr. Rajasekhar were working in the same small office, which was only about 12 square feet, with their desks in opposite corners. After this incident, Ms. Small testified that Mr. Rajasekhar got up from his desk, put his hands on his hips, and said, "[w]ell, I've been excluded from the project, so I don't feel like I have to answer you," or words to the effect. Ms. Small believed Mr. Rajasekhar was referring back to the UF watershed tour. Ms. Small felt that because she was a woman, Mr. Rajasekhar was not giving her the respect she deserved and that he was being insubordinate to her as his supervisor. Ms. Small told Mr. Rajasekhar that if he was going to be demeaning to her, he needed to leave the room. Mr. Rajasekhar did not leave, and Ms. Small decided that she should leave instead.

25. After Ms. Small left the room, Mr. Rajasekhar e-mailed Dr. Shirley, with copy to Mr. Burgess, saying: "A little while ago Andrea told me that I should not be working in this office and leave. Please let me know." Mr. Burgess replied, "Raj, You do not have to leave your office, continue working."

26. Dr. Shirley received complaints from both Ms. Small and Mr. Rajasekhar about the incident. Ms. Small told him she felt threatened and disrespected and Mr. Rajasekhar told him he felt

as if his character had been attacked. Upon further inquiry, Dr. Shirley decided that Ms. Small had not been physically threatened, but rather that she was upset at Mr. Rajasekhar's "posturing," which she felt was inappropriate, as she was his supervisor. Dr. Shirley was very concerned with the misunderstanding that had occurred and with this type of interaction between his employees. Dr. Shirley was also concerned that he had not been able to easily get a simple answer from Mr. Rajasekhar. Dr. Shirley wanted to make things work. He wanted to get his employees working together and not lose the potentially very important contribution Mr. Rajasekhar could make to the Reserve.

27. On January 30, 2012, Dr. Shirley met with Mr. Burgess, Ms. Small, and Mr. Rajasekhar to find out more details about the incident and to try to work out a plan for the future.

28. In considering options to resolve the tensions, Dr. Shirley discovered after talking with Department personnel in Tallahassee that because Ms. Small and Mr. Rajasekhar were both serving in the position of Environmental Specialist I, that she could not technically be his supervisor, even though she had been serving in that role for about a month.

29. On January 31, 2012, Dr. Shirley sent an e-mail to the three summarizing their meeting. The e-mail outlined several procedures to "improve communication and efficiencies" with

respect to GIS services. Among other items, the e-mail outlined that Mr. Rajasekhar would report to Mr. Burgess, Mr. Rajasekhar would provide a list of current GIS projects underway with milestones to completion, GIS projects would be completed using the best practically available data, notations would be made as to the accuracy of the product, and a summary report would be prepared by Mr. Rajasekhar at the completion of each project. The e-mail identified three projects as "high priority": SLAMM Model Inputs to the UF Team; the NERRS Habitat Mapping and Change Initiative; and the Reserve's Flow-Ways modeling effort.

30. Dr. Shirley, Mr. Burgess, and Mr. Rajasekhar jointly developed a GIS analyst work plan for Mr. Rajasekhar. It listed seven major projects that he was to be working on, including the updating of "burn maps," SLAMM inputs to the UF group, the preparation of a GTMNERR Habitat Mapping plan, and generation of LIDAR based water flow ways. These projects included interim and final products, as well as due dates. Dr. Shirley was very pleased with the e-mail outlining workflow changes and the work plan, because he believed they reflected collaborative effort and he hoped and believed that they would improve operations at the Reserve and resolve some of the issues regarding Mr. Rajasekhar's employment.

31. DEP Deputy Secretary Greg Munson was scheduled to visit the Reserve on May 25, 2012. Dr. Shirley prepared an agenda for

the visit, establishing staff assignments and themes for various tours and briefings to complement DEP headquarters initiatives relating to restoration, ecotourism, and water resources. While some agenda items specified participation by specific staff members, Mr. Rajasekhar was not listed on any of these. Other items, including lunch at the Matanzas Inlet Restaurant, and a meeting with all Reserve staff, were open to everyone.

32. Mr. Rajasekhar did not show up at the time and place scheduled for Deputy Secretary Munson to meet with staff, but Mr. Rajasekhar did meet with him for a short period shortly after the scheduled meeting time.

33. Sometime in May, Mr. Rajasekhar e-mailed Dr. Kathryn Frank, head of the sea level rise project being conducted by the Reserve and UF, requesting that he be added as a co-principal investigator on the project "for ethical reasons." He did not let his supervisor, Mr. Burgess, or the director, Dr. Shirley, know that he was doing this. Dr. Frank explained to Mr. Rajasekhar that his contribution was appreciated, but that co-principal investigator status rested with the people who initially submitted the grant. Dr. Frank called Dr. Shirley to ask what was going on and to comment that the request was very strange. Dr. Shirley was concerned because of the important relationship between UF and the Reserve. On May 29, 2012, Mr. Rajasekhar was counseled by Dr. Shirley for inappropriately

contacting the head of the UF project to request co-principal investigator status without even advising his superiors or getting their permission to do so. Mr. Rajasekhar indicated that he understood and would not do it again.

34. On May 31, 2012, a meeting was held at UF on the sea level rise project. Dr. Shirley, Ms. Montgomery, Ms. Small, and Mr. Rajasekhar made the drive over. Mr. Rajasekhar was critical of the UF speakers and the SLAMM modeling that was presented. Dr. Shirley was not too concerned for the presenters themselves, because as scientists, he believed that they would be used to criticism. However, he later testified that he was concerned because Mr. Rajasekhar had offered no solutions, but had just criticized the accuracy of the model, with no constructive suggestions about how it could be improved. Then, during discussions at the meeting about emergency management issues relating to sea level rise and people getting away from the coast, Mr. Rajasekhar made the comment that he personally had a low income and would not be able to get out because he was at the poverty level. Dr. Shirley was concerned because he believed this personal reference was "inappropriate," that it was not true, and that it embarrassed the Department and presented the Department in a bad light.

35. On June 4, 2012, Mr. Rajasekhar received an official "oral" reprimand from Dr. Shirley for conduct surrounding the UF

project team meeting and his comments regarding his personal income. The reprimand cited his behavior as a violation of DEP Standard of Conduct 435-7(a), Conduct Unbecoming a Public Employee. Mr. Rajasekhar was directed not to engage in further conduct that would bring discredit to DEP or to the State. The reprimand also noted that Mr. Rajasekhar "barely spoke" on the two-hour drive to and from the meeting and did not walk with the rest of the delegation, but walked far in front of them.

Dr. Shirley noted that this behavior was not unprofessional, but that it concerned him. The reprimand further advised that if Mr. Rajasekhar was having issues or problems that he felt he could not discuss with Dr. Shirley, that the Employee Assistance Program was available to him and to his family.

36. When Mr. Rajasekhar was presented with the reprimand, he became defensive and argumentative. He denied having said that his income was at poverty level. However, Dr. Shirley did not believe this because the other Reserve employees present at the UF meeting confirmed that he had made that statement. Mr. Rajasekhar went on to tell Dr. Shirley that he felt he had been excluded from the Deputy Secretary's visit that occurred earlier in the month. Mr. Rajasekhar began talking about discrimination, saying that he had been a union representative at the Minnesota Department of Natural Resources and that knew what his rights were. Dr. Shirley was surprised at this response to

the oral reprimand, because he considered it to be only a minor corrective action, not action leading toward dismissal or constituting significant discipline.

37. Mr. Rajasekhar prepared a written response to the reprimand that same day. After presenting his differing recollection of the remarks regarding low-income housing and poverty-level incomes, his response went on to state in part:

I appreciate you bringing your concerns about my behavior during the drive and the walk. Thanks for letting me know that the same is not un-professional. I participated in the work-related topics and fully acknowledge that I did not do so in non-work related topics (such as individual private matters).

* * *

Finally in future even if I am cautious, there inevitably would come some complaints that my conduct is unbecoming of a public employee in the eyes of some or few; for example when issues such as ethnicity/ demographics crop up. Would I then be subjected to more disciplinary action? Would minimizing (or possibly eliminating) my presence in public or other forums be helpful?

38. Petitioner's presumably sarcastic reference to courses of conduct he should follow in the future when issues might arise involving ethnicity fell short of a direct claim that the oral reprimand was an act of discrimination. However, his response did indicate that Mr. Rajasekhar perceived some connection

between his comments at the UF meeting, his national origin, and the reprimand.

39. In response to Mr. Rajasekhar's statement during the meeting on the oral reprimand that he had felt excluded during the Deputy Secretary's visit, Dr. Shirley found the original e-mail that he had sent out to all of the staff with the agenda attached. Dr. Shirley forwarded this e-mail to Mr. Rajasekhar on June 4, 2013, stating that Mr. Rajasekhar had not been excluded and again explaining that due to the limited time, only a few aspects of Reserve functions that related to DEP priorities could be placed on the agenda.

40. Shortly afterward, Ms. Zimmerman was coordinating preparation of NOAA Operations Grant progress reports. She sent out an e-mail at 12:38 p.m. on June 11 to several staff members, including Mr. Rajasekhar, explaining that two reports were due: progress report #4 on F0990; and the second progress report on F1001. Both of these reports were to cover the first half of the calendar year. She explained that she was attaching to the e-mail the remaining tasks from F0990 that she needed an update paragraph on, as well as a copy of progress report #3 so the staff could see what had been sent for the previous reporting period. She requested the update paragraphs by July 13, 2013, and advised that she would send out similar information on her request for the other grant report, F1001, shortly.

41. At 2:37 p.m. on June 11, Mr. Rajasekhar replied to Ms. Zimmerman's e-mail by pasting two paragraphs from progress report #3 along with the following comments:

I have gone through the documents and perused the items of relevance as requested by you. I seem to be in the dark and also somewhat confused. Below is the summary of what I just learned:

* (text pasted from progress report #3) *

This is the first time; I am coming across this information in any significant way. I believe I have not been provided this document before for perusal. I have not been involved in any decisions either.

* (more text from progress report #3) *

The above document contains much more information (GIS) and is concise (the way that would be ideal). However the information for most part is new to me.

1. Flow ways update: I have not been privy to most of the information and neither have been involved (in any significant way) in any aspect of development.

2. Habitat mapping and change plan Update: The same as above.

Hence if you need professional, accurate and significant response from [sic], I request that I be more involved in the critical processes that produce these portions of the document so that I may be better equipped to do so. In addition it would greatly help some aspects of my work. Please let me know.

42. Later that same afternoon, Ms. Zimmerman sent a second e-mail to several staff members, including Mr. Rajasekhar,

specifically requesting input into the second progress report for NOAA F1001. She attached the original grant task text, as well as a copy of the previous progress report (July through December 2011) as an example of what she was looking for. The e-mail further identified the specific tasks each of the staff members was responsible for (Mr. Rajasekhar's were identified as Task 4, outcome 4; and Task 5, outcome 1), asking for an update paragraph by July 13, 2012.

43. Ms. Zimmerman and Mr. Rajasekhar had further communications regarding the update paragraphs. He forwarded her e-mails he had sent earlier involving the two projects. She requested him to summarize this information into update paragraphs. He sent her another document. She asked him to carefully review her original e-mails and to submit an updated paragraph on each project.

44. On June 12, 2012, Mr. Rajasekhar responded to Ms. Zimmerman, with copies to Dr. Shirley and Mr. Burgess, in part as follows:

I have gone through the two documents (the relevant part). Both the documents contain information that is new to me for the most part. In addition, I have not been involved in producing or guidance of these documents. In fact very little of my time or efforts are spent on such activities. A very minor part of these large documents is in fact relevant to my performance. After spending significant time going through the documents and perusing the items of relevance, I am

more confused. One document has items of relevance (4 & 1) as guided by you that I am not aware of till now. Had my work involved discussing or guiding these in any way, I would have been more equipped to adequately respond. More over when such documents come to my attention for response, I recommend that relevant part/s be sent to me so that I am not confused anymore and do not unnecessarily tax my time or efforts.

45. These communications from Mr. Rajasekhar were not helpful to Ms. Zimmerman in preparing the progress reports. The tasks for which she was requesting update paragraphs from Mr. Rajasekhar involved the flow ways project and the Habitat Mapping and Change Plan, which were part of Mr. Rajasekhar's agreed-upon work plan and which had been identified as "high priority" projects.

46. Ms. Zimmerman sent an e-mail to Ms. Geraldine Austin, with copy to Dr. Shirley and Mr. Burgess, stating in part, "[a]s a probationary employee the amount of oversight/direction needed of this employee and his response lead me to believe that termination is necessary."

47. On June 13, 2012, Dr. Shirley sent an e-mail to Mr. Larry Nall, interim CAMA Director, describing some of the incidents and concerns regarding Mr. Rajasekhar. In the discussion of the oral reprimand, the e-mail specifically mentioned Mr. Rajasekhar's references to discrimination. The e-mail also summarized the situation involving Ms. Zimmerman's

attempts to update the progress reports for the NOAA grants.

Dr. Shirley also forwarded the e-mail to Mr. Kevin Claridge, who had been hired to fill the open position of CAMA Director, but had not yet begun work.

48. Dr. Shirley testified that he believed that the situations involving Mr. Rajasekhar were affecting staff, morale, teamwork, and the Reserve's partners. He found Mr. Rajasekhar's communications in response to requests from other staff members, including the assistant director and himself, to be often evasive and defensive. He believed that Mr. Rajasekhar defined his own duties very narrowly and that Mr. Rajasekhar's conduct and communications negatively impacted Reserve workflow and had the potential to damage the Reserve's partnerships.

49. Mr. Rajasekhar was notified by letter signed by Mr. Kevin Claridge, Director of CAMA, that his employment was being terminated for failure to satisfactorily complete his probationary period, effective at close of business on June 29, 2012. This was a form letter used whenever it was found necessary to terminate the employment of a probationary employee.

50. On October 5, 2012, Petitioner filed a complaint with the Commission, alleging that the Department had discriminated against him based upon his national origin, and had retaliated against him.

51. In a November 7, 2012, Affidavit, Dr. Shirley set forth reasons for Mr. Rajasekhar's termination for submission to the Commission in response to Mr. Rajasekhar's complaint. It stated that Mr. Rajasekhar demonstrated "inconsistent work performance and unacceptable behavior." It noted that Mr. Rajasekhar had been counseled on occasions prior to his termination. It gave three reasons for Mr. Rajasekhar's dismissal: that his abilities were not consistent with the skills that had been reported on his job application, that Mr. Rajasekhar exhibited a defensive and negative attitude when confronted with expectations that were clearly within the scope of his job, and that on occasion Mr. Rajasekhar did not interact positively with other employees who depended on GIS support for their job functions.

52. The Commission issued its Notice of Determination of No Cause on March 25, 2013, advising Petitioner of his right to file a Petition for Relief within 35 days.

53. Petitioner filed his Petition for Relief on April 23, 2013.

54. Mr. Rajasekhar was an excellent high-end geospatial analyst, but he had difficulty accepting any assignments not directly involving such analysis even though they were part of his job description. It is not entirely clear if this was because he was simply uncomfortable with some tasks, or unable to easily perform them, as appeared to be the case with some

analyses involving hydrology or the calculation of Kappa statistics; or, alternatively, whether he simply felt such tasks were inappropriate for his position, which appeared to be the case with the preparation of burn maps and some tasks involving basic computer skills. In any event, his narrow definition of his job responsibilities adversely affected the work flow and made his work performance inconsistent. This affected team productivity at the Reserve.

55. Mr. Rajasekhar never seemed to understand his role as part of the Reserve team. He made a request for a raise while still on probationary status, he made an inappropriate request for co-principal investigator standing directly to Dr. Frank without even notifying his superiors, and he indicated on more than one occasion that he believed he was being improperly excluded from events or activities at which his presence was not actually needed to support the Reserve mission. His relationship with other members of the Reserve team, including his superiors, was awkward, and at times his conduct was unacceptable and embarrassing to the Reserve.

56. Mr. Rajasekhar was extremely sensitive to any comments about his performance. He became defensive and hostile at any suggestion that his performance was lacking in any way, and sometimes interpreted questions or comments that were not intended to question his performance as doing so.

57. No evidence was presented to show that there were other probationary employees of the DEP who had received an oral reprimand and then continued to exhibit unsatisfactory behavior during the time that Mr. Rajasekhar was employed.

58. Mr. Rajasekhar believed that he had been "excluded" from the Secretary's visit and that there was a connection between his comments at the UF meeting, his national origin, and the reprimand.

59. The comments Mr. Rajasekhar made in his oral and written responses to the reprimand to the effect that he had been discriminated against were statutorily protected activity.

60. The actions of the Department toward Mr. Rajasekhar, and those of its employees, were not motivated in whole or in part by Mr. Rajasekhar's national origin.

61. Mr. Rajasekhar's dismissal was not an act of discrimination or retaliation.

CONCLUSIONS OF LAW

62. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 760.11(4), 120.569, and 120.57(1), Florida Statutes (2013).

63. Section 760.11(1), Florida Statutes (2011),^{1/} provides that an aggrieved person may file a complaint with the Commission within 365 days of the alleged violation. Petitioner

timely filed his complaint. The Notice of Determination of No Cause advised Petitioner of his right to file a Petition for Relief within 35 days. Petitioner timely filed his Petition requesting this hearing.

64. Petitioner has standing to bring this proceeding.

65. Respondent is an employer as that term is defined in section 760.02(7).

Post-Hearing Exhibits

66. Before addressing Petitioner's claims of unlawful employment practices, Respondent's Objections and Motion to Strike the post-hearing exhibits filed by Petitioner must be considered. Petitioner indicated at hearing that he had some documents -- which had earlier been provided to him by Respondent in response to public records requests -- that he wished to introduce into evidence, but he had them only in electronic form on a "thumb drive." Without objection, permission was granted for Petitioner to submit these documents as post-hearing exhibits, even though it was not clear whether copies had been provided to Respondent in accordance with the Order of Pre-Hearing Instructions. Respondent was then given seven days after these post-hearing exhibits were submitted to file any objections to them, and Petitioner was given seven days after that to respond to objections. This procedure was set up in light of the fact that Petitioner was proceeding pro se and

may not have fully understood the possible consequences of failure to provide the documents to Respondent prior to hearing, and because no prejudice could be seen to Respondent, which had originally provided all of the documents to Petitioner.

67. On July 5, 2013, Petitioner filed about 200 pages of documents, many of which he had already introduced at hearing. Respondent filed objections on July 17, 2013, and Petitioner filed a response to Respondent's objections on July 29, 2013, both of which were accepted under the Order Granting Extension of Time. Full consideration was given to the parties' arguments as to the admissibility of these documents. The references below to page numbers are to the Bate-stamp numbers helpfully provided by Respondent.

68. Respondent's objections to pages 1-43, 51-70, 78-82, 90-94, 97-101, 102, 103-104, 112, 117, 125, the bottom half of page 131, pages 132, 141-142, and 165-167 are sustained. These pages are irrelevant to the issues in this proceeding.

69. Respondent's objections to pages 44-46, 47, 71-75, 83-87, 88, 95-96, 105-111, 113, 114, 118, 120, 122-124, 126, 127-129, 130, the top half of page 131, pages 133, 134, 135, 138, 139, 140, 143, 144, 147, 148, 149-150, 151, 152-153, 154, 155, 156-157, 160-161, 162, 163, 164, 165, 168, 169, 170, 171-172, 173, 174-176, 177-178, 179, 180-181, 182-183, 184-185, 186-187,

188-189, 190, 194, 195-196, 197-198, and 199-200 are sustained. These pages are duplicative of exhibits already admitted.

70. Respondent's objection that pages 136-137 have not been properly authenticated is sustained. The e-mail string as offered by Petitioner contains on its face circumstantial evidence in the form of date and time information indicating that it does not constitute a continuous e-mail chain as represented. Petitioner responded: "Series of e-mails supplied to me electronic formats. Some of forwardings & response." Petitioner's response failed to demonstrate the authenticity of the e-mail string.

71. Respondent's objection to pages 76-77 as irrelevant is overruled and they are admitted as Petitioner's Exhibit P-66. Respondent's objection to page 191 as irrelevant is overruled and it is admitted as Petitioner's Exhibit P-67. Respondent's objection to pages 201-202 as irrelevant is overruled and they are admitted as Petitioner's Exhibit P-68.

72. Respondent's objection to pages 192-193 is overruled with respect to those portions of the letter which pertain to Petitioner's allegations of discrimination and the handling of those allegations by the Department. These pages are admitted as Petitioner's Exhibit P-69. Respondent's objections as to the portions of this letter pertaining to alleged conduct of Ms. Zimmerman and Mr. Burgess and those portions pertaining to

Re-employment Assistance are sustained; those portions will not be considered.

73. Respondent's objections to Petitioner's Exhibits P-9, P-17, P-42, P-44, and P-65, which were already admitted at hearing, are overruled.

74. Respondent did not object to pages 115-116, which are admitted as Petitioner's Exhibit P-70; pages 145-146, which are admitted as Petitioner's Exhibit P-71; or pages 158-159, which are admitted as Petitioner's Exhibit P-72.

75. At hearing, Petitioner also requested that he be provided with e-mails regarding monthly progress reports submitted by Ms. Small and Mr. Gary Swenk, which he had requested in a public records request to the Department prior to hearing. Although Petitioner did not comply with applicable rules of discovery, Respondent was asked to provide the e-mails to Petitioner post-hearing. These 24 pages of e-mails have been compiled as a composite exhibit and are admitted as P-73.

76. All exhibits, whether admitted during hearing or post-hearing, were given full consideration in the preparation of this order.

Petitioner's Request for Water Flow Records

77. Another matter preliminary to discussion of Petitioner's discrimination claims is Petitioner's pending Motion requesting Respondent to provide copies of certain

records and datasets from which he generated water flow lines on a map referred to by Respondent at hearing. The Motion, which was filed on August 20, 2013, nearly 60 days after hearing, is denied.^{2/} The information was requested for the express purpose of rebutting evidence presented by Respondent at hearing and to “dispel any and all inaccurate testimony” against Petitioner. While recognizing that Petitioner appeared pro se and may be unfamiliar with hearing procedures, evidence is presented at the final hearing, and the time for discovery of evidence in this case has long passed. Arguments on the merits of this case presented in Petitioner’s Motion were not considered in the preparation of this Recommended Order.

National Origin Discrimination Claim

78. The Florida Civil Rights Act, sections 760.01-760.11 and 509.092, 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 Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000) (Florida Act’s “stated purpose and statutory construction directive are modeled after Title VII”); Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996).

79. 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."

80. Petitioners 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).

81. Generally, direct evidence relates to the actions, statements, or bias of the person making the challenged employment decision. See Trotter v. Bd. of Trustees of Univ. of Alabama, 91 F.3d 1449, 1453-1454 (11th Cir. 1996). If, however, the evidence presented is by inference subject to more than one possible meaning, it is not direct evidence of discrimination and must be considered circumstantial evidence. Carter v. Three Springs Residential Treatment, 132 F.3d at 635, 642 (11th Cir. 1998) (citing Harris v. Shelby Cnty. Bd. of Educ., 99 F.3d 1078, 1082-1083 n. 2 (11th Cir. 1996)). 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 direct evidence is unavailable, and in this case, Petitioner presented none.

82. In the absence of direct evidence, the law permits an inference of discriminatory intent if complainants can produce sufficient circumstantial evidence of discriminatory animus. Discriminatory animus may consist of 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 may constitute a prima facie case.

83. In McDonnell-Douglas Corporation 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).

84. 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 of production then shifts back to Petitioner to demonstrate that the offered reason is merely 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. See also EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002) (while the intermediate burdens of production shift back and forth, the ultimate burden of persuasion remains with Petitioner).

85. In order to establish a prima facie case of national origin discrimination, Petitioner must prove that: (1) he is a member of a protected class; (2) he was subjected to an adverse employment action; (3) his employer treated similarly situated employees, who were not members of the same protected class, more favorably; and (4) he was qualified to do his job. Faucette v. Nat'l Hockey League, 2006 U.S. Dist. LEXIS 5188, 18-19 (M.D. Fla. Jan. 27, 2006); Mora v. Univ. of Miami, 15 F. Supp. 2d 1324, 1335 (S.D. Fla. 1998).

86. Respondent concedes that, as a person with national origin from India, Petitioner is a member of a protected class.

87. The second element is also met, as Respondent's intended action to dismiss Petitioner from his probationary employment is an adverse employment action.

88. Petitioner also established the fourth element, that he was qualified to do his job. Petitioner's demonstration that he possessed excellent geospatial analysis skills went beyond that minimal showing of the basic job qualification that is required to prove a prima facie case. Int'l Bhd. of Teamsters v. U.S., 431 U.S. 324, 358 n.44 (1977) (McDonnell-Douglas formula demands only that plaintiff demonstrate that his rejection did not result from an absolute or relative lack of qualifications or the absence of a vacancy); Gregory v. Daly, 243 F.3d 687, 696 (2d Cir. 2001) (qualification prong must not be interpreted in such a way as to shift into petitioner's prima facie case an obligation to anticipate or disprove an employer's proffer of a legitimate, non-discriminatory basis for its decision).

89. Respondent maintains that Petitioner failed to prove the third element, that Respondent treated similarly situated employees not of his protected class more favorably. In order to make a valid comparison, Petitioner must show that he and the comparators he identifies are similarly situated in all relevant respects. Conner v. Bell Microproducts-Future Tech, Inc., 492 Fed. Appx. 963, 965 (11th Cir. 2012). See also Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1091 (11th Cir. 2004) (comparator

must be nearly identical to petitioner to prevent courts from second-guessing reasonable decisions by an employer).

90. Petitioner presented scant argument as to similarly situated employees not of his national origin. He acknowledged at hearing that "similarly situated" is a difficult concept.

91. Petitioner's argument that Ms. Zimmerman and Mr. Burgess were similarly situated to him was rejected at hearing. Evidence of any alleged misconduct on their part that was unrelated to Petitioner was therefore excluded.

Petitioner's allegations against Ms. Zimmerman and Mr. Burgess were not at all similar to Petitioner's conduct or performance. In addition, neither of them was in probationary status. Both of them outranked Petitioner, and were in fact his supervisors. Miller-Goodwin v. City of Panama City Beach, 385 Fed. Appx. 966, 971 (11th Cir. 2010) (male officer who was promoted was not similarly situated to plaintiff because he was of higher rank). Ms. Zimmerman and Mr. Burgess were not similarly situated to Petitioner.

92. The only other employee on probationary status about whom any evidence was received was Ms. Small, and there was nothing to suggest that her conduct or situation was otherwise similar. There was no evidence that she had been counseled, as Petitioner had been for seeking co-principal investigator status, or that she had been reprimanded, as Petitioner had been

for conduct unbecoming a public employee. While she had been involved in an incident with Petitioner, the testimony was clear that neither party had been disciplined for that encounter. Dr. Shirley's testimony that the resulting reorganization of work procedures and development of the work plan were not actions against Petitioner was persuasive. Ms. Small was not similarly situated to Petitioner.

93. While Petitioner also suggested during the hearing that Ms. Elizabeth Montgomery did not attend certain meetings and that she was not disciplined for this, there was no evidence presented to show that Ms. Montgomery was on probationary status or was otherwise similarly situated to Petitioner. Lack of attendance at meetings by Petitioner was never mentioned at hearing as a basis for his dismissal and there was no indication that Petitioner had ever been disciplined for this either.

94. Petitioner failed to demonstrate that Respondent treated similarly situated employees who were not of Indian national origin more favorably than he was treated, and so failed to show a prima facie case of discrimination on the basis of national origin.

95. Even had Petitioner demonstrated a prima facie case, however, Respondent articulated legitimate, non-discriminatory reasons for Petitioner's dismissal. Respondent alleged in testimony that Petitioner had engaged in unacceptable behavior

embarrassing to the Department and possibly ultimately detrimental to maintaining the Reserve's partnerships, and that while highly skilled, Petitioner exhibited inconsistent work performance and lacked team-working skills.

96. Petitioner had the ultimate burden to show that the allegations of unacceptable behavior embarrassing to the Department, inconsistent work performance, and lack of team-working skills were pretextual, and nothing but excuses for discrimination against him. 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.

97. Petitioner did demonstrate that his high-end geospatial analysis skills were exemplary, but the facts also showed that Petitioner exhibited unacceptable behavior as well as inconsistent performance and a lack of team-working skills. A different decision-maker might well have concluded that additional oversight and direction to improve his work flow and interaction with other employees and partners of the Reserve would be preferable to terminating Petitioner. But Dr. Shirley's extensive earlier efforts to adjust structures and operations at the Reserve solely for the purpose of better integrating Petitioner into the work flow provided strong evidence that the later decision to terminate him was simply a

legitimate business decision. There is no basis to conclude that the true motive for dismissal was actually discrimination based upon Petitioner's national origin.

98. 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."

Retaliation Claim

99. Petitioner also alleged retaliation in his original filing with the Commission. 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).

100. 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.

101. To establish a prima facie case of retaliation, Petitioner must show that: (1) he engaged in statutorily protected activity; (2) he suffered a materially adverse action;

and (3) there was a causal connection between the protected activity and the adverse action. Howard v. Walgreen Co., 605 F.3d 1239, 1244 (11th Cir. 2010).

102. To establish statutorily protected conduct, Petitioner must first show that he had a good faith, reasonable belief that Respondent was engaged in an unlawful employment practice. He must show not only that he subjectively believed that Respondent engaged in such conduct, but also that his belief was objectively reasonable in light of the facts. Gant v. Kash N' Karry Food Stores, 390 Fed. Appx. 943, 944-45 (11th Cir. 2010); Little v. United Tech., 103 F.3d 956, 960 (11th Cir. 1997). At this stage, Petitioner need not prove that the conduct he opposed was actually unlawful, but the reasonableness of his belief that Respondent had engaged in an unlawful employment practice must be measured against existing substantive law. Ramirez v. Miami Dade Cnty., 509 Fed. Appx. 896, 896 (11th Cir. 2013); Howard v. Walgreen Co., 605 F.3d 1239, 1244 (11th Cir. 2010).

103. Petitioner demonstrated that he subjectively believed that Respondent engaged in unlawful discrimination against him based upon his national origin. Even at the very early point in his employment when Petitioner firmly stated that he wanted a pay raise, Petitioner's actions suggested that he considered the denial to be discrimination. While an objective person would

not agree, and testimony would even support the conclusion that Petitioner himself came to see that no discrimination was involved, it is clear that Petitioner was quick to initially perceive discrimination. Later events at the Reserve similarly raised concerns of discrimination in Petitioner's mind. It is clear that Petitioner either actually perceived discrimination on these occasions or alternatively was simply attempting to use his national origin as a "weapon" to achieve his goals even when he actually knew there had been no discrimination. There is no evidence to support the latter conclusion. Petitioner subjectively believed that he had been "excluded" from the Secretary's visit and that there was a connection between his comments at the UF meeting, his national origin, and the reprimand.

104. In order for Petitioner's oral or written responses to the reprimand to constitute statutorily protected activity, however, Petitioner must not only have believed that Respondent had engaged in an unlawful employment practice, that belief must also have been objectively reasonable, even if actually untrue. It is difficult to determine Dr. Shirley's true motives in scheduling presenters for Deputy Secretary Munson and to reconstruct exactly what Petitioner said at the UF meeting or how his comments related, if at all, to Petitioner's ethnicity. Given this difficulty, although the undersigned found no

discrimination in either Department action, it cannot be said that a reasonable, objective person confronted with these events as Petitioner was might not believe that discrimination had occurred. The comments about discrimination that Petitioner made in his oral and written responses to the reprimand therefore constituted statutorily protected activity.

105. The Department indicated its intent to dismiss Petitioner from his employment prior to completion of his probationary period. This constitutes a materially adverse action against him, and meets the second prong required for a prima facie case of retaliation.

106. The third prong is also met. Petitioner must demonstrate a causal connection between the protected activity and the adverse decision. This casual link element is construed broadly, and may be established by a demonstration that the employer was aware of the protected conduct and that the protected activity and the adverse action were not "wholly unrelated." Farley v. Nationwide Mut. Ins., 197 F.3d 1322, 1337 (11th Cir. 1999); Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998). Moreover, for purposes of demonstrating a prima facie case, close temporal proximity may be sufficient to show that the protected activity and adverse action were not wholly unrelated. Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 590 (11th Cir. 2000).

107. Respondent was clearly aware of Petitioner's allegation of discrimination made during his oral response to the reprimand and of the more veiled, but still clear, inference in his written response that there was a connection between his comments at the UF meeting, his national origin, and the reprimand. Less than one month later, Petitioner was presented with his letter of termination. This close proximity is sufficient circumstantial evidence of a causal connection for purposes of establishing a prima facie case.

108. Petitioner proved a prima facie case of retaliation.

109. Just as in other discrimination claims, once a prima facie case of retaliation is established, the employer has an opportunity to articulate a legitimate, non-retaliatory reason for the adverse employment action. Bryant v. Jones, 575 F.3d 1281, 1308 (11th Cir. 2009). Petitioner then bears the burden of showing that the reason provided by the employer is a pretext for prohibited retaliatory conduct, and the ultimate burden of proving retaliation by a preponderance of the evidence. Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1277 (11th Cir. Ala. 2008).

110. Respondent alleged at hearing that Petitioner was dismissed because he exhibited unacceptable behavior as well as inconsistent performance and a lack of team-working skills. The presumption of retaliation disappears in light of the

articulation of this legitimate, non-retaliatory reason. Entrekin v. City of Panama City, 376 Fed. Appx. 987, 997 (11th Cir. 2010) (if employer articulates a legitimate, non-retaliatory reason for the challenged employment action, presumption disappears and the burden is on petitioner to show that the employer's reasons are only a pretext for prohibited retaliation).

111. Petitioner failed to show that these proffered reasons for his dismissal were implausible, incoherent, or contradictory in any way. Gant v. Kash'n Karry Food Stores, Inc., 390 Fed. Appx. 943, 945 (11th Cir. 2010); Silvera v. Orange Cnty. Sch. Bd., 244 F.3d 1253, 1258 (11th Cir. 2001). Petitioner suggested that the offered reasons were inconsistent, as evidenced by the fact that no reasons had been given in his letter of termination, but were only presented later to the Commission or at hearing. However, this was fully explained by Respondent as being due to Petitioner's probationary status, which did not require Respondent to advance any reason in its initial "form letter" advising Petitioner of his dismissal.

112. Petitioner vehemently maintained at hearing that there was no evidence that his resume misrepresented his qualifications, or that his skills were anything but exemplary. While evidence on these points was slight, Respondent was not required to prove it was correct in its assessment, but only to

state that its action was based on these legitimate concerns as opposed to retaliatory ones. Respondent did so. Petitioner failed in his burden to show that the reasons given by Respondent were only pretext for discrimination.

113. As to the other reasons given as grounds for dismissal, Respondent was completely convincing in its presentation. The record clearly showed, through the testimony of several witnesses and the introduction of numerous documents, many offered by Petitioner himself, that Petitioner did engage in unacceptable behavior embarrassing to the Department which if left unchecked might ultimately have been detrimental to maintaining the Reserve's partnerships. While the record unequivocally demonstrated Petitioner had excellent professional skills, it also showed that he exhibited inconsistent work performance and lacked team-working skills. The evidence did not demonstrate that retaliation played any part in Respondent's decision to terminate Petitioner.

114. Petitioner failed to prove retaliation.

RECOMMENDATION

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

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing Mr. Dasyam Rajasekhar's Petition for Relief.

DONE AND ENTERED this 11th day of September, 2013, in Tallahassee, Leon County, Florida.

F. Scott Boyd

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 11th day of September, 2013.

ENDNOTES

^{1/} All references to statutes and administrative rules are to the versions in effect during the employment of Mr. Rajasekhar at the DEP, except as otherwise indicated. No relevant changes to the applicable statutes or rules were identified during this time period.

^{2/} Petitioner's Notice of public records request on August 26, 2013, does not request any action by DOAH, but to the extent it could be considered as a Motion to Compel a response to

discovery, it appears to relate to the same information as Petitioner's August 20, 2013, Motion, and is denied for the same reason.

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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.