STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM T. MAHAN, JR.,

Petitioner,

vs. Case No. 14-4582

UF IFAS EXTENSION PROGRAM,

Respondent.
_____/

RECOMMENDED ORDER

A final hearing was held in this matter before Suzanne Van Wyk, Administrative Law Judge with the Division of Administrative Hearings (Division), on April 17, June 10, and June 12, 2015, via video teleconference in Gainesville and Tallahassee, Florida, and on July 1, 2015, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Judith A. Stokowski, Qualified Representative
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Apalachicola, Florida 32329-0010

For Respondent: Jamie Marie Ito, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent discriminated against Petitioner based on either his age or in retaliation for engaging in a protected activity, in violation of the Florida Civil Rights Act of 1992.

PRELIMINARY STATEMENT

On February 21, 2014, Petitioner, William T. Mahan, Jr., filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR) against the University of Florida IFAS Extension Program (UF IFAS), alleging he was discriminated against based upon his age and in retaliation for engaging in a protected activity. On August 25, 2014, following its investigation, FCHR issued a Determination finding reasonable cause to believe that an unlawful discriminatory practice occurred.

On September 25, 2014, Petitioner filed with FCHR a Petition for Relief from an unlawful employment practice. The petition was forwarded to the Division on October 2, 2014.

Petitioner requested leave to be represented by a Qualified Representative, which request was granted on October 23, 2014. The final hearing in this case was originally scheduled to

commence on December 17 and 18, 2014, but was later rescheduled to January 14 and 15, 2015, at the request of the parties.

Petitioner requested a second continuance on January 8, 2015, representing that the parties were working on a resolution of the matter and required additional time to obtain and review certain of Petitioner's financial and retirement information. On January 9, 2015, the undersigned granted the continuance, placed the case in abeyance, and ordered the parties to jointly file a status report on or before February 16, 2015. The parties did not timely file a status report.

On February 23, 2015, Petitioner moved for an order extending the abeyance until March 16, 2015, to which Respondent filed a motion in opposition and a Motion to Enforce the Prior Order requiring the status report (Motions). Following a telephonic hearing on the motions, the undersigned granted, in part, Petitioner's motion, denied Respondent's Motions, and requested dates of availability in April 2015 to reschedule the matter for hearing. The final hearing was rescheduled to, and commenced on, April 17, 2015.

Presentation of the evidence in this matter proved laborious. The hearing took place on four separate dates: April 17, June 10, June 12, and July 1, 2015. At the final hearing, Petitioner testified on his own behalf and the parties jointly presented the testimony of Dr. Pete Vergot, III, UF IFAS

District Extension Director for the Northwest District (and Petitioner's supervisor at the time the alleged discriminatory acts occurred); Mary Ann Morgan, UF IFAS Director of Human Resources; Kevin Clark, UF IFAS Assistant Director of Human Resources; Dr. Thomas Obreza, UF IFAS Senior Associate Dean; Dr. Nick Place, UF IFAS Dean and Director; Dr. Angel Kwolek-Folland, University of Florida Associate Provost for Academic and Faculty Affairs; Alan Pierce, Franklin County Director of Administrative Services; and John Sink, a member of the Franklin County Extension Advisory Committee.

Petitioner's Exhibits P1 through P14, P16, P18 through P46, P48, P49, P51, P52, P54, P61, and P62 were admitted in evidence. Respondent's Exhibits R1 through R20 were also admitted.

A one-volume Transcript of the proceedings on July 1, 2015, was filed on July 16, 2015. A four-volume Transcript of the proceedings on June 10 and 12, 2015, was filed on August 26, 2015. A one-volume Transcript of the proceedings on April 17, 2015, was filed on August 28, 2015. The parties filed Proposed Recommended Orders on September 11, 2015.

Unless otherwise noted herein, all references to the Florida Statutes are to the 2013 version.

FINDINGS OF FACT

1. Petitioner, William T. Mahan, Jr., who was at all times relevant hereto an employee of the University of Florida

Institute of Food and Agricultural Sciences (UF IFAS or IFAS) Extension Program, was 59 years old when his age discrimination complaint was initiated.

2. Respondent, UF IFAS Extension Program, is a state-wide program run by the University of Florida that places extension agents in each of Florida's 67 counties. The core mission of the program is to transfer knowledge that is generated through research at the University to the clientele the extension agent serves, thereby turning research information into practical solutions.

3. Petitioner became a permanent faculty member of UF IFAS in June 1993. Petitioner had permanent status as an Extension Agent IV, with an administrative appointment as County Extension Director (CED) for Franklin County.

4. A CED is an Extension Agent with educational responsibilities; however, a CED also has the administrative task of running the local office, working with an advisory committee, and serving as liaison between UF IFAS and the county government. There is no permanent status in a CED administrative appointment.

5. Petitioner was the CED in Franklin County, Florida, with an office in Apalachicola from June 1993 until October 28, 2013.

6. An IFAS extension office is funded in part by the local board of county commissioners. In Franklin County, at all times relevant hereto, the county paid 20 percent of Petitioner's salary, as well as the salary of an administrative secretary and expenses of the physical office.

7. The Franklin County Extension Office was a single-agent office. Unlike other CEDs in the northwest district, Petitioner was solely responsible for running the office, working with an advisory committee, serving as liaison to the county, as well as all educational programming and client services.

8. Dr. Pete Vergot, III, is the UF IFAS District Extension Director (DED) for the northwest extension district, encompassing 16 counties in the panhandle of Florida. He was appointed DED in 1997 and supervised all UF IFAS Extension employees in that district. Dr. Vergot was Petitioner's direct supervisor until December 2013.

9. Dr. Vergot was an ineffective supervisor. During his tenure as DED, Dr. Vergot was counseled by his superiors, and required to take management training courses, in response to complaints from other IFAS faculty about his management and communication style. At one point, Dr. Vergot was required to undergo a "360 performance review" during which administrators interviewed not only employees supervised by Dr. Vergot, but

also community members and clientele of the program with whom Dr. Vergot came into contact.

10. Extension Agents are evaluated yearly by their DED through the submission of a Report of Accomplishments (ROA). An ROA is written by the employee and summarizes what the employee has accomplished during the prior calendar year. An ROA often includes an employee's job duties, number of publications, number of programs conducted for clientele in their district, and any other accomplishments of note.

11. CEDs have two components to their evaluation: their performance as an agent and their performance in their administrative position.

12. Petitioner's employment with UF IFAS was reportedly without incident until 2010. In Petitioner's annual performance appraisals for program years 2007, 2008, and 2009, Dr. Vergot gave Petitioner an overall rating of "Exemplary."[1/]

13. During an August 2010 Franklin County Commission budget hearing, the county voted to eliminate funding for Petitioner's position. Petitioner was informed about the decision via media reports the following morning.

14. Petitioner and Dr. Vergot personally met with several county commissioners following the August budget hearing. county funding of the extension office was restored at the final budget hearing on September 20, 2010.

15. The evidence conflicted as to whether the county's August decision to cut funding of the extension office was related, in any respect, to Petitioner's performance in the County. However, the record clearly established that, as a result of this incident, Dr. Vergot lost confidence in Petitioner's ability to perform.

16. On September 24, 2010, Dr. Vergot sent Petitioner an email requesting that he start developing and implementing a new plan of work (POW). The email lists a number of specific ideas to expand and enhance program offerings, including offering additional "Life Skill" areas for youth through 4H programming and volunteer development and support, increasing the master gardener program, and restarting a previously-successful family nutrition program.

17. In the email, Dr. Vergot also asked Petitioner to become part of the 4H PIT team, increase day camping for 4H youth, enhance his presence with the natural resource PIT team, increase teaching in natural resource areas, and enhance reporting to local officials and clientele. The email concluded by requesting Petitioner to review each item and email Dr. Vergot a plan by October 18, 2010.

18. Dr. Vergot did not issue Petitioner his 2010 annual performance appraisal until June 1, 2011. On this appraisal, Dr. Vergot rated Petitioner "Improvement Required (IR)." Of the

various categories in the appraisal, Petitioner was rated IR on "Financial Support," wherein Dr. Vergot noted Petitioner needed to "find continued financial support" and that "your internal and external funding is lacking." Dr. Vergot also rated Petitioner IR in "Delivery/Contacts and Statistical Report" noting "we need you to increase your Extension teaching in all of your program areas, just attending meetings is not Extension programming." In "CED Program Leadership and Coordination," on which Petitioner also received an IR rating, Dr. Vergot noted, "you had a severe issue with commissioners supporting your program this year, we need for you to work on communications and relationship with all commissioners and county government to reverse this issue."

19. IFAS maintains a Sustained Performance Evaluation Program (SPEP) to evaluate long-term performance of tenured and permanent status faculty. In addition to annual performance evaluations, tenured and permanent status faculty members are evaluated every seven years on their previous six years' performance. According to IFAS regulations, the purpose of SPEP is to document adequacy of sustained performance and encourage continued professional growth and development of faculty.

20. The SPEP review is conducted by the faculty member's administrator and is based on the performance evaluations from the prior six years and "any related evaluative or other

information relative to the faculty member during this period of time." The administrator must rate the faculty member as either "satisfactory" or "below satisfactory."

21. A faculty member receiving a "below satisfactory" rating receives a written reprimand, and is required to submit a summary of accomplishments (SOA) to the administrator within two months to be reviewed by a peer advisory committee (PAC). Two members of the PAC are selected by the administrator and one by the faculty member. If, after an in-depth review of the SOA, the PAC agrees that the faculty member's performance requires improvement, the faculty member is required to submit a performance improvement plan (PIP) within two months.

22. On July 25, 2011, Petitioner received a letter entitled "PIP/Written Reprimand" from Dr. Vergot "for your 'improvement required' annual work performance review dated June 1, 2011." The letter informed Petitioner that his accomplishments over the last six years would be reviewed by a PAC and that he may be asked to submit a PIP.

23. The letter reiterated many of the issues raised in Dr. Vergot's 2010 evaluation of Petitioner—need for more educational programming rather than meetings, as well as maintaining and increasing funding sources. Other specific requests included increasing creative works and publications,

redesigning reporting to commissioners, and de-cluttering and managing his office in a professional manner.

24. The letter raised two programming issues in specific areas of the County: (1) a youth program in the minority area of Apalachicola which "[y]our County Commissioners requested," and (2) extension and educational programming for clientele on St. George Island. With respect to the youth program, Dr. Vergot stated "we need to see a major positive program developed before the budget year of the county begins for 2012." With respect to the St. George Island programming, Dr. Vergot requested Petitioner meet with the commissioner for that district, as well as Petitioner's advisory committee representatives, determine the type of programming appropriate, and develop, implement and report to Dr. Vergot on the plan and progress.

25. In February 2012, the PAC issued its review of Petitioner's six year ROA. Excerpts from the PAC "comment form" were a mixture of positive and negative feedback. The overall feedback on Petitioner's creative works was negative—PAC members indicated that Petitioner's attendance at county commission meetings and reports to the county commission were not considered creative works, that he needed to develop creative works and publications that are used in teaching, and that he was "weak in this area." As for publications, the PAC noted

that Petitioner submitted "lots of newspaper columns" but had only published two abstracts in six years, was a junior author on one peer-reviewed article, and "need[ed] improvement in this area." Under extension programming, PAC members commented that Petitioner's speaking engagements and use of media is not a concise program of adult environmental education with objectives and outcomes, and that Petitioner did not have enough work in this program to constitute 25 percent of his job. An overall comment notes, "[n]eed to keep balance with meetings and teaching. Seem to be off balance, and need to remember primary job is to teach."

26. The PAC comments also noted a disconnect between the six-year record of Petitioner's works and Dr. Vergot's "Exemplary" evaluations during the same time period. The PAC noted, "[p]revious appraisal ratings by DED conflict with the total picture presented to the committee."

27. Dr. Thomas Obreza is the Senior Associate Dean for Extension, to whom Dr. Vergot reports. Dr. Obreza first became involved in review of Petitioner's performance when Petitioner contacted him to complain of the 2010 "Improvement Required" rating. At Petitioner's request, Dr. Obreza reviewed Petitioner's previous POWs and ROAs, as well as some of his prior performance evaluations. Dr. Obreza concluded that not only was Dr. Vergot's criticism of Petitioner's 2010 performance

justified, but also that Dr. Vergot had been "really lenient" in prior evaluations and may have engaged in "grade inflation."

28. On December 16, 2011, Dr. Obreza wrote Petitioner a three-page letter in response to his concerns with his 2010 evaluation. Dr. Obreza concluded that Petitioner "should have never received 'Exemplaries'" for 2007, 2008, and 2009.

29. On February 20, 2012, Dr. Vergot issued Petitioner a PIP request "in response to your 6-yr. Summary of Accomplishments . . . and the subsequent [PAC] review." The letter required Petitioner to submit a PIP within two months detailing his "plans, paths and timeline for overcoming deficiencies identified in the July 25, 2011 letter of reprimand." The letter listed 14 deficiencies, many of which reiterated items noted in Petitioner's June 1, 2011 performance evaluation and July 25, 2011 letter of reprimand.

30. On March 9, 2012, Petitioner submitted a revised POW to Dr. Vergot for review and comment. Petitioner submitted his PIP on April 19, 2012. The PIP referenced each one of the 14 issue areas outlined in the February 20, 2012 PIP request and included a response thereto.

31. On the first three issue areas, all of which related to planning educational programs and teaching activities, rather than meetings, Petitioner indicated they were addressed in his revised POW on which he was awaiting comments before finalizing.

32. On some of the issue areas, Petitioner provided a mix of excuses and updates. For example, in response to the need to increase creative works, Petitioner responded that closure of one of the local newspapers and sale of another had "reduced my newspaper publications." Petitioner reported that he was planning new "fact sheets" for 2012, was working to obtain column space in the monthly "Coastlines" publication, and had developed several Powerpoint presentations.

33. In response to the direction to develop programming for clientele on St. George Island, Petitioner noted that he had met with the district commissioner, that she had no programming recommendations, and that he "plan[ned] to regularly check with her on my programming efforts."

34. In response to efforts to obtain new funding, Petitioner expressed some frustration ("You say my internal and external funding is very low. What exactly does that mean?"), but reported having recently jointly applied for $300,000 in funding for an oyster-related project, of which Petitioner could be awarded $60,000 for "educational components of the proposal."

35. In response to the request to redesign his reports to the county commission, Petitioner noted:

> This is an issue that came up a few years ago when Alan Pierce and one former Commissioner felt that my reports to the Board were getting a little long. When notified, I immediately made my reports

> shorter and it hasn't been an issue since. As requested, I spoke with Alan about my reports and he stated that my current report format and length is good and nobody has a problem. He recommended that I continue to use my current reporting format.

36. In February 2011, all the northwest region CEDs were instructed to undertake "listening sessions" in their respective counties as part of a 10-year long-range planning process. At a district CED meeting, the CEDs were given instructions regarding conducting listening sessions to gather input from their communities on strengths and weaknesses, as well as where extension could provide new services. The listening sessions had to be conducted within a particular timeframe as an initial step in the long-range planning process.

37. Petitioner planned a series of listening sessions, the first at a Rotary Club meeting and another at an upcoming chamber of commerce meeting. When Petitioner reported to Dr. Vergot the plan for community sessions, Dr. Vergot was upset and instructed Petitioner not to hold the sessions at civic clubs, but to solicit information from a broader community base.

38. Petitioner described his situation as "scrambling" to put together additional sessions within a short timeframe. Petitioner was unable to reschedule the listening sessions in a timely manner, in part because of preexisting plans to visit his son in the military.

39. Petitioner attended the May 13, 2011 northwest district extension meeting at which he presented the results of his listening sessions. Petitioner presented the input he received from a meeting with the Franklin Promise Coalition and a group in the City of Carabelle, as well as input he received from "one-on-one" communication with individuals.

40. On July 25, 2011, the same day Petitioner received the PIP/Written Reprimand for his 2010 annual performance evaluation, Dr. Vergot issued Petitioner a Written Reprimand for failure to hold the required public extension listening session. Dr. Vergot's letter referred to Petitioner's May 13, 2011 report to the northwest extension directors as "deceiving," chastised Petitioner for failure to follow directives, and ordered Petitioner to "refrain from attempting to cover up [his] misdeeds through deceptive behavior." The letter instructed Petitioner to complete the listening session process by August 26, 2011.

41. Notably, Dr. Vergot included the following:

> This is yet another example of why Franklin County would rather withdraw funding and close Extension the office [sic] than continue with an ineffective CED. Although we were able to convince them last year not to withdraw their support, our ability to do so again is now greatly compromised. Only a change in your attitude and performance will make a difference moving forward. I expect you to comply with the directives that I

> have presented above, and I will be closely monitoring your performance during the next 3 months.

42. Petitioner's 2011 Performance Appraisal, completed by Dr. Vergot and dated June 1, 2012, showed an overall rating of "Standard Professional Performance," suggesting that Petitioner had cured any perceived deficiencies in his work product by the end of the calendar year 2011.

43. On January 31, 2013, Petitioner received a draft of his 2012 annual performance appraisal from Dr. Vergot in person with an overall rating of "Standard Professional Performance."

44. On June 12, 2013, Petitioner received through e-mail a final copy of his 2012 annual performance appraisal from Dr. Vergot with an overall rating of "Improvement Required." Dr. Vergot did not contact or in any way discuss a change in the overall rating with Petitioner prior to issuing the final performance appraisal.

45. On October 28, 2013, Dr. Vergot personally delivered Petitioner a Notice of Non-Reappointment informing Petitioner that his CED appointment to Franklin County would not be renewed the following year. This notice informed Petitioner that October 29, 2014, would be the last day of his employment. The letter further instructed Petitioner to report the following day to Marjorie Moore, CED for the Bay County Extension Office, and perform the duties assigned to him by Ms. Moore.

46. During this meeting with Petitioner, Dr. Vergot mentioned to Petitioner that if he was considering early retirement, he would not be eligible for medical insurance until he was 59 and one half years old, and that "you ain't there yet." Dr. Vergot's tone was sarcastic. Petitioner inferred that his job may be further jeopardized prior to the purported October 2014 "last day of employment."

47. Dr. Vergot admitted making the statement about early retirement and eligibility for medical benefits. However, the statement was made at the request of an HR employee, who asked Dr. Vergot to advise Petitioner of the age requirement to obtain continued medical benefits in the event Petitioner chose early retirement.

48. Although Petitioner was removed from his administrative position as CED, he remained an Extension Agent IV and neither his pay nor his benefits were reduced.

49. To effect the issuance of the Notice of Non-reappointment and the involuntary reassignment of Petitioner, Dr. Vergot and UF IFAS relied on UF Regulation 6C1-7.013, entitled "Rules of University of Florida 7.013 Non-Renewal of Non-Tenured and Non-Permanent Status Faculty Appointments: Notice of Ending of Employment of Non-Tenured and Non-Permanent Status Faculty."

50. Petitioner was surprised by the non-reappointment and reassignment. On November 18, 2013, Petitioner met informally with Dean Nick Place, UF IFAS Dean and Director, to discuss Petitioner's reassignment. During that meeting, Petitioner brought to Dean Place's attention that 6C1-7.013 did not provide a basis for reassigning Petitioner, who was a tenured, permanent faculty member.

51. UF Regulation 6C1-7.048 governs disciplinary actions against tenured, permanent faculty members. The regulation authorizes reassignment, among other disciplinary actions, for "just cause," which is defined as "incompetence or misconduct" and includes specific examples thereof. The regulation requires written notice by hand delivery or certified mail/return receipt of the proposed discipline to the faculty member, specifying the reasons therefor. Further, the regulation provides for a 10-day response period and an opportunity to meet with the individual issuing the notice, and for filing a grievance. The Notice on Non-Reappointment did not cite this regulation.

52. Dr. Place advised Petitioner to file a written formal Step 1 grievance if Petitioner disagreed with his reassignment.

Grievance Procedures

53. UF Regulation 7.042 governs the faculty grievance procedure. Pursuant to the regulation, a "grievance" is "a dispute or complaint alleging a violation of the regulations of

the University or the Board of Governors concerning tenure, promotion, non-renewal, and termination of employment contracts, salary, work assignments, annual evaluation . . . and other benefits or rights accruing to a faculty member . . . ." The purpose of the grievance procedures is to "provide a prompt and efficient collegial method for the review and resolution of" faculty grievances.

54. Under the general procedure, a grievance must be filed with the chief administrative officer (CAO) within 30 days of the act or omission complained of, a Step 1 meeting with the CAO held within 7 to 15 days, and the CAO's written decision issued no more than 30 days after the Step 1 meeting. At the Step 1 meeting, the grievant may present evidence in support of the grievance. After the Step 1 meeting, the CAO "shall establish through conferences and review of the appropriate documentation" the facts giving rise to the grievance.

55. For grievants holding IFAS appointments, the Step 1 review may include two levels: one by the dean and one by the appropriate vice president. Under that procedure, if a grievant is dissatisfied with the dean's review, he or she may request review by the vice president no later than 15 days after receipt of the dean's decision. The vice president shall review the grievance and issue a written decision with findings of fact and the reasons for the decision reached, within 30 days.

56. If the grievant is not satisfied with the decision in Step 1, the grievant may file a written request with the Office of the Provost for a Step II grievance review within 15 days after the date the grievant receives the Step 1 decision. The provost shall meet with the grievant (and his or her representative) in an effort to resolve the grievance no later than 15 days following receipt of the request for review. The provost shall issue a written decision with respect to the grievance, giving findings of fact and the reasons for conclusions reached, within 30 days of the meeting.

Petitioner's Step 1 Grievances

57. On November 27, 2013, Petitioner filed a Step 1 grievance against UF IFAS (PV 131127), alleging that the October 28, 2013 Notice of Non-reappointment was issued in violation of university regulations and that Petitioner was being discriminated against by his supervisor, Dr. Vergot, on the basis of his age. The grievance suggested that Dr. Vergot intentionally issued the non-renewal to interfere with Petitioner's eligibility for early retirement.

58. Petitioner testified that Dr. Vergot called him a "dinosaur" sometime while they were outside of a meeting, either a district faculty meeting or a CED meeting, but was unable to recall the timeframe or any other details. Dr. Vergot denied ever having called Petitioner a dinosaur.

59. On November 27, 2013, Dean Place issued a letter to Petitioner rescinding the October 28, 2013 Notice of Non-reappointment "due to an administrative error." At final hearing, Mary Ann Morgan, Director of IFAS Human Resources (HR), confirmed that the regulation did not apply to Petitioner, and accepted responsibility for the error.

60. The letter of rescission reiterated that Petitioner was to continue reporting to the Bay County CED. Thus, the November 27, 2013 rescission reversed Petitioner's non-reappointment, but not his involuntary reassignment to Bay County.

61. Petitioner met with Dr. Place again on December 16, 2013, formally regarding his Step 1 grievance of the October 28, 2013 Notice of Non-Reappointment. In attendance were Petitioner, Dean Place, Ms. Morgan, and Kevin Clarke, then-Employee Relations Manager/EEO Investigator. Mr. Clarke was asked to join the grievance meeting concerning Petitioner's allegation of age discrimination.

62. On December 24, 2013, Petitioner filed a second formal grievance (PV 140102) of the October 28, 2013 involuntary reassignment to Bay County, which was unresolved by rescission of the non-renewal letter.

Internal EEO Investigation

63. Mr. Clarke's investigation of Petitioner's complaint consisted of interviewing both Petitioner and Dr. Vergot, and reviewing Petitioner's employment file. Mr. Clarke counted the December 16, 2013 meeting as his interview of Petitioner.

64. On January 10, 2014, Mr. Clarke issued an investigative report of his findings in which he concluded that Petitioner's claim of age discrimination was unsubstantiated. The report concludes as follows:

> The allegations of discrimination based on age could not be substantiated. Annual evaluations and documents related to ongoing efforts to establish a Performance Improvement Plan for the Grievant provide evidence that the Grievant's job performance has been unsatisfactory and an issue for some time prior to the non-renewal and relocation.

65. Petitioner faults Mr. Clarke for failing to interview him separately from the Step 1 meeting which included other faculty and HR employees. No evidence was offered to establish the University EEO procedures. Thus, the undersigned has no evidence on which to base a finding that Mr. Clarke's investigation was contrary to University policy.

Step 1 Grievance Review

66. On January 13, 2014, Dean Place issued his Step 1 review letter to Petitioner regarding grievance PV 131127. As to Petitioner's first contention, that his non-reappointment was

based on an inapplicable regulation, Dean Place concluded that the "University acted in error" in issuing the October 28 letter, but that the issue had been corrected by rescission of the letter. As to Petitioner's claim of age discrimination, Dean Place concluded, based upon his review of Mr. Clarke's Investigative Report and "discussing the findings with the investigator," there was no basis for the allegation.

67. Dean Place's Step 1 review letter did not directly address Petitioner's complaint regarding his involuntary transfer to Bay County. The letter offered, as if in passing, "Further, University Regulation 7.042(2)(c) enables the reassignment of employees."

68. In closing, Dean Place informed Petitioner that the University "is exercising its discretion to 'forward this Step 1 review and all grievance materials to IFAS Senior Vice President Dr. Jack Payne for review as part of the Step 1 process[.]'"

69. University regulation 7.042(2)(c) sets forth the applicable burden of proof for faculty grievances. This rule, cited by Dean Place as "enabling the reassignment of employees," has no bearing on reassignment of, or for that matter, any disciplinary action against, faculty members.

70. Petitioner responded to Dean Place in writing on January 22, 2014, noting that Dean Place's letter failed to address Petitioner's continued involuntary transfer to Bay

County, and pointing out that University Regulation 7.042 does not authorize the "reassignment of employees." In his response, Petitioner requested that this grievance (PV 131127) be combined with PV 140102 for purposes of review by the vice president.

71. After the December 16, 2013, meeting with Dean Place for a formal grievance discussion concerning his complaint of involuntary reassignment and age discrimination, Petitioner discovered that UF IFAS had posted a notice for the position of CED for Franklin County that same date.

72. Petitioner filed a formal grievance (PV 14011A) alleging the posting was a continuation of discrimination and retaliation against him.

73. On December 23, 2013, one day before UF's Christmas break, Dr. Vergot issued Petitioner a Notice of Proposed Suspension citing Petitioner's lack of participation in previous PIP processes. Petitioner filed a formal grievance (PV 140100B) in response to this notice, but was subsequently notified that because the suspension was a "proposed" action, it was not grievable.

74. On January 27, 2014, Petitioner was issued a PIP entitled "Boat anchorage/mooring mapping and ranking for the Florida panhandle (Bay county and west)," outlining specific tasks to be completed within six months. The PIP purports to take into account Petitioner's "experience, professional

expertise, contacts and academic credentials," but Petitioner has no experience in boat anchorage mapping.

75. According to the University's policies, the purpose of a PIP is to address deficiencies and weaknesses identified in a faculty member's annual performance evaluation or SPEP process. A PIP should identify particular deficiencies and lay out a plan and timelines to address the deficiencies.

76. The PIP presented to Petitioner bears little, if any, relationship to any individual deficiency noted in the various performance evaluations or Petitioner's SPEP. The plan directs Petitioner to prepare a publication rating mooring sites in the Florida Panhandle by various qualities (safety, bottom type, etc.) and provide boater maps to those sites, which is important to both recreation and safety during storm events. It is an assignment to develop a publication for the Panhandle similar to one existing for southwest Florida.

Outcome of Second-Level Step 1 Review

77. On February 27, 2014, Dr. Payne submitted his Step 1 review of Petitioner's grievances. The letter again acknowledged error in the Notice of Non-reassignment and confirmed that Petitioner's reassignment to Bay County was not the result of age discrimination. Dr. Payne disagreed with Petitioner's allegation that Dean Place's reference to Regulation 7.042 as "allowing reassignment of employees" was in

error. However, in order to rectify the situation, Dr. Payne rescinded the November 27, 2013 Step 1 review letter, rescinded the Notice of Proposed Suspension, and confirmed revocation of the October 28, 2013 Notice of Non-reappointment.

78. Dr. Payne replaced the Notice of Non-reappointment with a letter stating that Petitioner's administrative appointment as Franklin County CED was removed effective October 28, 2013, pursuant to University Regulations 7.003(5)(b) and 7.004(3)(e).

79. Regulation 7.003(5)(b) provides that a faculty member holding an administrative position may be moved or reassigned to other institutional duties "at any time during the term of the appointment."

80. Regulation 7.004(3)(e) provides "[t]he administrator directly responsible for the appointment and supervision of an academic-administrative classification or an administrative position may choose not to renew, to remove, or to reassign a faculty member at any time during such an appointment."

81. Thus, the University finally identified for Petitioner a regulation authorizing his reassignment approximately four months after he was reassigned.

82. Petitioner exercised his right to a Step 2 grievance review by the University Provost for Academic and Faculty Affairs, Dr. Angel Kwolek-Folland. Dr. Kwolek-Folland issued

her Step 2 review of Petitioner's grievance on June 18, 2014, finding no merit in Petitioner's allegations that he was reassigned based either on his age or in retaliation for complaints of discrimination.

83. Erik Lovestrand, who is younger than Petitioner, was eventually awarded the position of Franklin County CED. The record does not support a finding of Mr. Lovestrand's age at the time of appointment.

84. Petitioner filed his Complaint of Discrimination with the FCHR on February 20, 2014.

CONCLUSIONS OF LAW

85. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 120.569, 120.57(1), and 760.11(4)(b), Florida Statutes (2015).

86. Section 760.10(1)(a) states as follows:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

87. Petitioner is an "aggrieved person," and Respondent is an "employer" within the meaning of section 760.02(10) and (7), respectively.

88. The Florida Civil Rights Act (FCRA), sections 760.01 through 760.11, as amended, was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq. Federal case law interpreting Title VII is applicable to cases arising under the FCRA. See Green v. Burger King Corp., 728 So. 2d 369, 370-71 (Fla. 3d DCA 1999); FSU v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996).

89. Petitioner has the burden of proving by a preponderance of the evidence that Respondent discriminated against him. See Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

Age Discrimination

90. The United States Supreme Court has established an analytical framework within which courts should examine claims of discrimination, including claims of age discrimination. In cases alleging discriminatory treatment, the petitioner has the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997).

91. Petitioner can establish a prima facie case of discrimination in one of three ways: (1) by producing direct evidence of discriminatory intent; (2) by circumstantial evidence under the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); or (3) by establishing statistical proof of a pattern of discriminatory conduct. Carter v. City of Miami, 870 F.2d 578 (11th Cir. 1989). If Petitioner cannot establish all of the elements necessary to prove a prima facie case, Respondent is entitled to entry of judgment in its favor. Earley v. Champion Int'l Corp., 907 F.2d 1077 (11th Cir. 1990).

92. "[N]ot every comment concerning a person's age presents direct evidence of discrimination." Young v. Gen. Foods Corp., 840 F.2d 825, 829 (11th Cir. 1988). "[D]irect evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor . . . . If an alleged statement at best merely suggests a discriminatory motive, then it is by definition only circumstantial evidence." Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Likewise, a statement "that is subject to more than one interpretation . . . does not constitute direct evidence." Merritt v. Dillard Paper Co., 120 F.3d 1181, 1189 (11th Cir. 1997).

93. Petitioner offered Dr. Vergot's statement that Petitioner was a "dinosaur" as direct evidence of discriminatory intent. Petitioner's testimony is admissible as an admission, a hearsay exception pursuant to section 90.803(18)(a), Florida Statutes (2014). However, an evidentiary admission is not conclusive. The party who made the out-of-court statement may offer evidence to dispute the truth of the statement.[2/]

94. In the case at hand, the admission was contradicted by Dr. Vergot's sworn testimony that he never made such a remark. The undersigned must examine the credibility and reliability of each witness and determine the weight to give each.

95. Petitioner's testimony on this point was imprecise and Petitioner was unable to relate the timeframe or the context during which the remark was made. However, Petitioner did recall that the remark was made directly to Petitioner by Dr. Vergot outside of a business meeting. Dr. Vergot had a history as a poor manager, and was subject to counseling by Deans Obreza and Place, required to attend management training classes, and undergo a 360 performance review. On balance, Petitioner's testimony on this issue is more credible and reliable than Dr. Vergot's.

96. Nevertheless, Dr. Vergot's single reference to Petitioner as a dinosaur is insufficient to constitute direct evidence of discrimination. That statement alone is not

blatantly discriminatory on the basis of age. The record is not clear whether Dr. Vergot was remarking on Petitioner's age, his thinking, or his methods. Without some context, the undersigned cannot conclude otherwise.

97. The evidence does not support a finding that Dr. Vergot's remark regarding Petitioner was intended to discriminate against him based upon his age.

98. Petitioner also offered, as additional direct evidence of discriminatory intent, Dr. Vergot's statement that Petitioner would need to attain age 59 and one half prior to obtaining early retirement with medical benefits. The record does not support a conclusion that the statement is direct evidence of discrimination. Dr. Vergot's statement was made at the direction of an IFAS HR employee in an effort to ensure Petitioner was informed of the options available to him. While it may have been delivered in a sarcastic tone, the remark is insufficient to establish discriminatory intent.

99. "[D]irect evidence of intent is often unavailable." Shealy v. City of Albany Ga., 89 F.3d 804, 806 (11th Cir. 1996). For this reason, those who claim to be victims of discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

100. In McDonnell Douglas, 411 U.S. at 800-803, the Supreme Court articulated a burden of proof scheme for cases involving allegations of discrimination under Title VII, where the plaintiff relies upon circumstantial evidence. The McDonnell Douglas decision is persuasive in this case, as is Hicks, 509 U.S. at 506-07, in which the Court reiterated and refined the McDonnell Douglas analysis. Pursuant to this analysis, the plaintiff (Petitioner herein) has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (1996) (citing Arnold v. Burger Queen Sys., 509 So. 2d 958 (Fla. 2d DCA 1987)).

101. If, however, the plaintiff (Petitioner herein) succeeds in making a prima facie case, then the burden shifts to the defendant (Respondent herein) to articulate some legitimate, nondiscriminatory reason for its complained-of conduct. If the defendant carries this burden of rebutting the plaintiff's prima facie case, then the plaintiff must demonstrate that the proffered reason was not the true reason, but merely a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-03; Hicks, 509 U.S. at 506-07.

102. In Hicks, the Court stressed that even if the trier-of-fact were to reject as incredible the reason put forward by the defendant in justification for its actions, the burden nevertheless would remain with the plaintiff to prove the ultimate question of whether the defendant intentionally had discriminated against him. Hicks, 509 U.S. at 511. "It is not enough, in other words, to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination." Id. at 519.

103. In order to prove intentional discrimination, Petitioner must prove that Respondent intentionally discriminated against him. It is not the role of this tribunal to second-guess Respondent's business judgment. As stated by the court in Chapman v. AI Transportation, 229 F.3d 1012, 1030 (11th Cir. 2000):

> [C]ourts do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how mistaken the firm's managers, the [Civil Rights Act] does not interfere. Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior. An employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason. (citations omitted).

104. At the administrative hearing held in this case, Petitioner had the burden of proving that he was the victim of a

discriminatorily-motivated action. See Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996)("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."); Fla. Dep't of Health & Rehab. Servs. v. Career Serv. Comm'n, 289 So. 2d 412, 414 (Fla. 4th DCA 1974)("The burden of proof is 'on the party asserting the affirmative of an issue before an administrative tribunal.'").

105. To establish a prima facie case of unlawful discrimination on circumstantial evidence, the McDonnell Douglas framework requires Petitioner to prove that: (1) he was a member of a protected class; (2) he was subject to an adverse employment action; (3) he was either replaced by, or treated less favorably than, a substantially younger person; and (4) he was qualified to do the job. McQueen v. Wells Fargo, 2014 U.S. App. LEXIS 14387, at *7 (11th Cir. 2014); Horn v. UPS, 2011 U.S. App. LEXIS 13973, at *9 (11th Cir. 2011).

106. Petitioner established the first two elements of a prima facie case showing that due to his age, 59, he was a member of a protected class,[3/] and that he was subject to several adverse employment actions, including the 2010 "Improvement Required performance evaluation," the July 25, 2011 PIP/Written Reprimand, the July 25, 2011 Written Reprimand for Misconduct,

and the October 28, 2013 involuntary reassignment to Bay County.[4/]

107. Petitioner failed to establish the third and fourth elements. Although the record clearly established Petitioner was replaced as CED by a younger person, Mr. Lovestrand, there is no record evidence of Mr. Lovestrand's age at the time he was hired. Thus, a conclusion cannot be drawn that Mr. Lovestrand was substantially younger than Petitioner. While the Eleventh Circuit has held that an age difference of a mere three years suffices to establish this element of prima facie case, Carter v. DecisionOne Corp., 122 F.3d 997, 1003 (11th Cir. 1997), Petitioner failed to prove even that relative age difference.

108. Alternatively, to meet the third element, Petitioner could have demonstrated that he was treated less favorably than other similarly-situated individuals in a non-protected class. Petitioner offered no evidence of any comparators who were treated more favorably.

109. Assuming, arguendo, Petitioner had proven a prima facie case by a preponderance of the evidence, the burden shifted to Respondent to articulate a legitimate, non-discriminatory reason for its employment decisions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 (1981); Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). An employer has the burden

of production, not persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. Id. This burden of production is "exceedingly light." Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997); Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994).

110. Respondent met its burden of production in the numerous documents reflecting, and testimony corroborating, Petitioner's poor performance as CED.

111. If the employer produces evidence that the decision was non-discriminatory, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. Hicks, 509 U.S. at 516-518. In order to satisfy this final step of the process, Petitioner must "show[] directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Chandler, 582 So. 2d at 1186 (citing Burdine, 450 U.S. at 252-256).

112. IFAS and its administrative officials mishandled many of its duties with respect to Petitioner. Dr. Vergot was an ineffective manager, and was not closely supervising (perhaps not paying much attention) to the Franklin County programming prior to the actions of the County Commission during its 2010 budget sessions. IFAS HR fumbled its obligations to

identify regulations applicable to Petitioner's tenured faculty status and administrative assignment, causing IFAS administration to rescind, at least twice, its disciplinary missives, and leave Petitioner questioning the regulatory basis for his reassignment until four months after it became effective. The entire incident is no doubt embarrassing to the program and its faculty. However, ineptitude in management does not establish pretext for the adverse employment actions to which Petitioner was subjected.

113. Petitioner may be correct that Dr. Vergot was harsh with him.[5/] It was unfair to demand radical changes in both Petitioner's faculty duties (scholarly research, publication, and presentations) and administrative duties (educational programming, funding, reporting, and listening sessions) in a short timeframe during one of the most difficult economic times in recent history. The stress of those demands delivered by a harsh, sarcastic, and unsympathetic supervisor was likely unbearable. Petitioner was drowning under the burden of multiple disciplinary actions, given in a short timeframe, arising out of roughly the same course of action.

114. In Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. 1999), cert. den., 529 U.S. 1109 (2000), the court noted that courts "are not in the business of adjudging whether employment decisions are prudent or fair.

Instead our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision." The demonstration of pretext "merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." Holifield, 115 F.3d at 1565. While, in the present case Petitioner demonstrated poor management and unfair treatment, he did not prove his treatment was pretext for age discrimination.

115. In an age discrimination cases, a complainant must demonstrate that his age was the "but for" cause of adverse employment actions against him. See McQueen, 2014 U.S. App. LEXIS 14387, at *7. In the case at hand, the evidence does not support such a conclusion. It is more likely that the "but for" cause of the adverse employment actions was the county commission actions during the 2010 budget cycle. That event drew Dr. Vergot's attention to the programming and performance issues in the Franklin County extension office.

Retaliation

116. Section 760.10(7) prohibits retaliation in employment as follows:

> (7) 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. (emphasis added).

117. The burden of proving retaliation follows the general rules enunciated for proving discrimination. Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1178 (2d Cir. 1996).

118. Petitioner can meet his burden of proof with either direct or circumstantial evidence. Damon, 196 F.3d at 1358. Direct evidence must evince discrimination in retaliation without the need for inference or presumption. Standard v. A.B.E.L Servs., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998).

119. Petitioner did not introduce direct evidence of retaliation in this case.

120. Thus, Petitioner must prove his allegation of retaliation by circumstantial evidence. Circumstantial evidence of retaliation is subject to the burden-shifting framework established in McDonnell Douglas.

121. To establish a prima facie case of discrimination in retaliation, Petitioner must show: (1) that he was engaged in statutorily-protected expression or conduct; (2) that he suffered an adverse employment action; and (3) that there is some causal relationship between the two events. Holifield, 115 F.3d at 1566.

122. Petitioner opposed an unlawful employment practice when he filed his grievance alleging age discrimination as the

basis for the Notice of Non-Reappointment. Thus, Petitioner satisfied the first two elements to establish a prima facie case of retaliation.

123. To prove the third element, Petitioner must demonstrate a causal connection between the protected activity and the adverse employment decision. This causal 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 Circ. 1999)(internal citations omitted); Olmstead 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).

124. In the case at hand, Petitioner did not meet the third element. Petitioner's grievance was filed on November 27, 2013, after the October 28, 2013 Notice of Non-Reappointment. No causal connection can be established.

Conclusion

125. Based upon the evidence and testimony offered at hearing, Petitioner failed to establish a prima facie case against Respondent for either age discrimination or in

retaliation for opposing an unlawful employment practice. Therefore, the employment discrimination charge should be dismissed and none of the damages claimed by Petitioner should be awarded to him.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issue a final order dismissing FCHR Petition 201400215.

DONE AND ENTERED this 4th day of February, 2016, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of February, 2016.

ENDNOTES

[1/] The scale of overall ratings in ascending order is Unacceptable, Improvement Required, Standard Professional Performance, Commendable, and Exemplary.

[2/] See Charles W. Ehrhardt, Ehrhardt's Florida Evidence § 803.18, p. 984 (2013 Ed.).

[3/] The federal ADEA, on which the FCRA is modeled, protects employees aged 40 and older. The FCHR has determined that the age "40" has no significance in the interpretation of the FCRA. See Ellis v. Am. Aluminum, FCHR Order No. 15-059 (Sept. 17, 2015). Florida caselaw is silent on the matter.

[4/] Ordinarily, a written reprimand or counseling that amounts to no more than a mere scolding, without any following disciplinary action, does not rise to the level of adverse employment action. Barnett v. Athens Reg'l Med. Ctr., 2013 U.S. App. LEXIS *4-5 (11th Cir. 2013). Where, as here, a negative evaluation leads to a material change in the terms or conditions of employment, it rises to the level of an adverse employment action. Id.

[5/] Dr. Vergot's harsh treatment of Petitioner was likely due, in no small part, to the light this incident shed on Dr. Vergot's management shortcomings. Dr. Vergot's superiors expected him to correct the situation that he had enabled by engaging in "grade inflation" with respect to Petitioner.

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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.