STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LUIS ROSADO, III,

Petitioner,

vs. Case No. 16-6142

FLORIDA DEPARTMENT OF CHILDREN
AND FAMILIES,

Respondent.
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RECOMMENDED ORDER

On January 3 and 4, 2017, an evidentiary hearing was held by video teleconference at sites in Tallahassee and St. Petersburg, Florida, before Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Luis Rosado, III, pro se
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For Respondent: Elmer C. Ignacio, Esquire
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STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent committed an unlawful employment practice against Petitioner by discriminating against him on the basis of disability and/or age.

PRELIMINARY STATEMENT

On February 15, 2016, Luis Rosado, III (Petitioner), filed with the Florida Commission on Human Relations (FCHR) a charge of discrimination against his former employer, the Department of Children and Families (Respondent or DCF), in which he alleged that he was terminated because of his disability and age. FCHR conducted an investigation, after which it determined there was no reasonable cause to believe that an unlawful employment practice occurred. Petitioner timely requested an administrative hearing, and on October 19, 2016, FCHR referred the case to DOAH to conduct the requested hearing.

The hearing was scheduled based on the parties' input and a telephonic pre-hearing conference was also scheduled.

On November 15, 2016, Joseph D. Rosado, Petitioner's son, filed a one-paragraph "Request for Qualified Representative." He asserted that he "shall be representing" Petitioner, and he stated that he was qualified, paraphrasing the considerations in Florida Administrative Code Rule 28-106.106. By Order issued November 21, 2016, the request was denied, as improper in form (in that the request is to come from Petitioner), and inadequate in substance to prove that the proposed representative is qualified (such as by an affidavit attesting to facts that show how the proposed representative has attained the various qualifications to be considered). The Order was without

prejudice to Petitioner submitting a proper request, supported by evidence of his son's qualifications.

During the telephonic pre-hearing conference on December 15, 2016, Petitioner was asked if he intended to file a request for approval of a qualified representative; and, if so, he was told that his request should be filed as soon as possible. His son, Joseph Rosado, who was present with Petitioner, stated that no request would be submitted. The undersigned provided an overview of the de novo hearing process and the issues for determination, explaining that Petitioner would bear the burden of proving his claims, and that he would need to determine what sworn testimony and documentary evidence to present to meet his burden of proof. The parties' responsibilities to exchange and submit to DOAH witness lists and proposed exhibits were discussed.

Prior to the hearing, Respondent filed its witness list, exhibit list, and proposed exhibits. Nothing was received from Petitioner.

The hearing went forward as scheduled. Petitioner represented himself. He testified on his own behalf and called no other witnesses. Petitioner did not offer any documentary evidence. Respondent presented the testimony of the following witnesses: Karen Gibson, former child protective investigator supervisor; Amy Baldree, former program administrator; Ranjana Bhandari, former employee relations coordinator; Rosa Baez,

former family and community services director; Gilda Ferradaz, deputy regional managing director; Elvin Quinones, former child protective investigator; Lisa Careaga, child protective investigator; and Petitioner. Respondent's Exhibits 1 through 11 were admitted in evidence, without objection.

At the conclusion of the hearing, the parties agreed to a two-week deadline after the filing of the hearing transcript for filing proposed recommended orders (PROs). The two-volume Transcript of the final hearing was filed on January 23, 2017. Petitioner filed his PRO and closing statement on January 30, 2017.[1/] Respondent timely filed its PRO on February 6, 2017. To the extent permissible (see endnote 1), both parties' filings have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner worked for Respondent as a child protective investigator (CPI) in Key West, Florida, for just over eight months, from June 30, 2014, until March 2, 2015.

2. Petitioner generally described his background prior to working for Respondent as including 30 years of work experience as a police officer, parole and probation officer, and insurance investigator.

3. Petitioner began working for Respondent in a temporary part-time OPS position on June 30, 2014.

4. Petitioner was required to complete a 10- to 12-week CPI training course and pass a test to attain provisional CPI certification in order to become eligible for a career service CPI position on a probationary basis. The probationary period for CPIs is one year from the effective date of employment in the career service position.

5. The CPI training program for the DCF region that includes Key West was held on three days each week in Miami. Petitioner began the training program sometime in July 2014. Petitioner commuted from Key West to Miami for the training sessions, and spent the other two days each week working in his OPS position in Key West, shadowing and observing CPIs. During this time, he was not assigned cases or allowed to take responsibility in investigations, but may have performed minor tasks, such as making phone calls to assist the CPIs.

CPI Essential Job Functions

6. The official state of Florida position description for the CPI position provides the following overview of the job: "This is professional work protecting children, working with families and conducting investigations of alleged abused, abandoned, neglected or exploited children." (R. Exh. 2). The job description sets forth a long list of CPI duties and responsibilities necessary to carry out that overall function, including the following (among others):

- Collects information through interviews with the children, parents, relatives, neighbors, and other parties associated with the case;

- Engages families, identifies needs and determines the level of intervention needed to include voluntary services or court ordered dependency services;

- Conducts initial/ongoing child Present and Impending Danger assessments;

- Develops with the family a signed Present Danger Plan and a signed safety plan for any identified threats and interventions;

- Arranges emergency placement for any child that cannot safely remain at home;

- Prepares appropriate reports/documentation in coordination with Children's Legal Services and provides testimony in court;

- Maintains thorough documentation in client records/appropriate information system(s) and maintains organized client files.

7. The official job description also identifies chapter 39, Florida Statutes, as the statutory chapter that establishes or defines the work performed in the CPI position. Statutes in this chapter, such as section 39.301, elaborate on the requirements for conducting child protective investigations when allegations of child abuse, neglect, abandonment, or exploitation are made to the central abuse hotline and referred to DCF. The statutes governing child protective investigations, along with DCF implementing rules and internal operating procedures, provide for strict time requirements for promptly initiating investigations

when new cases are referred from the central abuse hotline, identifying and interviewing witnesses, assessing danger, developing plans to address dangerous situations and to ensure child safety, monitoring plans, marshalling community resources, and ultimately, completing and closing the investigation within an outside limit of 60 days in all cases. Only two exceptions are provided in the statute to the strict 60-day case closure deadline: when there is an active concurrent criminal investigation that would be compromised; or in child death cases when the medical examiner's final report is necessary but not received within 60 days. See § 39.301(16), Fla. Stat.

8. In short, as well described by Respondent's witnesses, from Petitioner's supervisor on up the chain of command through the DCF deputy regional managing director for Miami-Dade and Monroe Counties, timely and thorough performance and documentation of all of the critical steps of child protective investigations described above are essential to ensure the safety and well-being of Florida's children. A misstep, a delayed step, or a step taken but not thoroughly documented could result in harm (or worse) perpetrated on a vulnerable child, which might otherwise have been prevented. The CPI job is not an easy one; it is a difficult, demanding job with no leeway for sliding on deadlines or cutting corners on job performance.

9. The official CPI job description specifies that on-call duty is required. New case reports from the central abuse registry that require child protective investigations can arise at any time of the day or night. Depending on the nature of the case, the assigned CPI will be required to make first contact with the child either immediately or, at the outside, within 24 hours. Since the DCF offices are only open eight hours per day, five days per week, the rest of the hours--nights and weekends--have to be covered by at least one on-call investigator and one on-call supervisor, so that cases can be opened and the investigation process started. On-call CPI duty is rotated; on average, a CPI is expected to take on-call duty one night of the week and one weekend per month.

10. Another essential function of the CPI position is to become proficient using the Florida Safe Families Network (FSFN) computer system, which is a central system used by the central abuse registry to submit new case reports to the appropriate DCF office, and by DCF to document every aspect of an investigation, from inception to closure. Use of the FSFN system is specifically incorporated in the requirements for child protective investigations set forth in Florida Administrative Code Chapter 65C-29. See, e.g., Fla. Admin. Code R. 65C-29.003(1)(a) (requiring documentation in FSFN of a CPI's

rationale for downgrading an “immediate response” case to a “24-hour response” case).

11. Training in the use of the FSFN system begins in the 10- to 12-week CPI training course required to obtain provisional CPI certification. Thereafter, FSFN proficiency is gained through on-the-job use. New CPIs may initially need some assistance from more seasoned CPIs in their offices and/or from their supervisor until they learn all aspects of the system, but the FSFN system is not considered difficult to master and it should not take long for new CPIs to learn to the point of not requiring assistance.

12. Another essential job requirement for the CPI position, according to the official position description, is a valid driver’s license. In conducting investigations, CPIs must be able to quickly and independently navigate from the DCF office to the homes of the subjects of an abuse report, to other homes and businesses to interview witnesses and conduct inspections, to schools where children to be interviewed might be found, to court when necessary to offer testimony, and other places.

Petitioner’s Undisclosed Stroke Episode

13. According to Petitioner, on July 31, 2014, while Petitioner was in Miami in the early weeks of his CPI training, he woke up feeling strange and stiff. However, he was able to go to his training course. When he arrived, a classmate allegedly

asked Petitioner if he was feeling okay. Petitioner remained in class for the day's training session. After class, the same classmate allegedly said that Petitioner should go to the hospital to get checked out. Petitioner said that after some resistance, he agreed and allowed the classmate to take him to an emergency room. The classmate did not testify at hearing.

14. Petitioner testified that his classmate waited with him at the emergency room for a short time, then left. Petitioner remained alone at the emergency room for about six and one-half hours without being seen by a physician. At that point, Petitioner was feeling better and was unwilling to wait any longer, so he had his son take him to his brother's home where Petitioner stayed when attending the Miami training sessions.

15. The next day (Friday, August 1, 2014), Petitioner still felt stiff, but well enough to attend the day's training session. After the training, he drove from Miami to Port Orange, where his wife lived. (He had only recently relocated to Key West to begin his new OPS job, and his wife had not yet joined him there.)

16. Petitioner said that his wife wanted to take him to the hospital to be checked out upon his arrival Friday evening, because she did not think he looked good (after a day's training followed by a long drive). Petitioner "dismissed her concerns" (Tr. 40), and stayed home that night. The next day--two full days after Petitioner woke up feeling strange and stiff--his wife

repeated her request that he get checked, and this time he agreed. Petitioner went to an emergency room and was subsequently admitted to the hospital from Saturday afternoon to Monday afternoon for testing. Petitioner said that he was informed by the doctor that the test results indicated that he had had two strokes, one affecting each frontal lobe of his brain. No documentation of this hospital stay, the test results, or the diagnosis was offered in evidence.

17. From the hospital, Petitioner called his direct supervisor, Karen Gibson, the child protective investigator supervisor (CPIS) for the Key West office. Petitioner told her that he was in the hospital because of diabetes, explaining that he had not been following his diet and had let himself get out of control. He did not ask for any accommodation for the diabetic condition (indeed, it is unknown whether Petitioner actually has or had diabetes, as no evidence was offered on that subject). Instead, Petitioner assured his supervisor he would be able to return to work and training right away. According to Petitioner, it was Ms. Gibson who told him to take some time off. She said that he should not return to Key West Monday or Tuesday, but rather, he should go straight to Miami on Wednesday to resume training. He did as she suggested.[2/]

18. Petitioner admits that he did not tell Ms. Gibson in the beginning of August 2014, or for many months thereafter, that

he had been diagnosed with having had two strokes. Petitioner did not deny Ms. Gibson's testimony that he had told her he was in the hospital due to diabetes. Petitioner acknowledges that it was his choice to not disclose the truth about the hospital stay. It was not until Petitioner had been counseled repeatedly by Ms. Gibson for not properly performing his CPI duties, and after he had been told that if he could not perform his duties he would not be able to keep the job, that Petitioner disclosed that he had had a stroke.

19. No medical information was provided to Ms. Gibson, nor was any offered at hearing, to illuminate Petitioner's condition in August 2014 or at any time thereafter while he was employed by Respondent. It is unknown whether Petitioner's description of what he was told by a doctor in August 2014 is accurate.[3/]

20. Petitioner failed to prove, other than in the most general anecdotal way, the nature or extent of his condition in August 2014 or thereafter while employed by Respondent. It is unknown whether the strokes he said he was told about were considered minor, severe, or somewhere in between; what sort of medical professional(s) Petitioner saw and how frequently; what medication was prescribed for Petitioner for what purpose; what specific symptoms were attributed by such medical professional(s) to his July 31, 2014, episode; what sort of treatment or therapy may have been recommended by any such professional(s); and how

the medical professional(s) have described Petitioner's prognosis then or at any time since then.[4/]

21. What is known about Petitioner's condition following the undisclosed stroke incident is that after Petitioner took the extra one or two days off as Ms. Gibson suggested, Petitioner was able to return to a full schedule of training in Miami, plus working two days per week in Key West, for the rest of August and September 2014. There is no evidence that Petitioner expressed any concerns about his physical or mental health, or experienced any health problems that interfered with his ability to work, to participate and learn in training sessions, and to frequently drive back and forth between Miami and Key West.

22. Petitioner successfully completed his CPI training on September 26, 2014, and he took and passed the test to obtain provisional CPI certification. With the training and provisional CPI certification, Petitioner qualified for a career service CPI position with probationary status. He was offered that position and accepted. He was transferred into the position on October 3, 2014, marking the beginning of his one-year probation.

Petitioner's Job Performance

23. Petitioner was eased into his new CPI position with a lot of direct supervision by CPIS Gibson and assistance from the other CPIs working in the Key West office.

24. Although Petitioner was eligible to receive new case assignments upon obtaining his provisional CPI certification, as a matter of course with all new CPIs, Petitioner's supervisor would assign fewer cases at first, direct the more difficult cases to other CPIs for at least the first month or two, and staff cases so that new CPIs would be working on their cases along with other CPIs to the extent possible. She did this for Petitioner, so that at first, he had a lower volume of easier cases on which other CPIs assisted him.[5/] He was also not immediately put into the on-call rotation, taking his first on-call assignment on a weekend late in December 2014.

25. Petitioner's performance on individual cases was documented in FSFN entries in the individual case files. At defined stages of an investigation, the progress would be reviewed by the CPIS, who would discuss the case with the CPI and issue or revise supervisory directives to identify tasks that the CPI needed to accomplish in the investigation. These benchmark points included: initial intake assessment performed by the CPI within 48 hours of case assignment and submitted to the supervisor for the initial supervisory review; case update submitted by the CPI after 30 days for the supervisory 30-day review; and investigation completed by the CPI and submitted to the supervisor for closure after 45 days. These supervisory reviews were documented in the FSFN case file by the CPIS.

26. As an example in evidence, an excerpt of the FSFN chronological notes report for one investigation assigned to Petitioner contains a summary entered by Petitioner's supervisor on October 31, 2014, documenting the initial supervisory review. Supervisory directives to Petitioner were listed as items that "CPI needs to" do, including requesting law enforcement calls to the home and requesting medical records from the hospital where the 14-year-old child had been admitted under the Baker Act. In a follow-up note on review of the investigation submitted for 45-day closure, Ms. Gibson set forth a list of items that Petitioner still needed to do, including documenting the law enforcement calls to the home that he was to have requested as a result of the initial supervisory review. In another follow-up note on December 24, 2014, Ms. Gibson reported that she had to request the hospital records for the 14-year-old's Baker Act stay, because "CPI Rosado had previously requested from incorrect hospital." (R. Exh. 1 at 4).

27. FSFN notes from other individual case files reflect other issues of concern with Petitioner's performance as a CPI. In one investigation of a three-year old child with a burn mark, the initial supervisory review notes entered by Ms. Gibson on December 22, 2014, reported that the mother has two children, ages three and one, by two fathers, and that she recently separated from the youngest child's father and began living with

her current paramour. Supervisory directives to Petitioner included: requesting medical collateral documentation; interviewing the boyfriend separate from the mother; interviewing both fathers and, if the children go to their homes, visiting the fathers' homes; and attempting a collateral interview with a maternal relative. On January 23, 2015, the 30-day supervisory review notes entered by Ms. Gibson reported that Petitioner still needed to interview both fathers, document observations of both fathers' homes, request medical collateral documentation for the children and upload the records to FSFN, and attempt a collateral interview with a maternal relative. Pointing out that there was not much time to accomplish these directives (many of which remained undone for over 30 days), the entry noted that the investigation was due to be submitted for closure on February 6, 2015. On February 1, 2015, Ms. Gibson completed an entry reporting that Petitioner submitted the investigation for 45-day closure, but the investigation was incomplete and recalled, because "CPI has not completed prior supervisory directives in first and 30-day reviews." (R. Exh. 1 at 18).

28. Several other examples were shown in the FSFN notes of investigations submitted by Petitioner for closure, but which were incomplete and recalled. Petitioner admitted what is documented in the records of his investigations: that he had problems meeting the time frames imposed for completing the

investigations, and that he had problems completing and documenting all of the supervisory directives.

29. FSFN notes of other investigations show that Petitioner did not thoroughly document the investigative steps he did complete. Instead, in supervisory reviews, Petitioner frequently had to be asked to upload documents he had collected, to document that he accomplished certain supervisory directives, to clarify his interview summaries, and to clarify whether he had asked certain questions germane to the specific case. A particular problem in this regard was Petitioner's inability to hone in on the critical information needed to assess the child's safety, when conducting and summarizing interviews and providing back-up documentation in the FSFN case files. As Petitioner's supervisor credibly described the problem, Petitioner would amass a lot of information in the course of his investigations, but not necessarily the information needed to assess the child's safety in light of the allegations to be investigated.

30. One FSFN note of particular concern documented a 30-day supervisory review of an investigation assigned to Petitioner. The intake was received on January 4, 2015, for investigation of a child's safety. Both the mother and stepfather were arrested for domestic violence. Petitioner had developed a safety plan, meaning that he determined that the plan was necessary to ensure the child's safety. The safety plan, signed by the mother only,

indicated that the stepfather would not return home. Petitioner discussed the safety plan with the stepfather, but did not ask him to sign it. Of greatest concern was the note that as of the 30-day review, Petitioner had not worked on the case since the initial supervisory review, had not monitored the safety plan, could not report as to the family's circumstances or safety plan compliance, and had not been back to the home. Ms. Gibson noted that she counseled Petitioner regarding the importance of monitoring safety plans. She added that Petitioner still needed to complete the initial supervisory directives issued in January.

31. Petitioner's supervisor testified credibly that the foregoing example was symptomatic of Petitioner's overall inability to effectively manage his cases. He did not demonstrate good choices in prioritizing his tasks within a case or among his cases. Examples such as the foregoing one in which a case that required a safety plan to ensure the child's safety was left dormant by Petitioner for 30 days demonstrate that it is a matter of sheer fortuity that there were not dramatic, tragic consequences from Petitioner's failure to properly perform his duties as a CPI.

32. At hearing, Petitioner acknowledged his performance problems. He was well aware that when he was a CPI, he was having problems meeting case deadlines, completing the necessary tasks for each investigation by those case deadlines, and

completing the supervisory directives in his cases. He was well aware that cases he submitted for closure were being recalled to him because they were not ready for closure. Indeed, all of these performance problems were repeatedly called to Petitioner's attention in supervisory case reviews, as documented in the FSFN case files.

33. In addition to these investigation-specific problems of not meeting the time frames necessary to complete investigations for timely closure, not completing specific supervisory directives, not documenting what was done, not uploading documentation collected, and not clearly summarizing interviews and information, Petitioner had trouble learning how to use FSFN.

34. Some learning-curve time is to be expected to master all of the mechanics of logging in, checking for new cases referred by the central abuse hotline, creating a new case file, entering interview summaries, reviewing existing case files for information entered in supervisory reviews or by other CPIs working on the investigation, uploading documents such as medical records and signed safety plans, and similar tasks. However, Petitioner's supervisor credibly testified that after allowing for reasonable learning-curve time, Petitioner was still not catching on and was not showing any signs of progress. Instead, he required constant help from her and from other CPIs to perform even the most basic steps. He repeated the same requests for

help and received the same instructions multiple times. As another CPI who worked with Petitioner in the Key West office described Petitioner's difficulties with basic, everyday FSFN tasks, "He would ask for assistance and you would explain it to him and then a short time later or the next day he would ask the same question . . . as if he couldn't remember to--how it was done." (Tr. 327).

35. Petitioner admitted that he had to be given the same instructions over and over by his supervisors because he could not remember the instructions previously given to him. He admitted that he asked the same questions and asked for assistance with the same tasks because he had problems remembering that he had been given those instructions before.

36. As an example, Petitioner was assigned to on-call duty on the weekend of February 28, 2015. Although it was Petitioner's third on-call duty experience, and although Petitioner had been working in his career service CPI position for five months, he could not remember how to check the FSFN new case screen for referrals from the central abuse registry. He had to ask for help from another on-call CPI, who walked him through the process to check the new case screen, accept the new case that was waiting, and open a new investigation file. The other worker had to give Petitioner advice to review the new case with the on-call supervisor. Petitioner went in to see

Ms. Gibson, and even though he had just been walked through the process, Petitioner had to ask Ms. Gibson to show him how to access the new case file. He told her he was embarrassed to have to ask again. At hearing, Petitioner admitted that he had to repeatedly ask for assistance when using FSFN because he had trouble remembering how to use the system.

<u>Petitioner's Disclosure</u>

37. Even before the on-call problem on February 28, 2015, Petitioner's supervisor had discussions with her supervisor, Program Administrator Amy Baldree, regarding dissatisfaction with Petitioner's performance, despite the repeated counseling and directives evident from the FSFN case notes discussed above.

38. Ms. Gibson candidly acknowledged that "at this point [mid-February 2015] we were trying to move towards termination with Mr. Rosado." (Tr. 131). She was told that she needed to document her counseling of Petitioner. Although there was documentation of counseling in the FSFN notes for individual cases, Ms. Gibson admitted that she had not prepared any probationary progress reviews for Petitioner. According to Respondent's employee relations coordinator, ideally supervisors complete probationary progress reviews monthly for CPIs during their one year on probation.

39. Ms. Gibson proceeded to complete probationary progress review forms for Petitioner for the months of December 2014,

January 2015, and February 2015. The completed evaluation forms were all presented to Petitioner and signed by Ms. Gibson and Petitioner on the same day, February 23, 2015.[6/] Although it would have been better practice for each of these progress reviews to have been prepared and presented to Petitioner close to the time period addressed in each review, Ms. Gibson credibly explained that nothing written in the three months of progress reviews was new to Petitioner. Instead, the review forms contain samplings of the same types of performance problems that she had been discussing repeatedly with Petitioner in supervisory reviews of individual cases assigned to him. Her explanation is supported by the FSFN individual case notes.[7/]

40. According to Petitioner, he responded to the performance reviews by disclosing to Ms. Gibson on February 23, 2015, one week before he was terminated, that he had suffered two strokes, as if to explain his performance issues. He claims that Ms. Gibson's comment was that he just needed to work faster if he wanted to keep his job.

41. Ms. Gibson acknowledged that at some point close in time to the February 23, 2015, performance review discussion, and shortly before Petitioner was terminated, Petitioner disclosed to her that he had had a stroke (one, not two). However, she recalled the conversation differently. According to Ms. Gibson, she and Petitioner were having one of their periodic discussions

about performance problems, such as missing deadlines or failing to complete supervisory directives, and he acknowledged that he was having difficulty remembering things. Her response was that he could not stay in the CPI position unless he could perform his duties and remember his directives and responsibilities. It was at that point that he said that he guessed he had to tell her that he had a stroke.

42. Ms. Baldree was present when Ms. Gibson presented the performance reviews to Petitioner on February 23, 2015. She testified that Petitioner asked her whether Ms. Gibson had told her that he had had a stroke recently. She said yes, and Petitioner responded that he just wanted to make sure she was aware. She asked him how he was doing and he said, "Fine. I'm seeing a doctor." That was the end of the conversation.

43. Regardless of how or exactly when Petitioner finally disclosed to his supervisors the fact that he had had a stroke or two strokes (not so recently, but rather, nearly seven months before his disclosure), the evidence establishes that Petitioner was unable to perform the essential functions of his job. Petitioner admitted as much.

44. Petitioner acknowledges that he never requested a specific accommodation to enable him to perform his job. Petitioner seemed to suggest that if only he had been told to take a leave of absence, he could have undergone rehabilitation

and gotten better. However, he never asked for days off, much less any extended leave of absence, so that he could undergo rehabilitation.

45. Petitioner testified that while he was employed with Respondent, he had an insurance policy that he had obtained through the state. Although the policy was not offered in evidence, it was described in terms that sounded like short-term disability insurance (which would have been made available for Petitioner to purchase, but was not a benefit actually provided by DCF). Petitioner contends that he should have been allowed to take time off using that insurance policy to receive income while not working. However, Petitioner admitted that he never asked to take time off. Moreover, he never submitted a claim under the short-term disability policy, because he said he did not know he could (and whether he could have or not is unknown, as there is no record evidence to answer that question).

46. Petitioner testified that he never asked for any accommodation because he was afraid to ask for an accommodation while a probationary employee. Alternatively, and somewhat inconsistently, he also testified that he did not ask for a specific accommodation because he thought his supervisors would know what he needed and would refer him to the right place for assistance.

47. At hearing, Petitioner was unable to identify any specific accommodation that would have enabled him to perform the essential functions of his CPI position. The best he could offer was that he should have been allowed to go slower, or should have been assigned a full-time mentor to work with him every day to slowly explain to him how to do his job, since he believes his main performance problem was that he could not complete investigations quickly enough. However, the fast time lines for moving forward on investigations, with the interim supervisory reviews and benchmarks, are essential to the job because of the statutorily-mandated investigation closure deadline.

Petitioner's Termination

48. Ms. Gibson and Ms. Baldree discussed their concerns about Petitioner's performance with the DCF employee relations coordinator, Ranjana Bhandari, and they offered their view that Petitioner's employment should be terminated.

49. Ms. Bhandari reviewed the three probationary progress reviews, and asked for additional documentation.

50. Ms. Gibson and Ms. Baldree prepared a memorandum providing more detail regarding the history of performance problems since Petitioner was transferred into the career service CPI position, the additional instruction and oversight provided to Petitioner because of his inability to perform his duties without constant assistance, the lack of improvement, and the

constant counseling that had been provided to him to impress upon him the importance of meeting the deadlines for investigations and carrying out supervisory directives.

51. Additional specific examples of performance problems were provided in the memo. One such example was a recent investigation involving three children, with allegations of sexual abuse. The case was initially assigned to Petitioner on January 30, 2015. Ms. Gibson asked another CPI, Mr. Quinones, to go with Petitioner to interview the children, and they did so on a Friday at the children's school. The next Monday, Ms. Gibson asked Petitioner about the case, which she identified by name. Petitioner did not recognize the name. Ms. Gibson added details: "You know--the sexual abuse case with the three African American children you interviewed at [name of school] on Friday?" Petitioner responded with a blank look; he had no recollection of the case. Ms. Gibson reassigned the case to another CPI.

52. Another more recent example was provided, in which Petitioner was assigned a new case on February 18, 2015, and he told Ms. Gibson he planned to see the children at school the next day. The next day, after the 24-hour response deadline had passed, Ms. Gibson asked him about the case, and he responded that he had not yet seen the children because he had gone out on another investigation that Ms. Gibson determined was not as high a priority as meeting the 24-hour deadline in the new case. Not

only was he late seeing the children for the first time in the new case, but he was also late finishing the child safety assessment for those same children.

53. Bringing the performance report completely current, among other examples detailed in the memo, Ms. Gibson and Ms. Baldree recounted Petitioner's continued FSFN failures that hampered his performance of his on-call duty over the weekend of February 28, 2015.

54. Ms. Bhandari reviewed the memorandum and determined that the documentation was sufficient and supported the recommendation that Petitioner be terminated because of his demonstrated inability to perform the duties of a CPI. Ms. Bhandari did not know about Petitioner's recent disclosure of his stroke episode seven months earlier. Ms. Bhandari did not know Petitioner's age.

55. Rosa Baez also reviewed the documentation supporting the proposed termination of Petitioner's employment. At the time, Ms. Baez was a family and community services director who oversaw DCF programs, including child protective investigations. Her role was to review the reasons why the program administrator and the employee's supervisor were recommending termination, and unless she disagreed with the recommendation, she would let the process go forward. After reviewing the documentation regarding Petitioner's performance provided by Ms. Bhandari, she did not

disagree with the proposed termination, since child safety was an issue. Ms. Baez did not know about Petitioner's recent disclosure of a stroke episode seven months earlier, nor did she know Petitioner's age; there was nothing in the memo or progress reviews regarding either subject.

56. The documentation and recommendations were provided to Gilda Ferradaz, the deputy regional managing director, who made decisions on proposed dismissals of probationary employees. She reviewed the material and made the decision to terminate Petitioner's employment, signing the letter informing Petitioner of that decision. She explained the basis for her decision:

> [T]his was a probationary employee in a child protective investigation role. This work is very critical work; it is very detail-oriented. We have to make sure that the staff we have working have--are fully grasping all of the responsibilities of this position, making sure all of the assessments are fully done, all of the appropriate people are interviewed, and that decisions are made based on all of the information available to make sure that children aren't at risk. And it seemed that this employee was not able to grasp the scope of responsibility for this critical position. (Tr. 305).

57. Ms. Gibson and Ms. Baldree met with Petitioner on March 2, 2015, to deliver the termination letter signed by Ms. Ferradaz. Petitioner signed the letter to acknowledge that he received it.

58. Petitioner testified that when he was presented with the termination letter on March 2, 2015, he asked Ms. Gibson and Ms. Baldree whether they could extend the same courtesy that they provided to former CPI Jeffrey Qualls, by demoting him to another position instead of terminating him.

59. Contrary to Petitioner's testimony, both Ms. Gibson and Ms. Baldree denied that Petitioner made any such request. There is nothing in writing to substantiate Petitioner's claim that he asked to be treated the same as Mr. Qualls.[8/]

60. Even if Petitioner had requested a demotion, Petitioner offered no proof that there was a vacant position available for him at the time. Instead, Petitioner admitted that he does not know if there was any position available at the time to which he could have been demoted. The only evidence on the subject was Ms. Baldree's testimony that, in fact, there was no open position at the time to which Petitioner could have been demoted. As program administrator, she would be in a position to know or to research that question when Petitioner's claim was made known during this proceeding (such as in his deposition).

61. Even if Petitioner had proven that there was an available lower-level position at the time of his termination, Petitioner's own testimony raises considerable doubt as to whether Petitioner was capable of working at all in any kind of DCF position had one been available.

62. Petitioner was asked about the efforts he made to find another job after he was fired. Petitioner responded: "I was not able to make--have any efforts to look for other employment because of my mental health status. . . . I didn't feel I was able to perform a job with the residual effects from the two strokes I was having." (Tr. 64).

63. Petitioner added that although he was not looking for work, during the spring of 2015 after he moved to Tarpon Springs, he agreed to work part-time at Old McMicky's Farm, a children's farm in Odessa. His job was to lead groups of children on a walking tour of six or seven stations. Multiple tours would be conducted at the same time, with other groups led by other employees. To evenly distribute the tour groups among the stations, each tour leader was required to lead his or her group through the stations in a certain order, and the assigned order would change depending on the number of tour groups. Petitioner was terminated from the job after a few weeks, because he could not remember the order of the stations to which he was supposed to lead his group, and he would sometimes skip a station or two.

64. Petitioner explained that the reason he took the job at Old McMicky's Farm was: "I wanted to get my feet wet and see if I could do a job. It turned out that even though [the job involved] most[ly] menial tasks, I was failing at it." (Tr. 90). Petitioner has not attempted work since then.

65. For purposes of pursuing his charge of discrimination on the basis of a disability, Petitioner was required to submit to FCHR either medical records to prove a disability or a completed medical certification form. After receiving an extension of the deadline, Petitioner submitted a medical certification form completed on July 5, 2016, by a doctor identifying himself or herself as having a specialty in the area of neurology. The doctor checked the "yes" box in answer to the question asking whether he/she is the complainant's treating medical professional with knowledge of the complainant's medical condition and history. No details were provided. Also answered yes was the question asking whether the complainant has a physical or mental impairment that substantially limits one or more major life activities. On the following pages, the doctor identified those life activities as seeing (sufficiently to perform daily functions/general hygiene), learning ("has a hard time learning new things, memory affects this"), performing manual tasks ("drops things with right hand"), speaking ("when tired has slurred speech"), and walking ("loses balance easily, stumbles, falls"). (R. Exh. 7). This form was accepted by FCHR. Although for purposes of this hearing, the completed form is hearsay, it does lend some credence to the notion that Petitioner has a disabling condition (at least as of July 2016).

66. Petitioner said that over time, he has gotten worse. He testified that he is hardly able to drive now, and his memory is worse--he is not able to remember his street address.

Claimed Damages

67. Petitioner did not prove the existence or amount of damages caused by the claimed unlawful employment practice.

68. Petitioner testified that he was seeking one year's salary and benefits as back pay. However, Petitioner's own testimony establishes that he was unable to perform the CPI duties, or any job duties, in the year after he was terminated. If Petitioner had been able to work but simply chose not to, then he would have failed to mitigate damages by not looking for another job--but he said that he was completely unable to work.

69. Petitioner's inability to work in even a less demanding job with menial duties is demonstrated by his failed experience working at Old McMicky's Farm only a month or so after he was terminated.

70. Petitioner cannot claim compensatory damages for income lost by reason of having been terminated when he admits that he was unable to do any kind of work.

71. Petitioner alluded to other damages, such as moving expenses, but he offered no evidence to prove what his actual expenses were in any of these areas of claimed loss.

Ultimate Facts

72. Accepting Petitioner’s marginal showing that he was, at the relevant time, a person with a disability, Petitioner failed to prove that he was qualified to perform the essential functions of the CPI position, with or without accommodation. Instead, the evidence established that Petitioner was unable to perform the essential functions of a CPI, with or without accommodation.

73. Petitioner never requested a specific accommodation to enable him to perform his duties as a CPI.

74. Petitioner failed to prove that there was any reasonable accommodation he could have requested that would have enabled him to perform the essential functions of his job.

75. Respondent offered a legitimate non-discriminatory reason for terminating Petitioner’s employment. Beyond just articulating a reason, Respondent proved that Petitioner’s employment was terminated based on well-documented performance problems in virtually all essential areas of the CPI position, and not as a pretext for unlawful discrimination.

76. Petitioner failed to prove that Respondent intentionally discriminated against Petitioner because of his disability.

77. Petitioner did not prove that there was any similarly situated person who was not disabled and who was treated more favorably than Petitioner.

78. Petitioner failed to prove that Respondent intentionally discriminated against Petitioner because of his age. Indeed, the record is devoid of any evidence, circumstantial or otherwise, directed to Petitioner's charge of age discrimination.

79. Petitioner did not prove that there was any similarly situated person of a different age than Petitioner and who was treated more favorably than Petitioner.

CONCLUSIONS OF LAW

80. The Division of Administrative Hearings has jurisdiction over the subject matter of, and parties to, this proceeding, pursuant to sections 120.569, 120.57(1), and 760.11(7), Florida Statutes (2016).[9/]

81. Section 760.10(1) provides that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an employee "because of" the employee's handicap (used interchangeably with disability) or age.

82. Invoking this statute, Petitioner claims that he was unlawfully discharged by Respondent because of his disability and/or his age, resulting in damages. Petitioner bears the burden of proving his claim and the resulting damages by a preponderance of the evidence. See EEOC v. Joe's Stone Crabs, Inc., 296 F. 3d 1265, 1273 (11th Cir. 2002) (claimant bears the

ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee);
§ 120.57(1)(j), Fla. Stat.

83. Respondent is an "employer" within the meaning of the Florida Civil Rights Act (FCRA). § 760.02(7), Fla. Stat.

84. FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing the FCRA. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

85. Discriminatory intent can be established through direct or circumstantial evidence. Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without inference or presumption. Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

86. "[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." Schoenfeld v. Babbitt, supra. In this case, Petitioner has presented no direct evidence of discrimination based on disability or age. Instead, Petitioner relies on circumstantial evidence to prove intentional discrimination.

87. The burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), is applied in circumstantial evidence-based discrimination cases. Under this analysis, Petitioner bears the initial burden of establishing a prima facie case of discrimination. Failure to do so ends the inquiry. If Petitioner is able to prove a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Dep't of Corr. v. Chandler, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991) (discussing shifting burdens in discrimination cases under McDonnell and Burdine). The employer has the burden of production, not persuasion, and need only articulate a non-discriminatory reason for the action. Id.; Alexander v. Fulton Cnty, Ga., 207 F.3d 1303, 1339 (11th Cir. 2000). The employee must then prove that the reason given by the employer is a pretext for discrimination. The employee must meet the proffered reason head on and rebut it. Chapman v. Al Transp., 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc).

88. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the [Petitioner] remains at all times with the [Petitioner]." Joe's Stone Crabs, 296 F.3d at 1273; see also Byrd v. BT Foods, Inc.,

948 So. 2d 921, 927 (Fla. 4th DCA 2007) ("The ultimate burden of proving intentional discrimination against the plaintiff remains with the plaintiff at all times.").

Disability Discrimination Claim

89. Disability discrimination claims under the FCRA are analyzed using the same framework as claims under the Americans with Disabilities Act (ADA). Holly v. Clairson Indus., L.L.C., 492 F.3d 1247, 1255 (11th Cir. 2007).

90. To establish a prima facie case of disability discrimination, Petitioner must prove that: (1) he is disabled; (2) he is a qualified individual; and (3) he was subjected to unlawful discrimination because of his disability. St. Johns Cnty. Sch. Dist. v. O'Brien, 973 So. 2d 535 (Fla. 5th DCA 2007); Holly, 492 F.3d at 1255-1256.

91. Unlawful disability discrimination includes either intentional discrimination because of a disability, or failure to accommodate an employee's disability. A somewhat different analysis applies to the latter theory, which does not apply the McDonnell Douglas burden-shifting analysis. Instead, Petitioner must prove the following to establish unlawful discrimination based on the theory of failure to accommodate: (1) he is disabled; (2) he is otherwise qualified for the position, with or without a reasonable accommodation; (3) his employer knew or had reason to know about his disability; (4) he requested a

reasonable accommodation; and (5) his employer failed to prove the necessary accommodation. Marshall v. Aryan Unlimited Staffing Solution, 2013 U.S. Dist. LEXIS 30308, *12 (S.D. Fla. Mar. 6, 2013). Thus, under either theory of unlawful discrimination based on a disability, the first two components are the same.

92. A disability is an impairment that substantially limits a major life activity. Lenard v. A.L.P.H.A. "A Beginning," Inc., 945 So. 2d 618, 622 (Fla. 2d DCA 2006).

93. Respondent does not contest Petitioner's contention that he has a disability because of a stroke episode on July 31, 2014. Some evidence, even in the form of hearsay documentation from medical professionals, would have been helpful to corroborate Petitioner's testimony regarding what happened on July 31, 2014, and what the test results or diagnoses were on August 1-3, 2014, when Petitioner said he was in the hospital in Port Orange, particularly since he gave his employer a different explanation for his hospitalization then. In addition, some evidence would have been helpful to establish what treatments Petitioner has undergone since August 2014, and what the medical professionals' diagnoses and prognoses for Petitioner have been. Nonetheless, Petitioner's testimony is accepted as marginally sufficient to prove disability, albeit an undisclosed disability for almost the entire time of his employment with Respondent.

94. As to the second criterion, in order to be a "qualified individual," Petitioner "must show that he can perform the essential functions of his position with or without reasonable accommodations." Williams v. Revco Disc. Drug Ctrs., Inc., 552 Fed. Appx. 919, *921 (11th Cir. 2014).

95. When determining what functions are essential to a job, consideration is given to a number of factors, including the employer's judgment of what it believes to be the essential functions (to which substantial weight is given), any written description of the position, the amount of time spent on the job performing the function, and the consequences of not requiring the employee to perform the function. Id. (citing D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1230 (11th Cir. 2005)).

96. Respondent established an array of essential functions for the CPI position based on the official job description, the regulatory requirements for the job imposed by statutes and rules, and Respondent's judgment, as expressed through the credible testimony of Petitioner's supervisors as to the essential nature of these functions. Another significant factor in this particular case, as explained by Respondent's witnesses, is consideration of the consequences of not requiring CPIs to conduct and document investigations with a sense of urgency commensurate with the risk to children's safety and well-being.

97. Petitioner was and is unable to perform the essential functions of the CPI position. His performance problems were widespread and well-documented during his time working in that position.

98. Where, as here, Petitioner was unable to perform the essential functions of his job without accommodation, it is Petitioner's burden to identify an available reasonable accommodation that would allow him to perform the essential functions of his job, and then establish that Respondent denied him this accommodation. Medearis v. CVS Pharm., Inc., 646 Fed. Appx. 891, *896 (11th Cir. 2016); Spears v. Creel, 607 Fed. Appx. 943, *948 (11th Cir. 2015).

99. At hearing, Petitioner stated that he might have been able to perform the essential functions of his job if a mentor had been assigned to him to work with him daily to slowly show him how to do his job. Significantly, Petitioner never made a specific demand for this accommodation to Respondent. But even if he had, such a request has been rejected as beyond what the ADA demands of employers, because it would require a reallocation of job duties that would alter the essential functions of the CPI position and shift Petitioner's job duties to another employee. See Williams v. Revco Disc. Drug Ctrs., 552 Fed. Appx. at *922. A request for accommodation is not reasonable unless it would

enable Petitioner, not another employee, to perform the essential functions of Petitioner's CPI position. Id.

100. At hearing, Petitioner also offered the theory that he might have gotten better if he had been allowed to take a leave of absence as an accommodation. As an initial point, Petitioner offered no proof to support his understandable hope that he might have gotten better during a leave of absence of unspecified duration, much less that any improvement would have enabled Petitioner to perform the essential job duties of a CPI. Even if Petitioner had offered such proof, Petitioner admitted that he never asked to take a leave of absence, even when he disclosed his disability to his supervisors a week or so before he was terminated. Petitioner did not ask for any accommodation to enable him to perform the essential functions of his job.

101. Invoking language in disability discrimination cases, Petitioner asserted in his Petition for Relief that Respondent failed to engage in an interactive process to help Petitioner identify a reasonable accommodation that would have enabled him to perform in his CPI job. However, as explained in Spears:

> Where the employee fails to identify a reasonable accommodation, the employer has no affirmative duty to engage in an "interactive process" or to show undue hardship. . . . We have likewise held that "the duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been made.

Spears, 607 Fed. Appx. at *948 (citations omitted). As in Spears, Petitioner in this case failed to identify a reasonable accommodation, so Respondent had no affirmative duty to engage in an interactive process. Since Petitioner never made a specific demand for an accommodation, Respondent's duty to provide a reasonable accommodation was never triggered.

102. Petitioner also claimed that when he was terminated, he requested an accommodation by asking his supervisors if he could be demoted like Jeffrey Qualls in lieu of termination. In some instances, a specific demand for an accommodation might be in the form of a transfer request to another available position. See Id. at *948-*949. Here, however, the more credible evidence did not support Petitioner's claim that he made such a request.

103. Even if such a request had been made, Petitioner bears the burden of proving that there was an available vacant job for which he was qualified at the time of his termination. Id.; cf. Mengine v. Runyon, 114 F.3d 415, 418 (3d Cir. 1997) (noting that federal employers may have to reassign non-probationary employees who become unable to perform their essential job functions, if there are already funded, vacant positions available; but the employee has the burden to prove there was a vacant, funded position whose essential functions he was able to perform).

104. Petitioner failed to prove that there was an available vacant position that he was qualified for to which Respondent

could have transferred him (if he had asked). Instead, the evidence established that there was no vacant position to which Petitioner could have been demoted. An employer is not required to create a position as an accommodation, nor is an employer required to bump another employee from a position in order to accommodate a disabled employee. See Medearis, 646 Fed. Appx. at *895; Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1256 (11th Cir. 2001).

105. Petitioner's claim of disability discrimination fails, whether under a theory of intentional discrimination or a theory of failure to accommodate, because Petitioner failed to prove that he is a qualified individual and that he ever made a specific demand for any reasonable accommodation.

106. Even if Petitioner had established a prima facie case of disability discrimination, Respondent offered a legitimate, non-discriminatory reason for Petitioner's termination: Petitioner was unable to perform the essential job duties of a CPI. Although Respondent was not required to prove the validity of its reason, it did so. The evidence was compelling that Respondent's performance problems were widespread, encompassing most facets of the CPI job responsibilities.

107. Petitioner did not rebut, or even attempt to refute, the well-documented performance problems he had as a CPI. Instead, he only argued that the performance problems were the

result of residual effects of his stroke episode. However, the fact that a disabling condition may render an employee unable to perform the essential functions of his job does not mean that the employer engages in unlawful discrimination by not continuing to employ someone in a job they cannot perform. Employers are not required to eliminate an essential function of an employee's job or reallocate job duties to change the essential functions of the job. Williams v. Revco Disc. Drug Ctrs., 552 Fed. Appx. at *922 (citing Lucas v. W.W. Grainger, Inc., 257 F.3d at 1255).

108. Petitioner failed to meet his burden of proving that Respondent discriminated against him because of his disability. Instead, Respondent reasonably determined that Petitioner was unable to perform the essential functions of a CPI. Petitioner was terminated because he was unable to do the job.

Age Discrimination Claim

109. To establish a prima facie case of age discrimination under the FCRA, Petitioner must show that: (1) he was a member of a protected age group; (2) he was subject to an adverse employment action; (3) he was qualified to do the job; and (4) he was replaced by, or treated less favorably than, a person of a different age. McQueen v. Wells Fargo, 573 Fed. Appx. 836, *839 (11th Cir. 2014); see Ellis v. Am. Aluminum, Case No. 14-5355 (Fla. DOAH July 14, 2015, FCHR Sept. 17, 2015), FO at 2-3

(noting different interpretation of FCRA regarding whether comparator must be younger or just of a different age).

110. Petitioner failed to establish a prima facie case of age discrimination. Most significantly, Petitioner failed to present evidence of any similarly situated comparator. Petitioner failed to prove that a person of a different age, who was otherwise similarly situated, was treated more favorably than Petitioner, or replaced Petitioner.

111. Petitioner attempted to demonstrate that former CPI Jeffrey Qualls was demoted instead of discharged when he was arrested for driving under the influence and possession of marijuana. As found above, Mr. Qualls (whose age is unknown, and thus, might be the same age as Petitioner) was not similarly situated. He was a career service employee, not a probationary employee like Petitioner. There was no evidence that Mr. Qualls had serious performance problems like Petitioner, extending to such basic functions as using a computer system that could present problems for demoted positions. And significantly, there was a vacant position that Mr. Qualls qualified for, whereas there was no evidence that there was a vacant position available that Petitioner would have qualified for when he was terminated.

112. As with the disability discrimination claim, even if Petitioner had established a prima facie case, Respondent not only produced, but proved that Petitioner was terminated because

of a legitimate, non-discriminatory reason--the well-documented performance problems--and not because of his age. Petitioner did not attempt to refute or rebut the performance-based reasons for his termination, hence it cannot be concluded that the documented performance-based reasons for terminating Petitioner were a pretext for unlawful discrimination based on Petitioner's age.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Petition for Relief filed by Petitioner, Luis Rosado, III, be DISMISSED.

DONE AND ENTERED this 15th day of March, 2017, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of March, 2017.

ENDNOTES

[1/] Petitioner's filing did not comply with certain procedural requirements, such as the requirements that each filing contain the party's signature and include a certificate of service

attesting that a copy of the filing was furnished to the adverse party. Fla. Admin. Code R. 28-106.104(2)(e) and (f). A Notice of Ex Parte Communication was issued, and a copy of Petitioner's filing was provided to Respondent. Petitioner's filing also strayed beyond the proper bounds for a PRO with closing argument. As Petitioner was informed at the conclusion of the evidentiary hearing, the post-hearing filing is not an opportunity to present additional evidence, but rather, to set forth proposed facts that are supported by the hearing testimony and exhibits admitted in evidence, and to set forth the legal conclusions that flow from those facts. In addition, closing argument could be included, but again, the argument had to be based on the evidentiary record that was closed at the end of the two-day hearing. Contrary to this instruction, Petitioner's filing set forth facts unsupported by any evidence presented at hearing, and argument based on facts not in the record. See, e.g., Petitioner's filing at 5 (describing how he had been pondering a question after the hearing concluded, and then attempting to augment his hearing testimony with additional facts that were not offered in sworn testimony, subject to cross-examination, at hearing); Petitioner's filing at 7 (offering an estimate of damages not contained in the hearing record). All such references have been disregarded, as required by section 120.57(1)(j), Florida Statutes (findings of fact in a proceeding such as this one must be based exclusively on the evidence of record).

[2/] According to Petitioner, Monday, August 4, 2014, was a holiday, but he did not identify what holiday he believed it was. It was not a state holiday, falling in between the designated state holidays for Independence Day (July 4) and Labor Day (first Monday in September). Petitioner testified with some pride that Tuesday, August 5, 2014, was the only day he lost from work as a result of his stroke episode until his termination. Whether Petitioner took one day or two days off at Ms. Gibson's urging, the point is that insofar as Ms. Gibson was informed, the reason for the time off was to recover after an episode of uncontrolled diabetes, not to recover from a stroke episode. And when he returned to work, he assured Ms. Gibson that he was fine. She had no reason to think otherwise; Petitioner always appeared to be in good health.

[3/] As Petitioner was repeatedly informed, his testimony regarding what others told him--such as what the doctor told him at the hospital--was hearsay, and could not be relied on as the sole basis for a finding of fact. See § 120.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 28-106.213(3).

[4] Petitioner testified that after the July 31, 2014, episode, a neurologist felt that with proper treatment, he would regain his health after some time. Petitioner referred generally to prescribed medications by his physician in Key West, which he had difficulty renewing after he moved to Tarpon Springs in spring, 2015. He also said that for one or two months shortly before he was terminated, he was seeing two psychologists in Key West, and they were conducting evaluations and testing to determine what he needed to do to improve. Petitioner stated generally that after he was terminated from his CPI position, he was not able to make any effort to look for other employment "because of my mental health status." (Tr. 84). It is impossible to discern from these scattered references what Petitioner's physical or mental health condition was at any point from July 31, 2014, forward.

[5] Petitioner attempted to prove that his on-the-job training was hampered when Jeffrey Qualls, described by Petitioner as his primary mentor and the CPI with whom he worked the most, was arrested for driving under the influence and possession of marijuana, and demoted to a clerical position in the food stamps office. None of Respondent's witnesses agreed with Petitioner's assertion that Mr. Qualls had been Petitioner's primary mentor for on-the-job CPI training. In fact, Mr. Qualls was removed from his CPI position on October 1, 2014, before Petitioner began as a career service CPI. Petitioner may have done some shadowing with Mr. Qualls, along with the other CPIs, in July, August, and September 2014, but Petitioner was in training in Miami for the majority of that time, and in any event, would only have been permitted to do minor tasks. Petitioner's real on-the-job CPI training did not begin until Petitioner was qualified to do that work on October 3, 2014, when Mr. Qualls was no longer a CPI.

[6] Petitioner attempted to make much of the fact that Ms. Gibson put the wrong date--February 23, 2014, instead of February 23, 2015, next to her signature on one of the progress reviews; Petitioner characterized the review form as "falsified." Ms. Gibson admitted that she made a simple mistake that is not only patently obvious, but also, is completely inconsequential. It is not as if she backdated the reviews to give the appearance that they had been done monthly. Ms. Gibson could have no conceivable nefarious purpose for dating her signature on February 23, 2014, on one of the reviews; Petitioner had not even begun working for Respondent then.

[7] Petitioner argued unpersuasively that his ability to improve his performance to address the criticisms in the progress reviews was hampered because he did not receive them monthly, but rather,

all at once shortly before he was terminated. Petitioner was fully aware of the performance problems discussed in the progress reviews, and admitted as much. These performance problems were discussed in supervisory reviews of Petitioner's individual cases and documented by Ms. Gibson in the FSFN case notes. Moreover, Petitioner's assertion that he could have improved his performance is at odds with his contrary assertion that he could not help his performance problems because he was suffering from mental health issues caused by his strokes. Notably, Petitioner does not contend that the performance problems summarized in the progress reviews were not true.

[8/] Unlike Petitioner, Mr. Qualls had reached full CPI certification and was a permanent career service employee, not a probationary employee. Mr. Qualls was not proposed for termination from his CPI position because of an inability to perform the essential functions of the job. Rather, he had been arrested for DUI and possession of marijuana. After his arrest, but before any conviction, he was allowed to be demoted to the food stamps office. He left that position after five weeks, for unknown reasons. There is no record evidence of Mr. Qualls' age.

[9/] References herein to Florida Statutes are to the 2016 codification, unless otherwise provided. It is noted that there were no material amendments to the FCHR laws since 2014, the version in effect when Petitioner was terminated.

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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.