STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DENISE BURNS,

Petitioner,

vs. Case No. 18-0425

CITY OF GAINESVILLE,

Respondent.
_____/

AMENDED RECOMMENDED ORDER

Pursuant to notice, this case was heard on April 5 and 20, 2018, in Gainesville, Florida, before Administrative Law Judge Suzanne Van Wyk.

APPEARANCES

For Petitioner: Gary Lee Printy, Esquire
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Tallahassee, Florida 32308

For Respondent: Elizabeth A. Waratuke, Esquire
Gainesville City Attorney's Office
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Gainesville, Florida 32601

STATEMENT OF THE ISSUES

Whether Petitioner was subject to an unlawful employment practice by Respondent in retaliation for participating in a protected activity, in violation of section 760.10, Florida Statutes (2016)[1/]; and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On January 31, 2017, Petitioner filed an Employment Charge of Discrimination with the Florida Commission on Human Relations ("Commission"), which alleged that Respondent violated section 760.10 by discriminating against her for engaging in a protected activity.

On December 21, 2017, the Commission issued a Determination: No Cause and a Notice of Determination: No Cause, by which the Commission determined that reasonable cause did not exist to believe that an unlawful employment practice occurred. On January 24, 2018, Petitioner filed a Petition for Relief with the Commission, which was transmitted that same date to the Division of Administrative Hearings ("Division") to conduct a final hearing.

The final hearing was scheduled for April 5, 2018, in Gainesville, Florida, and was commenced, but not concluded, on that date. The final hearing was continued to, and concluded on, April 20, 2018, in Gainesville, Florida.

At the final hearing, Petitioner testified on her own behalf and presented the testimony of Joseph Michael Weeks, Tim Burnett, Robert Arnold, William Webb, Daniel Trujillo, and R.V. Mathews. Petitioner introduced Exhibits P1, P2, P3(a) through (j), P4 through P8, P9 (except for affidavits attached to Petitioner's Petition for Relief), P10, and P12, which were admitted in

evidence. **Copies of Exhibits P7, P8, and P10 were not provided to the Administrative Law Judge.**

Respondent presented the testimony of Brian Hinson, George Demopoulos, Lonnie Little, Dino DeLeo, Tim Bates, and Petitioner. Respondent's Exhibits R1(a) through (g), R2(a) through (j), R5, R9, **R16**, R24 through R27, R29 through R31, and R34 through R45, were admitted in evidence.

A two-volume Transcript of the proceedings was filed on May 16, 2018. The parties jointly filed, and the undersigned granted, a Motion to set June 6, 2018, as the due date for proposed recommended orders.[2/] The parties timely filed Proposed Recommended Orders which have been considered by the undersigned in preparing this Recommended Order.

FINDINGS OF FACT

Background

1. Petitioner, Denise Burns, is a 17-year employee of Gainesville Regional Utilities ("GRU"), the corporate entity through which the City of Gainesville ("City") provides electric service to its customers in Gainesville and surrounding areas.

2. Petitioner is an electrician by training, and was hired by GRU as a Power Plant Electrician on May 29, 2001. Petitioner participated in an internal training program, beginning in June 2006, and ultimately became a journeymen level Power Plant Instrumentation, Controls and Electrical Technician ("ICE Tech")

for GRU. Petitioner has been continuously employed as an ICE Tech for GRU since May 8, 2006.

3. There are currently eight full-time ICE Techs. ICE Techs perform assignments requested by employees throughout the plant through a work order system. The work orders come through a computer system, and are assigned to ICE Techs by their supervisor. On a day-to-day basis, an ICE Tech may be asked to perform preventative maintenance on transmitters, breakers, and switches within the facility, as well as daily maintenance and major repairs during plant outages.

4. There are three levels of ICE Techs: trainee, apprentice, and journeymen. A journeymen is level 7 through 10, where level 10 is the top of the pay scale. Petitioner is a level 10 ICE Tech.

5. Level 10 ICE Techs are expected to be the most experienced and knowledgeable, and to work under minimum supervision. They are not expected to have the answers to everything that comes before them, but to apply their experience and knowledge to find additional resources and problem-shoot the issues they encounter.

6. Prior to formation of the ICE Tech position, GRU separately employed electricians and instrumentation control specialists to install and repair equipment throughout its facilities. The employees frequently worked in pairs on work

orders to ensure that all aspects of the work could be addressed at the same time.

7. The ICE Tech position was created in an effort to address budget reductions and increase efficiency in technical service. Ideally, the ICE Techs were to be cross-trained and capable of installing and servicing both electrical equipment and instrument controls.

8. GRU operates two facilities relevant to the issues herein: The Deerhaven Generating Station ("Deerhaven") in northeast Gainesville, and the John R. Kelly Plant ("Kelly Plant") close to the University of Florida campus.

9. The ICE Techs, as well as the ICE Tech Supervisor and manager, are based out of the administrative building at Deerhaven. The majority of the work orders and associated time is spent working on facilities located at Deerhaven. ICE Techs are assigned to work at other locations as needed, but there are no ICE Techs assigned to those locations, including the Kelly Plant, on a permanent basis.

10. From an organizational perspective, the ICE shop is one of three divisions within the Major Maintenance Group. The other two divisions are Maintenance and Planning.

Relevant Employees and Managers

11. Brian Hinson is the ICE Tech Supervisor and has served as Petitioner's direct supervisor since December 12, 2011.

Mr. Hinson has worked with Petitioner since 2003. Mr. Hinson retired from GRU in 2007, and became employed as a contractor building an Air Quality Control System ("AQCS"), or "scrubber," which was eventually installed at Deerhaven. Mr. Hinson returned as an ICE Tech in 2009, and was promoted to ICE Tech Supervisor in 2011.

12. George Demopoulos has been employed by GRU for six years. He currently holds the position of Major Maintenance Leader, reporting to Lonnie Little. Both Mr. Hinson and the supervisor of the Mechanical Shop, Jeff Williams, report to Mr. Demopoulos. Mr. Demopoulos' duties pertain to the planning and scheduling of major maintenance for all power plants within GRU. He has held this position since August of 2011, but at final hearing was temporarily assigned to a software implementation project.

13. Lonnie Little is the Manager of Outage Planning and Major Maintenance and has held that position since April 2014. He took over the position as Manager from Timothy Bates. His direct reports are Mr. Demopoulos and two engineers. Mr. Little has known and worked with Petitioner in excess of 10 years and has been in a supervisory role relative to her since 2014.

2016 Charge of Discrimination

14. On February 16, 2016, Petitioner filed a Charge of Discrimination with the EEOC ("2016 Charge") alleging GRU

unlawfully discriminated against her on the basis of her sex and in retaliation for filing a 2004 EEOC Charge, which was resolved by settlement agreement. The 2016 Charge contains numerous specific allegations that Mr. Hinson and other managers treated her differently than her male coworkers in relation to discipline, training, and overtime, among other allegations.[3/]

Performance Evaluations

15. All supervisors and managers are involved in the evaluation process. The City's evaluation period runs from October 1st of a year to September 30th of the following year. An evaluation for the time period of October 1, 2015 to September 30, 2016, is referred to as an employee's 2016 evaluation.

16. GRU uses a numerical system for scoring each factor in an evaluation, with numbers ranging from 1 to 5, where 1 is "unacceptable" and 5 is "outstanding."

17. From 2006 to 2016, the City's evaluation format contained fourteen (14) factors, with each factor having several elements that an evaluator should consider in scoring that factor.

18. Supervisors begin preparing evaluations for the preceding 12 months in October. The draft evaluations are submitted to the appropriate managers for review and discussion, if needed. Final evaluations are approved by the appropriate

managers and turned over to the supervisors to discuss with their employees. The process usually takes several weeks between reviewing the employee's performance over the year, preparing comments, attending meetings between the supervisors and managers as needed, editing drafts, preparing the final document, and meeting with the employee.

19. As a supervisor, Mr. Hinson prepares annual evaluations for the ICE Techs and has done so since the fall of 2012. In preparing the evaluations, he reviews the employees' performance from the previous year, looking at information gathered throughout the year, including verbal and written feedback, observations in the field, and comments and hours logged on work orders. Mr. Hinson spends several weeks on the evaluations between the preparation and review with his supervisor. After preparing the draft of the evaluations, Mr. Hinson submits them to his manager for review.

20. For the 2015 and 2016 ICE Tech evaluations, Mr. Demopoulos met with Mr. Hinson to go over each employee's evaluation. Together they looked at the scores and the documentation to support the scores.

21. Mr. Demopoulos also talked with Mr. Hinson during the year about the work orders and projects and, at evaluation time, discussed with him the highest and lowest recommended scores, asking for examples to support each score. At various times over

the last few years, these meetings have included the upper-level manager, Mr. Little.

22. The upper-level managers review the draft evaluations for consistency within the departments, to make sure the comments match the score and that there are comments to support the scores. They also consider their own knowledge and observations of the employee's performance during the year, as well as feedback from others.

23. The managers meet with Mr. Hinson to discuss any scores they may have questions about or to discuss borderline scores. For example, there may be one area within the overall factor on which the employee needs improvement, but overall, the employee meets expectations in that factor. Those are some of the hardest ones to decide. If scores are outside the range of "meets expectations," the evaluator and managers discuss the reason for the outlying score.

24. During the 2011 to 2014 time frame, there were discussions within management at GRU about the evaluation scores needing to more accurately reflect the work performance of the employee. Specifically, Mr. Bates criticized Mr. Hinson's evaluation scores of ICE Techs as not reflecting Mr. Hinson's verbal reports on the employee's performance. Mr. Bates found the scores extremely high.

25. Likewise, when Mr. Little became Major Maintenance Manager in 2014, he noted that the ICE shop scores were much higher than the maintenance shop scores, and much higher than the scores he gave when supervising the engineering department. When Mr. Demopoulos became Major Maintenance Manager in 2015, he noted the earlier evaluations were "overinflated," meaning many employees were receiving scores higher than 3, which correlates with "meets expectations," when their work did no more than meet expectations.

26. Management began to work with the supervisors to accomplish scoring that more accurately reflected the level of work performed by the employees. The directive of grading to the actual verbiage of the factors had come down from the head of Deerhaven, first from John Stanton, Assistant General Manager, and then Mr. DeLeo.

27. Beginning in 2015, his first full year in Major Maintenance, Mr. Little took the approach of adding commentary in the remarks section to reflect the score that should have been given, rather than dropping the actual score. For example, if the employee had previously consistently received scores of 3 "meets expectations" in a factor, but actually needed improvement in that factor, the number would stay the same that year, but the comments would reflect that they needed improvement in some aspect of that factor. This would inform the employee that their

performance needed to improve in the following year, and if there was no improvement, the score would drop in the next year.

28. For the 2016 evaluation year, management began to adjust the scores to more closely match the criteria as described in the evaluation. That year, virtually every ICE Tech saw a drop in their overall evaluation score. With the exception of a probationary employee, Ray Yanke, the ICE Techs overall scores dropped a minimum of 4 points from 2015 to 2016.

29. Five ICE Techs received performance evaluations in both 2015 and 2016. Tim Burnett's score dropped 4 points; Miro Turk, 5 points; Mike Weeks, 6 points; Tracey Wilkinson, 4 points; and Petitioner, 4 points.[4/]

Petitioner's Performance Evaluations

30. On Petitioner's 2012 performance evaluation, Mr. Hinson rated Petitioner's overall performance as 3.36 out of 5.0. The only performance factor on which Petitioner scored lower than a 3 was for Safety Consciousness. On that factor Petitioner received a 2 "needs improvement," apparently based on an injury during that evaluation period.

31. Mr. Hinson gave Petitioner an overall performance score of 3.21 on Petitioner's 2013 evaluation. Petitioner received a score of 2 in Flexibility. Mr. Hinson noted, "Denise needs to improve in this area. Needs to recognize priorities when work assignments are changed."

32. On her 2014 evaluation, Mr. Hinson gave Petitioner an overall performance score of 3.0. Petitioner received a 2 in both Initiative and Communication. With regard to Initiative, Mr. Hinson noted, "Denise needs to improve in this area. Use EAM to continue to work on assignments if held up on assigned work without supervisor direction." With respect to Communication, Mr. Hinson noted, "Denise needs to improve in this area. Provide better feedback to supervisor on scope, timeframes, and projections for work orders and projects."

33. Petitioner's evaluation scores fell again on her 2015 evaluation, on which she received an overall performance score of 2.86. During that period, Mr. Hinson gave Petitioner a 2 on the following factors: Customer Relations, Initiative, Communication, and Effectiveness and Productivity. With regard to both Customer Relations and Communication, Mr. Hinson noted that Petitioner needs to improve communications with her supervisor, including "face-to-face" contact with her supervisor, especially on the status of assigned tasks. With respect to Productivity and Effectiveness, Mr. Hinson gave examples of specific assignments which were not completed in a timely and effective manner. In regards to Initiative, Mr. Hinson again noted, "Use EAM to continue to work on assignments if held up on assigned work without supervisor direction."

34. Petitioner was presented with her 2016 evaluation on November 30, 2016. Both Petitioner and Mr. Hinson reviewed and signed it on that date.

35. Petitioner's 2016 performance evaluation dropped again to an average performance score of 2.64. Petitioner received a 2 on 8 out of 14 factors, including Customer Relations, Initiative, Communication, Teamwork and Interpersonal Relations, Problem Solving/Decision Making, Effectiveness and Productivity, Support of Organizational Goals and Objectives, and Professional Development.

36. Petitioner did not lose any pay or other benefits for the scores she received on the evaluation. She received the same raise as the other Level 10 ICE Techs.

Petitioner's Corrective Action Plan

37. Mr. DeLeo met with Petitioner's leadership team several times to put a plan together to address the issues Petitioner was having with her work performance.

38. On January 31, 2017, a meeting was held with Petitioner to talk about her overall performance, as well as the comments that had been made on her 2016 evaluation--communication with her supervisor, work ethic, productivity and the ability to apply the skill sets of a Level 10 ICE Tech.

39. The meeting was attended by Mr. Hollandsworth, the Director of Production and Assurance Support; Keisha Young, Labor

Relations; Melissa Jones, Director of Production; Mr. Little; Mr. Demopoulos; Petitioner, and her union representatives, Robert Arnold and Mr. Welch.[5/] Mr. Hinson was specifically excluded from the meeting because of Petitioner's previous complaints about him.

40. Three main areas in her evaluation were the focus of the meeting--communication with her supervisor, work ethic and productivity, and knowledge and ability to do the job.

41. Mr. Demopoulos was assigned to develop the plan. With the assistance of the City's Human Resources Department, and the involvement of the Union, Mr. Demopoulos prepared the action plan.

42. The entire action plan consisted of direction to Petitioner to review materials from GRU trainings she had previously attended, such as "Take Charge of Change," "Emotional Intelligence," "Relationship Strategies," and "Dealing with Difficult Customers," and "come up with a plan on how you as a GRU employee in Energy Supply can move forward in a positive and more productive direction." The action plan directed Petitioner to "[i]dentify behaviors that need to be changed," and develop an "action plan to change behavior."

43. The action plan was light on details and provided little guidance on how Petitioner was to address behaviors. Management testified it was only the first step in the action

plan, directed at Petitioner's "soft skills." Eventually, the action plan was scrapped following a grievance filed by Petitioner and her union representatives.

Petitioner's Charge of Discrimination

44. In her 2017 Charge of Discrimination ("2017 Charge"), Petitioner alleged as follows:

> I was given a poor job performance evaluation (see attached copy) in retaliation for my filing of an EEOC Charge No. 510-2016-02011 in violation of Chapter 760 of the Florida Civil Rights Act, Title VII of the Federal Civil Right [sic] Act of 1964 as amended and the Federal Civil Rights Act of 1991 as applicable. I am requesting injunctive relief, removal of said evaluation, reimbursement of out of pocket expenses and costs, attorney's fees, costs, punitive damages, compensatory damages and whatever other relief is deemed to be just and appropriate.

Notably, on her 2017 Charge, Petitioner indicated the last date discrimination took place was November 30, 2016, but checked the box to indicate the charge was for a "continuing action."

45. In its Determination of No Reasonable Cause ("Determination"), the Commission reported as follows:

> Complainant alleged that Respondent retaliated against her for filing a complaint with the [EEOC]. However, the investigation did not reveal enough evidence to support Complainant's allegations. The investigation revealed that Complainant's evaluation score declined based on pre-existing employment weaknesses and that she was put on an action plan to help her improve her performance. The investigation did not reveal any evidence

> that Respondent's reasons for her lower evaluation score, or for putting her on an action plan, were pretext for retaliation. The investigation did not reveal that Complainant was treated less favorably than other employees regarding discipline, overtime, or training. The investigation did reveal that Complainant complained to Respondent that she thought her supervisor was retaliating against her for reporting that he was a poor manager, but reporting her supervisor's poor management style was not a protected activity that could lead to unlawful retaliation under the Florida Civil Rights Act. Additionally, the investigation revealed that any animosity between Complainant and her supervisor was likely due to personal issues and not retaliation for her EEOC compliant. Complainant did request a transfer to another building, but the investigation revealed that Complainant's request was denied because her position did not exist at that building and nobody worked full-time at that building.

46. The EEOC Investigative Report was not introduced into evidence. However, it is apparent from the Determination that the EEOC investigated, in connection with Petitioner's 2017 Charge, Mr. Hinson's 2016 performance evaluation of, and action plan for, Petitioner, as well as Petitioner's complaints that Mr. Hinson treated her less favorably than other employees regarding training and that he denied her request to transfer to another location.

Bases of Mr. Hinson's Evaluation Scores

47. Mr. Hinson considered a number of specific instances that occurred over the previous year in preparing Petitioner's

2016 evaluation. One of these was her handling of the crushed lime bin/air cannon job, which involved repairing a solenoid on the third floor of the air cannon on a grated floor. Mr. Hinson provided Petitioner with a manual to do the job, and she received verbal instructions from both Mr. Hinson and Mr. Demopoulos. Despite these resources, and her years of experience, it took her 43 hours to complete what managers estimated should have been a 16 hour job.

48. The time was so excessive that Mr. Little requested Petitioner to meet with him, Mr. Demopoulos, and Mr. Hinson to discuss the issues she had come across on the job. Petitioner explained that much time was spent looking for and retrieving screws that frequently fell through the third floor grating to the floors below. She spent much time climbing down two floors, sifting through lime dust to retrieve the screws, and climbing back up again. To resolve this problem on a future job, Petitioner suggested that a second worker be assigned to work with her and hold their hands under the solenoid to catch screws rather than having them drop through to floors below. Management found this to be an unacceptable solution for a level 10 ICE Tech to propose.

49. Petitioner’s handling of this assignment factored in her evaluation scores in the categories of Communication, Initiative, and Problem Solving/Decision Making.

50. Another of Petitioner's work assignments considered during this evaluation period was her work on the hydrolyzer Masoneilan control valves. Petitioner was assigned to do preventive maintenance on the valves. Petitioner had performed this same work before, but on this occasion calibrated the valves backwards. A manual was available to assist her, but she had not used it. Her handling of this assignment factored in her evaluation scores in the categories of Initiative, Problem Solving/Decision Making, Productivity, and Job Skills and Knowledge.

51. Another issue Mr. Hinson considered in preparing Petitioner's evaluation was her failure to ask permission to take GCU classes (City-sponsored trainings) prior to registering with Human Resources to take them. She also enrolled in supervisory classes which were not applicable to her position, and repeated classes she had previously taken. This factored into her evaluation scores in Communication and Following Instructions.

52. In addition to specific examples, Mr. Hinson testified generally about Petitioner's failure to communicate with him. He testified that it is generally "very minimal," despite his availability on his City cell phone at all times.

53. At the final hearing, the tension between Petitioner and Mr. Hinson was palpable. Petitioner's demeanor during Mr. Hinson's testimony was completely different than that during

the other managers' testimony. During the testimony of other managers, Petitioner sat quietly taking notes and passing them to her counsel. She did not make eye contact with other managers. Petitioner sat bolt upright from the minute Mr. Hinson entered the room until he exited following his testimony. During Mr. Hinson's testimony, Petitioner practically stared him down.

54. As if in response, Mr. Hinson's tone of voice during his testimony was defensive, and at times, sarcastic. He avoided eye contact with Petitioner.

55. It is readily apparent that Petitioner and Mr. Hinson do not care for one another. In fact, there is outright resentment between the two.[6/]

56. Petitioner's complaints about Mr. Hinson are not new. During Mr. Bates' tenure as Major Maintenance Supervisor, between 2011 and 2014, Petitioner repeatedly complained about Mr. Hinson's management style. She was offended by his tone of voice, yelling, and "jerking her off jobs." Mr. Bates observed that Mr. Hinson spoke loudly and barked out directions, but did so across the board to all ICE Techs.

57. GRU has taken some steps to resolve the issues between Petitioner and Mr. Hinson. Mr. DeLeo asked Mr. Bates to meet with Petitioner individually and asked her directly what management could do to ease tensions and facilitate a better working relationship. Petitioner stated that she wanted

management to fire her supervisor, to "leave her alone," and to "stay out of her pocket." By this, Petitioner meant she wanted to be able to work on the projects of her choice and to not have her overtime hours cut. Mr. DeLeo and Mr. Bates found no cause to terminate Mr. Hinson. They could not grant her other requests because all ICE Techs have to take the assignments given and all overtime was being cut plant-wide for budgetary reasons.

58. Petitioner's failure to communicate with Mr. Hinson was intentional, due, at least in part, to resentment and fear.

59. Petitioner's communication methods may not have been antagonistic, but Mr. Hinson clearly resented her refusal to meaningfully communicate directly with him about issues she encountered on the job. It appears Petitioner tried to conceal from him problems she encountered on the job, instead seeking assistance from other employees.

60. Petitioner's managers have also noted her failure to communicate with her supervisor. Mr. Demopoulos met with Petitioner on numerous occasions during the 2015 and 2016 evaluation periods and counseled her on a number of areas he identified as needing improvement, including the importance of learning how to communicate adequately with a supervisor. He also spoke with her about the importance of dealing with change in the organization and how to deal with it.

61. Mr. Hinson testified to several specific incidents in these same areas of deficiency in her 2015 evaluation. Mr. Demopoulos also testified to the same areas of deficiency in both her 2015 and 2016 evaluations. The areas identified as needing improvement in Petitioner's 2016 evaluation were consistent with the areas identified as needing improvement in her 2015 evaluation.

62. The areas in Petitioner's 2015 and 2016 evaluations that Mr. Hinson identified as needing improvement were consistent with Mr. Little, Mr. Demopoulos, and Mr. Bates' observations of Petitioner's performance over the years that they worked with her.

63. Mr. Bates gave an example of Petitioner working on the cleaning system for the baghouse at the AQCS. Petitioner and the others were having difficulty with the assignment. Mr. Bates found the manual and gave it to them so they could complete the assignment. A few months later, a similar situation arose. Rather than Petitioner getting the documentation Mr. Bates had previously shown her, Mr. Bates had to get the manual and show her again. Upon inspection, the manual had Petitioner's handwritten notes from the previous work on the same project.

Other Alleged Retaliatory Acts

64. In addition to the negative evaluation, Petitioner cited denial of her request to transfer to the Kelly Plant as a form of retaliation.

65. In April 2016, two months after her 2016 Charge, Petitioner requested a transfer to the Kelly Plant and that she no longer be supervised by Mr. Hinson.

66. Mr. DeLeo denied Petitioner's request. GRU employs no ICE Techs at the Kelly Plant, and there is not enough demand to warrant employment of a full-time ICE Tech at the Kelly Plant.[7/] All ICE Techs are headquartered at Deerhaven and are deployed to the Kelly Plant when an ICE work order is issued.

67. Moreover, assigning Petitioner to the Kelly Plant would not have relieved her from Mr. Hinson's supervision. Mr. Hinson is the only supervisor of the ICE Techs.

68. Finally, Petitioner alleges that she was denied training opportunities given to similarly-situated employees. The evidence does not support Petitioner's allegation.

69. When the instrument and electrical shops were combined, the instrument techs received electrical training and vice versa. However, the supervisor prior to Mr. Hinson tended to assign work orders to the ICE Techs according to their strengths, so meaningful on-the-job cross-training was limited.

70. Petitioner gave examples of Mr. Hinson refusing to allow other employees to assist her when she encountered difficulty with tasks in the field, alleging that these were instances in which she was "denied training." However, the record established that Mr. Hinson's intervention in those instances was based on Petitioner's request for assistance from another employee or manager, rather than communicating with her supervisor, and her failure to consult readily available manuals (some of which she had previously been instructed to use) rather than interrupt another employee's work to assist her.

71. There was no credible evidence that Petitioner was denied any formal training opportunities. As to GCU classes, the record revealed that Petitioner attended many classes, some without obtaining prior approval, and many more than once.

Allegations Post-Commission Complaint

72. Petitioner testified about incidents occurring in 2017 and in 2018, after she filed the 2016 Charge, she alleges were retaliatory.

73. The first of these was a written warning issued in April 2017. About 2:00 p.m., on April 21, 2017, while out on the plant grounds, Mr. Little came across a number of ICE Tech tools, but no ICE Techs, at a gas turbine on which Petitioner and another ICE Tech had been assigned to do preventative maintenance. Being concerned that the techs were taking an

extended break (as there was no shop supervisor that Friday afternoon), he called Mr. Demopoulos to check the shop and find the ICE Techs that were supposed to be at that location. While Mr. Little was waiting, the other ICE Tech returned.

74. Petitioner was found in the plant about an hour later in the motor control center, a concealed area that was not routinely occupied or utilized as an office or to do paperwork. The paperwork that she claimed she was doing--writing down the results of visual checks of the batteries--was something that would be expected to be completed by the ICE Tech when observing the equipment. Yet, Petitioner was nowhere in the vicinity of the equipment.

75. Mr. Little issued Petitioner a first-step employee notice, or written warning. Mr. Hinson was not involved in that incident or issuance of the discipline, as he was on vacation that afternoon.

76. The second incident occurred in August 2017. In this incident, Petitioner was assigned to work on the sump pump for a gas turbine transformer. Petitioner observed conditions at the site and deemed the area to be unsafe to work unless the gas turbine was taken out of service. Rather than reporting back to Mr. Hinson and asking for direction, Petitioner approached Torey Richardson, the manager of a different department, and asked him

to take the gas turbine out of service so she could work on the sump pumps.

77. Mr. Richardson told Petitioner he could not take the gas turbine out of service. It was August and the plant was operating at peak capacity, which requires use of the gas turbines. Again, Petitioner did not report back to Mr. Hinson. Instead, Petitioner allowed Mr. Richardson to call Mr. Hinson from his office and inform Mr. Hinson he would not take the gas turbine out of service. This call came as a surprise to Mr. Hinson, who had not asked for the gas turbine to be taken out of service, and was not aware Petitioner had determined the work area to be unsafe with the gas turbine in service.

78. Petitioner was given a written warning and a three-day suspension for not contacting her supervisor prior to requesting another department to interrupt normal operations.

79. Petitioner had been repeatedly counseled about her failure to communicate with her supervisor when issues arose in the field.

80. Petitioner complained of a third incident occurring in early 2018. In that incident, Mr. Hinson instructed Petitioner to unwire a valve, replace the components, and work with the mechanics to have it reinstalled. Very little non-hearsay evidence was introduced related to this incident. The most that can be found is Mr. Little called Petitioner in to question her

about the job, which he stated she had abandoned and left for a mechanic to do. In the end, Petitioner received no discipline regarding the incident.

CONCLUSIONS OF LAW

81. The Division has jurisdiction over the subject matter of, and parties to, this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2017).

82. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. See § 120.57(1)(j), Fla. Stat.

83. The Florida Civil Rights Act ("the Act"), at 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).

84. Florida courts have held that because the Act is patterned after Title VII of the Civil Rights Act, as amended, federal case law dealing with Title VII is applicable. See e.g., Fla. Dept. of Cmty. Aff. v. Bryant, 586 So.2d 1205, 1209 (Fla. 1st DCA 1991).

85. 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).

86. There is no direct evidence the City lowered Petitioner's 2016 evaluation score and placed her on a corrective action plan in retaliation for Petitioner for filing the 2016 Complaint.

87. To establish a prima facie case of discrimination in retaliation by indirect evidence, Petitioner must show: (1) that she was engaged in statutorily protected expression or conduct; (2) that she suffered an adverse employment action; and (3) that there is a causal relationship between the two events. See Holifield v. Reno, 115 F.3d 1555, 1566 (11th Cir. 1997).

88. It is undisputed that Petitioner filed the 2016 Charge, which is a statutorily protected activity. Thus, she has demonstrated the first element of a prima facie case.

89. As to the second element, "[n]ot all conduct by an employer negatively affecting an employee constitutes adverse employment action." Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1238 (11th Cir. 2001) (Plaintiff, who received one oral reprimand, one written reprimand, the withholding of a bank key, and a restriction on cashing nonaccount-holder checks, did not suffer an adverse employment action). "The asserted impact cannot be speculative and must at least have a tangible adverse

effect on the plaintiff's employment." Id. at 1239. An employee is required to show a "serious and material change in the terms, conditions, or privileges of employment." Id.

90. Petitioner was not disciplined, demoted, dismissed, transferred, or otherwise subjected to any action with a tangible adverse effect on her employment due to the scores on her 2016 evaluation. The uncontroverted evidence is Petitioner received the same salary increase as other level 10 Ice Techs following her 2016 evaluation.

91. Further, under the facts of this case, that Petitioner was placed on a corrective action plan, does not constitute an adverse employment action. The plan was not a form of discipline under the GRU personnel policies and resulted in no tangible effect on the terms, conditions, or privileges of Petitioner's employment. In fact, GRU abandoned the plan following Petitioner's objection to it through her union representatives.

92. Petitioner's allegation that she was denied a transfer to the Kelly Plant was proven. However, the denial of Petitioner's transfer request was not an adverse employment action. The denial did not result in any material change to terms or conditions of Petitioner's employment. The transfer, had it been available, would not have resulted in an increase in Petitioner's employment status or pay, or a substantial change

in her duties. Further, the transfer would have required GRU to create a special position not within its normal business operations.

93. As to Petitioner's allegation that she was denied training opportunities, she failed to prove that allegation.

94. Assuming, arguendo, Petitioner had established she suffered an adverse employment action, Petitioner's case fails because she did not establish the third element--a causal connection between her engagement in the protected activity and the adverse employment action.

95. The U.S. Supreme Court changed the causation standard for Title VII retaliation claims in University of Texas Southwest Medical Center v. Nassar, 570 U.S. 338 (2013). There, the Court held that "[t]he text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under section 2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer". Nassar, 570 U.S. at 365. "Title VII retaliation claims must be prove[n] according to traditional principles of but-for causation, not the lessened causation test" for status-based discrimination. Id. at 360.

96. There is no direct evidence of a causal connection in this case.

97. As to circumstantial evidence, there is no temporal proximity between the filing of her 2016 Complaint on February 20, 2016, and the issuance of the annual performance evaluation on November 30, 2016. Mere temporal proximity, without more, must be "very close." Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007). "A three to four month disparity between the statutorily protected expression and the adverse employment action is not enough." Id. (citing Richmond v. Oneok, 120 F.3d 205, 209 (10th Cir. 1997) and Hughes v. Derwinski, 967 F.2d 1168, 1174-75 (7th Cir. 1992)).

98. Again, assuming arguendo, Petitioner had established a prima facie case of retaliation, GRU presented persuasive evidence that Petitioner's 2016 evaluation was based on her actual work performance and the efforts of management to reform "grade inflation" in the evaluation process. The record was replete with evidence of legitimate nondiscriminatory reasons supporting the scores on her 2016 evaluation.

99. As to the denial of Petitioner's transfer request, there is temporal proximity of approximately two months. However, GRU produced ample evidence that the denial of Petitioner's transfer request was not a pretext for retaliation. No ICE Tech positions were available at the Kelly Plant, and had the transfer been granted, Petitioner would have remained under the supervision of Mr. Hinson.

100. Petitioner did not present any credible evidence that GRU's reasons for its actions were pretext for retaliation. Petitioner expressed her belief that the evaluation was retaliatory because it was based upon facts with which she disagreed, but disagreement with the employer's decision falls short of the showing necessary to establish pretext. Chambers v. Walt Disney World Co., 132 F. Supp. 2d 1356, 1366 (M.D. Fla. 2001).

Allegations of Retaliation Post-Commission Complaint

101. As to the other instances of alleged retaliation--the April 2017 written warning, the August 2017 written warning and three-day suspension, and the 2018 discussion with Mr. Little--there was no evidence that these issues had been presented to the Commission. The Commission Determination established that Petitioner's allegations of her poor performance evaluation, denial of her transfer request, and denial of training were the only allegations investigated by the Commission in arriving at its determination that there was no cause to believe GRU retaliated against Petitioner for engaging in statutorily-protected activity.

102. A plaintiff is required to administratively exhaust her remedies through a charge of discrimination before bringing a civil suit on her claims in order to "notify the employer of discriminatory practices." See Gregory v. Ga. Dep't. of Human

Res., 355 F.3d 1277, 1279 (11th Cir. 2004); see also Wilkerson v. Grinnell Corp., 270 F.3d 1314, 1319 (11th Cir. 2001) ("One of the primary purposes for the charge requirement is to provide notice to the employer of the allegations against it.").

103. In order to bring a civil claim under the Act, a plaintiff must first file a charge alleging the discriminatory conduct within 365 days of when it occurred. The exhaustion requirement allows the Commission, "the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts." Ramsay v. Broward Cnty. Sheriff's Off., 2007 U.S. Dist. LEXIS 98428 *16 (S.D. Fla. 2007). See also Jackson-Levarity v. Dep't. of Child. and Fams., 2003 Fla. Cir. LEXIS 1081 (Fla. 2d Cir. 2003) (holding that a party cannot proceed on claims from discrete acts not reasonably related to the allegations in a charge). It is well-settled that "[d]iscrete acts of discrimination that occur subsequent to the filing of an administrative charge are not reasonably related to the charged conduct." Buzzi v. Gomez, 62 F. Supp. 2d 1344, 1352 (S.D. Fla. 1999) (citing Ray v. Freeman, 626 F.2d 439, 443 (5th Cir. 1980)).[8/] The denial of promotions which occur after the filing of a charge of discrimination are "discrete acts," which require the filing of a new or an amended charge. Buzzi, 62 F. Supp. 2d at 1352.

104. In this case Petitioner's complaint was specific--that her 2016 evaluation, attached to her charge, was retaliation for having filed the 2016 Complaint. Therefore, the Division does not have jurisdiction to consider her claims as to the April and August 2017 discipline, and her allegation of a 2018 discipline.

105. "The ultimate burden of persuading the trier of fact that the [employer] intentionally discriminated against the [employee] remains at all times with the [employee]." Texas Dep't. of Cmty. Aff. v. Burdine, 450 U.S. 248, 253 (1981). In this case, Petitioner failed to meet her burden.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations dismiss the Petition for Relief from an Unlawful Employment Practice filed by Petitioner against Respondent in Case No. 2017-00520.

DONE AND ENTERED this 20th day of August, 2018, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of August, 2018.

ENDNOTES

[1/] Except as otherwise noted herein, all references to the Florida Statutes are to the 2016 version, which was in effect when Petitioner received the alleged retaliatory performance evaluation.

[2/] The parties waived the requirement that the undersigned issue the recommended order within 30 days after receipt of the Transcript by agreeing to a date for filing proposed recommended orders that is more than 10 days after the date the Transcript was filed. See Fla. Admin. Code R. 28-106.216.

[3/] The outcome of the 2016 Charge was not a matter of record in this proceeding.

[4/] Two ICE Tech's scores were not available for comparison as they were no longer in the ICE shop in 2016. Mr. Dickhaut's employment was terminated before his 2016 evaluation and Mr. Trujillo retired before his 2016 evaluation.

[5/] Mr. Welch was not identified by first name anywhere in the record.

[6/] Ironically, by all accounts, the two worked well together when they were both ICE Techs, but that changed in the years since Mr. Hinson was promoted to supervisor.

[7/] Petitioner's testimony that Claude Pinder, the former Kelly Plant manager, had requested an ICE Tech position be created at the plant and that Petitioner be assigned there, was uncorroborated hearsay testimony for which no exception applies. Thus, the testimony cannot support a finding of fact. See Fla. Admin. Code R. 28-106.213(3).

[8/] The caselaw establishes three exceptions to the "discrete acts" rule, none of which apply under the specific facts of this case.

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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.