**STATE OF FLORIDA**
**COMMISSION ON HUMAN RELATIONS**

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| **AUSBON BROWN, JR.,** | ) | EEOC Case No. 15D980057 |
| **Petitioner,** | ) | FCHR Case No. 98-0366 |
| | ) | DOAH Case No. 99-004039 |
| **vs.** | ) | FCHR Order No. 03-012A |
| | ) | |
| **AGENCY FOR HEALTH CARE ADMINISTRATION,** | ) | |
| **Respondent** | ) | |

# AMENDED FINAL ORDER DISMISSING PETITION FOR RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE

On November 29, 1997, Petitioner filed a complaint with the Florida Commission on Human Relations (FCHR) alleging that the Respondent failed to hire him for several positions for which he applied because of his age, sex and race. On August 18, 1999, the FCHR issued a No Cause Determination based upon its investigation. The Petitioner filed a Petition for Relief and was granted a formal evidentiary hearing that was held by video teleconferencing in Tallahassee and Daytona Beach, Florida on February 10, 2000, before Administrative Law Judge Donald R. Alexander.

Judge Alexander issued a Recommended Order of Dismissal dated April 7, 2000. A Commission panel held a telephonic non-evidentiary hearing on October 26, 2000, and issued its Order 00-024, dated January 9, 200[1], in which a majority (2-1) of the panel found that the Administrative Law Judge (ALJ) committed an error of law in concluding that there was no evidence that Respondent's actions were a pretext for discrimination and concluded that the Respondent unlawfully discriminated against the petitioner for six positions at issue. The panel remanded the case to the ALJ for determination of appropriate remedy.

Subsequently, the ALJ reopened the case and required the parties to "submit proposed supplemental orders which were to contain a suggested final disposition of the case, together with references to the record which supported their suggested disposition." He reviewed the submissions made by both parties and issued a Supplemental Recommended Order, dated May 25, 2001. A Commission panel reviewed this Supplemental Recommended Order in a telephonic non-evidentiary hearing held on April 30, 2002, and issued its Order 02-026, dated May 10, 2002. The panel upheld the ALJ's conclusions that the Petitioner was not entitled to attorney's fees and non-quantifiable economic damages; but, it did not agree with his conclusion that the Petitioner was not entitled to any relief. Instead, by a majority (2-1) it remanded the case to the ALJ to determine the proper amount of back pay and ordered the Respondent to "(1) cease and desist from discriminating further in the manner in which it has been found to have unlawfully discriminated against the Petitioner; and (2) to offer Petitioner the next available full-time position for which the Petitioner is qualified."

The Commission subsequently filed a Petition for Relinquishment of Jurisdiction on October 24, 2002. The Petition was granted by the ALJ on November 6, 2002 who contemporaneously closed the DOAH case.

The Commission held an en banc telephonic non-evidentiary hearing on January 14, 2003, in which 10 Commissioners participated. It considered the record of this matter and unanimously determined the following action to be taken on the Recommended Order and vacates its prior Orders numbered 00-024 and 02-026.

## Findings of Fact

The Commission's file contains a transcript of the proceeding before the Administrative Law Judge.

The Administrative Law Judge (ALJ) found that, in 1996, Petitioner filed a number of job applications with the former Department of Health and Rehabilitative Services (HRS). Shortly after the applications were filed, HRS was abolished and many of its functions were transferred to at least three other agencies, including the Respondent. The ALJ found that seven such transferred positions, as follows, are at issue in this case. ¶ 5, Recommended Order.

Even though the Agency for Health Care Administration ("AHCA" or "Agency") had at least three Senior Management Analyst II vacancies at approximately the same time, according to DMS personnel rules, it was necessary for an applicant to file a separate application for each position. Although Petitioner claimed to have faxed an application for position #63640 (Senior Management Analyst II), the fax number was incorrect and, therefore, his claim of discrimination for that job was not considered. ¶ 7, Recommended Order.

The ALJ then reviewed each of the six remaining positions at question (see, ¶ 8-16, Recommended Order) and found that, while the Petition for Relief alleges that Respondent "classified positions and varied conditions of employment" in an effort not to hire Petitioner, there was no evidence to support this claim, nor were the Department's actions a pretext for discrimination. See, ¶ 21, Recommended Order. The ALJ noted that Petitioner suggested that employees within an agency have an inherent advantage over outsiders in acquiring the specific job experience required for vacant positions, but the ALJ found that the Agency gave no special consideration or preference to existing Agency employees who filed applications for these jobs. See, ¶ 18, Recommended Order. Finally, the ALJ found that "the most qualified persons were selected in each instance." See, ¶ 21, Recommended Order.

Since an Administrative Law Judge's finding of whether discrimination occurred is a finding of fact, the Commission may overturn such a finding only if, after reviewing the complete record of the case, the Commission determines that the finding is not supported by competent substantial evidence in the record or that the proceeding leading to the determination did not comply with the essential requirements of law. See Florida Department of Community Affairs v. Bryant, 586 So2d 1205, at 1210 (Fla. 1st DCA 1991). See also, Department of Health and Rehabilitative Services v. Yhap, 680 So2d 559 (Fla. 1st DCA 1996); Southpointe Pharmacy v. Department of Health and Rehabilitative Services, 596 So2d 106 (Fla. 1st DCA 1992); Clay County Sheriff's Office v. Loos, 570 So2d 394 (Fla. 1st DCA 1990); National Industries, Inc. v. Commission on Human Relations, 527 So2d 894 (Fla. 5th DCA 1988); Howard Johnson Co. v. Kilpatrick, 501 So2d 59 (Fla. 1st DCA 1987); Holmes v. Turlington, 480 So2d 150 (Fla. 1st DCA 1985); Brevard County Sheriff's Department v. Florida Commission on Human Relations, 429 So2d 1235 (Fla. 5th DCA 1983); and School Board of Leon County v. Hargis, 400 So2d 103 (Fla. 1st DCA 1981).

We adopt the Administrative Law Judge's findings of fact.

## Conclusions of Law

In "failure to hire" cases, such as the situations presented in this case, a Commission panel has concluded that, to establish a prima facie case of discrimination, a Petitioner must establish: "(1) that he belongs to a protected group; (2) that he was qualified for the job for which the employer was seeking applicants; (3) that he was rejected despite his qualifications; and (4) that, after rejection, the position remained opened and the employer continued to seek applicants with the Petitioner's qualifications." Longariello v. The School Board of Dade County, 19 F.A.L.R. 1960, at 1961 (FCHR 1996); Blum v. National Enquirer, Inc., 21 F.A.L.R. 426, at 434 (FCHR 1998).

If a prima facie case is established, "the Respondent must articulate some legitimate nondiscriminatory reason for its action." Hart v. Double Envelope Corporation, 15 F.A.L.R. 1664, at 1673 (FCHR 1992). Once this is articulated, the burden returns to the Petitioner to demonstrate the Respondent intentionally discriminated against the Petitioner; that is, the reason is only a pretext to cover discriminatory intent. O'Neill v. Sarasota County School Board, 18 F.A.L.R. 1129, at 1130 (FCHR 1994).

The ALJ found that the Petitioner failed to make a prima facie case in certain instances; and, in others, where he did establish that (1) he was a member of a protected class; (2) he met the minimum qualifications for the job; and (3) he was rejected and a person outside the protected class was later chosen, and the ALJ further found that the Respondent did articulate a legitimate nondiscriminatory reason for not hiring the Petitioner in those instances. Namely, the ALJ found that the Respondent, in each case, selected someone who was better qualified, and that there was no evidence that Respondent's actions were a pretext for discrimination, or that Respondent acted with discriminatory intent.

We adopt the Administrative Law Judge's conclusions of law.

Exceptions

Petitioner filed 17 numbered exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Petitioner's Exceptions to Proposed Recommended Order in the case DOAH #99-4039, FCHR #98-0366 issued 7th day of April, 2000." As indicated above, the Commission's file contains a transcript of the proceeding before the Administrative Law Judge.

The exceptions focus on the lack of investigation by the Commission and do not challenge any specific finding of the ALJ other than exception 1 which notes that the sex, age and race of the successful candidates for the three positions that the ALJ indicated races and/or age unknown were known (¶ 11 race—Hispanic; ¶ 13 race—Asian; ¶ 14 race and age—White and 28). Even if the record before the ALJ did contain evidence as to the race and age of these individuals, the ALJ's finding that this information was not of record would have no impact on the outcome of the case, given the ALJ's finding that Respondent articulated legitimate, nondiscriminatory reasons for not hiring Petitioner and that those reasons were not a pretext for discrimination. Exception 1 is therefore rejected.

Exceptions 2, 3, 4, 5, 6, 7, 8 and 9 suggest that certain career service rules were not followed in the hiring process for the positions in question. While it is possible to infer discrimination from a failure by Respondent to follow established hiring rules, the making of such an inference would be the function of the ALJ. See, e.g., Barr v. Columbia Ocala Regional Medical Center, 22 F.A.L.R. 1729, at 1730 (FCHR 1999), where the Commission stated, "It is well settled that it is the Administrative Law Judge's function 'to consider all of the evidence presented and reach ultimate conclusions of fact based on competent substantial evidence by resolving conflicts, judging the credibility of witnesses and drawing permissible inferences therefrom. If the evidence presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide between them." (emphasis added). Beckton v. Department of Children and Family Services, 21 F.A.L.R. 1735, at 1736 (FCHR 1998), citing Maggio v. Martin Marietta Aerospace, 9. F.A.L.R. 2168, at 2171 (FCHR 1986). The ALJ considered Petitioner's allegations that certain of Respondent's hiring rules had not been followed, yet declined to draw an inference of discrimination therefrom, and did not make a factual finding that the rules alleged to be violated had actually been violated. ¶17-18, Recommended Order. Exceptions 2, 3, 4, 5, 6, 7, 8 and 9 are therefore rejected.

Exceptions 10, 11, 12, 14, 15, 16 & 17, question the conduct of the investigation of the case by the Commission, and concluded (#17) with "The Finder of Facts states that since Petitioner was given 'de novo' hearing the findings by FCHR are irrevalant [irrelevant]. This is not true. If the results of FCHR investigation are Fraudulent/Bogus the hearing was based upon untruths and this order should be set aside." See ¶ 20, Recommended Order. None of his exceptions relating to the failures in the initial Commission investigation are relevant to the hearing before the ALJ and are, therefore, rejected.

Exception 13 requests that the Commission set aside the Recommended Order "because the Finder of Facts has not interpreted the evidence correctly in this case." The case law is clear that the Commission has no authority to re-interpret evidence. See, cases cited above. Exception 13 is, therefore, rejected.

Dismissal

The Request for Relief and Complaint of Discrimination are DISMISSED with prejudice and FCHR Orders numbered 00-024 and 02-026 are vacated.

The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 14th day of January, 2003
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam; and
Commissioner Gayle Cannon; and
Commissioner Rita Craig;

Filed this 14th day of January, 2003,
in Tallahassee, Florida

**/s/**
Violet Crawford, Clerk
Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, FL 32399
(850) 488-7082

Copies furnished to:

Ausbon Brown, Jr.
PO Box 10946
Daytona Beach, FL 32120-0946

Mr. Richard J. Saliba, Esquire
Senior Attorney, Agency for Health Care Administration
2727 Mahan Drive, Building #3, Mail Stop #3
Tallahassee, FL 32308

D.R. Alexander, Administrative Law Judge, DOAH

Jim Tait, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addresses this 14th day of January, 2003.

By: **/s/**
Violet Crawford,

Clerk of the Commission
Florida Commission on Human Relations