198009 TBD.R
‘AGENCY RECOMMENDED ORDERS’

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198009 TBD.R 001

'AGENCY RECOMMENDED ORDERS'

CAPTION: *Smith v. Pembroke Pines*

CITATION: 198009 TBD.R 001

DATE: 2/27/1980

STATE: FL

CASE NO: ???? (FCHR)
79-001977 (DOAH)

CASE TYPE: Employment Discrimination

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FILENAME: 79001977.PDF

PAGES: 5

RESULT: judged (defendant won)

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EDWARD SMITH, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 79-1977
	)	
CITY OF PEMBROKE PINES UTILITY DEPARTMENT,	)	
	)	
Respondent,	)	
	)	
NORMAN A. JACKSON, Executive Director, Florida Commission on Human Relations,	)	
	)	
Intervenor.	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William E. Williams, held a public hearing in this cause on January 18, 1980, in Pembroke Pines, Florida.

APPEARANCES

For Petitioner: Eugene Gillis, Esquire
3025 West Broward Boulevard, Suite 203
Fort Lauderdale, Florida 33311

For Respondent: Steven Josias, Esquire
Post Office Box 23536
Fort Lauderdale, Florida 33307

For Intervenor: Marva A. Davis, Esquire
Assistant General Counsel
Florida Commission on Human Relations
2562 Executive Center Circle, East
Tallahassee, Florida 32301

On or about August 28, 1979, Edward Smith, Jr. ("Petitioner") filed a Petition for Relief with the Florida Commission an Human relations requesting relief from an alleged unlawful employment practice. Petitioner alleges that the City of Pembroke Pines, Florida, through it utility department ("Respondent") discriminated against Respondent on the basis of his race in that he was terminated as a city employee because he refused to discuss personal business with city officials pertaining to court appearances; was terminated as a city employee for tardiness, whereas white employees were not; was required to take an unnecessary physical examination to prove his fitness for employment which was not required of white employees; and had detrimental information

placed in his mersonnel file by city employees without prior discussion With him, a procedure which was not followed with white employees.

Respondent answered the Petition, denying the material allegations thereof, and alleging that Petitioner's termination of employment resulted from his failure to furnish Respondent with an emergency telephone number in accordance with city policy, habitual tardiness, and absence from work. Respondent further asserts that Petitioner's termination was in no way racially motivated.

In accordance with the provisions of Section 120.57(1)(b)(3), Florida Statutes, the Florida Commission on Human Relations requested that a Hearing Officer from the Division of Administrative Hearings be assigned to conduct the hearing in this cause. Thereafter, the Executive Director of the Florida Corirnission on Human Relations ("Intervenor") filed a Motion to Intervene pursuant to the provisions of Rule 9D-8.13, Florida Administrative Code, which petition was granted. Final hearing in this cause was scheduled for January 18, 1980, by Notice of llearinc: dated November 7, 1979.

At the final hearing, Petitioner testified in his own behalf and called Valerie C. Smith as an additional witness. Petitioner offered Petitioner's Exhibits Nos. 1 through 14, inclusive, each of which was received into evidence. Respondent called Willie Lee Rogers, Walter Otto, John C. Depp, Leo Feula, and Theresa De Rosa as its witnesses. Respondent offered no exhibits.

FINDINGS OF FACT

1. Petitioner, a black male, was hired on May 17, 1978, by Respondent as a Maintenance Worker I, and was assigned to the water and sewer section of Respondent's utility department. In accordance with Respondent's personnel rules, Petitioner was required to serve a probationary period of six months, the purpose of which was "[t]o provide [Petitioner] with an opportunity to demonstrate basic qualifications and a desire to perform the duties as assigned . . . , and [t]o provide [Respondent] with an opportunity to observe [Petitioner], his work habits and attitude."

2. Under Respondent's personnel rules, "probationary employees" are not afforded many of the protections enjoyed -- by "regular employees" who have completed their probationary employment period. For example, vacation days and sick leave days are not accrued during an employee's probationary period, nor are probationary employees entitled to reimbursement for time off taken due to illness during the probationary period. Whereas "regular employees" are entitled to leaves of absence without pay for a period not to exceed one year for sickness, disability, pregnancy or , . . other good and sufficient reasons which are considered to be in the best interests of (Respondent] . . .", no such privileges are enjoyed by "probationary employees". In addition, although Respondent's personnel rules allow for dismissal of any employee for cause, dismissals of "regular employees" may not take effect until at least ten days from the date a written statement of the reasons for dismissal is subpitted to the employee and his department head. Finally, one of the grounds for dismissal "for cause" for any city employee is " . . . failure to maintain a satisfactory attendance record or properly report absence due to illness, emergency, or other reason".

3. At the time of his initial employment, Petitioner completed and filed with Respondent an "Application for Employment" form and a form entitled "Required Personnel Information, both of which provided telephone numbers at which Petitioner could be contacted in case of emergency.

4. While employed by Respondent, Petitioner's job consisted of a five-day work week, during which Petitioner was to report to work at 7:30 a.m., and leave at 4:00 p.m. During the period of his employment it was possible for Petitioner to have worked a total of 44 days, with one day off for the July 4 holiday. During this 44-day work period, Petitioner was late in checking in for work a total of 25 times, and was absent from work for personal reasons a total of approximately 4 days. Petitioner was cautioned on several occasions by his superiors, including his foreman, a black male, that continued tardiness and absences could endanger his continued employment by Respondent. Although Respondent was never absent from his duty station without permission from his supervisors, he never gave advance notice of such requests, instead delaying such requests until the day on which he was to absent himself from his job.

5. As a result of Petitioner's tardiness and absences, his foreman was unable to fully evaluate his abilities as an employee in that Petitioner never worked a full week during the time that he was employed by Respondent.

6. By letter dated July 13, 1978, Petitioner was advised by Respondent's Director of Utilities that he would be separated from the work force of Respondent effective the following day. The reasons civen by Respondent for terminating Petitioner's employment were that he had failed to furnish an emergency telephone number, he was habitually late for work each morning, and had been constantly absent from work.

7. There is a total absence from the record in this proceeding of any direct evidence that Petitioner's discharge was in any way related to race. Petitioner testified that the question of race never was discussed between him and his supervisors, and Petitioner's forenan, a black male, also testified that no such discussion ever occurred, and that Petitioner's discharge was the direct result of his poor attendance record.

8. Another white male employee of Respondent was alleged by Petitioner to have received preferential treatment, though his work record with respect to tardiness was similar to that of Petitioner. However, it appears from the record that this white employee had been a long-time employee of Respondent, and was, therefore, not in "probationary" status. It further appears that that employee's record of tardiness was not as extensive as Petitioner's. The record also clearly establishes that Respondent placed a written reprimand in the white employee's file, which is a procedure allowed under Respondent's personnel rules.

9. Petitioner and Respondent have submitted proposed findings of fact in this proceeding. To the extent that those findings of fact are not adopted in this Recommended Order, they have been specifically rejected as being either irrelevant to the issues in this cause, or as not having been supported by the evidence.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the subiect matter and the parties to this action. Section l20.57(1), Florida Statutes.

11. At all times material hereto, Section 13.261, Florida Statutes, provided, in part, that:

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

13. Respondent is an "employer" within the meaning of Section 13.261, Florida Statutes.

14. Petitioner has failed to establish by substantial competent evidence that his discharge was in any way racially motivated. In fact, the evidence in this proceeding clearly establishes that, not only was his discharge not racially motivated, but ample justification existed for the action taken by Respondent on the basis of Petitioner's work record.

RECOMMENDED ORDER

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

RECOMMENDED:

That a Final Order bc entered by the State of Florida, Comjnission on Human Relations, dismissing the Petition for Relief, and denying Petitioner's request for damages and attorney's fees.

RECOMNDED this 27th day of February, 1980, in Tallahassee, Florida.

_____

WILLIAM E. WILLIAMS
Hearing Officer
Division of Administrative Hearings
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Tallahassee, Florida 32301
(904) 488-9675

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198009 TBD.R 002

'AGENCY RECOMMENDED ORDERS'

CAPTION: *Hargis v. Leon County*

CITATION: 198009 TBD.R 002

DATE: 2/28/1980

STATE: FL

CASE NO: ???? (FCHR)
79-002198 (DOAH)

CASE TYPE: Employment Discrimination

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FILENAME: 79002198.PDF

PAGES: 14

RESULT: judged (defendant won)

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARY E. HARGIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 79-2198
	)	
LEON COUNTY SCHOOL BOARD,	)	
	)	
Respondent,	)	
and	)	
	)	
NORMAN A. JACKSON, EXECUTIVE DIRECTOR, FLORIDA COMMISSION ON HUMAN RELATIONS,	)	
	)	
Intervenor.	)	

RECOMMENDED ORDER

A hearing was held in the above captioned matter, after due notice, at Tallahassee, Florida, on January 30, 1980, before Thomas C. Oldham, Hearing Officer.

APPEARANCES

For Petitioner: Ralph Armstead, Esquire
Legal Services of North Florida, Inc.
822 North Monroe Street
Tallahassee, Florida 32303

For Respondent: Charles A. Johnson, Esquire
Leon County School Board
2757 West Pensacola Street
Tallahassee, Florida 32304

For Intervenor: Aurelio Durana, Esquire
Assistant General Counsel
Florida Commission on Human Relations
2562 Executive Center Circle, East
Montgomery Building, Suite 100
Tallahassee, Florida 32301

This proceeding commenced with a complaint filed by Petitioner Mary E. Hargis with the Florida Commission on Human Relations on October 16, 1978, alleging that she was denied a position at Fairview Middle School, Tallahassee, Florida, on September 12, 1978, due to discrimination against her because of her race. The matter was investigated by the Florida Commission on Human Relations pursuant to the requirements of the Human Rights Act of 1977, Chapter 13, Florida Statutes, Part II (now Chapter 23, F.S., Part IX). On August 31, 1979, the Intervenor, Norman A. Jackson, Executive Director of the Commission, issued

a "Determination: Cause" summarizing the results of the investigation and concluding that there was reasonable cause to believe that an unlawful employment practice in violation of the Human Rights Act had occurred in Petitioner's case. Such a determination is required under the provisions of Chapter 9D-9.04, Florida Administrative Code, which implements Chapter 13, F.S. Attempts at conciliation of the dispute were made by the Commission pursuant to the requirements of Chapter 9D-9, but failed, and therefore, on October 24, 1979, Petitioner filed a petition for relief with the Commission which was referred to this Division for assignment of a Hearing Officer on November 2, 1979.

This case was initially assigned to William E. Williams, Hearing Officer, who granted a prehearing motion to intervene by the Executive Director of the Florida Commission on Human Relations. Rule 9D-8.13, F.A.C., provides for such intervention by the Executive Director. The Hearing Officer also denied a prehearing motion to dismiss the petition filed by Respondent. These determinations were made by the Hearing Officer's Order, dated January 4, 1980. Subsequently, this case was reassigned to the undersigned Hearing Officer due to the unavailability of the original Hearing Officer on January 30, 1980, the scheduled date of hearing.

At the hearing, the Intervenor sought to introduce in evidence his Determination of August 31, 1979, as a public record exception to the hearsay rule, pursuant to Section 90.803(8), Florida Statutes. Respondent objected to the introduction of the document on the ground that it constituted an investigative report which should be excluded from evidence in the interest of fairness and in consideration of the fact that such documents are not reasonably encompassed in Section 90.803(8). Respondent offered in evidence certain affidavits of employees of Respondent, which were executed prior to the hearing, to show that the Intervenor's Determination was not impartial and failed to include various matters known during the course of the investigation. Ruling was reserved on the admissibility of both the Determination (Intervenor's Exhibit 1) pending submission of briefs subsequent to the hearing. Having now considered such a posthearing submission filed by Respondent, Intervenor's Exhibit 1 is received in evidence as a public records exception to the hearsay rule solely for the purpose of establishing the fact that the Intervenor complied with pertinent rules of the Commission in processing this case, but not for the truth of the matters contained in the summary of the investigation or the validity of the Intervenor's findings therein. It is patent that receipt in evidence of such investigative reports as substantive evidence effectively would deprive a party of the opportunity to cross examine witnesses who provided the information contained in the report. Such would not be embraced within the term "matters observed pursuant to duty" set forth in public records under the statutory hearsay exception. In view of this ruling, Respondent's Composite Exhibit 7 is rejected as unnecessary to serve the purposes for which it was offered.

FINDINGS OF FACT

1. Petitioner has been employed as a food service worker at Fairview Middle School, Tallahassee, Florida, since January 1976. The position which she has held is designated as "Food Service Worker - 3 1/2 hours," and involves various duties such as the serving of food and cleaning the dining hall during the school lunch period.

2. In October 1977 a school food service employee, Frances Barbree, who worked during the breakfast shift and held the position of "Food Service Worker

- 5 1/2 hours," became ill and unable to perform her duties. The food service manager, Jean Linton, thereafter handled the breakfast shift herself with the assistance of a school maid, for a period of about two weeks. She learned that Mrs. Barbree was seriously ill and probably would not be able to return to work in the foreseeable future. In late October, at an informal meeting, Linton told her food service employees about the problem and asked if any of them wished to work during the breakfast shift in the 5 1/2 hour position. Three of the workers, including Petitioner, declined to work the additional hours for various reasons. Petitioner stated that she could not arrive at work at an earlier time because she had children to take to school at 8:00 a.m. The breakfast shift commenced at 6:45 a.m. The remaining employee, Minnie Barfield, stated her willingness to accept the job because she needed the additional money.

3. Linton reported to Carina Beaudoin, Respondent's Director of School Food Service, of Barfield's acceptance, and Beaudoin approved Barfield's temporary appointment in the 5 1/2 hour position. This necessitated carrying Barfield on both the regular payroll in her permanent 3 1/2 hour position and on a separate payroll for the extra two hours. On January 11, 1978, Barfield's status was changed, effective January 3, 1978, to reflect that she would be carried on only one payroll in the 5 1/2 hour position through June 13, 1978. The minutes of the Leon County School Board for January 24, 1978, reflected Barfield's transfer from the 3 1/2 hour position to the 5 1/2 hour position. (Testimony of Petitioner, Beaudoin, Larichiuta, Davis, Humose, Barfield (Whitfield), Linton, Respondent's Exhibits 1, 4-6)

4. Food service employees are appointed at the end of each school year for the ensuring school year, contingent upon their prior agreement to work during the following year. In April 1978, Petitioner and Barfield executed statements of agreement to work the following year. Mrs. Barbree had been in a leave-of-absence status without pay since January 4, 1978. Respondent Leon County School Board reappointed all three of these employees at its meeting on June 13, 1978. On August 17, 1978, Barbree tendered her resignation due to illness. In view of this vacancy in the position of "Food Service Worker - 5 1/2 hours" created by Barbree's resignation, Respondent's personnel department issued a Job Opportunity Bulletin on September 5, 1978, announcing the vacancy which stated that anyone interested in being considered for the position should contact the personnel office before the application deadline of September 12, 1978. The bulletin was posted at Respondent's administration building and routinely would have been provided to the Fairview Middle School with instructions to post in a designated place. The principal of Fairview personally and routinely posts all such notices in the teacher's lounge of the school to which all employees had access, but which seldom was visited by food service workers.

5. The posting of the Job Opportunity Bulletin was in accordance with the requirements of the existing contract agreement between Respondent and Local 66, International Brotherhood of Painters and Allied Trades, which included food service workers as members of the bargaining unit. The contract provided that employees applying for a vacancy must be considered before a decision on employment is reached. Respondent's applicable personnel directive further provides that applicants for a position must file an application with the personnel department, and that after the close of the job advertising period, a list of qualified applicants is submitted to the school principal for the conduct of interviews and submission of a personnel appointment form to the personnel department for final processing for employment. As a matter of practice, the principal of Fairview Middle School does not interview or submit recommendations for appointment of food service workers. These positions are handled on the basis of recommendations from the school food service manager to

the Director of School Food Service who performs the hiring functions normally handled by a school principal. (Testimony of Beaudoin, Nims, Linton, Stipulation, Petitioner's Exhibits 2, 4, Respondent's Exhibits 2, 4-6, 8)

6. The Food Service Manager at Fairview Middle School, Mrs. Linton, was under the impression that Mrs. Barfield had been appointed to the 5 1/2 hours position on a permanent basis in January 1978, and was unaware that the position vacancy had been advertised in September 1978. She assumed that Barfield would retain the position because she had occupied it at the end of the 1977-78 school year. In fact, her appointment was recommended by Mrs. Beaudoin on a "personnel Appointment" form, dated August 3, 1978, to be effective on September 5, 1978. The form reflected that the recommendation was approved by Respondent's officials and the school board. (Testimony of Linton, Respondent's Exhibit 2)

7. On or about September 6, 1978, Petitioner saw the Job Opportunity Bulletin posted in Respondent's administration building. She then went to the office of the Director, School Food Service, and inquired concerning the advertised position. An employee at that office informed her that the job had already been filled. Although none of the employees then at that office could later recall that Petitioner had made such inquiry, Petitioner's testimony is deemed credible in this regard.

8. Petitioner then complained to the Fairview Middle School Principal on or about September 11 concerning the matter and he told her that he would look to her complaint. He ascertained from Mrs. Linton the following day that she had not offered the job to Petitioner because Petitioner had previously declined the position in 1977. The principal informed Petitioner that if she was not satisfied with the situation, she could check with the Director of School Food Service. Petitioner did not pursue the matter with that official, but did later ask Mrs. Linton about the matter and she confirmed that Mrs. Barfield would retain the position because she had worked in it the prior year. Petitioner thereafter filed the complaint with the Human Relations Commission. (Testimony of Petitioner, Nims, Linton, Beaudoin, Revell, Garrison, Lewis, Petitioner's Exhibit 5)

9. At no time did either Petitioner or Mrs. Barfield file a written application for the position of "Food Service Worker - 5 1/2 hours." Both employees had received about average evaluations in the spring of 1978. Petitioner has been employed as a food service worker for Respondent for a longer period than Mrs. Barfield. Petitioner also is the only black food service worker at Fairview Middle School. (Testimony of Nims, Petitioner's Exhibit 1, Respondent's Exhibits 3-4)

CONCLUSIONS OF LAW

10. Section 23.167, F.S., provides pertinently as follows:

> 23.167 Unlawful employment practices: Remedies; construction.--
> (1) It is an unlawful employment practice for an employer: (a) To . . . fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, . . .
> * * *
> (10) Any person aggrieved by a violation of this section may file a complaint with the commission within 180 days of the alleged violation . . .
> * * *
> (13) In the event that the commission, in the case of a complaint under subsection (10) . . . finds that an unlawful employment practice has occurred, it shall issue an order prohibiting the practice and providing affirmative relief from the effects of the practice, including reasonable attorney's fees.

11. The foregoing Findings of Fact clearly establish that (a) Respondent improperly filled the vacant position in question without completing proper procedures of accepting applications and interviewing applicants as required by its contract agreement with the employee labor organization and its own directives. Petitioner indicated her desire to apply for the position based upon the erroneous assumption by Respondent's officials that the job had already by properly filled. However, in spite of Respondent's negligence in failing to follow required procedures, no evidence was presented at the hearing from which it can be concluded or even inferred that Petitioner was the subject of unlawful discrimination because of her race or color. The evidence is undisputed that when Petitioner's supervisor originally inquired of her employees as to anyone's desire to take the job on a temporary basis, Petitioner declined to do so because of conflicting personal commitments. Subsequent events establish that the employee, Mrs. Barfield, who accepted the additional hours of work on a temporary basis was retained and erroneously appointed to the position on a permanent basis in September 1978, because of a misapprehension and apparent lack of knowledge on the part of the supervisor as to the requirement for advertising and other necessary procedures prior to a valid appointment. There is no suggestion at all that she or any other of Respondent's officials were motivated by racial considerations to deprive Petitioner of such employment. It may be possible that Petitioner has a valid grievance to pursue under the collective bargaining agreement or by some other procedure, but she has filed to establish the existence of an unlawful employment practice under the Human Rights Act of 1977.

12. Respondent's Proposed Findings of Fact and Conclusions of Law have been fully considered, and those portions not incorporated in this Recommended Order are deemed either unnecessary, irrelevant, or unsupported in law or fact.

RECOMMENDATION

That the complaint and petition herein be dismissed by the Florida Commission on Human Relations.

DONE AND ENTERED this 28th day of February 1980, in Tallahassee, Florida.

THOMAS C. OLDHAM
Hearing Officer
Division of Administrative Hearings
101 Collins Building
Tallahassee, Florida 32301
(904) 488-9675

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Tallahassee, Florida 32301

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARY E. HARGIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 79-2198
	)	
LEON COUNTY SCHOOL BOARD	)	
	)	
Respondent.	)	
and	)	
	)	
NORMAN A. JACKSON, EXECUTIVE	)	

DIRECTOR, FLORIDA COMMISSION ON)
HUMAN RELATIONS,)
)
Intervenors.)
_____)

AMENDMENT TO RECOMMENDED ORDER

1. Intervenor Norman A. Jackson, having filed Motion for Reconsideration of the Recommended Order issued in this case on February 28, 1980, and it appearing that good cause has been shown therefor, the Motion is granted by the issuance of this Amendment.

2. The record discloses that the Intervenor timely filed a Proposed Recommended Order with this Division on February 18, 1980 but, through administrative error, the said Proposed Recommended Order was not provided to the Hearing Officer for consideration. Having now fully considered the Proposed Recommended Order, and having determined that the matters set forth therein do not justify substantive modification of the Recommended Order, the Findings of Fact, and Conclusions of Law, and Recommendation contained therein are hereby affirmed. Those portions of the Proposed Recommended Order which are not adopted or incorporated in Recommended Order, as amended, are deemed to be unnecessary, irrelevant or unwarranted in law or fact, and are rejected.

DONE and ENTERED this 3rd day of March, 1980, in Tallahassee, Florida.

_____
THOMAS C. OLDHAM
Hearing Officer
Division of Administrative Hearings
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Tallahassee, Florida 32301
(904) 488-9675

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==========

AGENCY FINAL ORDER

==========

BEFORE THE FLORIDA COMMISSION ON HUMAN RELATIONS

MARY E. HARGIS,

Petitioner,

vs.

FCHR NO. 00132-79
CASE NO. 79-2198
ORDER NO. 800010

LEON COUNTY SCHOOL BOARD,

Respondent,

and

NORMAN A. JACKSON, Executive Director, Florida Commission on Human Relations,

Intervenor.

_____/

The following Commissioners participated in the disposition of this matter:

Commissioner Reese Marshall, Chair
Commissioner Gabriel Cazares
Commissioner Cynthia M. Chestnut
Commissioner Elvira M. Dopico
Commissioner Robert Joyce
Commissioner Melvin L. Levitt
Commissioner Thomas H. Poole, Sr.

APPEARANCES:

Larry White, Legal Services of North Florida, Inc., 822 North Monroe Street, Tallahassee, Florida 32303, for Petitioner.

Charles A. Johnson, Leon County School Board, 2757 West Pensacola Street, Tallahassee, Florida 32304, for Respondent.

Aurelio Durana, Assistant General Counsel, Florida Commission on Human Relations, 2562 Executive Center Circle, East, Suite 100, Montgomery Building, Tallahassee, Florida 32301, for Intervenor.

I

PRELIMINARY MATTERS

On October 16, 1978, Petitioner, a black female, filed a complaint with this Commission to the Human Rights Act of 1977, Part IX, Chapter 23, Florida Statutes (1979), alleging that the Leon County School Board and the Fairview Middle School unlawfully discriminated against her on the basis of her race in denying her promotional employment to the position of "Food Service Worker-5 1/2 hours" in the Fairview Meddle School's dining facility. Petitioner alleges that she was denied this position on or about September 12, 1978.

Subsequent to the filing of the complaint, the matter was investigated by the Office of Field Services, this Commission, pursuant to the requirements of Part IX, Chapter 23, Florida Statutes (then Part II, Chapter 13) and Rule 9D-9.03, Florida Administrative Code. Pursuant to the requirements of Rule 9D-9.04, on August 31, 1979, the Executive Director issued a Determination: Cause which concluded that the investigation revealed reasonable cause to believe that an unlawful employment practice had occurred in violation of the Human Rights Act. Subsequent to the issuance of the Determination, the Office of Field Services sought to conciliate the dispute, as required by Rule 9D-9.05. The conciliation efforts were unsuccessful and on October 24, 1979, Petitioner filed a petition for relief, as provided in Rule 9D-9.05(3). Thereafter, pursuant to Commission Rules, the petition was referred to the Division of Administrative Hearings, on November 2, 1979, for assignment of a Hearing Officer.

After due notice, a hearing was held in this matter at Tallahassee, Florida, on January 30, 1980, before Thomas C. Oldham, Hearing Officer, pursuant to the provisions of Chapter 120, Florida Statutes, and Chapter 9D-8, Florida Administrative Code.

II

FINDINGS OF FACT

The Hearing Officer entered his Recommended Order on February 28, 1980. A copy of the Recommended Order of the Hearing Officer, including his Findings of Fact, is fully set forth in the appendix of this Order.

On March 19, 1980, the Executive Director, Intervenor herein, filed his exceptions to the Hearing Officer's Recommended Order. Petitioner subsequently joined in and adopted the Intervenor's exceptions. On April 11, 1980, Respondent Leon County School Board filed its response to Intervenor's exceptions. Briefs and supporting legal memoranda were also filed by the parties. On April 21, 1980, the oral argument was held on the exceptions to the Hearing Officer's Recommended Order and the response thereto.

Having reviewed the transcript of the proceedings, and having considered the exceptions, briefs and oral arguments of the parties, we find that the Hearing Officer's Findings of Fact are supported by competent, substantial evidence of record and are hereby adopted by this Commission as its Findings of Fact and are incorporated herein.

II

CONCLUSIONS OF LAW

Unlawful Employment Practice. Section 23.167, Florida Statutes, provides in pertinent part, as follows:

> 23.167 Unlawful employment practices: remedies; construction. --
> (1) It is an unlawful employment practice for an employer: (a) To . . . fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment, because of such individual's race, color, ...
> * * *
> (13) In the event that the commission, in the case of a complaint under subsection (10) . . . finds that an unlawful employment practice has occurred, it shall issue an order prohibiting the practice and providing affirmative relief from the effects of the practice, including reasonable attorney's fees.

Since the Florida statute is patterned after the federal law on the same subject (Title VII of the Civil Rights Act of 1964), then the Florida statute should be given "the same construction in the Florida Courts as its prototype has been given in the federal Courts insofar as such construction is harmonious with the spirit and policy of Florida legislation on the same subject." Pasco County School Board v. Florida Public Employees Relations Commission, 353 So. 2d 108, 116 (Fla. 1st DCA 1977).

The standard of proof applicable in cases of individual actions involving disparate treatment is as delineated by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792(1973). Under McDonnell Douglas and subsequent cases, the Petitioner bears the initial burden of establishing a prima facie case of racial discrimination by showing: (1) that she belongs to a protected class (racial minority); (2) that she applied and was qualified for a job for which the employer was seeking applicants; (3) that despite her qualifications, she was not hired (promoted); and (4) the employer hired/promoted a Caucasian for the job prior to the published closing date for the position.

It is clear, from McDonnell Douglas, that Petitioner "carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the Act." Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1977).

To dispel the adverse inference from the petitioner's prima facie case, the burden then shifts to the employer. The employer then must articulate some legitimate, non-discriminatory reason for not hiring or promoting the petitioner. McDonnell Douglas v. Green, Supra, at 802.

Finally, the petitioner is required to rebut the employer's stated reason for failure to hire or promote by showing that the employer's alleged non-

discriminatory motive is in fact a pretext. Furnco Construction Corp. v. Waters, Supra, at 578.

In order for the Petitioner to prevail in this case, she must convince the Commission by a preponderance of the evidence that Respondent's failure to hire/promote her to the Food Service Worker- 5 1/2 hour position was based on the fact that she is black, rather than any legitimate non-discriminatory reason.

There is substantial competence evidence in the record to support the Commission's conclusion that Ms. Hargis established a prima facie case. Petitioner is the only black food service worker employed at Fairview Middle School. Petitioner was qualified for the position she sought and had more seniority than the white female chosen for the position. She was the only person who sought to make formal application for the vacancy listing which appeared in the Leon County School's September 5, 1978, Job Opportunities Bulletin. When she attempted to make formal application for the position, she was informed that the position had already been filled. Petitioner's formal application was effectively frustrated and would have been futile at that point. Despite her superior past record of performance as a food service worker, Petitioner was neither advised of the vacancy nor permitted to apply, so that Respondent might promote/hire Mrs. Minnie Barfield, a white female, for the position. Therefore, Petitioner's establishment of a prima facie case raises an inference that Respondent's failure to hire/promote her was racially premised.

The Respondent seeks to rebute Petitioner's prima facie case by articulating as its legitimate, non-discriminatory reason for not hiring/promoting Mrs. Hargis, to a lack of coordination and communication in advertising the vacancy, between the Central Kitchen and the Dining Hall manager at Fairview Middle School, who was also responsible for making the final employment decision. Respondent also places great reliance on an informal October, 1977, meeting in which Petitioner indicated that she was unable to assume the additional hours of the 5 1/2 hour position, for various personal reasons at that time.

It is undisputed that Respondent failed to comply with its existing collective bargaining agreement in filling the vacancy that Petitioner sought. The contract requires that existing employees be considered for a vacancy before a decision on employment is reached.

Upon being informed that the advertised position vacancy had already been filled, Mrs. Hargis complained to the Fairview Middle School principal on or about September 11, 1978, prior to the announced closing date for the position. The principal took no positive actions to correct an obvious error, but instead informed Petitioner that if she was not satisfied with the situation, she could check with Mrs. Linton, the Director of School Food Service. Mrs. Linton is the same management official who had already filled the Food Service Worker position by hiring/promoting the white employee with less seniority than Petitioner.

In light of these substantial procedural irregularities in the filling of this position, Respondent asserts that although its procedures and collective bargaining agreement may not have been properly complied with in this case, its actions were not motivated by discriminatory intent.

There is no direct evidence of discriminatory intent in the instant case, and such evidence is seldom present. Therefore, circumstantial evidence, or inferences, may be relied upon to establish discriminatory motive.

Bolger, 21 EPD paragraph 30,500 (4th Cir. 12/19/79), citing the U.S. Court decisions in International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 335, n. 15 (1976), and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973). The ultimate inquiry, in examination of the issue of discriminatory intent, is whether the decision or action in question was racially premised, i.e., was it a cover-up for a racially discriminatory purpose. B. Schlei and P. Grossman, Employment Discrimination Law, 1153-1154 (1976).

An examination of the totality of the circumstances in this case leads this Commission to the conclusion that the Respondent's stated reasons of error and negligence in its failure to promote/hire the Petitioner for the Food Service Worker-5 1/2 hour position are merely a pretext for racial discrimination against Mrs. Hargis. It is beyond question that Petitioner was thoroughly qualified for the position sought. The procedures utilized by Respondent to fill this position afford too much opportunity for subjective evaluation by a single supervisor with no clear standards for making crucial employment decisions. Mrs. Linton entirely controlled the promotion/hiring process in this case. The vacancy was filled prior to the proper posting of notices and without complying with Respondent's collective bargaining agreement. Such procedures must be subjected to close scrutiny by this Commission. Respondent had ample opportunity to remedy its actions, but failed to take any corrective measures. Instead, Respondent simply suggested that Petitioner contact the very individual who had committed the unlawful employment practice in the first instance. It can only be concluded that Respondent knew of the racially discriminatory impacts of its decision and that Respondent sought to cover-up its unlawful activity by posting of vacancy announcements after the employment decision had been made.

As the United States Supreme Court noted in Local 189, Papermakers & Paperworkers v. United States, 416 F.2d 980, 997 (5th Cir. 1969), cert. denied 397 U.S. 919 (1970), "the conduct engaged in (here) had racially-determined effects. The requisite intent may be inferred from the fact that the (respondents) persisted in the conduct after its racial implications had become known." Section 23.167 requires no more.

In summary then, the Commission finds that the Respondent unlawfully discriminated against the Petitioner on account of her race by failing to hire/promote her to the position of Food Service Worker-5 1/2 hours, and instead promoted a white person, in violation of Section 23.167(1), Florida Statutes.

B. Admissibility of Executive Director's Determination. On page 2 of his Recommended Order, the Hearing Officer notes that: "At the hearing, the Intervenor sought to introduce in evidence the Executive Director's Determination: Cause, issued August 31, 1979, under the public records exception to the hearsay rule, pursuant to Section 90.803(8), Florida Statutes.

After having considered post-hearing submissions filed by the parties, the Hearing Officer ruled that the Executive Director's Determination was:

> received in evidence as a public record exception to the hearsay rule solely for the purpose of establishing the fact that the (Executive Director) complied with pertinent rules of the Commission in processing this case, but not for the truth of the matters contained in the summary of the investigation or the validity of the (Executive Director's) findings therein.

We reject this conclusion of the Hearing Officer.

It is well settled in Florida that the contents of public records may be introduced as an exception to the hearsay rule. Smith v. Mott, 100 So. 2d 173 (Fla. 1959); Wilkerson v. Grover 181 So. 2d 591 (Fla. 3d DCA 1965). All that Florida law requires is that the reporting be made pursuant to law, Bell v. Kendrick, 25 Fla. 778 6 So. 868 (1889), and that the document be credible and trustworthy. Smith v. Mott, supra. As the court in Mott held, "the secondary character of the evidence . . . only affects the weight to be accorded it and not its competency."

We also conclude that the Determination is admissible "for the purpose of supplementing or explaining other evidence even though it may not be sufficient in itself it support a finding." Section 120.58(1)(a), Florida Statutes; Pasco County School Board v. PERC, supra.

This Commission concludes, as did the Fifth Circuit Court of Appeals in Smith v. Universal Services, Inc., 454 F 2d 154, 4 FEP Cases 187 (5th Cir. 1972), that the Determination is admissible as it tends to ease the agency's fact-finding burden. However, the fact-finder is not bound by the findings in the Determination and it is to be given no more weight than any other evidence or testimony received at the hearing. No due process violation occurs as a result of the admission of the Determination. Georator Corp. v. EEOC, 592 F.2d 765 (4th Cir. 1979); Pantechenko v. C.B. Dolge Co., 18 FEP Cases 686 (D.C. Conn. 1977).

The Executive Director's Determination, consisting of a summary of the allegations of discrimination, a brief summary of the facts developed in the investigation, and the Executive Director's finding of reasonable cause to believe that a violation of the Human Rights Act has occurred, is analogous to other reports admissible under Section 90.803(8) and (6), Florida Statutes. See Smith v. Mott, supra; Wilkerson v. Grover, supra, (admitting hospital records).

The report was prepared in the regular course of the Executive Director's duties and in accordance with Section 23.166(5), Florida Statutes, and Rule 9D-9.04(2), Florida Administrative Code. In view of the general presumption under Florida law that public officials perform their duties in accordance with law, and the absence of any evidence to the contrary, the Determination of the Executive Director is admissible in evidence. Hillsborough County Aviation Authority v. Taller and Cooper, 245 So. 2d 100 (Fla. 2d DCA 1971). In reaching this conclusion, we have not considered and do not have decide whether the Investigatory Report, upon which the Determination is based, is admissible. See Gillin v. Federal Paper Board Co., 52 FRD 838, 2 FEP Cases 507 (D.C. Conn. 1979), aff'd 479 F.2d 97, 5 FEP Cases 1094 (2d Cir. 1973), where the EEOC Determination was admitted in evidence while the rest of the investigatory materials were excluded.

In their exceptions to the Recommended Order, Intervenor and Petitioner assert that the Hearing Officer's Conclusions of Law re in error and should not be adopted by the Commission. To the contrary, Respondent asserts that the Hearing Officer's Conclusions are correct and should be upheld.

Having fully considered the exceptions and briefs of the parties, as well as the Conclusions of Law reached by the Hearing Officer, in view of the foregoing Conclusions reached by the Commission, those portions of said

exceptions and Recommended Order not incorporated in this Order are deemed to be unnecessary, irrelevant or unwarranted in law or fact, and are rejected.

Having considered all of the foregoing, it is therefore

ORDERED AND ADJUDGED:

1. Petitioner shall be promoted by Respondent to the Food Service Worker-5 1/2 hour position at Fairview Middle School, or to an equivalent position within the Leon County School System that is within a reasonable convenient commuting distance for Petitioner; such promotion to be retroactive to September 12, 1978, and to take place no later than August 1, 1980.

2. Petitioner shall receive from Respondent back pay equivalent to the salary she would have been paid in the position for the period which she has been illegally denied employment; such back pay to be reduced by the amount of income Petitioner received from her interim employment with the Leon County School Board.

3. Petitioner is awarded attorney's fees. Petitioner has seven working days from the date of this Order to submit affidavits on attorney's fees to Respondent. Respondent has seven working days in which to respond. Following such response the parties have seven working days in which to negotiate a settlement of the amount to be awarded. If, at the end of the seven-day negotiation period, the parties have been unable to reach settlement amount, Petitioner shall immediately file a notice of failure of settlement with the Clerk of the Commission requesting that an evidentiary hearing be set on the award of attorney's fees.

It is so Ordered:

Dated this 29th day of May, 1980.

FOR THE FLORIDA COMMISSION
ON HUMAN RELATIONS

_____
Reese Marshall, Commission Chair
Florida Commission on Human Relations

FILED this 29th day of May, 1980, at Tallahassee, Florida.

BY:_____
Sondra J. Anderson
Acting Clerk of the Commission

APPENDIX

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