



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**EDWARD J. BAILEY,**

Complainant,

v.

**VILLAGE OF PITTSFORD,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10142313

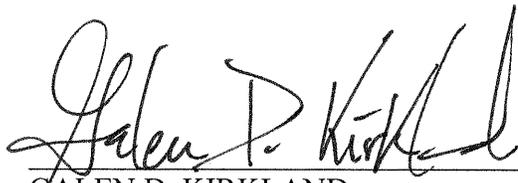
**PLEASE TAKE NOTICE** that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on January 18, 2012, by Thomas J. Marlos, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

**PLEASE TAKE FURTHER NOTICE** that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

**ADOPTED, ISSUED, AND ORDERED.**

DATED: 2/15/12  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER



ANDREW M. CUOMO  
GOVERNOR

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**EDWARD J. BAILEY,**

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**VILLAGE OF PITTSFORD,**

Respondent.

**RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER**

Case No. **10142313**

**SUMMARY**

Complainant alleged that his employer unlawfully retaliated against him because he had filed an age discrimination complaint against the employer. Because the evidence does not support the allegations, the complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On June 24, 2010, Complainant filed a verified complaint with the New York State Division of Human Rights (“Division”), charging Respondent with retaliation as an unlawful discriminatory practice relating to employment in violation of N.Y. Exec. Law, art. 15 (“Human Rights Law”).

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Thomas J. Marlow, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on September 14, 2011.

Complainant and Respondent appeared at the hearing. Complainant was represented by James D. Hartt, Esq. Respondent was represented by Patrick B. Naylor, Esq., of Goldberg Segalla LLP.

Permission to file proposed findings of fact and conclusions of law was granted.

### **FINDINGS OF FACT**

1. On October 4, 1999, Complainant became the building inspector and fire marshal for Respondent. (Tr. 36, 49-51, 53)
2. In late 2009, Respondent began planning its budget for its fiscal year starting June 1, 2010. (Tr. 211, 213-17, 224)
3. In reviewing income and expenditures for 2009, Respondent realized that it “had a significant budget shortfall.” Sales receipts were lower than in the past. Interest earned on accounts was lower than in the past. Pension costs and health care costs had risen. (Tr. 213-15)
4. In late 2009 and early 2010, Respondent evaluated ways “to reduce costs and end up with a balanced budget.” By the end of April, 2010, Respondent decided to take certain actions to reduce spending which included the following: reduction of capital expenditures for road work; laborers working in the Department of Public Works had their hours reduced from 40

hours per week to 36 hours per week; the elimination of Complainant's full-time building inspector position; the creation of a twenty-four-hour per week part-time building inspector position; and, the creation of an eight-hour per week part-time fire marshal position.

(Complainants Exhibit 1; Tr. 213-17, 280-81, 287-89, 319-21)

5. On or about April 28, 2010, Robert Corby ("Corby"), Respondent's Mayor, informed Complainant, in writing, that Complainant's full-time building inspector position was being eliminated. Corby also informed Complainant that Respondent was creating a twenty-four-hour per week part-time building inspector position and an eight-hour per week part-time fire marshal position. Corby further informed Complainant that Complainant was being offered the part-time building inspector position and that a regular schedule of hours would be required.

(Complainant's Exhibit 1; Tr. 71-72, 145-46, 217-21, 227, 287-90, 307)

6. On May 26, 2010, Complainant filed a complaint ("Case No. 10141586") with the Division, alleging that Respondent unlawfully discriminated against him because of his age.

(ALJ's Exhibit 1; Tr. 35-36)

7. On May 28, 2010, the Division notified Respondent of Case No. 10141586. On June 1, 2010, the clerk of Respondent notified the trustees of Respondent regarding Case No. 10141586. (Tr. 35-38).

8. On June 11, 2010, Corby gave Complainant a memorandum ("June 10 memo") regarding his part-time position, which included the following: Complainant's salary; Complainant's regular schedule of hours; the requirement of specific in-office hours; Respondent's expectations; and, the delegation of the responsibility of supervision of Complainant to Steven Maddox ("Maddox"), a trustee of Respondent. This memorandum was

given to Complainant so that Complainant had a complete understanding of his new employment status. (Complainant's Exhibit 2; Tr. 75-76, 147, 309, 323-24)

9. On June 24, 2010, Complainant filed the instant complaint (Case No. 10142313) with the Division alleging that Respondent unlawfully retaliated against him for filing Case No. 10141586. Complainant alleged that the unlawful retaliation included the following: his new regular schedule of hours and the requirement of specific in-office hours, as set forth in the June 10 memo; the lack of flexibility in his hours as compared to other part-time employees; the requirement of maintaining a work log as set forth in the June 10 memo; the procedure for obtaining permission to be excused from board meetings; and, the designation of Maddox as his supervisor. (ALJ's Exhibit 1)

10. At least as early as July of 2009, when Complainant received an unsatisfactory rating for his performance, Complainant was required to maintain work logs. (Respondent's Exhibit 1; Tr. 84-92, 154-56, 168, 253-54, 267-68, 294)

11. In 2008, 2009, and 2010, as well as other years, Corby designated Maddox as trustee-liaison with supervisory responsibilities with regard to Complainant. (Tr. 61-65, 150-51, 170, 177, 179-81, 207-09, 236, 295-96)

12. Since the building inspector position was going to be part-time, Respondent wanted Complainant to have a regular schedule of hours and specific in-office hours so that residents and applicants knew when the building inspector would be present to answer questions. (Tr. 160-61, 225-26)

13. Respondent is flexible with the hours and schedules of its part-time employees. Respondent has accommodated requests of part-time employees with regard to flexibility of work hours and schedules. Complainant has made no requests of Respondent regarding

flexibility of his work hours or schedule. (Tr. 105-08, 121-26, 129-30, 138, 150, 169-70, 172, 232-33, 247, 280, 291-94, 303-04, 310-11, 314-18)

14. Complainant has made no request of Respondent to alter any requirement of his job as set forth in the June 10 memo. (Tr. 80-84, 97-101, 172, 247)

### **OPINION AND DECISION**

The Human Rights Law makes it an unlawful discriminatory practice for an employer to retaliate against an individual because that individual filed a complaint under the Human Rights Law alleging unlawful discrimination. *See* Human Rights Law § 296.7.

Complainant raised an issue of unlawful discrimination, alleging that Respondent retaliated against him because he filed an age discrimination complaint with the Division in May of 2010 against Respondent. Complainant alleged that, after Respondent learned of his complaint, Respondent: established an unnecessary, regular schedule of hours for Complainant's work schedule, with the requirement of specific in-office hours; established Complainant's schedule in a manner that lacked flexibility as compared to other part-time employees; established the requirement that Complainant maintain a work log; established a procedure for Complainant to obtain permission to be excused from board meetings; and, designated Maddox as Complainant's supervisor.

After considering all of the evidence presented and evaluating the credibility and demeanor of the witnesses, I find that the credible evidence does not support Complainant's allegation. I credit the testimony of Corby and Maddox and find that the establishment of the expectations associated with Complainant's new employment status was not motivated by or determined by discriminatory animus. Corby and Maddox wanted the Village's building

inspector to be available on a regular basis for the residents, but would also be flexible if necessary. They saw no reason to change the requirement of a work log that existed prior to 2010 or to change Maddox's supervisory responsibilities with regard to Complainant. At no time did Complainant approach Respondent with a request to alter any requirement of his job.

Complainant has the burden to establish by a preponderance of the evidence that unlawful discrimination occurred. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004). Conclusory allegations, unsupported by credible evidence, are insufficient to establish unlawful discrimination. *See Gagliardi v. Trapp*, 221 A.D.2d 315, 633 N.Y.S.2d 387 (2d Dept. 1995). Complainant has failed to meet the burden of showing that any conduct attributed to his employer constituted unlawful discrimination in violation of the Human Rights Law. Therefore, the complaint must be dismissed.

### **ORDER**

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the complaint be, and the same hereby is, dismissed.

DATED: January 18, 2012  
Bronx, New York



Thomas J. Marlow  
Administrative Law Judge