

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

WILLIAM M. BERRY,

Complainant,

v.

SUFFOLK COUNTY, SHERIFF'S OFFICE,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10102743

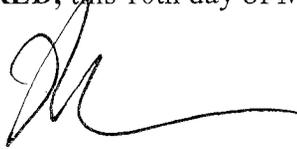
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on February 14, 2008, by Robert J. Tuosto, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was 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 KUMIKI GIBSON, 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, this 10th day of March, 2008.

A handwritten signature in black ink, appearing to be 'Kumiki Gibson', written over a horizontal line.

KUMIKI GIBSON
COMMISSIONER

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

Case No. 10102743

SUMMARY

Complainant, a 60 year old African-American corrections officer, alleged that he was discriminated against on the bases of age and race when passed over for promotion.

Complainant has failed to prove his case and his complaint is dismissed.

PROCEEDINGS IN THE CASE

On November 23, 2004, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with 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 an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Robert J. Tuosto, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held in Hauppauge, New York on November 29-30, 2007, and December 21, 2007.

Complainant and Respondent appeared at the hearing. Complainant was represented by the Law Offices of Frederick Brewington, by Valerie Cartright, Esq. Respondent was represented by the Suffolk County Department of Law, Jennifer K. McNamara, Esq., Assistant County Attorney.

Permission to file Findings of Fact and Conclusions of Law was granted and both side so filed.

FINDINGS OF FACT

1. Complainant, a 60 year old African-American corrections officer, alleged that he was unlawfully discriminated against on the bases of age and race when passed over for promotion on two separate occasions. (ALJ Exh. 2)

2. Respondent denied unlawful discrimination in its verified Answer. (ALJ Exh. 5)

Background

3. On September 6, 1977, Complainant began employment with the Suffolk County Sheriff’s Office (hereinafter “SCSO”). (Tr. 134)

4. In 1987, Complainant took a civil service promotional examination for the position of Sergeant with the SCSO. In 1989, Complainant was promoted to Sergeant. (Tr. 144)

5. From 1989 to 2005, Complainant sought promotion to the position of Lieutenant with the SCSO. (Tr. 163, 164)

The 1993 Civil Service Promotional Examination

6. On October 23, 1993, Complainant applied for the position of Lieutenant by taking a civil service promotional examination (“the examination”) and receiving a passing score. On March 4, 1994, a certified promotional list (“the list”) was established as a result of the examination. Complainant was ranked 13th of 22 candidates. (Respondent’s Exh. 34; Tr. 194, 197, 198, 322)

7. At this time the selection of candidates was based on the “one in three” civil service rule. This rule mandated that a decision maker was only allowed to bypass without explanation any two of three candidates from the list. (Tr. 371, 540-41)

8. Three Caucasian candidates who ranked lower on the list than Complainant were promoted to the position of Lieutenant. (Tr. 201-02, 277, 322)

9. Complainant did not file a complaint with the Division after the 1993 examination.

The 2003 Civil Service Promotional Examination

10. On October 25, 2003, Complainant again applied for the position of Lieutenant by taking the examination. On April 5, 2004, a list was established as a result of the examination and Complainant, along with 12 other candidates, was ranked in the “first band” of eligible candidates for this position. (Respondent’s Exh. 35; Tr. 218, 220)

11. By this time the “one in three rule” had been abandoned by Respondent and, in its place, “zone scoring” was adopted. Zone scoring allows for greater numbers of candidates, including minorities, to be considered for promotion by rounding off test scores and having more candidates grouped together in “bands” of candidates with similar scores. Unlike the “one in three” rule, a decision maker must exhaust at least ten of 12 candidates in the first “band” before

moving to the next one. Zone scoring also allows the decision maker a greater degree of discretion in choosing whom to promote. (Tr. 372, 381-83, 384-85, 462, 472)

12. On October 7, 2004, the Suffolk County Department of Civil Service certified eligible candidates from the April 5, 2004 list to the SCSO for the position of Lieutenant. On November 8, 2004, three Caucasian candidates were promoted. (Respondent's Exh. 35; Tr. 223-24, 385)

13. The personnel files for Complainant and the three successful candidates revealed that Complainant, unlike the three others, had 20 negative incidents relating to job performance. (Respondent's Exhs. 4, 5, 6, 7, 22, 23, 24, 26, 28, 33)

14. On November 23, 2004, Complainant filed his Division complaint. (ALJ Exh. 2)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer, "...because of the age [or] race...of any individual...to discriminate against such individual in compensation, or in terms, conditions or privileges of employment." Human Rights Law § 296.1 (a).

In order to establish a prima facie case based on age or race, a complainant must show: 1) membership in a protected class; 2) that he or she was qualified for the position applied for; 3) an adverse employment action; 4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *McCluskey v. County of Suffolk*, 9 Misc. 3d 1106A, 806 N.Y.S.2d 446 (2005). A complainant's burden in establishing a prima facie case is 'de minimis'. *Schwaller v. Squire, Sanders & Dempsey*, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dep't., 1998).

A respondent, should a complainant establish a prima facie case, has the burden of

producing a legitimate, nondiscriminatory reason for its employment action. If successful, the burden shifts back to complainant to show that the proffered reason is a pretext for unlawful discrimination. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

Statute of Limitation

At the outset, the Division must consider whether to include those matters beyond the one year statute of limitation. Human Rights Law § 297.5. Complainant, in support of such a contention, takes the position that a continuing violation has occurred. *See* 9 N.Y.C.R.R. § 465.3 (e).

Complainant's allegation of unlawful discrimination based on the 1993 examination exists beyond the statutory time period, i.e., prior to November 23, 2003. As such, this claim is only viable to the extent that Complainant can show a continuing violation. *Clark v. State of New York*, 302 A.D.2d 942, 754 N.Y.S.2d 814 (4th Dep't., 2003)(in which a continuing violation is found where there is "...proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory practice.")

The record shows that Complainant alleged that he was not promoted as a result of the 1993 examination. However, failing to promote an employee has been found by the Appellate Division not to constitute a basis for invoking the continuing violation doctrine. *Nielsen v. United Parcel Service, Inc.*, 210 A.D.2d 641, 619 N.Y.S.2d 844 (3d Dep't., 1994)("...individual instances of failure to promote do not constitute a continuing violation...") Therefore, all matters relating to the failure to promote Complainant to the Lieutenant position in the wake of the 1993 examination are discrete and singular acts and, as such, are time barred. Similarly, Complainant is limited to the consideration of those acts which occurred from one month after

the administration of the 2003 examination, i.e., November 23, 2003, to the date of the complaint.

Discrimination Analysis

Here, Complainant makes out a prima facie case. The record showed that Complainant was clearly a member of a protected class, and was qualified for the Lieutenant position by way of his 2003 examination score and placement on the list. Also, Complainant was not promoted within the statutory time period, and those outside of his protected class were promoted before him.

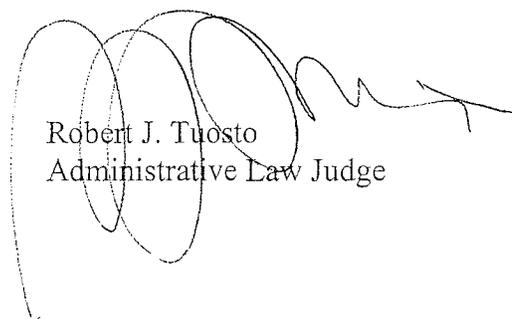
Respondent proffered a legitimate, nondiscriminatory reason for its employment actions, namely, that any promotion decisions at this time were consistent with civil service law and a reasonable exercise of discretion given the information contained in the personnel files of Complainant and the three successful candidates. Complainant, in his attempt to show pretext, could not prove that unlawful discrimination, rather than the relevant information in Complainant's personnel file, was the real reason for Respondent's employment decision.

Respondent was free to promote others over Complainant for any reason or for no reason as long as it did not violate the Human Rights Law. *See State Div. of Human Rights v. County of Onondaga Sherriff's Dep't.*, 71 N.Y.2d 623, 630, 528 N.Y.S.2d 802 (1988). Therefore, this 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: February 14, 2008
Bronx, New York



Robert J. Tuosto
Administrative Law Judge