ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

STEPHEN DANIELS,

Complainant,

v.

BLOSSOM HEALTH CARE CENTER, INC. A/K/A BRIGHTON MANOR,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10164247

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 December 19, 2014, by Michael T. Groben, 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 HELEN DIANE FOSTER, 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: FEB 03 2015
Bronx, New York

HELEN DIANE FOSTER
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10164247**

SUMMARY

Complainant alleges that Respondent unlawfully discriminated against him in employment because he had been convicted of a criminal offense. Because the evidence supports Complainant's allegations, the complaint is sustained. Damages are awarded, and a civil fine and penalty is imposed.

PROCEEDINGS IN THE CASE

On September 3, 2013, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices 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 Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. The public hearing was held on July 23, 2014.

Complainant and Respondent appeared at the hearing. Complainant was represented by Legal Assistance of Western New York, Inc., by Robin Marable, Esq., of counsel. Respondent requested and received permission to be represented at the hearing by Lorraine Festa, Respondent's administrator. (Tr. 5-6)

The complaint was amended at the public hearing to reflect Respondent's name as "Blossom Health Care Center, Inc., a/k/a Brighton Manor." (Tr. 4-5)

Permission to file post-hearing briefs was granted. Neither party filed a post-hearing brief.

FINDINGS OF FACT

1. Complainant has an Associates degree in business and has been a licensed practical nurse ("LPN") since 2005. (Tr.17)

2. In 2005, Complainant was charged with resisting arrest, and harassment in the second degree. (Tr. 21-26; Complainant's Exhibit 1)

3. I take official notice that resisting arrest is a class A misdemeanor. N.Y. Penal Law § 205.30.

4. I take official notice that harassment in the second degree is a violation. Penal Law § 240.26.

5. In 2006, Complainant pled guilty to harassment in the second degree in satisfaction of the charge of resisting arrest, and was sentenced to a small fine and a short jail term. (Tr. 22-26; Complainant's Exhibit 1)[1]

6. At all times relevant to the complaint, Complainant's LPN license was in force. (Tr. 17-18)

7. Respondent operates a nursing home at 989 Blossom Road, Rochester, New York. (Tr. 18-19, 38)

8. On or about April 25, 2013, Complainant filled out a job application form for an LPN position at Respondent's nursing home. (Tr. 18, 19; Joint Exhibit 1)

9. The application form included the question "(h)ave you ever been convicted of a crime?" The words "yes" and "no" followed that question. Complainant circled "no." (Tr. 19-20, 26, 49, 55-56, 58; Joint Exhibit 1 [p. 5])

10. Complainant also wrote an explanation regarding his negative answer to the question regarding criminal conviction on the application form. No such explanation was present in the application form proffered by Respondent and accepted into evidence at the hearing. (Tr. 34-37, 59, 60-64, 82; Joint Exhibit 1) I credit Complainant's testimony that he wrote such an explanation on the form, and submitted it to Respondent. I credit Complainant's testimony that the application form proffered by Respondent at the hearing was incomplete in this respect.

11. Complainant was aware that Respondent would have a criminal background check performed regarding his application. (Tr. 48-49, 51, 66-67; Joint Exhibit 1 [p. 2])

12. James Keagle ("Keagle") is Respondent's staff coordinator. (Tr. 81)

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[1] Complainant's testimony on this issue was unclear, implying that he pled guilty to the charge of resisting arrest. The official court record received in evidence makes clear that his guilty plea was to the lesser charge of harassment in the second degree. (Complainant's Exhibit 1)

13. Keagle's duties include interviewing job candidates regarding their work history, licensing, and other appropriate qualifications. (Tr. 81-82, 95-96)

14. Respondent subjects candidates for nursing positions to a background check through the New York State Department of Health, including a resource known as the Nurse Aide Registry. Respondent also reviews a report known as a "CHRC check." (Tr. 82-84, 100-02)

15. Respondent may wait up to one week after its request before receiving the Nurse Aide Registry report. If the job candidate is otherwise acceptable, Respondent's practice is to hire the candidate and place him in Respondent's orientation process while awaiting the report. (Tr. 87-88)

16. In the event that the new employee's application indicates that he has no criminal conviction history, and Respondent's background check reveals that the employee has been convicted of a crime, it is Respondent's practice to "rescind" its job offer and terminate the employee. (Tr. 86, 91-92)

17. In the past, Respondent has had at least one job applicant whose criminal conviction background report was found to be erroneous. That job applicant was able to have the report corrected after consultation with Respondent's human resources personnel. (Tr. 92-93)

18. Keagle reviewed Complainant's application and interviewed him. (Tr. 94-95)

19. On or about May 7, 2013, Respondent hired Complainant for a position as an LPN. Complainant received copies of Respondent's personnel policies. (Tr. 37-38; Joint Exhibit 1 [pp. 12-14])

20. Complainant's job was full-time, paying $17.50 per hour. (Tr. 37-39)

21. On May 10, 2013, while Complainant was employed at the nursing home participating in Respondent's orientation process, he was directed by Keagle to go to Respondent's Human Resources Department ("HR"). (Tr. 37, 39-41)

22. Respondent's HR employee (name unknown) advised Complainant that the criminal background check revealed that he had lied on his job application when he indicated that he had not been convicted of a crime, that his employment was terminated, and that he "must leave." (Tr. 39-43, 57-58, 60-62)

23. Complainant told the HR employee that he had "been through this before" and that the background check was in error. (Tr. 72, 75)

24. Complainant told the HR employee that she was mistaken and attempted to explain the situation. He was rebuffed and again told to leave. (Tr. 41-42, 55, 62, 100)

25. Complainant also attempted to explain the problem to Keagle but was told "it's out of my hands." (Tr. 42, 72-73, 98-99)

26. Complainant's employment was terminated on May 10, 2013, because Respondent concluded that he had lied on his job application when he denied that he had been convicted of a crime. (Tr. 97)

27. Complainant was upset and "shocked" that he lost his job. Complainant underwent financial difficulties as a result of the job loss. (Tr. 43-45, 98)

28. Respondent paid Complainant for the time he worked for Respondent. (Tr. 45)

29. On June 17, 2013, Complainant began work at Blossom North Nursing Home, at a pay rate of $25 per hour. (Tr. 43)

30. Between May 10, 2013 and June 17, 2013, the only work Complainant performed was at the Monroe County jail. Complainant performed 16 hours of work at the rate of $18 per hour, for a total of $288. Complainant did not receive unemployment benefits. (Tr. 46-48)

31. Complainant was unemployed for five weeks between May 10 and June 17, 2013. At a pay rate of $17.50 per hour, Complainant would have earned $140.00 per day, for a weekly pay rate of $700.00. Complainant's lost wages for this period total $3,500.00. The $288 Complainant earned at the Monroe County Jail is deducted from his lost wages, for a total of $3,212.00.

OPINION AND DECISION

It is an unlawful act for an employer to deny employment to any individual because that individual has been convicted of one or more criminal offenses "when such denial is in violation of the provisions of article twenty-three-A of the correction law." N.Y. Exec. Law, art. 15 (Human Rights Law) § 296.15.

An employer is obligated to consider the factors enumerated in Article 23-A of the Corrections Law before denying employment based on an individual's criminal conviction record. The exceptions contained in the statute permit a respondent to consider prior criminal offenses where there is a direct relationship between the offense and the employment sought, or where the grant or continuation of employment would involve "an unreasonable risk to property or to the safety or welfare of specific individuals or the general public." N.Y. Corr. Law § 752. Additionally, a respondent must consider factors including the seriousness of the offense, the job duties and responsibilities related to the employment sought, the respondent's legitimate interest in protecting the safety and welfare of specific individuals or the general public, the complainant's age at the time of the offense, and the time elapsed since the commission of the

offense. Corr. Law § 753.1.

Criminal offenses include felonies, misdemeanors and violations. N.Y. Penal Law §10.00. A crime is defined as a misdemeanor or felony. Penal Law §10.00(6). A violation is defined as an "offense, other than a 'traffic infraction', for which a sentence to a term of imprisonment in excess of 15 days cannot be imposed." Penal Law §10.00 (3).

Complainant was charged with resisting arrest and harassment in the second degree. Resisting arrest is a class A misdemeanor. Penal Law § 205.30. Harassment in the second degree is a violation. Penal Law § 240.26. Complainant pled guilty to harassment in the second degree in satisfaction of the charge of resisting arrest, and received a sentence. A person is convicted of a criminal offense when found guilty by a court of law, whether that conviction is based on a plea of guilty or on an evidentiary trial. Therefore, it is clear that Complainant was convicted of a criminal offense after his guilty plea to the charge of harassment in the second degree. He is entitled to the protection of the Human Rights Law against discrimination by reason of his conviction.

Respondent terminated Complainant's employment because its background report indicated that Complainant had been convicted of a crime and that he gave false information on his employment application as to his criminal record. Complainant has not been convicted of a felony or misdemeanor, therefore he has not been convicted of a crime. Complainant's answer on the job application form was truthful. He attempted to explain this several times to Respondent's employees, to no avail.

To meet his burden to establish that discrimination occurred, Complainant must initially show that he is a member of a protected class, that he was qualified for the position, that he suffered an adverse employment action, and that this adverse action occurred under

circumstances giving rise to an inference of unlawful discrimination because of his status as a member of a protected class. *See, Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 665 N.Y.S.2d 25 (1997). The credible evidence establishes that Complainant is a member of a protected class, a person who has been convicted of a criminal offense, that he was capable of performing his duties as an LPN in a reasonable manner, and that he suffered an adverse employment action, termination, under circumstances inferring discrimination because of a criminal record. Complainant has established a prima facie case, the burden of which has been described as "de minimis." *Schwaller v. Squire Sanders & Dempsey*, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dept. 1998). Because Complainant has established a prima facie case of discrimination, the burden shifts to Respondent to establish a legitimate, nondiscriminatory basis for terminating Complainant's employment. *See, Ferrante*, 90 N.Y.2d at 629.

Respondent erroneously believed that Complainant had been convicted of a crime. Complainant attempted to supply information which would have clarified the situation. Respondent refused to allow Complainant any opportunity to do so, and demanded that he leave its premises.

In *State Division of Human Rights (Maymi) v. Sorrento Cheese Co. Inc.*, 115 A.D.2d 323, 495 N.Y.S.2d 865 (4th Dept. 1985), the complainant, who had been convicted of disorderly conduct, answered "no" to a question on respondent's employment application which asked whether he had ever been convicted of a crime. Respondent fired him on the grounds that he lied on his application. The court found that the complainant truthfully answered the question on the application. Therefore, the employer could not refuse to employ complainant on the basis that he "lied." As the court stated "it is as much a violation of the Human Rights Law to discriminate against a person because of an arrest (see, Executive Law § 296 [16]) or a conviction for a

criminal offense (see, Executive Law § 296 [15]) as it is to discriminate against a person because of an erroneously perceived conviction for a crime." *See, State Division of Human Rights (Maymi)* 115 A.D.2d at 324.

In the instant case, Respondent's reason for terminating Complainant was not a legitimate business reason, because it was simply not true, and therefore amounts to discrimination on the basis of the conviction itself. Complainant has established a violation of Human Rights Law § 296.15, and the complaint is sustained.

Damages

Complainant was out of work for five weeks following the termination of his employment. His lost wages during that period totaled $3,500.00. Complainant earned $288 during that time and this amount is deducted from Complainant's lost wages, for a total of $3,212.00.

Complainant is also entitled to an award for mental anguish and humiliation. A complainant is entitled to recover compensatory damages for mental anguish caused by a respondent's unlawful conduct. In considering an award for compensatory damages for mental anguish, the Division must be especially careful to ensure that the award is reasonably related to the wrongdoing, supported in the record, and comparable to awards for similar injuries. *State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991).

Because of the "strong antidiscrimination policy" of the Human Rights Law, a complainant seeking an award for pain and suffering "need not produce the quantum and quality of evidence to prove compensatory damages he would have had to produce under an analogous provision." *Batavia Lodge v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 147, 359 N.Y.S.2d 25, 28 (1974). Indeed, "[m]ental injury may be proved by the complainant's own

testimony, corroborated by reference to the circumstances of the alleged misconduct." *New York City Transit Authority v. State Div. of Human Rights (Nash)*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991). The severity, frequency and duration of the conduct may be considered in fashioning an appropriate award. *New York State Department of Correctional Services v. State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996).

Complainant was upset and shocked when he lost his job. Complainant underwent financial problems after his dismissal. There is no proof as to the duration of Complainant's condition, its severity, or consequences. Therefore, in the absence of evidence of any medical treatment, an award of $2,500.00. for emotional distress is appropriate and would effectuate the purposes of the Human Rights Law. *Goffe v. Alterra Healthcare Corp.*, SDHR 10113568 (April 5, 2010) ($2,500 "nominal damages" for mental anguish based on inference that some damage was incurred by violation of the Human Rights Law); *Sevilla v. Gottlieb*, SDHR 10119299 (April 24, 2009) ($2,500 award based on Complainant's testimony that she "felt badly," "hurt" and "disrespected").

Civil Fines and Penalties

Pursuant to Human Rights Law § 297, the Division may assess civil fines and penalties. The factors that determine the appropriate amount of a civil fine and penalty are the goal of deterrence; the nature and circumstances of the violation; the degree of respondent's culpability; the relevant history of respondent's actions; respondent's financial resources; and other matters as justice may require.

In the instant case, there was no proof regarding Respondent's financial resources. The relevant history of Respondent's actions indicates that on at least one occasion Respondent has assisted a prospective employee in correcting errors in that person's criminal conviction report.

In the instant case, however, Respondent ignored Complainant's repeated attempts to correct the error, and ordered him to leave its premises. Under these circumstances, a civil fine of $2,000.00 will be appropriate to deter Respondent from future discriminatory behavior.

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 Respondent, and its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices; and

IT IS FURTHER ORDERED, that Respondent shall take the following action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this order:

1. Within 60 days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of $3,212.00 for lost wages. Interest shall accrue on the lost wage amount at a rate of nine percent per annum from May 27, 2013, a reasonable intermediate date, until payment is made by Respondent.
2. Within 60 days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of $2,500.00, without any withholdings or deductions, as compensatory damages for the mental anguish and humiliation suffered by Complainant as a result of Respondent's unlawful discrimination. Interest shall accrue on the award at the rate of nine percent per annum from the date of the Commissioner's Order until payment is made by Respondent.
3. The aforesaid payments shall be made by Respondent in the form of two certified checks made payable to the order of Complainant, Stephen Daniels, and delivered by

certified mail, return receipt requested, to his attorney, Legal Assistance of Western New York, Inc., Att'n Robin Marable, Esq., 1 West Main Street, Suite 400, Rochester, New York, 14614.

4. Within 60 days of the date of the Commissioner's Order, Respondent shall pay the sum of $2,000.00 as a civil fine and penalty, by certified check made out to the "State of New York" and delivered by certified mail, return receipt requested, to the offices of Caroline Downey, Esq., General Counsel of the Division, at One Fordham Plaza, 4th floor, Bronx, New York, 10458. Interest shall accrue at the rate of nine percent per annum on any amount paid after 60 days from the date of said Final Order until payment is made.

5. Within 60 days of the date of the Commissioner's Order, Respondent shall develop and implement a training program in the prevention of unlawful discrimination in accordance with the Human Rights Law. Respondent shall provide this training to all personnel involved in the process of handling employment applicants with prior criminal convictions. A copy of the training program shall be provided to Caroline Downey, Esq., General Counsel of the Division, at One Fordham Plaza, 4th floor, Bronx, New York, 10458.

6. Respondent shall furnish written proof to the New York State Division of Human Rights, Compliance Unit, Att'n Barbara Buoncristiano, One Fordham Plaza, 4th floor, Bronx, New York 10458, of its compliance with the directives contained in this order.

DATED: December 19, 2014
Bronx, New York

Michael T. Groben
Administrative Law Judge