



DAVID A. PATERSON
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

GILBERT A. DARRELL,

Complainant,

v.

ROTTERDAM FIRE DISTRICT NO. 6,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10128050

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 April 29, 2010, by Edward Luban, 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: **SEP 17 2010**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



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

Case No. **10128050**

SUMMARY

Complainant, a volunteer firefighter, alleged that Respondent unlawfully discriminated against him because of his race and color. Because Complainant failed to sustain his burden of proof, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On September 5, 2008, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to volunteer firefighters 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. A public hearing session was held on November 9, 2009.

Complainant and Respondent appeared at the hearing. The Division was represented by Lawrence J. Zyra, Esq. Respondent was represented by Thomas M. Witz, Esq.

Complainant and Respondent filed proposed findings of fact and conclusions of law after the conclusion of the public hearing.

After the hearing and receipt of post-hearing submissions, the case was reassigned to Edward Luban, another ALJ of the Division, pursuant to 9 NYCRR § 465.12(d)(2).

FINDINGS OF FACT

1. Complainant identifies himself as African American and Native American. (Tr. 6)
2. Respondent, operating as the South Schenectady Fire Department (“the Department”), serves residents of Rotterdam, New York. (Tr. 165; Respondent’s Exh. 6)
3. Complainant has served as a volunteer firefighter with the Department since 2003, when he was elected to membership. (Tr. 6-7)
4. The Department is governed by a five-member Board of Fire Commissioners (“Board”) and nine officers. These officers are the Chief, the First Assistant Chief, the Second Assistant Chief, two Captains, two First Lieutenants, and two Second Lieutenants. Officers are elected by

the membership for one-year terms, subject to the approval of the Board. (Tr. 10, 26, 210; Respondent's Exh. 8)

5. The Chief is the only officer with the authority to suspend Department members. (Tr. 218, 251-52, 299; Respondent's Exh. 6, p. 78)

6. Kevin Mercoglan, a former member of the Department, testified that on two occasions "very shortly" after Complainant joined the Department, he overheard Louis Morrette and Bill MacMillan, two Board members, refer to Complainant as "Artie, the nigger." Mercoglan was unable to identify when he heard these comments, and he did not hear anything else Morrette or MacMillan said on either occasion. Mercoglan did not report the alleged comments to any officers or other Board members. Complainant did not mention the alleged comments in his complaint or in his own testimony. (Tr. 167-72, 176, 178, 180-81, 184-86)

7. Morrette and MacMillan denied Mercoglan's accusation. Both Morrette and MacMillan had previously voted to admit Complainant to membership in the Department. (Tr. 193, 201-02, 204)

8. Howard Relyea was the Department's Chief in 2006 and 2007. (Tr. 83, 294)

9. In December 2007, the membership elected officers for 2008. James DeLorenzo was elected Chief, Michael France was elected First Assistant Chief, and Complainant and Jason Pollard were elected First Lieutenants. (Tr. 11-12, 26, 206, 247, 293)

10. Respondent has a "zero tolerance" policy for "members participating in any aspect of a fire operations [sic] while under the influence of alcohol or drugs." (Tr. 16, 245, 318; Complainant's Exh. 2; Respondent's Exh. 6, p. 75)

11. On December 19, 2007, the Department held a holiday party at its firehouse. Pollard drank at least one beer at the party. Later that evening, Complainant, Pollard, and other members

responded to a fire call. Relyea came to the fire, but he put France, who was then Second Assistant Chief, in charge. Although Pollard did not appear intoxicated to Complainant, Complainant complained to France that Pollard had responded to the call after drinking at the party. (Tr. 13-16, 87-89, 298, 318; Complainant's Exh. 1)

12. When Pollard returned to the firehouse, France verbally reprimanded him. This was consistent with Relyea's disciplinary practices. Relyea had given verbal reprimands to Chad Demania, Gary Miller, and Smith (first name unknown), Caucasian members who had previously violated the "zero tolerance" policy. Relyea did not suspend any members during his tenure as Chief. (Tr. 220, 298-301, 319-20, 330)

13. On December 27, 2007, Complainant complained to the Board in writing about the incident, without identifying Pollard by name. Complainant objected to what he stated was the failure "to come down with a hard and stiff penalty" for Pollard. Complainant also proposed stricter language for Respondent's alcohol and drug policy. (Tr. 16, 18; Complainant's Exh. 1)

14. Relyea, who was still Chief at the time, took no action with respect to Pollard. (Tr. 298, 319)

15. On January 1, 2008, when DeLorenzo became Chief, he designated Pollard the senior First Lieutenant and Dan Knights the senior Second Lieutenant. The Board did not give DeLorenzo specific authority to make such designations, and they had not been made in previous years. (Tr. 246-50, 287-88)

16. Between February 2 and April 11, 2008, Complainant's driver license was suspended five times for failure to answer summonses and pay fines. All these suspensions were cleared by May 13, 2008. (Tr. 100, 102, 128-29; Respondent's Exh. 2)

17. In or about March 2008, Complainant was using his blue light on his personal vehicle while driving to a fire scene. At the time, Complainant's driver license was suspended, and Respondent had directed him not to use his blue light. DeLorenzo suspended Complainant for 30 days for this conduct. (Tr. 99, 103, 229)

18. While Complainant was on suspension, DeLorenzo attempted to remove him as First Lieutenant. However, DeLorenzo did not have this authority. The Board directed DeLorenzo to take a five-day "vacation" and made France acting chief for this period. France made it clear that Complainant was still First Lieutenant, and Complainant resumed that position when he returned from his suspension. At no time while on active duty was Complainant removed from his duties as First Lieutenant. (Tr. 71-72, 104-05, 238-40, 309-10, 323-24)

19. Truck 163 ("163"), a ladder truck, is the Department's newest and most sophisticated piece of apparatus. The Department required two separate qualifications, driver and ladder, to operate 163. Complainant completed the ladder qualification shortly after the Department received 163. He was the only officer with ladder qualification. (Tr. 23, 211-12, 253)

20. The Department requires three hours of training to drive any piece of apparatus. DeLorenzo assigned Complainant as trainee to Joe Dixon, another firefighter, to qualify to drive 163. Complainant completed one hour of training with Dixon and, according to DeLorenzo, did "an absolute perfect job with the truck." However, Complainant did not establish that he completed the remaining two hours of training. (Tr. 22, 31, 92-93, 212-13, 254, 290)

21. The Department paid the company that manufactured 163 to provide a two-day "Training the Trainer" course for 163. Complainant and seven other members attended the course. (Tr. 220-22; Respondent's Exh. 7)

22. In early 2008, DeLorenzo assigned Complainant to 163 because he was the only officer qualified to operate the ladder. Complainant had to perform weekly "truck checks," including checking fluid levels in the engine and aerial ladder and adding fluids when necessary. (Tr. 30, 91-92, 211, 213, 253, 289, 301, 306)

23. In February or March 2008, DeLorenzo found that the engine oil level on 163 was "well above the line on the dip stick." KME Fire Apparatus, the company that serviced the Department's equipment, had to drain eight quarts of oil from 163's engine to bring the oil level down to "full." (Tr. 214, 257, 301-02, 305, 326; Respondent's Exh. 12)

24. In May or June 2008, DeLorenzo removed Complainant from 163, because DeLorenzo did not believe Complainant was completing his truck checks properly. DeLorenzo was concerned about the oil overfill, that Complainant was not spending sufficient time performing truck checks, and that Complainant failed to run the aerial ladder every week. (Tr. 213-15, 256)

25. After DeLorenzo removed Complainant from 163, he assigned Complainant to a smaller truck and to janitorial duties. (Tr. 69-70, 94)

26. Sometime in 2008, the Department received a call of a fire at the Rotterdam Mall. At the firehouse, Complainant moved his crew from Truck 160 ("160") to 163 because of the nature of the call. Then, because he was not qualified to operate 163, Complainant reconsidered, moved his crew back to 160, and responded to the call. (Tr. 37-38, 41, 98)

27. Scott Zido, the Department's Second Assistant Chief, was the officer in charge at the fire scene. Zido called DeLorenzo, who was not at the scene, and told him that Complainant attempted to leave a probationary firefighter in charge of a Department truck so Complainant could resume his responsibilities as lieutenant at the scene. Zido also told DeLorenzo that Complainant was going to drive 163 to the call but decided not to do so. At DeLorenzo's

direction, Zido told Complainant that he could not leave the truck with a probationary firefighter. Zido also reminded Complainant that he could not drive 163 because he was not qualified to operate it. (Tr. 223-24)

28. Complainant testified that he believed he received a written reprimand for this incident, but he did not produce any evidence of such a reprimand. I find that Complainant was not disciplined for the incident. (Tr. 41, 224)

29. One night while DeLorenzo was Chief, Complainant and other Department members were at Top's Diner for a dinner. Several firefighters at Complainant's table participated in a "food fight." DeLorenzo issued written reprimands to everyone who was seated at that table, including Complainant. Complainant did not testify about the incident, and the evidence is inconclusive whether Complainant participated in the "food fight" or left the table before it took place. (Tr. 138-41, 158-59, 263-66, 290-91, 311-12, 321-22)

30. On July 22, 2008, Complainant arrived at the firehouse in response to a fire call and found firefighter Sue Burns sitting in the officer's seat of Truck 164 ("164"). Complainant asked Burns three times to leave that seat because she was not an officer. Burns refused to move, and Complainant had to command 164 from the back seat. (Tr. 59-60)

31. Complainant reported the incident to DeLorenzo and requested "that at minimum a strict letter from the Chief should be issued as a warning, and if something like this happens again, a 30 day suspension should be given without hesitation." (Tr. 60, 105-06, 231; Complainant's Exh. 5)

32. On July 25, 2008, DeLorenzo gave Burns a written warning for her refusal to move when Complainant requested. DeLorenzo advised Burns that a repeat offense would result in a suspension. (Tr. 231-32, 234, 317; Respondent's Exh. 3)

33. Respondent's Standard Operating Guidelines require firefighters to use only Department-issued or Department-approved equipment at all emergency incidents.

(Respondent's Exh. 6, p. 10)

34. On July 18, 2008, Complainant responded to a call of a lost hiker in the Plotter Kill Preserve ("Preserve"). Complainant, who is a member of the Department's rope rescue team and the New York State Urban Search and Rescue Team ("USRT"), was wearing his USRT helmet, not a Department helmet. At DeLorenzo's direction, France removed Complainant from the team that was going into the Preserve because he was not wearing a Department-issued helmet.

(Tr. 63-66, 117, 119, 141-42, 160, 235-36, 311; Respondent's Exh. 11)

35. Burns replaced Complainant on the team that went into the Preserve. The evidence is conflicting as to whether Burns was wearing a helmet at the time. (Tr. 143, 160, 311)

36. After the incident, DeLorenzo counseled Complainant about using USRT equipment on Department operations. On July 23, 2008, DeLorenzo directed Complainant in writing to remove his USRT equipment from his locker and the firehouse. (Tr. 236-38; Respondent's Exh. 11)

37. In August 2008, Complainant was the ranking officer when the Department responded to a call at the Rotterdam Industrial Park. The Pine Grove Volunteer Fire Department ("Pine Grove") was also notified of the incident. When Complainant arrived at the scene, he determined that there was no smoke, fire, or other hazard. Complainant radioed the Department that Pine Grove's help was not needed. Jason Fernald, Pine Grove's assistant chief, then arrived at the scene. Complainant and Fernald had a brief, congenial conversation, and Fernald got into his car and left. (Tr. 42-45, 145-47)

38. Several days later, Wes Blessing, Pine Grove's chief, called France and said that there had been an incident at the fire scene between Complainant and Fernald. France referred Blessing to DeLorenzo. (Tr. 306-07, 324-25)

39. Blessing told DeLorenzo that Complainant had treated Pine Grove's assistant chief in an unprofessional manner. At DeLorenzo's request, Blessing sent DeLorenzo a letter which stated that an unnamed Department officer "showed an inappropriate attitude" in communicating with Pine Grove's officer at the scene. (Tr. 99, 224-25, 275-78; Respondent's Exh. 10)

40. On September 3, 2008, DeLorenzo suspended Complainant for unprofessional conduct toward Fernald. The suspension was indeterminate, pending a Board meeting that was scheduled for that evening. (Tr. 46, 229, 279)

41. At the Board meeting, nineteen Department members, including Complainant, presented a petition calling for DeLorenzo to be removed as Chief because of actions that were "unprofessional, abusive in power, prejudiced in application, and detrimental to the safety of the firefighters and the morale of the department." DeLorenzo resigned from the Department at the meeting. (Tr. 51, 52-53, 151, 153, 157, 226, 273; Respondent's Exh. 9)

42. After the Board meeting, Dusty Luckhurst, another member of the Department, told France that Fernald had told her that Complainant had not shown him any disrespect. In a letter dated September 6, 2008, Fernald noted that while "there was a lack of better communication" at the scene, Complainant did not show any disrespect toward him, and there was no problem at the scene between Complainant and him. France investigated the matter and reported back to the Board, which reinstated Complainant one week later. (Tr. 149, 308-09; Complainant's Exh. 6)

43. During his tenure as Chief, DeLorenzo also suspended Nick Ragucci and Demania, who are Caucasian. (Tr. 56, 122, 230-31)

44. Mercoglan testified that on several occasions, DeLorenzo told “racially motivated jokes” aimed at African Americans and other ethnic groups, that Complainant was present when DeLorenzo told such jokes, and that Mercoglan did not complain to the Board about the jokes he heard. Mercoglan did not identify when he heard these jokes, and he said he could not remember any of the jokes. (Tr. 173-75, 187-89) Complainant did not mention the jokes in his complaint or in his testimony.

45. During Complainant’s tenure with the Department, the Department has had only one other African American member, Dante Smith. Smith was a member for several years but left because he did not satisfy the minimum percentages of calls and/or training required to maintain active membership. (Tr. 9, 201, 241)

OPINION AND DECISION

Statute of Limitations

A complaint under the Human Rights Law must be filed within one year after the alleged unlawful discriminatory practice. Human Rights Law § 297.5. This provision acts as a mandatory statute of limitations in these proceedings. *Queensborough Cmty. College v. State Human Rights App. Bd.*, 41 N.Y.2d 926, 394 N.Y.S.2d 625 (1977). Although this allegation was not a part of the complaint, Mercoglan testified that soon after Complainant joined the Department, two Board members referred to Complainant as “Artie, the nigger.” Even if the Board members made such comments, they did so several years before September 5, 2008, when Complainant filed his Division complaint. Therefore, any claim that the comments were expressions of unlawful discrimination is time-barred.

Disparate Treatment

It is an unlawful discriminatory practice for a volunteer fire department to discriminate against a member on the basis of race or color. N.Y. Exec. Law, art. 15 (“Human Rights Law”) § 296.9(a). Complainant has the initial burden to prove a prima facie case of discrimination. He must show that he is a member of a protected class, that he was qualified for his position, that he suffered an adverse action in connection with his service in the Department, and that the adverse action occurred under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Association*, 90 N.Y. 2d 623, 629, 665 N.Y.S. 2d 25, 29 (1997). If Complainant makes such a showing, the burden shifts to Respondent to present a legitimate, non-discriminatory reason for its action. If Respondent does so, Complainant must show that the reason Respondent has presented was merely a pretext for discrimination. *Id.* at 630

An adverse action requires “a materially adverse change in the terms and conditions of employment.” *Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 306, 786 N.Y.S. 2d 382, 391 (2004). This may be shown by “a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation.” *Id.*, quoting *Galabya v. New York City Board of Education*, 202 F. 3d 636, 640 (2d Cir. 2000). While Complainant is not Respondent’s employee, the employment analysis is applied in cases involving alleged discrimination against volunteer firefighters. *Matter of New York State Div. of Human Rights v. Belmont Fire Co.*, 224 A.D. 2d 954, 637 N.Y.S. 2d 565 (4th Dept. 1996). Thus, an adverse action requires a materially adverse change in the terms and conditions of Complainant’s service in the Department.

Complainant, an African American, is a member of a protected class, and he was

qualified for his positions as firefighter and officer. Complainant suffered an adverse action when DeLorenzo suspended him for the incident with Fernald. However, Complainant did not show that his suspension had anything to do with unlawful discrimination. DeLorenzo suspended Complainant because of Blessing's report about the incident. Complainant presented no evidence that DeLorenzo was motivated by racial animus. Complainant did not establish that DeLorenzo told racial jokes. Mercoglan, the only witness who testified about the jokes, could not recall when DeLorenzo told the jokes or their substance. More significant, although Mercoglan testified that Complainant heard the jokes, Complainant himself never complained about the jokes. Complainant did not even mention them in his complaint or his testimony.

In addition, Complainant presented no evidence that similarly situated Caucasian members were not suspended. In fact, while DeLorenzo was Chief, he also suspended two Caucasian members, Ragucci and Demania. Absent evidence that Complainant was treated differently because of his race or color or that DeLorenzo was motivated by racial animus, Complainant has failed to establish that he was suspended in circumstances giving rise to an inference of discrimination. Therefore, Complainant failed to prove a prima facie case of discrimination with respect to his suspension.

Complainant made numerous other allegations of disparate treatment, including the Department's failure to discipline Pollard; DeLorenzo's naming Pollard the senior First Lieutenant; DeLorenzo's failure to allow him to drive 163; his removal from 163 and assignment to another truck and to janitorial duties; DeLorenzo's response to Burns' refusal to move from the officer's seat; his supposed reprimand for considering taking 163 to the Rotterdam Mall fire; DeLorenzo's attempt to remove him from his position as First Lieutenant; his reprimand for the food fight; and his removal from the rescue team at the Preserve. Complainant failed to

substantiate some of these allegations. Moreover, even if Complainant's allegations were true, none of the incidents constituted materially adverse changes in the terms and conditions of his Department service. Complainant remained a member and officer of the Department, he continued to perform functions consistent with those positions, he did not sustain any loss of benefits, and his material responsibilities were not significantly diminished. *Cf. Messinger v. Girl Scouts of the U.S.A.*, 16 A.D. 3d 314, 315, 792 N.Y.S. 2d 56, 57 (1st Dept. 2005). Thus, none of the allegations involve an adverse action. Therefore, Complainant failed to establish a prima facie case that he was subject to unlawful discrimination.

The ultimate burden of proving unlawful discrimination always remains with Complainant. *Ferrante* at 630, 665 N.Y.S. 2d at 29. Because Complainant failed to sustain his burden, 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: April 29, 2010
Syracuse, New York


Edward Luban
Administrative Law Judge