



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

JONATHAN L. HARRIS,

Complainant,

v.

ACTION FOR A BETTER COMMUNITY, INC.,
Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10146479

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 October 31, 2012, 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.

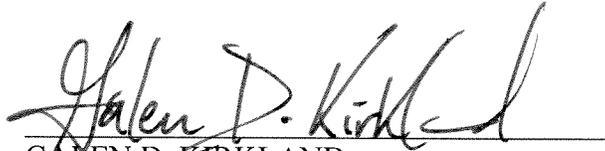
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: 1/23/2013
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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JONATHAN L. HARRIS,

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**ACTION FOR A BETTER COMMUNITY,
INC.,**

Respondent.

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

Case No. **10146479**

SUMMARY

Complainant alleges that Respondent subjected him to unlawful discrimination in employment based upon his prior criminal conviction. Respondent denies the allegations. Complainant has failed to sustain his burden of proof, and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On January 31, 2011, 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. Public hearing sessions were held on January 18 and 19, 2012.

Complainant and Respondent appeared at the hearing. Complainant was represented by Michael Cobbs, Esq. Respondent was represented by Steven V. Modica, Esq.

At the public hearing, Respondent requested permission for the ALJ and counsel to view Respondent's Hudson Avenue facility. Respondent's request was granted, over Complainant's objection. ALJ Groben, both counsel, and the parties viewed the facility on January 19, 2012. (Tr. 9-11, 211, 283-86)

Permission to file post-hearing briefs was granted, and both parties filed proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Respondent is a nonprofit organization. Its programs include a federally funded Head Start program. Respondent operates a Head Start facility located on Hudson Avenue, Rochester, New York (the "Hudson Avenue facility"). (Tr. 145-46, 223-24)
2. The Hudson Avenue facility has approximately 48 employees, and it serves 321 children, between the ages of three and four, in 12 classrooms. (Tr. 225-26, 255)
3. Jannie Hill ("Hill") is director of Respondent's Hudson Avenue Head Start center. (Tr. 158, 222-23)

4. Loretta Kruger ("Kruger") is Respondent's Deputy Director for Early Childhood Services. She has primary responsibility for Respondent's Head Start program, including regulatory compliance. (Tr. 40-41, 144)

Complainant is Hired by Respondent

5. On or about July 20, 2010, Complainant applied for work with Respondent. In his job application, Complainant noted that he had been convicted of "contempt of court." (Joint Exhibit 2; Tr. 24, 27, 65, 68-69)

6. By letter dated August 18, 2010 Respondent hired Complainant. The offer letter noted that Complainant was to start work the following week and that his employment was "contingent...upon successful New York State Central Registry Clearance, (and) upon positive results from a background check," as per Respondent's standard hiring practice. (Joint Exhibit 3, Joint Exhibit 8, Joint Exhibit 9; Tr. 69-70, 149-50, 153-55, 182, 207-08)

7. Respondent is obligated by state law to conduct criminal background checks on its new employees. (Tr. 148-50) Complainant was also fingerprinted as per Respondent's hiring practice. (Joint Exhibit 7; Tr. 152-53)

8. Respondent's "Lexis Nexis" search of Complainant's criminal record indicated that he had pled guilty to the felony of aggravated criminal contempt on March 13, 2010, and received a sentence of five years probation. (Joint Exhibit 6 [p. 4]; Tr. 25-26, 35, 65-68, 152)

9. Respondent was unaware that Complainant's plea of guilty included an admission that he had violated an order of protection, resulting in physical injury. (Tr. 182-83)

10. On August 23, 2010, Complainant began work as a food service assistant at the Hudson Avenue facility. (ALJ's Exhibits 2 and 3, Joint Exhibit 9; Tr. 15, 20-22, 227)

11. Complainant filled out a "conviction statement," completed a training session, and received Respondent's employee handbook. (Joint Exhibits 11, 12, 13, and 14; Tr. 24-25, 155-58)

12. Until Respondent receives the results of a criminal background check by the New York State Office of Children and Family Services of a new employee, it does not permit that employee to have any unsupervised contact with children. (Joint Exhibit 16 [p. 46]; Tr. 160-61, 190, 191, 234-35, 259-62, 264-65) Employees who fail to pass a criminal background check are terminated. (Joint Exhibit 16 [p. 46]; Tr. 191-93, 206-07)

13. Because Complainant's criminal background check had not yet been completed, Complainant was observed and monitored while at work by another staff member. (Tr. 193-94)

14. Complainant's fellow food service employees included his immediate supervisor, Dionne Samuels, and two other food service assistants. (Tr. 28, 76-77, 227-28)

Complainant's Duties

15. Complainant's responsibilities as a food service assistant required him to, inter alia, assist with nutrition education in Respondent's classrooms "as needed," and transport food and dishes to classrooms from the kitchen, located in the basement of the Hudson Avenue facility. Complainant's responsibilities also required him to retrieve used dishes from the classrooms and return them to the basement kitchen after meals. (Joint Exhibit 10 [p. 3], Joint Exhibit 36, Joint Exhibit 39; Tr. 22-23, 28-30, 71-74, 77-78, 155, 197-98, 228-31, 250-54, 266, 268-70, 280, 282, 291-92)

16. These classrooms are located on the first and second floors of the Hudson Avenue facility. (Joint Exhibits 32 and 37; Tr. 230, 281, 290-91)

17. Food service assistants, such as Complainant, could also be required to travel to other locations in the facility, such as the main office, and on rare occasions, could be called upon to aid teaching personnel during classroom instruction. (Joint Exhibits 27, 28 and 29; Tr. 232-33, 254-56, 272-73, 274-75, 287-88)

18. Food service assistants at the Hudson Avenue facility, such as Complainant, may routinely encounter children during the course of their duties. (Tr. 278-79, 282)

19. Respondent maintains a children's exercise room in the basement of the Hudson Avenue facility, which is known as the "muscle room." (Tr. 231-32) All students use the muscle room every day, for approximately one half hour. (Tr. 232)

20. Complainant's duties required him to access the kitchen storeroom. The muscle room is located between the kitchen and the storeroom. (Joint Exhibits 45, 46, 47, 48, 49, 50, 51 and 52; Tr. 74, 77, 248-49, 294-96)

21. On one occasion, Complainant encountered a child who had been left behind in the bathroom of the muscle room after his teacher and classmates left the area. Complainant escorted the child back to his classroom. Complainant was not disciplined or reprimanded for this. (Joint Exhibit 17; Tr. 59-64, 78-80, 161-63)

22. Children are not allowed in either the kitchen or the storeroom. (Tr. 28-29, 248-49) Children are required to be supervised at all times. (Tr. 34-35, 105-06, 188-89, 198, 257, 270)

23. Complainant was considered to be a good employee. (Tr. 84, 163, 235, 270)

New York State Office of Children and Family Services

24. The New York State Office of Children and Family Services ("OCFS") is responsible for licensing child day care facilities in New York, including Respondent's Head Start facilities. Each child day care facility is licensed separately. (Tr. 117, 147-48)

25. The Hudson Avenue facility is licensed by OCFS. (Joint Exhibit 1; Tr. 148)

26. The State Central Register of Child Abuse and Maltreatment maintains a list of individuals who have been subjects in cases of child abuse and maltreatment. It is Respondent's practice to request verification that its new employees are not on that list. In October 2010, Respondent received verification that Complainant was not on the list. (Joint Exhibits 4, 5, and 16 [p. 45]; Tr. 32-33, 150-52, 190-91, 204)

27. As part of its "safety assessment" process of licensed child care facilities, OCFS's responsibilities include reviewing the criminal history of new facility employees. The purpose of the safety assessment is to ensure the safety of children at the facilities. (Tr. 117, 121, 148, 153)

28. Pursuant to the safety assessment process, OCFS personnel review the new employee's records, interview the employee, and recommend any needed restrictions regarding that employee. (Tr. 118-121, 141, 132-33, 137-38) Following a review of that recommendation at OCFS's Albany office, the final determination is then sent to the child care facility. (Tr. 122-25, 140-41)

29. Any restriction imposed by OCFS regarding the new employee must be listed on the license held by the child care facility. If the child care facility does not observe the restrictions, it may be fined by OCFS or have its license revoked. (Tr. 129-31)

The OCFS Review of Complainant's Record

30. Michael Havert is a Child and Family Services Specialist 1 with OCFS. (Tr. 116-17) His responsibilities include conducting interviews and reviewing safety assessments as a part of the OCFS safety assessment process. (Tr. 117-18, 133)

31. Jean Calder ("Calder") of OCFS requested and received Complainant's documents from Respondent, and interviewed Complainant. (Joint Exhibits 11 and 15; Tr. 38, 80-82, 108-09, 125,

142-43, 158-60, 180-82) OCFS then conducted its recommendation and review process regarding Complainant's criminal conviction. (Tr. 126-28)

32. On January 7, 2011, OCFS completed its review of Complainant's conviction history, finding that Complainant had been found guilty on March 19, 2010 of "Aggravated Criminal Contempt: Violate Order of Protection-Cause Physical Injury, Penal Law 215.52." As a result, OCFS imposed the restriction of "No Unsupervised Contact" on Complainant and promulgated said restriction as an addendum to Respondent's Hudson Avenue facility license. (Joint Exhibit 18; Tr. 142-43, 164)

33. The license for the Hudson Avenue facility is posted on the wall in the main hallway. (Joint Exhibits 30 and 31; Tr. 288-89)

34. The restriction of "No Unsupervised Contact" means that the employee may not have any unsupervised contact with children, and thus must be under constant supervision while at the Hudson Avenue facility. (Tr. 169-70)

Complainant's Employment is Terminated

35. Respondent received the OCFS determination on January 10, 2011. Kruger was aware that the OCFS determination did not constitute an order for Respondent to fire Complainant, and that it was Respondent's responsibility to determine whether or not to continue Complainant's employment. (Joint Exhibit 18; Tr. 163-64, 187, 200, 208-09)

36. Kruger determined that the OCFS requirement that its restriction regarding Complainant be publicly posted, and that Complainant be supervised while at the Hudson Avenue facility, would cause a disruption in Respondent's operations. Kruger was also concerned that Respondent might incur a fine or lose its license if it were unable to observe the restriction. (Joint Exhibit 18; Tr. 164-67, 195-96)

37. Kruger was aware of the requirements of the Correction Law regarding the termination of an employee because of a criminal conviction. Kruger considered the factors set forth in the Correction Law and, after consultation with her supervisor, and Respondent's Director of Human Resources Paulette Washington ("Washington"), decided to terminate Complainant's employment. (Tr. 167, 175-78, 180-81, 187, 200-04, 209-10)

38. Complainant was informed by Hill of his pending termination on January 13, 2011. (Tr. 30-32, 35-36, 82-83, 237-39, 240-41, 277-78, 245-46)

39. In a memorandum dated February 3, 2011, addressed to Washington, Kruger set forth her reasons for terminating Complainant's employment. These reasons include the very recent nature of Complainant's conviction, the fact that it was for a violent crime, and Respondent's inability to provide Complainant with constant supervision in order to ensure the safety of children at the Hudson Avenue facility. (Joint Exhibit 23; Tr. 174, 178-80, 205)

40. Complainant received two weeks notice of his termination from Respondent. In order to comply with the OCFS restriction, Respondent put in place a safety plan for the last two weeks of Complainant's employment, pursuant to which Complainant was escorted by another employee at all times when he was not in the basement kitchen. (Joint Exhibits 19 and 24; Tr. 36-38, 84-86, 167-69, 194-95, 239-42, 246, 270-71)

41. By letter dated January 19, 2011, Complainant resigned his position effective January 28, 2011. (Joint Exhibit 21; Tr. 172)

OPINION AND DECISION

It is unlawful 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.

Pursuant to Article 23-A of the Correction Law, an employer may not deny employment based on a prior criminal offense unless, inter alia, there is a direct relationship between the offense and the employment sought or held, or the granting or continuation of the 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.

In making that determination, an employer is obligated to consider the factors enumerated in § 753 of the Correction Law before denying employment based on an individual's criminal conviction record. Respondent must consider factors including the specific duties and responsibilities necessarily related to the employment; the bearing, if any, the criminal offense for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities; the time which has elapsed since the occurrence of a criminal offense; the age of the person at the time of occurrence of the criminal offense; the seriousness of the offense; any information produced by the person in regard his rehabilitation and good conduct; and the legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public. N.Y. Corr. Law § 753.1. A failure to take into consideration said factors results in a failure to comply with the Correction Law's mandatory directive. *See, Acosta v. New York City Department of Educ.*, 16 N.Y.3d 309, 921 N.Y.S.2d 633 (2011).

In the instant case, the record demonstrates that Respondent considered the factors set forth in the Correction Law, and concluded that termination of Complainant's employment was necessary. Respondent was well aware of the date and nature of Complainant's offense, and

concluded that it was unable to continue his employment. Complainant was regarded as a good employee. Nevertheless, Respondent determined that it was unable to provide the level of supervision required by the restriction in order to ensure the safety of children at the school. This was particularly significant in view of the fact that Complainant's conviction was very recent and was for a crime involving violence. Because of the structure and layout of the Hudson Avenue facility, it was unlikely that Respondent could ensure that Complainant would have no unsupervised contact with children. Further, the restriction imposed by OCFS would prevent Complainant from performing a significant number of the duties required of him as a food service assistant, disrupting Respondent's operations. Respondent did not violate the Correction Law, and its dismissal of Complainant was not in violation of the Human Rights Law. 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 hereby is, dismissed.

DATED: October 31, 2012
Bronx, New York

A handwritten signature in black ink, appearing to read 'Michael T. Groben', with a large, stylized flourish at the end.

Michael T. Groben
Administrative Law Judge