

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

CHARLES F. HARTMANN,

Complainant,

v.

**NEW YORK STATE EDUCATION
DEPARTMENT,**

Respondent.

**and NEW YORK STATE, OFFICE OF THE STATE
COMPTROLLER, NEW YORK STATE,
DEPARTMENT OF CIVIL SERVICE, Necessary
Parties.**

**NOTICE AND
FINAL ORDER**

Case No. 10122350

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 July 14, 2009, 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 16 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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STATE, DEPARTMENT OF CIVIL
SERVICE**, Necessary Parties.

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

Case No. **10122350**

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against him on the basis of his age by denying him a lateral transfer to a new position. Because the evidence does not support the allegations, the complaint should be dismissed.

PROCEEDINGS IN THE CASE

On January 15, 2008, 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 Edward Luban, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on May 26, 2009.

Complainant and Respondent appeared at the hearing. The Division was represented by Cara Romanzo, Esq. Respondent was represented by Louise M. DeCandia, Esq.

At the hearing, the parties entered into an extensive stipulation of facts. (Tr. 9; Joint Exh. 1) ALJ Luban accepted the stipulation and relied upon it in the Findings of Fact.

At the hearing, the complaint was amended to reflect Respondent’s correct legal name. (Tr. 12)

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

FINDINGS OF FACT

1. Complainant was born on July 16, 1938. Complainant was 69 years of age at the time he filed his complaint with the Division. (Joint Exh. 1)

2. Complainant was employed by Respondent’s Office for Vocational and Educational Services for Individuals with Disabilities (“VESID”) for approximately 18 years. Complainant worked in VESID’s Syracuse office. During his tenure, Complainant held the position of Clerk II, Grade 9. At some point, his title changed to Calculations Clerk II. Calculations Clerk II is a related class to Clerk II within the New York State Department of Civil Service classification standards. (Tr. 14, 26, 48-49, 76; Joint Exhs. 1, 4)

3. In early November 2007, VESID created a new Clerk II position (“position”) for its Central New York (“CNY”) region, which includes its Syracuse, Utica, and Southern Tier (Binghamton) offices. The position was to be regional; the person hired would work in all three offices. The position required good computer skills, including familiarity with the Microsoft Office programs. Unlike Complainant’s Calculations Clerk II position, the position required regular face-to-face meetings with vendors and service providers. (Tr. 49-51)

4. Complainant met the minimum qualifications to interview for the position, and he applied for a lateral transfer. Respondent could have blocked Complainant’s application for a transfer “in order to maintain the running of its operations.” However, John Tracy, VESID Regional Coordinator for CNY, allowed Complainant to interview for the position because it was a new position and Tracy wanted to find the best candidate. (Tr. 71, 74-75; Joint Exh. 1; Respondent’s Exh. 6)

5. Because the position was a lateral transfer, Complainant would not have received any additional salary or benefits. Nevertheless, Complainant was interested in the position because he thought he would make more money. Respondent would have reimbursed Complainant for mileage and expenses he incurred in travel to Utica and Binghamton. Complainant viewed the potential travel reimbursement as “more income.” (Tr. 38-40, 86-87; Joint Exh. 1)

6. Respondent utilizes a uniform interview process for all positions except Commissioner of Education. Interview committees must be diverse in areas including gender, ethnicity, salary grade level, perspective or thought, and disability. (Tr. 53, 56, 81-83)

7. Kevin VanNess is Business Manager of VESID’s Syracuse office. VanNess coordinated the recruitment and interview process for the position. The interview team (“team”) consisted of VanNess; Tom Guiffre, Senior Counselor in Utica; Karen Robinson, Clerk II in

Binghamton; and Rita White, Keyboard Specialist in Syracuse.¹ The composition of the team was consistent with Respondent's guidelines. (Tr. 48, 51, 56; Joint Exh. 1; Respondent's Exh. 3, 4)

8. On or about November 16, 2007, the team interviewed Complainant and three other candidates for the position. The team asked all four candidates the same questions and scored them on their responses. Complainant received the worst scores of the four candidates on all four interviewers' score cards. During the interviews, Complainant admitted to his lack of computer skills, some of his answers were random and unfocused, and he did not demonstrate a sense of what he would do in the position. (Tr. 17, 54-60; Joint Exh. 1; Respondent's Exh. 7)

9. Tamika White received the best scores on all four interviewers' score cards. White is an African-American woman. At the time White was interviewed for the position, she was in her thirties and had worked for VESID as a Keyboard Specialist 1, Grade 6, for approximately 22 months. (Tr. 26, 62; ALJ's Exh. 4; Respondent's Exh. 2)

10. During the interview process, the team did not discuss the candidates' ages or the subject of retirement. (Tr. 41, 60)

11. After the interviews, the team discussed all four candidates. The team's consensus was that White was the best candidate. White had very good computer experience, including "recently honed" skills with the Microsoft Office programs, she was very enthusiastic, she projected herself very well into the position, and she presented as a very outgoing person. VanNess believed that White could be a very good representative of VESID to outside vendors. (Tr. 61-62)

¹ Guiffre is identified as "Guthrie" in the transcript.

12. The team recommended White to Tracy, who made the final hiring decision. Tracy chose White because she scored best on all four interviewers' score cards and because "it was a professional opportunity for an African-American woman." (Tr. 62, 72)

13. On November 20, 2007, VanNess informed Complainant that White had been selected for the position. That afternoon, Complainant emailed Tracy "asking for some clarity as to why myself, and another seasoned finance staff from Syracuse were passed over for the job." Complainant was concerned about VanNess' objectivity and about the possibility that Complainant's age may have been a factor in the decision. (Tr. 42, Respondent's Exh. 6)

14. Tracy reviewed the team members' score sheets, which included their comments on the candidates, and he spoke with all four team members. Tracy concluded that the interview process was fair, that the team followed all Civil Service rules, and that the process was typical of Respondent's interview processes. (Tr. 73, 74; Respondent's Exh. 6)

15. Complainant did not lose any income or monetary benefits by not obtaining the transfer. Complainant remained with VESID until he retired in June 2008. (Tr. 28-29, 86)

OPINION AND DECISION

It is an unlawful discriminatory practice for an employer to discriminate against an employee in the terms or conditions of employment on the basis of age. Human Rights Law §296.1(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 employment action, and that the adverse employment 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.* The ultimate burden of proof always remains with Complainant. *Id.* at 630, 665 N.Y.S. 2d at 29.

Complainant is a member of a protected class, and he was qualified for the Clerk II position. However, Complainant did not show that he suffered an adverse employment action when Respondent denied his application for a transfer. An adverse employment action requires “a materially adverse change in the terms and conditions of employment.” *Forrest* at 306, 786 N.Y.S. 2d at 391. 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). Complainant did not lose any pay or benefits by not obtaining the transfer. While Complainant believed he would make more money in the position, the only additional “income” he identified was reimbursement of travel expenses he would have incurred had he obtained the position. Complainant did not suffer any other material change in the terms or conditions of his employment. Therefore, Complainant failed to establish a prima facie case of discrimination, and the complaint should 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 that the complaint be and the same hereby is dismissed.

DATED: July 14, 2009
Syracuse, New York

A handwritten signature in black ink, appearing to read 'Edward Luban', with a long horizontal flourish extending to the right.

Edward Luban
Administrative Law Judge