



ANDREW M. CUOMO  
GOVERNOR

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

KENNETH MAURICE JETER,

Complainant,

v.

VILLAGE OF ELLENVILLE,

Respondent.

NOTICE AND  
FINAL ORDER

Case No. 10148575

Federal Charge No. 16GB103142

**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 January 16, 2013, by Christine Marbach Kellett, 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: 2/27/2013  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER



ANDREW M. CUOMO  
GOVERNOR

DRAFT FOR REVIEW PURPOSES ONLY  
**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

**KENNETH MAURICE JETER,**

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v.

**VILLAGE OF ELLENVILLE,**

Respondent.

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

Case No. **10148575**

**SUMMARY**

Complainant charged Respondent with unlawful discrimination in employment on the basis of his race when it failed to consider his application for a full time position. Respondent acknowledged a filing error had taken place which resulted in Respondent not knowing Complainant had applied for the position. Complainant failed to establish that this explanation was a pretext for unlawful discrimination. Complainant failed to meet his burden of proof, and this complaint should be dismissed.

**PROCEEDINGS IN THE CASE**

On May 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 Christine Marbach Kellett, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on June 4, 2012.

Complainant and Respondent appeared at the hearing. Complainant was represented by Michael H. Sussman, Esq. Respondent was represented by Hilliary Raimondi, Esq.

At the hearing the ALJ requested additional information from counsel. Respondent submitted the requested copy of the applicable Collective Bargaining Agreement (CBA) and the requested salary schedule. Copies were also given to Complainant’s attorney. The CBA is received as ALJ Exh. 5; the salary information is received as ALJ Exh. 6. Complainant’s attorney provided the requested earnings information. A copy was also sent to Respondent’s attorney. This earnings information is received as ALJ Exh. 7.

Permission to file post-hearing briefs was granted. Post hearing legal briefs were filed by each party and have been considered.

### **FINDINGS OF FACT**

1. Respondent Village of Ellenville, a municipal corporation in the State of New York, has a Village Board consisting of an elected Mayor and four elected Trustees. The Village Board is responsible for hiring new employees. (Tr. 161-162)

2. At all times relevant for this complaint, the five person Village Board had two white members, two Hispanic members and one black member. (Tr. 161)

3. Respondent's day-to-day operations are managed by a part-time Village Manager nominated by the Mayor and approved for appointment by the Board. Since 2009, the part time Village Manager has been Mary Sheeley (Sheeley). (Tr. 120-122)

4. Village official and employees in the Village offices also include Village Clerk, Noreen Dechon, who prepares the agenda for the Village Board Meetings, a full time clerk-typist, Traci Jeter, who serves as Deputy Village Clerk, and Michelle Booth, a full time assistant to the Manager, and the Village Treasurer. Their offices are located in the same building as the Mayor's office. (Tr. 100-103)

5. Complainant is an African American male. (Tr. 12)

6. In 2009, Complainant was one of five applicants for a full time seasonal Laborer position with Respondent. (Tr. 13-14, 145-146)

7. Two of the five applicants were African American and three were Caucasian (Tr. 146)

8. Complainant was interviewed by Sheeley in her role as Village Manager and later by two Village Board members, Trustees Alvarez and Lopez. (Tr. 15)

9. After considering the candidates, the Board determined to split the one full time seasonal position into two part-time seasonal positions. On June 24, 2009, Complainant was appointed to one of the part-time positions (20 hours a week) position and assigned to the Street section of the Public Works Department. (Tr. 16-19)

10. On July 30, 2009, Michael Coombs (Coombs) was appointed to the other part-time position, which was assigned to the Wastewater Treatment Department. (Tr. 149)

11. Coombs is white. (Tr. 35)

12. On June 17, 2010, Respondent decided to make the part-time Wastewater Treatment position full time. Sheeley prepared a posting notice which Dechon then posted in the required

five locations required under the applicable CBA. (Tr. 19, 22, 61, 123; Complainant's Exh. 1)  
The position, though intended for the Wastewater Treatment Department, is identified as a general Public Works position. (Tr. 19, 22, 61, 123 Complainant's Exh. 1)

13. On June 18, 2010, Coombs submitted an application for the full-time position.  
(Complainant Exh. 5)

14. His application, with its date-stamp of June 18, 2010, was placed on Sheeley's desk in accordance with her expectations. (Tr. 126; Complainant's Exh. 5)

15. Sheeley did not use file folders: she thought any job applications would be simply placed on her desk for review. (Tr. 141-142; 152)<sup>1</sup>.

16. On June 21, 2010, Complainant, still interested in full-time work, brought his application to the Village Office where it was date-stamped as received. (Tr. 25, 28; Complainant's Exh. 2)<sup>2</sup>

17. Complainant could not identify to whom he gave the application except to say she was a white female, maybe six feet tall, and he thought her name was "Maureen." (Tr. 25)

18. Complainant was sure he did not give it to Ms. Sheeley. (Tr. 25)

19. In the past, Traci Jeter, who is the Deputy Village Clerk, and had been a Clerk Typist with Respondent for more than 23 years, would receive all applications for positions. Traci Jeter is white and is married to Complainant's nephew, Michael Jeter, who is African American. (Tr. 85, 102, 105, 118, 139, 169, 173)

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<sup>1</sup> Since this complaint was filed, Respondent has changed its process for applications. Applications are both date stamped and initialed by the person receiving them, and are kept in a file by the Village Clerk, not the Village Manager, until such time as the position is filled. (Tr. 140-141.)

<sup>2</sup> Complainant had retired from the Albany Housing Authority in 2008. In addition to his pension, and his part-time salary with Respondent, Complainant was working side jobs on houses. (Tr. 51-52) He was also applying for trucking positions. (Tr. 52-53)

20. Once a position was posted, Traci Jeter would make a folder labeled with the job title for the position. (Tr. 181) She would give that folder to Michelle Booth, who serves as Sheeley's secretary. (Tr. 108, 181-182) However, it was also possible that, if a position was available, someone else, such as Michelle Booth might make the file. (Tr. 178-179) The first file made would be used. (Tr. 179)

21. Traci Jeter confirmed that in June of 2010, there were no set policies for accepting job applications. (Tr. 178)

22. Traci Jeter did not know in June of 2010 who had applied for the position. (Tr. 180)

23. Traci Jeter was not at work on June 21, 2010. (Tr. 160, 164-165, 175-176)

24. Michelle Booth did not work on June 21, 2010. (Tr. 160, 164-165, 176-177)

25. Village Clerk Dechon was working on June 21, 2010. She has no recollection of receiving Complainant's application for the full time position. (Tr. 108-109) She knew Complainant as he was in and out of the Village Offices several times a week. (Tr. 117) He would occasionally substitute for the building custodian (Tr. 117)

26. Dechon could not identify who received Complainant's application. (Tr. 110)

27. Sheeley did not get Complainant's application. (Tr. 141)

28. With only Coombs' application on her desk, Sheeley believed there was only one applicant for the full time position. (Tr. 141)

29. No one told her there were any other applicants. (Tr. 159)

30. Because Coombs was the only candidate known to Sheeley and the Village Board, and because he already worked for the Village in the Wastewater Treatment Department, neither Sheeley nor any Board member felt the need to interview him. (Tr. 162-163)

31. Coombs was appointed to the full time position effective July 7, 2010. (Tr. 48)

32. Shortly after Coombs' appointment, one of Complainant's co-workers told Complainant Coombs had been appointed to the full-time position. (Tr. 34)

33. Complainant was upset to learn of Combs' appointment as both he and his foreman, Juan Caba (Caba), believed Complainant had seniority rights under the CBA and should have at least been interviewed. (Tr. 34-37)<sup>3</sup>

34. Complainant saw Trustee Lopez on the street and asked why he was not interviewed for the position, to which Lopez expressed shock. (Tr. 38)

35. When Complainant spoke to Trustee Lopez he did not tell the Trustee he thought he was the victim of racial discrimination. He thought he should have been interviewed. (Tr. 80)

36. Complainant had not advised either the head of his own department or the head of the Wastewater Treatment Department that he was interested in the 2010 position. (Tr. 88-90)

37. The applicable CBA provides that employees interested in posted vacancies discuss their interest with the department head. (ALJ Exh. 5)

38. Complainant never spoke with Sheeley about the opening in 2010 even though he knew she would make the recommendation to the Board. (Tr. 64)

39. Complainant acknowledged Sheeley had advocated for him to get his part-time position in 2009. (Tr. 66)

40. Complainant had not gone to the two Board members who had recommended his appointment less than a year earlier to express an interest in the 2010 vacancy. (Tr. 65)

41. Complainant took a leave of absence in August 2010, and resigned effective September 1, 2010, as he had accepted full time employment as a long distance trucker in Virginia. (Tr. 44-45)

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<sup>3</sup> Complainant's resume identifies him as having served as CSEA shop steward for 15 years. (Complainant's Exh. 2)

42. Sometime in August, Booth gave the prepared file back to Traci Jeter for filing. (Tr. 183-184, 195) Traci Jeter reported she assumed Coombs' application was in the file. (Tr. 183-184)

43. Traci Jeter reported that she first heard that Complainant had also applied from general gossip, and then from Caba after she returned from vacation in August 2010. (Tr. 185-186)

44. Traci Jeter also testified that she saw the Complainant's application in August when she filed the Village Board minutes appointing Coombs in the file she kept of posted positions. (Tr. 189-191)

45. Traci Jeter told no one Complainant's application was there. (Tr. 191-192) Her testimony that she told no one of seeing Complainant's application in the file was emphatic and unequivocal. (Tr. 191-192).

46. Complainant confirmed that people in his protected class (African-American) are employees of the Village. (Tr. 90-91)

47. Complainant reported he had never been subjected to racially offensive comments from Sheeley, or a Trustee. (Tr. 81). He did not report any racially offensive comments at all.

48. Complainant's own nephew, Michael Jeter, who is African American, is Traci Jeter's husband, is a supervising foreman for the Village of Ellenville Street Department and a part-time police officer for the Village of Ellenville. (Tr. 85)

49. Complainant had spoken with his nephew when he sought a position in Ellenville in 2009, but he did not tell him he was interested in the 2010 full time position. (Tr. 90)

50. While Complainant told his foreman Caba he was interested in the 2010 full time position, he knew Caba had no decision making authority regarding the position. (Tr. 64)

Complainant himself did not think he would get the position as he had no experience in wastewater treatment. (Tr. 63-64)

51. Caba had encourage Complainant to apply for the 2010 full time position as Caba thought Complainant's seniority in the part-time position might help him at least get an interview. (Tr. 33, 63-64)

52. After he was not appointed to the 2010 full-time position, Complainant spoke with his union representatives to see if the appointment could be challenged as a violation of the union contract due to his "seniority." (Tr. 98)

53. However, as a part-time employee, Complainant was not covered by the union contract, he had no seniority rights, and the Union would not grieve Respondent's actions. (Tr. 98)

54. At the hearing Complainant continued to assert his belief that he should have seniority rights. (Tr. 62, 86)

55. In paragraph 3 of his complaint Complainant emphasizes his belief that "Respondent hires according to seniority..." (ALJ Exh.1)

56. Complainant also does not believe his application was misfiled. (Tr. 84) He thinks that a lost application is a lame excuse. (Respondent's Exh. 2)

57. Complainant also speculated that the reason that Coombs got the position was that Coombs might be related to someone. (Respondent's Exh. 2).

58. In August Complainant took a leave of absence in order to assist his daughter in Virginia. (Tr. 44; Complainant's Exh. 3) Complainant resigned his position with Respondent in September 2010 as he had taken a full time position with a trucking firm in Virginia. (Tr. 44-45; ALJ Exhibit 1; Complainant's Exh. 4)

59. Upon Complainant's return to Ellenville in 2011, he complained to the Ellenville NAACP in February or March of 2011 about not getting the 2010 full time position. (Tr.82) Complainant described his complaint as the same as his Division complaint filed several months later. The Ellenville NAACP went to interview Sheeley regarding Complainant's charge. (Tr. 68, 71)

60. After being contacted by the NAACP, Sheeley went outside her office and asked why the Village was getting this complaint as she had had only Coombs application. (Tr. 131; ALJ Exh. 3; Respondent's Exh. 1) She asked Traci Jeter to get the application file. (Tr. 106-107; 131) Complainant's application was there. (Tr. 68, 106-107; 131) Sheeley was shocked and apologetic. (Tr. 106-107)

### **OPINION AND DECISION**

The Human Rights Law of the State of New York makes it an unlawful discriminatory practice for an employer to refuse to hire or promote an individual on the basis of his race. NY Exec. Law, Article 15, §296(1)

Complainant charged Respondent with illegal discriminatory practices on the basis of race when he was not considered for a full time position. Respondent answered that at the time of the appointment it was unaware he had applied. Complainant's application had been misplaced and not provided to the Village Manager. Complainant failed to show that the Respondent's explanation was a pretext and the complaint should be dismissed.

To make out a prima facie case of unlawful discrimination under the N.Y. Exec. Law, art. 15 (Human Rights Law), a complainant must show (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful

discrimination. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

If a complainant makes out a prima facie case of discrimination, the burden shifts to the respondent to present a legitimate, non-discriminatory reason for its action. If the respondent does so, the complainant must show that the reasons presented were merely a pretext for discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004). The ultimate burden of proof always remains with the complainant. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997).

Complainant articulated a prima facie case of discrimination: he was in a protected class; he was qualified for, and applied for, the position. He suffered an adverse employment action when he did not get the full-time position. That the successful candidate is in a different protected class arguably gives rise to an inference of discrimination. However, Complainant fails to show that Respondent's explanation for its actions: that his application was never received by the Village Manager and consequently never considered by the Village Board, is a pretext for unlawful discrimination. He never established he was the victim of illegal discrimination.

In this case, the decision makers never knew Complainant was interested in the position. Respondent acknowledged that through an error Complainant's application never made it to the Village Manager's desk.

Mistakes happen, even in the well- run offices, and the description of practices in the Village office is one of some confusion regarding process. Discrimination is often very subtle and the excuse of an accident or mistake can not be permitted to cover up illegal discrimination. It is important to look carefully at the circumstances surrounding the actions to see if pretext can be found.

Here there is no evidence anyone in the Village Office had any reason, much less an illegally discriminatory reason, to prevent Complainant's application from being considered by the Village Board. Complainant charged that his race was a factor because the successful candidate was of a different race. But he provided not one scintilla of evidence that his race was any consideration or factor at all. Complainant did not report any racially offensive comments had been made by Village officials during his employment with Respondent. Less than a year earlier his application for employment had been successfully processed by the same Village personnel. Less than a year earlier, the same decision makers had selected Complainant as their first choice for appointment from pool of candidates that included black and white candidates.

The person most responsible for receiving employment applications was Complainant's niece by marriage, Traci Jeter. She emphatically denied receiving his application, or knowing that he had submitted an application prior to the appointment of another. Complainant never asserted his niece by marriage received his application or even knew about it. There is no suggestion of motive for her to keep his application from Sheeley's attention. More importantly Traci Jeter testified she never brought Complainant's application, even after she did see it after Coombs appointment, to the attention of the Village Manager, Sheeley.

Complainant believed at the time of his application for the full-time position, that he had seniority rights as he had been appointed earlier to the part-time position than the successful candidate. He continued to argue this. He continued to assert seniority rights despite the plain language of the union contract and despite the union telling him he did not have seniority rights to the position. He also speculated that perhaps the successful candidate was related by marriage to someone but he provided no basis for that speculation. Such a basis, if true, is not related to Complainant's race.

Complainant failed to meet his burden of proof 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 the complaint be and hereby is dismissed.

DATED: January 16, 2013  
Bronx, New York

  
Christine Marbach Kellett  
Administrative Law Judge