

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

CHARLES LANE,

Complainant,

v.

MONROE COUNTY, SHERIFF'S DEPARTMENT,
Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10114330

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 20, 2009, by Spencer D. Phillips, 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: **JUN 02 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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

Case No. **10114330**

SUMMARY

Complainant alleged that Respondent discriminated against him on the basis of age and perceived disability. Complainant has failed to prove his claims and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On October 27, 2006, 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, the Chief Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on

February 27, 2008. The matter was subsequently reassigned to Spencer D. Phillips, an ALJ of the Division, to issue the Recommended Findings of Fact, Opinion and Decision, and Order.

Complainant and Respondent appeared at the hearing. The Division was represented by Rosalind M. Polanowski, Esq. Respondent was represented by Michael E. Davis, Esq.

Permission to file post-hearing briefs was granted and timely briefs were received from both parties.

FINDINGS OF FACT

1. Complainant was born on January 31, 1950 and was fifty-six years of age at the time he alleges that Respondent did not hire him because of his age and perceived disability. (ALJ Exh. 1; Tr. 11, 47-49, 52-53, 58, 60)

2. In or about July, 2006 Samuel Farina, Respondent's Commander of Staff Services, requested and received a list of eligible candidates for a Deputy Sheriff – Civil ("DSC") vacancy from the New York State Department of Civil Service. Sixty-six individuals were on the list. (Respondent's Exh. 3; Tr. 98-99, 103-04, 106-07)

3. In or about July, 2006 Complainant applied for the DSC vacancy. As part of the application process, Complainant took a Civil Service examination ("CSE") on which he received a score of 80. (Respondent's Exh. 8; Tr. 11-12)

4. Complainant did not request Veteran's Credits to be applied to his CSE score. (Tr. 163-64, 168)

5. Five applicants for the DSC vacancy obtained scores of 85 or higher on the CSE. (Tr. 119)

qualified, he did not obtain the position, and his failure to obtain the position occurred under circumstances giving rise to an inference of age discrimination. *Kent v. Papert Companies, Inc.*, 309 A.D.2d 234; 764 N.Y.S.2d 675 (1st Dep't. 2003); *Ferrante v. American Lung Assoc.*, 90 N.Y.2d 623; 665 N.Y.S.2d 25 (1997).

Complainant belongs to a protected class because he is over eighteen years of age. Human Rights Law 296.3-a. He applied for a vacant DSC position and he did not ultimately obtain that position. However, Complainant was not qualified for the position because he failed the mandatory psychological exam administered to all applicants. Therefore, Complainant has failed to satisfy his prima facie burden of age discrimination.

Complainant alleges, as discussed below, that his score on the psychological exam was the result of unlawful disability discrimination. In light of this allegation, I turn to the final prong of Complainant's age discrimination claim. Complainant must show that his failure to obtain the position occurred under circumstances giving rise to an inference of age discrimination. The proof demonstrates that Complainant's score of 80 on the applicable Civil Service exam was lower than the successful applicant's score, and was, in fact, not reachable under the Civil Service's "Rule of Three" because five other applicants scored higher than Complainant. The proof also demonstrates that Complainant did not submit the documentation necessary for Veterans Credits to be applied to his Civil Service exam score. Complainant proffered no evidence suggesting that Veterans Credits were unlawfully withheld from his application because of his age. Therefore, Complainant has failed to show that his failure to obtain the position occurred under circumstances giving rise to an inference of age discrimination and his age discrimination claim is dismissed.

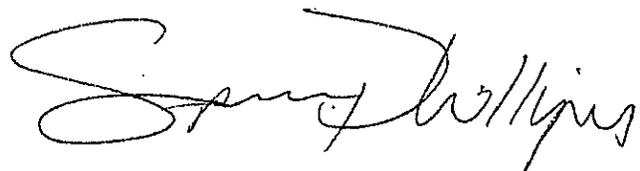
exam made comments suggesting that Complainant was doing well on the test and, because he ultimately failed the test, someone must have changed his scores on the exam because of his age. Complainant's conclusory and unsupported allegation that "someone" changed his score because of his age is insufficient to satisfy his prima facie burden. *Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003); *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dep't., 1999). Therefore, Complainant's "regarded as" disability discrimination claim is 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: January 20, 2009
Rochester, New York

A handwritten signature in black ink, appearing to read "Spencer D. Phillips". The signature is written in a cursive style with a large, sweeping initial "S".

Spencer D. Phillips
Administrative Law Judge