NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

GLORIA MCLEOD,

Complainant,

v.

BOARD OF COOPERATIVE EDUCATIONAL SERVICES (BOCES), MONROE #1,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10120194

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 January 20, 2009, 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: APR 24 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10120194**

SUMMARY

Complainant claims that Respondent discriminated against her on the basis of race, and retaliated against her after she filed a previous complaint of race discrimination against Respondent. Complainant has failed to satisfy her legal burdens and her claims are dismissed.

PROCEEDINGS IN THE CASE

On October 1, 2007, 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 Spencer D. Phillips, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on October 8-9, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Rosalind M. Polanowski, Esq. Respondent was represented by Laura M. Purcell, Esq and Adam F. Tucker, Esq..

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

FINDINGS OF FACT

1. Complainant is African American. (Joint Exh. 2; Tr. 14)

2. Sheila Wallenhorst is Respondent's Director of Human Resources. Wallenhorst held supervisory authority over Complainant at all times relevant to this case. (Tr. 139)

3. Kathy MacKay is Respondent's Executive Coordinator of School Health Services. MacKay held supervisory authority over Complainant at all times relevant to this case. (Tr. 240)

4. Flora McEntee is Respondent's Coordinator of the Rochester City School District ("RCSD") School Health Program. McEntee held supervisory authority over Complainant at all times relevant to this case. (Tr. 31)

5. In September, 2004 Respondent hired Complainant as a Public School Health Aide. In this position, Complainant provided hearing screening and related services to RCSD students pursuant to a contract between Respondent and RCSD. (Joint Exh. 4; Tr. 149-50, 244-45)

6. Complainant earned an annual salary of $19,754 in the Public School Health Aide position, based, in part, on her five years' experience in a similar position. (Joint Exh. 4; Tr. 151)

7. On September 20, 2004, Respondent changed Complainant's job title to the Civil Service job classification of Audiometric Technician ("Tech") and set her annual starting salary at $26,000, based on a 1,400 hour schedule. Complainant's salary increased to $27,040 in 2006, and to $28,122 in 2007. (Joint Exh. 5; Tr. 150-52, 162)

8. In September, 2004 Respondent also hired Nilda Marcano-Cabrera as an Aide. Marcano-Cabrera is Hispanic. Marcano-Cabrera earned an annual starting salary of $28,000, based, in part, on her ten years' experience in a similar position. Respondent also hired Kelly Lane, a Caucasian, as an Aide. Lane received a starting annual salary of $29,657, equivalent to an hourly wage rate of $18.54 based on a 1,600 hour schedule. (Complainant's Exh. 1; Joint Exh. 3, 23; Tr. 62-4, 154-56, 244-45)

9. In October, 2006 Respondent and the Monroe County Civil Service Commission began an eleven-month comparison of the prescribed job duties of the Tech and Audiometric Aide ("Aide") titles, as set forth in the applicable Civil Service descriptions. (Joint Exh. 7, 24, 25)

10. On January 26, 2007, Complainant filed a complaint of race discrimination with the Division because Marcano-Cabrera was receiving a higher salary than Complainant. The Division investigated and found no probable cause to believe that Respondent was unlawfully discriminating against Complainant. (Joint Exh. 2, 3; Tr.)

11. On August 27, 2007, Complainant was asked to leave a pre-school-year staff meeting because she had not yet met with Wallenhorst, despite having received two telephone messages

and one certified-mail letter directing Complainant to meet with Wallenhorst before the staff meeting. (Joint Exh. 14; Tr. 172-76, 259-61)

12. On September 20, 2007, Respondent and the Monroe County Civil Service Commission determined that the job duties actually performed by Respondent's Techs were more accurately reflected by the Aide title. (Joint Exh. 16)

13. On September 21, 2007, Complainant and Marcano-Cabrera were converted to Aides and the Tech title was eliminated. (Joint Exh. 17; 162-64, 252-53)

14. The salary range for the Aide Civil Service job title in 2007 was $15,000 to $32,000. Each Aide's starting salary was determined by considering a number of factors, including the number of months an Aide was scheduled to work during the year and the Aide's previous education and experience. (Complainant's Exh. 2; Tr. 217-23, 231-32)

15. As an Aide, Complainant received an annual salary of $26,247.00, equivalent to an hourly rate of $18.75. Respondent employed four other Aides, each of whom received hourly rates ranging from $13.00 to $18.54. (Joint Exh. 23; Tr. 176-78, 215-25, 231-32)

16. On the first day of the 2007-08 school year, Complainant told McEntee that she needed to leave work early that afternoon. Complainant was allowed to leave despite her failure to give Respondent one-week notice of pending leave as required by Respondent's policy. (Joint Exh. 20; Tr. 90-91)

17. On the second day of the 2007-08 school year, Complainant left work early without giving Respondent any notice and without obtaining permission for such leave. (Joint Exh. 20; Tr. 91-94)

18. On the third day of the 2007-08 school year, Complainant arrived late to work and left work in the middle of the day for one and one-half hours to get work-related papers that were

allegedly "packed away in [her] basement." Upon her return to work that afternoon, McEntee reminded Complainant that she was expected to be at work from 8:00 a.m. to 3:30 p.m. (Joint Exh. 20; 94-98, 256-58)

19. On the fourth day of the 2007-08 school year, Complainant again left work in the middle of the day for nearly two hours. When she returned, Complainant again told McEntee that she went home to pick up "forms." (Joint Exh. 20; Tr. 99-100)

20. On September 10, 2007, Complainant met with Wallenhorst, MacKay, and McEntee to discuss her performance during the first week of the school year and to set forth Respondent's expectations for improved performance for the remainder of the year. Complainant's union representatives also attended this meeting. (Joint Exh. 19, 20; Tr. 89, 100-03, 183-87, 262-66)

21. Complainant's performance remained unsatisfactory following the September 10, 2007 meeting. She showed up for work late with no excuse on September 25, 2007, repeatedly refused to train a new co-worker how to complete required paperwork, and responded to her supervisors in an insubordinate manner when directed to perform her duties. (Tr. 194-95, 267-68, 296-99)

22. On October 1, 2007, Complainant met with Wallenhorst, MacKay, and Complainant's union representatives to discuss her continued failure to meet Respondent's performance expectations. Wallenhorst then placed Complainant on paid administrative leave while Respondent investigated her claim that she was not tardy on September 25, 2007. Complainant remained on administrative leave though June 2008, and she received full pay and benefits until March 20, 2008. (Tr. 49, 196-99)

23. Complainant was paid $22,441.29 during the 2007-08 school year, despite working only one month of the school year. (Joint Exh. 23)

24. RCSD did not renew its contract with Respondent for audiology services during the 2008-09 school year. As a direct result, Respondent eliminated its Aide positions on June 30, 2008. (Joint Exh. 22; Tr. 202-04)

OPINION AND DECISION

The Human Rights Law §296.1(a) makes it an unlawful discriminatory practice for an employer "because of...race...to discriminate against an individual in compensation or in terms, conditions or privileges of employment." It is also a violation of the Human Rights Law to retaliate against any person who "has opposed any practices forbidden under this article." N.Y. Exec. Law §§ 296.1(a); 296.7.

Race Discrimination

Complainant claims that Respondent paid her a disparately low salary because she is African American. To establish a prima facie case of race discrimination, Complainant must demonstrate that: 1) she belongs to a protected class; 2) she was qualified for her position; 3) she suffered an adverse employment action; and 4) the adverse employment action occurred under circumstances giving rise to an inference of race discrimination. *Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004).

Complainant satisfied her prima facie burden. She belongs to a protected class because she is African American. She was qualified for the Aide position, based in part on her five years of experience in a similar position. She suffered an adverse employment action suggesting race discrimination because she was paid a lower annual salary than a Hispanic Aide (Marcano-Cabrera) and a Caucasian Aide (Lane) who were hired shortly after Complainant.

Complainant's claim must fail, however, because Respondent articulated independent, nondiscriminatory reasons for the salary discrepancies which Complainant is unable to rebut. The evidence shows that Marcano-Cabrera received a higher starting salary because she had ten years' previous experience in a similar position. Because Complainant had only five years' previous experience at the time of hire, her starting salary was $2,000 lower than Marcano-Cabrera. Lane earned a higher annual salary, despite her lower hourly wage rate, because she worked two hundred more hours per year than Complainant.

Complainant failed to produce evidence showing that Respondent's articulated reasons are pretext for unlawful discrimination; therefore, her race discrimination claim is dismissed.

Retaliation Claim

Complainant claims that, after she filed a race discrimination complaint against Respondent in January, 2007, Respondent retaliated against her by changing her job title from "Tech" to "Aide," decreasing her salary, placing her on administrative leave and by ending her employment on June 30, 2008.

To establish a prima facie retaliation claim, Complainant must demonstrate that: 1) she engaged in a protected activity; 2) that Respondent was aware of such protected activity; 3) she suffered an adverse employment action; and 4) a causal connection existed between the protected activity and the adverse employment action. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dep't., 1999).

Complainant has failed to satisfy her prima facie burden of retaliation. There can be no doubt that she engaged in protected activity by filing a complaint of race discrimination, that Respondent was aware of such activity, or that she suffered adverse employment actions up to and including termination. *Messinger v. Girl Scouts of the U.S.A.*, 16 A.D.3d 314, 792 N.Y.S.2d

256 (2005). However, because these adverse employment actions did not occur until more than eight months after Complainant filed her discrimination complaint, no causal connection exists. *Pace,* 692 N.Y.S.2d at 223, 224.

Even assuming that the eight-month chasm is not fatal to her retaliation claim, Respondent articulated independent and nondiscriminatory reasons for each of its challenged actions and Complainant failed to show that such reasons are pretext for unlawful conduct.

Respondent changed Complainant's job title from "Tech" to "Aide" as a result of a review process that began in October, 2006, three months before Complainant filed her discrimination complaint. The review process was undertaken with the assistance of the Monroe County Civil Service Commission to ensure that Respondent's employees were classified under Civil Service job titles that most accurately reflected their actual job duties. Although Complainant's pay was decreased pursuant to the salary range applicable to the Aide position, she received the highest hourly wage rate of all of Respondent's Aides.

Respondent placed Complainant on paid administrative leave only after Complainant failed to meet work performance expectations clearly set forth in a meeting with her supervisors and her union representatives. Complainant received almost $22,500 during the 2007-08 school year despite working only one month of the year. Finally, Complainant's employment as an Aide to the RCSD students ended on June 30, 2008 because RCSD did not renew its audiological services contract with Respondent.

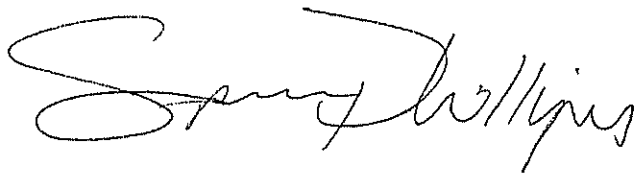
Complainant has proffered no evidence to rebut Respondent's legitimate, nondiscriminatory reasons for the suffered adverse employment actions. Therefore, Complainant's retaliation claim is dismissed.

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



Spencer D. Phillips
Administrative Law Judge