NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

GREGORY NEWSOME,

Complainant,

v.

COUNTY OF ONONDAGA,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10114038

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 June 18, 2008, by Rosalie Wohlstatter, 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: JUL 28 2008
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10114038**

SUMMARY

Complainant charged Respondent with violating the employment provisions of the Human Rights law by discriminating against him on the basis of his race. Respondent claimed that Complainant was not subject to the Human Rights Law because Complainant was an independent contractor. Complainant is an employee for the purposes of the Human Rights Law. Nevertheless, Complainant failed to prove that Respondent had unlawfully discriminated. The complaint is dismissed.

PROCEEDINGS IN THE CASE

On September 28, 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 David W. Bowden, formerly an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on October 3 and 4, 2007. After Judge Bowden left the Division, the case was assigned to ALJ Rosalie Wohlstatter to write the recommended findings of fact, decision, and order.

Complainant and Respondent appeared at the hearing. Complainant was represented by Stefan D. Berg, Esq. Respondent was represented by Thomas H. Kutzer, Esq., Deputy County Attorney. Both parties submitted proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Complainant, an African-American male, administers a program called Weatherization Referral and Packaging ("WRAP"), for low income persons 60 years of age and older, with the Respondent's Department of Aging & Youth. Complainant has been administering this program since 1994. (ALJ's 1, Joint Exh. 1; Tr. 58)

2. Complainant was originally hired by Marilyn Pinsky, then Commissioner for Respondent's Office of Aging and Youth, to work for Respondent as a contractor. Complainant was given a desk in Respondent's Office for Aging. (Joint Exh. 1; Tr. 59-61)

3. The 1994 agreement between Complainant and Respondent contained the following paragraph:

> For the purposes of this contract, the Contractor shall be considered an independent contractor and hereby covenants and agrees to act in accordance with that status, and the Contractor, the employees and agents of the Contractor shall neither hold

> themselves out nor claim to be officers nor employees of the County of Onondaga, and shall make no claim for, nor shall be entitled to workers' compensation coverage, medical and unemployment benefits , social security or retirement membership benefits from the County.

(Joint Exh. 1)

4. The term of this contract was extended until 1996. (Joint Exh. 2)

5. On June 29, 1996, Central New York Services, Inc. (CNY) entered into a contract with Respondent to provide services under the WRAP program as well as a program called HEAP, the Heat Energy Assistance Program. The contract provided for a payment to CNY not to exceed $48,248.00. Payment was to be made in accordance with Onondaga County procedures. CNY was to report directly to Commissioner Pinsky. (Joint Exh. 3; Tr. 70)

6. The contract between Respondent and CNY contained the same provision as quoted above, stating that CNY had independent contractor status. (Joint Exh. 3)

7. CNY leased its employees from Staff Leasing, Inc. Staff Leasing issued the paychecks to these employees, among whom was Complainant. (Joint Exh.. 2-A; Tr. 24-25, 36, 47)

8. Under this agreement, initially, Complainant's time sheets were provided by Staff Leasing, completed and signed by Complainant, counter-signed by Pinsky and then forwarded to CNY. Overtime was approved by Pinsky. (Joint Exh. 2-A, 18; Tr. 115)

9. CNY did not provide day to day supervision of the employees it provided to Respondent. (Tr. 34-5)

10. Under the agreement with CNY, Complainant's salary and responsibilities were determined by Respondent. (Joint Exhs. 15, 15-A)

11. CNY hired Complainant to provide HEAP and WRAP services to Respondent. (Tr. 36)

12. In April of 2006, or shortly after, the HEAP program was temporarily placed under the purview of DSS. (Exh. 1; Tr. 235-36)

13. The program was later returned to the Office of Aging in the Department of Aging and Youth. Larry Matthews, a newly hired, provisional, civil service employee, who is not African-American, was then appointed program director for HEAP at the Office for the Aging in Complainant's stead. (ALJ Exhs. 1, 4; Tr. 102, 151, 178, 184, 196, 240)

14. Complainant's salary was never reduced. (Tr. 128)

15. Respondent contended that there had been some problems with Complainant's job performance. At one point, Complainant had refused to accept program applications from some seniors who had submitted them; he had complained to Sutkowy that he was not getting enough help from DSS; and he had been in a loud and angry discussion with Pinsky when she was Commissioner of Aging and Youth. (Tr.162, 166-67, 208-210)

16. Joe King was another employee provided by CNY services to Respondent. King, who is not African-American, worked under Christine Flynn in the Youth Bureau in the Department of Aging and Youth. At one point in time, Joe King requested health insurance benefits from the program budget. Christine Flynn determined that there was enough money in the Youth Bureau budget to provide health insurance benefits to King, and he was given the benefits. (ALJ Exh. 4; Tr. 99, 201-02)

17. In 2001, Complainant had inquired of Pinsky if he could obtain health benefits from the Office of Aging. Pinsky told Complainant that there were insufficient funds in the Office of Aging budget to provide him with health insurance. (Tr. 99)

OPINION AND DECISION

Independent Contractor Argument

The Human Rights Law prohibits an employer from discriminating against an employee on the basis of race or color. N.Y. Executive Law § 296.1 This protection against discrimination does not extend, however, to an independent contractor. *Mehtani v. New York Life Insurance Co.*, 145 A.D.2d 90, 537 N.Y.S. 2d 800 (1st Dept., 1989), *appeal dismissed in part, denied in part*, 74 N. Y. 2d 835, 546 N. Y. S. 2d 341, 545 N. E. 2d 631 (1989)

The following factors must be considered when determining whether someone is an employee or independent contractor for the purposes of the Human Rights Law: the selection and engagement of the servant; the payment of salary or wages; the power of dismissal; and control over the person's conduct on the job. *SDHR (Emrich) v. GTE*, 109 A.D.2d 1082, 487 N.Y. S. 2d 234 (4th Dept. 1985) Most important is whether the employer exercises control over the results produced or the means to achieve those results. *Murphy v. ERA United Realty et al.*, 251 A.D. 2d 469, 674 N.Y. S. 2d 415 (2d Dept. 1998)

By these criteria, Complainant was an employee for the purposes of the Human Rights Law. Complainant worked out of Respondent's offices and was supervised on a day to day basis by Respondent's Commissioner. His time sheets were counter-signed by the Commissioner. It was ultimately Respondent who decided to place the HEAP program under the direction of someone other than Complainant.

Statute of Limitations

Complainant's race discrimination complaint with respect to the denial of health benefits is time-barred under Executive Law § 297.5, which mandates that complaints be filed within one year. This one-year period begins to run when Complainant acquires knowledge of the alleged

Complainant health insurance, Respondent was not obligated to do so under its contract for Complainant's services. The health benefits that Respondent provided to King were taken from a program budget different from the one under which Complainant was paid.

After Respondent has proffered a non-discriminatory reason for its actions, Complainant, who has the burden of proof, must demonstrate that the Respondent's reasons for its actions were a pretext for unlawful discrimination. *See Pace College v. Commission on Human Rights of the City of New York*, 38 N.Y. 2d 28, 377 N.Y. S. 2d 471 (1975) The record provides no basis for finding that Respondent's reasons were pretext for discrimination.

Complainant did not meet his burden of establishing discrimination. 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 the same hereby is dismissed.

DATED: June 18, 2008
Bronx, New York

Rosalie Wohlstatter
Administrative Law Judge