ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE**
**DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF HUMAN RIGHTS**
on the Complaint of

**ELPHREM TREMAYNE ROBINSON,**
Complainant,

v.

**NEW YORK STATE, OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES,**
Respondent.

**NOTICE AND FINAL ORDER**

Case No. **10169607**
**10171009**

**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 22, 2015, 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 HELEN DIANE FOSTER, 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: AUG 18 2015
Bronx, New York

HELEN DIANE FOSTER
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

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on the Complaints of

**ELPHREM TREMAYNE ROBINSON,**
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v.

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Respondent.

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

Case Nos. **10169607, 10171009**

## SUMMARY

Complainant alleged that Respondent terminated his employment because of his arrest record and in retaliation for filing a complaint of unlawful discrimination. Complainant, who is black, also alleged that Respondent discriminated against him on the basis of race and color because it did not terminate the employment of two Caucasian employees who he alleged had similar arrest records. Because Complainant did not sustain his burden of proof, the complaint is dismissed.

## PROCEEDINGS IN THE CASE

On June 27, 2014 and September 10, 2014, Complainant filed verified complaints 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 complaints and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the cases to public hearing.

After due notice, the cases came on for hearing before Edward Luban, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on April 8, 2015.

Complainant and Respondent appeared at the hearing. Complainant was represented by Cassandra Kelly and Robin Marable, Esqs. Respondent was represented by Christine M. Galvin, Esq.

At the hearing, Complainant elected not to proceed on his retaliation claim. (Tr. 42) The parties also entered into a written stipulation of facts. (Tr. 5-6; ALJ's Exh. 6)

Permission to file post-hearing briefs was granted. Complainant and Respondent filed timely post-hearing briefs.

## FINDINGS OF FACT

1. Complainant is black. (Tr. 21)

2. In 2013, Complainant was employed with Respondent's Finger Lakes Developmental Disabilities Services Office ("DDSO") as a direct support assistant. Complainant was employed

in this position, which was previously called developmental aide, for approximately ten years. (Tr. 10, 25, 46, 89; Respondent's Exh. 5)

3. As a direct support assistant, Complainant provided direct care to individuals with developmental disabilities in a group home. (Tr. 11; Respondent's Exh. 6)

4. Complainant's responsibilities included administering prescribed medication, including controlled substances, to individuals in his care. (Tr. 26, 34, 72, 84; Respondent's Exh. 6)

5. On July 24, 2013, Complainant was arrested and charged with criminal sale of a controlled substance in the third degree, narcotic drug, on September 11, 2012 and October 22, 2012, in violation of N.Y. Penal Law § 220.39. These charges were Class B felonies. (ALJ's Exh. 6; Respondent's Exh. 5)

6. When an employee of Respondent is arrested for off-duty misconduct, Respondent evaluates whether there is a "nexus" between the misconduct and the employee's job. To discipline the employee, "the arrest and alleged crime must have some relevance to the employee's job or have brought notoriety on the DDSO." (Tr. 90-91; Complainant's Exh. 2; Respondent's Exh. 8)

7. Respondent determined that there was a nexus between the criminal charges against Complainant and his job duties because he had access to and was required to administer medications, including controlled substances, to individuals in Respondent's care. (Tr. 96-97)

8. On July 30, 2013, Respondent suspended Complainant without pay because of his arrest. (Tr. 34, 98-99; ALJ's Exh. 6; Respondent's Exh. 10)

9. On August 26, 2013, Respondent issued a Notice of Discipline charging Complainant with three charges of misconduct: selling cocaine to an undercover policeman on September 11, 2012, selling cocaine to an undercover policeman on October 22, 2012, and his July 24, 2013

arrest. Respondent notified Complainant that it sought the termination of his employment. (Tr. 102, 109; ALJ's Exh. 6; Respondent's Exh. 12)

10. The Civil Service Employees Association ("union"), Complainant's union, filed a grievance appealing his Notice of Discipline. (Tr. 96, 105, 107; Respondent's Exh. 13)

11. Respondent was unwilling to settle Complainant's disciplinary charges because his criminal charges were felonies, his job duties involved access to medication, including controlled substances, and he had a prior disciplinary history. (Tr. 31-32, 125-26)

12. At the union's request, the arbitration hearing on Complainant's grievance was adjourned pending the outcome of his criminal case. Respondent did not object to the adjournment. (Tr. 19, 21, 112-13)

13. On or about June 2, 2014, following a jury trial in Monroe County Court, Complainant was acquitted of all criminal charges arising from his June 24, 2013 arrest. (Tr. 12; Complainant's Exh. 1)

14. On June 25, 2014, Thomas N. Rinaldo, Esq., arbitrator, held a hearing on Complainant's grievance. (Tr. 113; ALJ's Exh. 6; Respondent's Exh. 3)

15. Rinaldo precluded the admission into evidence of any documents connected with Complainant's criminal case, because such documents were sealed pursuant to N.Y. Criminal Procedure Law § 160.50. (Respondent's Exh. 3)

16. In an Opinion and Award dated July 26, 2014, Rinaldo dismissed the misconduct charge based on Complainant's arrest. However, he found that Respondent had probable cause to suspend Complainant without pay, that Complainant was guilty of the two charges that he sold cocaine, and that termination of Complainant's employment was the appropriate penalty. Accordingly, Rinaldo denied Complainant's grievance. (Respondent's Exh. 3)

17. On July 29, 2014, Respondent terminated Complainant's employment effective August 6, 2014. Respondent made this decision based on Rinaldo's Opinion and Award finding Complainant guilty of selling narcotics. (Tr. 72-73; Respondent's Exh. 4)

18. Kari Hurd is employed with the Finger Lakes DDSO as a direct support assistant.[1] (Tr. 37, 47)

19. Hurd is Caucasian. (Tr. 37)

20. On October 26, 2008, Hurd was arrested and charged with unlawful possession of marijuana in violation of N.Y. Penal Law § 221.05. This charge was a violation. (Tr. 57; Respondent's Exh. 2)

21. Because Hurd's charge was only a violation, Respondent permitted her to continue to work while it investigated the case. However, Respondent restricted her from certain duties, including administering medication. (Tr. 52, 53-54, 56-57; Respondent's Exh. 2)

22. On December 17, 2008, Hurd's criminal case was adjourned in contemplation of dismissal. The charge was ultimately dismissed. (Tr. 48, 50; Respondent's Exh. 2)

23. Respondent decided not to prosecute Hurd for misconduct but to return her to duty. (Tr. 48, 51; Respondent's Exh. 2)

24. Jamie Fanton was employed as a safety and security officer with the Finger Lakes DDSO. (Tr. 120, 129)

25. Fanton is Caucasian. (Tr. 38)

26. Fanton's duties did not involve providing direct care to individuals with developmental disabilities or administering medication to such individuals. (Tr. 121; Respondent's Exh. 16)

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[1] Hurd is identified as Kerry Herd in the transcript. (Tr. 36)

27. On August 3, 2012, Fanton was arrested and charged with unlawfully dealing with a child in the first degree: sex/drug, criminal possession of marijuana in the fourth degree, and unlawfully growing cannabis. These charges were misdemeanors. They related to possession of marijuana, growing equipment, and smoking devices in a home in which children were present. (Tr. 123; Respondent's Exhs. 17-18)

28. Respondent suspended Fanton without pay and notified him that it sought the termination of his employment for misconduct. (Tr. 123; Respondent's Exh. 18)

29. On February 20, 2013, Fanton, his union, and Respondent entered into an agreement settling the disciplinary charges. Under the agreement, Fanton was suspended without pay from August 8, 2012 to February 21, 2013 and returned to work February 21, 2013. (Tr. 125-26; Respondent's Exh. 19)

## OPINION AND DECISION

Arrest Record

It is an unlawful discriminatory practice for an employer "to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual." N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.16.

After Complainant was arrested, Respondent suspended him without pay and sought the termination of his employment. These actions did not violate the Human Rights Law because Complainant's criminal charges were still pending. However, Complainant alleges that Respondent violated Human Rights Law § 296.16 because it terminated his employment after he was acquitted, when the criminal case had been resolved in his favor.

In *Patterson v. MTA New York City Transit*, DHR Case No. 10163438 (October 17, 2014), the complainant was arrested on misdemeanor weapons charges. The respondent suspended him without pay and immediately sought the termination of his employment. The complainant pled guilty to disorderly conduct, a violation, and his record was sealed. An arbitration hearing was subsequently held on the disciplinary charges brought against the complainant, and his employment was terminated. The Commissioner found that the complainant was not protected by Human Rights Law § 296.16:

> Respondent, upon learning of Complainant's arrest, immediately sought the termination of Complainant's employment. The charges were still pending at that time. Although the Complainant's employment was not formally and officially terminated until after the charges were no longer pending, Respondent had already made its determination well before the charges were resolved in Complainant's favor. . . . But for the lengthy grievance and arbitration process, Complainant could have, and likely would have, been dismissed while the charges were pending. Respondent determined that the behavior of which Complainant was accused was serious enough to warrant termination; it acted quickly while the charges were pending and, therefore, avoided liability under the Human Rights Law for unlawful discrimination based upon Complainant's arrest record.

The facts in this case are similar. Complainant was arrested on July 24, 2013. On July 30, 2013, Respondent suspended him without pay. On August 26, 2013, while Complainant's criminal charges were still pending, Respondent notified him that it sought the termination of his employment. The criminal charges were not resolved in Complainant's favor until June 2, 2014, more than nine months after Respondent determined to terminate his employment. As in *Patterson*, the only reason Complainant was still employed at that time was "the lengthy grievance and arbitration process," a process that was delayed at the request of Complainant's union. Accordingly, the Commissioner's Order in *Patterson* controls this case, and Respondent's action did not violate Human Rights Law § 296.16.

Moreover, Respondent terminated Complainant's employment for the misconduct underlying his arrest, not for the arrest itself. Respondent's decision to terminate Complainant's employment was based on Rinaldo's Opinion and Award. Rinaldo found Complainant guilty of selling cocaine to an undercover police officer on two occasions. However, he dismissed the disciplinary charge based on Complainant's arrest, and he precluded the admission into evidence of any documents connected with Complainant's criminal case. The termination of Complainant's employment for selling drugs, but not for his arrest, did not violate the Human Rights Law. *See Kenner v. Coughlin*, 105 A.D.2d 1130, 1131, 482 N.Y.S.2d 615, 616-17 (4th Dept. 1984), *lv denied*, 65 N.Y. 2d 760, 492 N.Y.S. 2d 31 (1985) (no violation of Human Rights Law when termination based on petitioner's acts, not on the "mere fact" of his arrest).

Race/Color Discrimination

It is an unlawful discriminatory practice for an employer to discriminate against an employee because of the employee's race. 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 action occurred under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Ass'n.*, 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 presented was 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).

Complainant, who is black, is a member of a protected class. Complainant was qualified for his position as a direct support assistant. Complainant suffered an adverse employment

action when Respondent terminated his employment. However, the termination of Complainant's employment did not occur under circumstances giving rise to an inference of discrimination. While Respondent did not terminate the employment of Hurd or Fanton, who were also arrested on drug charges, these employees are not proper comparators to Complainant.

Complainant must establish that he and the comparators were "similarly situated in all material respects." *Shah v. Wilco Systems, Inc.*, 27 A.D.3d 169, 177, 806 N.Y.S.2d 553, 559 (1st Dept. 2005), *lv denied*, 7 N.Y.3d 859, 824 N.Y.S.2d 597 (2006), quoting *Shumway v. United Parcel Service, Inc.*, 118 F.3d 60, 64 (2d Cir. 1997). Where allegations of differential discipline are involved, Complainant must show that he and the other employees engaged in conduct of "comparable seriousness." *Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000). Complainant cannot make this showing. While he was charged with felonies for selling cocaine on two occasions, Hurd was charged with simple possession of marijuana, a violation, and Fanton was charged with misdemeanors related to possession of marijuana.

In addition, Fanton's job title and responsibilities were different from Complainant's. Unlike Complainant, Fanton did not provide direct care to individuals, and he did not administer medication. Because Fanton was not assigned the same duties or responsibilities as Complainant, he was not "similarly situated." *See Castro v. New York Univ.*, 5 A.D.3d 135, 136, 773 N.Y.S.2d 29, 30 (1st Dept. 2004).

The ultimate burden of persuasion lies at all times with Complainant to show that Respondent intentionally discriminated against him. *Bailey v. New York Westchester Square Med. Ctr.*, 38 A.D.3d 119, 123, 829 N.Y.S.2d 30, 34 (1st Dept. 2007). Complainant failed to establish a prima facie case of unlawful discrimination. Accordingly, this claim must 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 22, 2015
Syracuse, New York

Edward Luban
Administrative Law Judge