

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**RYAN ROSENHAUER,**

Complainant,

v.

**SUFFOLK COUNTY, POLICE DEPARTMENT,**  
Respondent.

**and SUFFOLK COUNTY, CIVIL SERVICE  
COMMISSION,**

Necessary Party.

**NOTICE AND  
FINAL ORDER**

Case No. 10107239

**PLEASE TAKE NOTICE** that the attached is a true copy of an Order issued by Peter G. Buchenholz, Adjudication Counsel, as designated by the Honorable Kumiki Gibson, Commissioner of the New York State Division of Human Rights (“Division”), after a hearing held before Robert M. Vespoli, an Administrative Law Judge of the Division. 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.

DATED: February 22, 2008  
Bronx, New York

  
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PETER G. BUCHENHOLZ  
Adjudication Counsel

**STATE OF NEW YORK  
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Case No. **10107239**

Because Complainant failed to establish that Respondent discriminated against him based on his sex and/or age, the complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On August 18, 2005, 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 referred the case to public hearing.

After due notice, the case came on for hearing before Robert M. Vespoli, an Administrative Law Judge (“ALJ”) of the Division. The public hearing was held on October 24, 2007. Complainant and Respondent appeared at the hearing. Complainant was represented by

Reynold A. Mauro, Esq. Respondent and Necessary Party were represented by Christine Malafi, Esq., Suffolk County Attorney, by Jennifer K. McNamara, Esq., Assistant County Attorney.

Both parties filed timely post-hearing submissions.

On January 10, 2008, ALJ Vespoli issued a recommended Findings of Fact, Opinion and Decision and Order (“Recommended Order”). No Objections to the Recommended Order were received by the Commissioner’s Order Preparation Unit.

**FINDINGS OF FACT**

1. In 2005, Complainant, who is a male and was born on April 21, 1982, applied to become a Suffolk County police officer. (Respondent’s Exhs. 1, 2; Tr. 19)

2. On May 24, 2005, Complainant took Respondent’s physical fitness screening test. (Complainant’s Exh. 1; Respondent’s Exh. 1; Tr. 26, 34, 62)

3. As required by New York State Civil Service Law § 58, Respondent utilized the guidelines for the physical fitness screening test promulgated by the New York State Municipal Police Training Council (“MPTC”). Those guidelines were prescribed by the Cooper Institute, which “has worked with fitness programs in law enforcement, public safety and military since 1976.” (Complainant’s Exhs. 3, 5, 6; Tr. 51, 86, 89, 96, 133) The guidelines were established through scientific testing validation studies that take into account the ability of individuals to perform the functions of the law enforcement job. (Complainant’s Exh. 6)

4. The physical fitness screening test consisted of three separate parts: the push-up test, the sit-up test, and the 1.5 mile run. (Complainant’s Exh. 5; Tr. 85-86, 117) The MPTC guidelines establish different standards for each test based on a candidate’s sex and age. (Complainant’s Exh. 5; Tr. 89)

5. As a 23-year-old male, Complainant was required to successfully perform 29 push-ups in order to continue with the remainder of the physical fitness screening test. (Complainant's Exh. 5; Tr. 36, 95) Female candidates between the ages of 20 and 29 were required to perform 15 push-ups. Male candidates between the ages of 30 and 39 were required to perform 24 push-ups. (Complainant's Exh. 5)

6. Prior to the test, Complainant, along with all candidates, received routine instructions, including video instructions on how to properly complete the physical fitness screening test in general and the push-up test specifically. An opportunity to ask questions was also provided. (Tr. 35-36, 117-19, 121)

7. Complainant completed only 24 push-ups. This is confirmed by the physical fitness screening test form, executed contemporaneously by the two police officers who administered the test. Thus, Complainant failed the examination. (Respondent's Exh. 1) On the day of the test, Complainant did not dispute the official count with the testing officers or their supervisors. (Tr. 69-70)

8. Complainant performed a re-test of the physical fitness screening test on June 27, 2005. (Respondent's Exh. 2; Tr. 41) Once again, Complainant failed the test, having performed only 19 push-ups. (Respondent's Exh. 2) Again, on the day of the test, Complainant did not dispute the official count. (Tr. 70)

9. Respondent allowed candidates two attempts to pass the physical fitness screening test. (Tr. 92-93) Because Complainant failed the physical fitness screening test on May 24 and June 27, 2005, he was eliminated from consideration for the position of police officer from the applicable civil service list. (Tr. 104)

10. Complainant bases his claim on the fact that he would have passed the push-up test had the standard for women in his age range been applied to him. (ALJ's Exh. 1; Complainant's Exh. 5)

### **OPINION AND DECISION**

Complainant alleged that he was discriminated against because Respondent utilized different standards in its physical fitness screening test for males and females based on their ages. Because Complainant has not shown how the utilization of these standards was unlawful, the complaint is dismissed.

It is unlawful for an employer to refuse to hire or employ an individual on the basis of his or her sex or age. *See* Human Rights Law § 296.1(a). In this case, Respondent asserts that it did not unlawfully discriminate against Complainant. Rather, pursuant to the New York State Civil Service Laws, it based its decision on the requirements of the MPTC guidelines, which mandate that all applicants for appointment to the position of police officer satisfy the MPTC physical fitness standards. *See* N.Y. Civ. Serv. Law § 58.1(c).

The purpose of the MPTC standards is to level the playing field among applicants so that applicants have a fair opportunity to compete for certain law enforcement positions:

[The MPTC] recognized the need to revise the physical fitness screening practice so that the test employed provides an accurate assessment of a candidate's physiological capacity to learn and perform the essential job functions of an entry-level police officer. Pursuant to the statewide job task analysis, a battery of physical screening elements was developed, based upon the model formulated by the Cooper Institute for Aerobics Research. The analysis recommended the adoption of such elements for physical fitness screening and determined that such elements do not adversely impact a candidate based upon his/her sex. Each of the physical fitness screening elements of the tests were validated and correlated to the performance of essential job functions.

9 N.Y.C.R.R. § 6000.2.

The different standards utilized to measure the relative fitness of male and female candidates based on their ages has been determined and validated through scientific testing, and is not unlawfully discriminatory. *See* Complainant's Exh. 6 (a computer printout of the Cooper Institute's website, which provides explanations regarding its methodology); *see also* *McCarthy v. Nassau County*, 208 A.D.2d 810; 617 N.Y.S.2d 860 (2d Dept. 1994) (noting in disability case that MPTC physical fitness standards "have a rational relationship to the ability of an individual to perform police functions, and their application is neither arbitrary nor capricious."); *Rice v. Schuylar County Civ. Serv. Comm.*, 183 A.D.2d 974, 583 N.Y.S.2d 583 (3<sup>rd</sup> Dept. 1992) (noting in disability case that MPTC standards for physical fitness may not be disturbed unless shown to be arbitrary or illegal); *Rice v. Schuylar County Civ. Serv. Comm.*, 137 A.D.2d 359, 528 N.Y.S.2d 944 (3<sup>rd</sup> Dept. 1988) (noting in disability case that MPTC physical fitness standards "are enforceable legislative exceptions to the application of the Human Rights Law"). Indeed, such differential standards are necessary to protect against arbitrary and/or unlawful discrimination. *Cf. McCarthy v. Nassau*, 208 A.D.2d at 811; *see also* *Alspaugh v. Mich. Law Enforcement Officers Training Council*, 246 Mich. App. 547, 562 (Mich. Ct. App. 2001) ("gender-norming . . . performance standards [are] to avoid the potential for a disproportionate impact that a single standard would necessarily have on the female candidates"). Because the MPTC guidelines are not unlawfully discriminatory as a general matter against males of any age, Complainant has not shown them to be in violation of the Human Rights Law.

Nor has Complainant proved that the guidelines were applied to him in this case in a discriminatory manner. The evidence proffered at the hearing made clear that the guidelines were applied to all applicants in a fair and equal manner regardless of sex and age. Accordingly, the complaint is dismissed.

**ORDER**

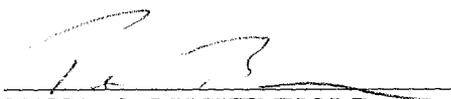
Pursuant to 9 N.Y.C.R.R. § 465.17(c)(3), Adjudication Counsel Peter G. Buchenholz has been designated by Commissioner Kumiki Gibson to issue this Final Order. The Adjudication Counsel has not taken part in the prior proceedings with respect to this case.

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 instant complaint be, and the same hereby is, dismissed.

DATED: **FEB 22 2008**  
Bronx, New York

NYS DIVISION OF HUMAN RIGHTS

  
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PETER G. BUCHENHOLZ  
Adjudication Counsel