

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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

EDWIN VALENTIN,

Complainant,

v.

**NEW YORK STATE, DEPARTMENT OF
CORRECTIONAL SERVICES,**

Respondent.

**and NEW YORK STATE, DEPARTMENT OF
CIVIL SERVICE, NEW YORK STATE, OFFICE
OF THE STATE COMPTROLLER, Necessary
Parties.**

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 10107921

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 April 10, 2007, by Robert I. Tuosto, 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 KUMIKI GIBSON, 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, this 15th day of May, 2007.


KUMIKI GIBSON
COMMISSIONER

TO:

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

STATE DIVISION OF HUMAN RIGHTS

On the Complaint of

EDWIN VALENTIN,

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**NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES,**

Respondent,

**NEW YORK STATE DEPARTMENT OF CIVIL
SERVICE, and NEW YORK STATE OFFICE OF THE
STATE COMPTROLLER,**

Necessary Parties.

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

Case No: 10107921

SUMMARY

Complainant charged Respondent with discrimination in employment on the bases of race/color and national origin. Respondent offered a legitimate, nondiscriminatory reason for its actions. Complainant failed to establish that this reason was a pretext for unlawful discrimination. Therefore, the complaint should be dismissed.

PROCEEDINGS IN THE CASE

On September 21, 2005, complainant filed a verified complaint with the N.Y.S. Division of Human Rights ("Division") charging respondent N.Y.S. Department of Correctional Services ("DOCS") with an unlawful discriminatory practice relating to employment in violation of the N.Y.S. 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. Thereafter, the Division referred the case to a Public Hearing.

After due notice, the case came on for hearing before Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on November 27-29, 2006, and February 8, 2007. Both complainant and DOCS appeared at the hearing. The Division was represented by Caroline J. Downey, Esq., Acting General Counsel, by Robert Meisels, Esq. DOCS was represented by Anthony J. Annucci, Esq., General Counsel for the DOCS, by Benjamin H. Rondeau, Esq.

Permission to file Post-Hearing Briefs was granted.

FINDINGS OF FACT

1. Complainant, while employed by DOCS, applied for and was appointed to the position of Maintenance Supervisor 1 ("MS1"), and subsequently received permanent civil service status for this position. However, complainant was removed from the MS1 position approximately 18 months later on the alleged bases of race/color and national origin when DOCS failed to refute his union's position at a grievance hearing which successfully opposed his appointment. (ALJ Exhibits 1, 2)

2. In its verified Answer, DOCS denied unlawful discrimination, and averred that complainant was removed for lawful, nondiscriminatory reasons. (ALJ Exhibit 5)

3. Complainant is Puerto Rican. (Tr. 110)

4. In June, 1994, Complainant began working for DOCS at the Downstate Correctional Facility ("DCF"). In 1995, complainant became an electronic equipment mechanic. (Tr. 111)

Complainant Applies for an Open MS1 Position

5. On or about August 7, 2003, an Open Vacancy Notice ("first posting") was circulated which sought applicants for a single MS1 position. The minimum qualifications for the position included, "*Five years journeyman level experience in building trades...*" which included three years of journeyman level experience in testing, calibration, maintenance and repair of complex electronic systems and equipment in buildings and building complexes including alarm systems, close circuit television, telephone, computer and computer networks. (Complainant's Exhibits 2, 8)

6. Prior to the first posting it was not required that a successful candidate for the MS1 position have both computer and electronic experience. (Tr. 87)

7. On or about August 29, 2003, the minimum qualifications of the first posting was amended ("the second posting") to require that a candidate for the MS1 position need only have, "*One year experience as a skilled trades person with appropriate experience.*" (Tr. 325, Complainant's Exhibits 8, 9)

8. Complainant applied for the MS1 position and was interviewed along with several other applicants. The other DCF applicants, all of whom were Caucasian, were complainant's coworkers Mike Papo and Ralph Voyers. Complainant was the least senior of these three individuals. (Tr. 16, 17, 29, 30, 31, 44, 117-118, 628)

9. Complainant's qualifications included holding a two year college degree in electronic engineering, experience as an electronic technician and in the use of computers. Papo and Voyers lacked electronic experience. (Tr. 20, 41, 152, 153)

Complainant Receives the MS1 Position

10. On October 15, 2003, complainant received a letter informing him that he had been chosen for the MS1 position. (Complainant's Exhibit 3; Tr.20, 88, 99, 119-120)

11. On October 15, 2004, complainant received a permanent appointment to the MS1 position after successfully completing his probationary period. (Complainant's Exhibits 4, 5; Tr. 121, 124, 325)

12. Complainant successfully held the MS1 position for approximately 18 months after having been chosen in October, 2003. (Tr.22, 89)

Complainant Subsequently Loses the MS1 Position

13. On March 14, 2005, an arbitral award directed that complainant's appointment to the MS1 position be immediately rescinded. This came about after the union representing complainant's coworkers successfully grieved his selection to an arbitrator on the ground that "*specialized minimum qualifications*" were used to eliminate "*eligible and more senior*" candidates in violation of the job vacancy interview and posting procedures contained in the collective bargaining agreement ("CBA"). (Complainant's Exhibit 8)

14. The arbitrator's 'Opinion and Award' stated that, notwithstanding the fact that the MS1 position's minimum qualifications were changed in the second posting in order to require one year of experience as a skilled trades person, the five years experience requirement of the first posting was nonetheless used to eliminate otherwise eligible and senior candidates in order to appoint complainant to the MS1 position. (Complainant's Exhibit 8; Tr. 405, 606-609)

15. The relevant portion of the CBA dictated that, "*Appointment to higher salaried vacant positions...shall be made on the basis of seniority from among the employees bidding...provided the candidate meets the posting qualifications required, meets the legitimate operating needs of the department or agency, and has the ability to perform the duties and responsibilities satisfactorily.*" This meant that the MS1 position was to be filled by the most senior, minimally qualified candidate, provided that that person could perform the job and meet the legitimate operating needs of the agency. (Respondent's Exhibit 3; Tr. 531, 532-533)

16. I credit the testimony of Maureen Seidel, the labor relations specialist representing DOCS at the arbitration, when she testified that seniority and minimum qualifications were not at issue as to Voyers and Papo. Seidel told DOCS that, in its attempt to preserve complainant's appointment, it "*didn't have a leg to stand on*" as she could not put forth a meritorious defense in the arbitration. This was because DOCS could not meet its burden of showing, as per the facts and the CBA, that Voyers and Papo were either unable to do the job or that their appointment would not meet DOCS's legitimate operating needs. DOCS's opinion that complainant was the better worker was not a contractual standard, not a contractually permissible piece of evidence and ruled inadmissible by the arbitrator. (Tr. 512, 514, 515, 516, 517, 532, 535-536, 540, 541, 550, 558, 576, 590, 596, 601-603, 604)

17. In April, 2005, as a result of the arbitral award complainant was removed from the MS1 position and Voyers was subsequently chosen in his place. (Complainant's Exhibits 7, 9, 17; Respondent's Exhibit 2; Tr. 124, 127)

DECISION AND OPINION

Complainant asserted that DOCS unlawfully discriminated against him on the bases of race/color and national origin. DOCS denied engaging in unlawful discrimination.

For the reasons which follow, I find that complainant has failed to prove his case.

Whether Preclusive Effect Should be Given to the Arbitral Award

Initially, I must decide whether the arbitral award should be given preclusive effect.

A pending arbitration proceeding does not bar a complaint before the Division. Board of Education v. State Div. of Human Rights, 33 N.Y.2d 946 (1974). Likewise, the prior determination of an arbitrator also will not bar a Division complaint. See Tipler v. E. I. DuPont de Nemours & Co., 443 F.2d 125 (6th Cir., 1971)(in which the prior decision of an NLRB arbitration did not prevent the adjudication of a Title VII discrimination complaint given that the former did not specifically decide the issue of discrimination, 'per se'). Here, the arbitrator decided that there was a violation of the CBA. Nothing in the record suggests that the arbitrator's decision considered the issue of alleged unlawful discrimination.

Further, complainant himself was technically not a party to the arbitration and, as such, cannot be bound by its result.

Therefore, the result of the arbitral award, as well as the reasons justifying same, cannot be dispositive in this proceeding.

Discrimination Analysis

N.Y.S. Human Rights Law § 296 (1) (a) states, in pertinent part, that it shall be an unlawful discriminatory practice for an employer, "...because of the race..." or "...national origin...of any individual...to discriminate against such individual in compensation or in terms, conditions, or privileges of employment."

It is well settled that in discrimination cases that a complainant has the burden of proof and must, at the outset, establish a prima facie case of unlawful discrimination. A complainant's burden in establishing a prima facie case has been found to be 'de minimis'. Schwaller v. Squire

Sanders & Dempsey, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dept 1998). Once a complainant makes out a prima facie case of unlawful discrimination, a respondent must subsequently produce evidence showing that its action was legitimate and non-discriminatory. Should a respondent articulate a legitimate, non-discriminatory reason for its actions, a complainant must then show that the proffered reason is pretextual. St. Mary's Honor Ctr. v Hicks, 509 U.S. 502 (1993). The burden of proof always remains on a complainant and conclusory allegations of discrimination are insufficient to meet this burden. Pace v. Ogden Servs. Corp., 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept 1999).

In order to make out a prima facie case, complainant must show that: 1) he belongs to a protected class; 2) he was qualified for the position held; 3) he suffered an adverse employment action; and 4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004).

I find that complainant makes out a prima facie case.

First, complainant is within several protected classes. Second, complainant is clearly qualified given both his initial appointment and subsequently fulfilling the responsibilities of the MS1 position for approximately 18 months. Third, complainant suffered a demotion after his MS1 appointment was rescinded. Finally, complainant's demotion occurred under circumstances giving rise to an inference of discrimination in light of the fact that he was replaced by a coworker outside of his protected classes.

DOCS articulated a legitimate, nondiscriminatory reason for its actions when it showed that complainant's demotion was the result of an arbitrator's finding that incorrect minimum

qualifications for the MS1 position were intentionally used to exclude coworkers with greater seniority.

As to proof of pretext, complainant attempted to show that DOCS failed to successfully counter the allegation in the grievance against him which resulted in the rescission of his appointment and the subsequent appointment of Voyers.

The record shows that complainant failed to rebut credible testimony which justified DOC's position at the time of the arbitration, namely, that based on both the facts and the CBA, it could not meet its burden of showing that either Voyers or Papo was unable to do the job or that either could not meet the legitimate operating needs of DOCS. Even assuming that the reason for DOC's position was untrue, nothing in the record suggests that discriminatory animus was the real reason that it did not make this showing. This includes the fact that the record fails to reveal anyone¹ associated with the arbitration who was motivated to act, either alone or in concert with others, because of discriminatory animus towards complainant. See, e.g., St. Mary's, 509 U.S. 502 (1993); Ferrante v. American Lung Ass'n., 90 N.Y.2d 623, 665 N.Y.S.2d 25 (1997). On the contrary, it was DOCS which originally went out of its way to hire complainant over other Caucasian candidates in 2003 and, as per the arbitral award, explicitly failed to follow the second posting in order to accomplish this objective.

Complainant, in his Post Hearing Brief, takes the position that several pieces of evidence show that DOCS failed to assert a justification or defense in favor of Complainant during the arbitration. However, these pieces of evidence (Complainant's Exhibits 9, 10, 11 and 28) merely

¹ In his Post Hearing Brief, Complainant labels the Caucasian and non-Puerto Rican Deputy Superintendent for Administration as "deceptive" because his job involved working with employee grievances, and because he purportedly lied about not knowing prior to the arbitration about the "problem" with Complainant's appointment, i.e., the union grievance which resulted in the rescission of Complainant's position. (Complainant's Post Hearing Brief, pp. 5-6) However, no proof exists in the record which suggests any connection between this individual and the decision of the independent arbitrator.

show a desire for DOCS to reconfigure the MS1 position both prior to and including the time of the first posting. Again, DOCS's desire in this regard was independently found to be secondary to the dictates of the CBA.

Complainant's mistaken belief that he was discriminated against was apparently motivated by receiving the MS1 position and then losing it to a coworker with greater seniority but with arguably lesser qualifications. While unfortunate, such a circumstance does not prove that unlawful discrimination was the real reason for this turn of events.

Therefore, I find that complainant cannot prevail on this claim.

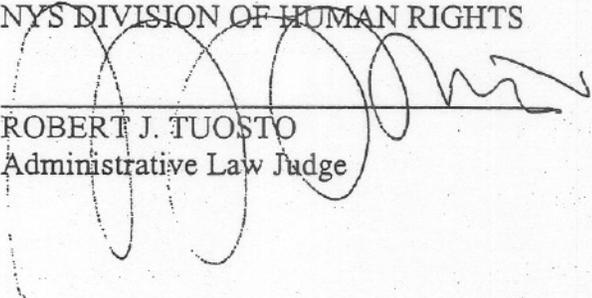
ORDER

Based on the foregoing, and pursuant to the provisions of the N.Y.S. Human Rights Law, and the Rules of Practice of the Division, it is

ORDERED, that the complaint be, and the same hereby is, dismissed.

Dated: April 10, 2007
Bronx, New York

NYS DIVISION OF HUMAN RIGHTS


ROBERT J. TUOSTO
Administrative Law Judge