ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

JASON T. WARD,

Complainant,

v.

INTERFAITH PARTNERSHIP FOR THE HOMELESS,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10150419

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 March 18, 2013, by Christine Marbach Kellett, 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: 4/18/2013
Bronx, New York

Galen D. Kirkland
GALEN D. KIRKLAND
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

JASON T. WARD,

Complainant,

v.

INTERFAITH PARTNERSHIP FOR THE HOMELESS,

Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10150419**

SUMMARY

Complainant charged Respondent with retaliation in violation of the Human Rights Law when his employment was terminated shortly after he engaged in a protected activity. Complainant failed to meet his burden of proof and the complaint should be dismissed.

PROCEEDINGS IN THE CASE

On August 26, 2011, 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 Christine Marbach Kellett, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on June 21 - 22, 2012.

Complainant and Respondent appeared at the hearing. The Division was represented by Lawrence J. Zyra, Esq.. Respondent was represented by Mark S. Mishler, Esq.

FINDINGS OF FACT

1. Respondent is a not-for profit organization organized under the Religious Corporation Law of the State of New York. (Tr. 173-175; ALJ Exh. 4) It provides emergency shelter and beds for homeless individuals in the city of Albany, and provides affordable permanent housing for homeless individuals with disabilities. (Tr. 183-184)

2. Respondent hired Complainant in 2010 as a Shelter Attendant assigned to the 1 a.m. to 9 a.m. shift. (Tr. 19-20, 200; ALJ Exhibits 1 and 4)

3. Shelter Attendant duties included providing accurate shift notes hourly; cooking breakfasts, daily rounds, cleaning, laundry, and correctly filing census reports, which accounted for the individuals ("guests") housed at the shelter. (Tr. 23, 245) Shelter Attendants are charged with insuring the safety of the people staying in the shelter. They need to know who is in the shelter and what is going on in the shelter during their shifts. (Tr. 196, 245; Respondent's Exh. 11) By state law, two shelter attendants are required to be duty on at all times. (Tr. 196)

4. Complainant's first supervisor, Brigitte Emmanuel, never provided any written evaluations of Complainant. (Tr. 20, 23-25, 213-219) Complainant testified that the feedback he

got from Emmanuel was generally positive, although Emmanuel had cautioned him about some of his behaviors such as relating too closely with the guests. (Tr. 24-25) Emmanuel had however discussed issues she had with Complainant's performance with Janine Robitaille (Robitaille), Respondent's Executive Director. (Tr. 200-202, 214-215)

5. In March of 2011 Respondent reorganized its supervisory staff, and Shahmeeka Chaney-Artis became Complainant's supervisor in the new position of Senior Shelter Attendant. (Tr. 184-185, 188, 246; Respondent's Exhibits 15, 16 and 17)

6. Complainant reported he was uncomfortable with the appointment of Chaney-Artis as his supervisor due to his perception of her feelings regarding homosexuality. (Tr. 44) [1] Complainant admitted Chaney-Artis "never did anything to him." (Tr. 136)

7. Chaney-Artis saw deficiencies in Complainant's performance, especially in the areas of census accuracy and completing rounds. (Tr. 247)

8. Because Chaney-Artis did not work the same shift as all the shelter attendants, including Complainant, she held what she described as conversations with the shelter attendant making errors at the various shift changes. (Tr. 248)

9. When Chaney-Artis did work the same shift as Complainant, she noticed he was pre-writing the shift notes, and she instructed him not to do so any more. (Tr. 250-251)

10. Chaney-Artis also was present when he would call in to report he would be late or was not coming into work, and she noticed his leave accruals were very low. (Tr. 251-252)

11. By May 2011 Chaney-Artis was meeting with Complainant every two weeks in "supervision" sessions. (Tr. 252-253; Respondent's Exh. 11)

---

[1] Complainant reported at the hearing that he was bisexual. (Tr. 46) When asked if Complainant was pursuing a charge of discrimination based upon sexual orientation the response from Counsel was no. (Tr. 46) On the record produced at the hearing there is no evidence Respondent knew Complainant's sexual orientation.

12. On July 8, 2011, Chaney-Artis had a longer, more formal supervisory session with Complainant on the issues of time and attendance, shift notes, removal of head-gear, and other administrative matters (Tr.126-127, 130-132, 255-256; Respondent's Exh. 11)

13. Not only Complainant's supervisor was concerned about Complainant's performance: even Respondent's receptionist, to whom census reports were submitted, questioned Complainant regarding errors in his census numbers and how Complainant was creating the census. Complainant himself admitted he had been using incorrect documentation. (Tr. 48-49, 91)

14. Respondent required all Shelter Attendants to know how to accurately file census reports. (Tr. 220-222) Accuracy in census figures insured Respondent could provide shelter where necessary. Inaccuracy impacted the very individuals Respondent was committed to help. (Tr. 216,-217, 347-350)

15. Complainant fully understood the purpose of the census. (Tr. 54-55, 87-90)

16. Complainant felt that if he was making errors in the census, that other Shelter Attendants on duty with him could prepare the census. (Respondent's Exhibits 23 and 24)

17. Complainant acknowledged that in May 2011 Chaney-Artis spoke with him regarding pre-writing shift notes (Tr. 41, 84-88). His initial testimony in this area had been that Chaney-Artis spoke with him regarding pre-writing shift notes sometime after he had engaged in a protected activity. (Tr. 41) Later on he acknowledge it had occurred in May, well before his participation in the protected activity. (Tr. 84-88)

18. Respondent found him disrespectful: for example, at a staff meeting held by Kathy Leyden, Deputy Director, in May of 2011 Complainant had "air quoted" the administration's

changes in process, an action both Leyden and Chaney-Artis interpreted as disrespectful. (Tr. 258-259)

19. Complainant's time and attendance problems came to the fore in June 2011 when he went on vacation without having enough accruals to cover his time away, and he ultimately had to pay back moneys overpaid to him. (Tr. 55-61)

20. On July 15, 2011, Complainant participated as a witness in an investigation of a complaint filed with the Division of Human Rights against Respondent by a former employee. (Tr. 25-26, 28) [2]

21. The parties stipulated that Complainant engaged in a protected activity by participating in this Division investigation and that Respondent knew he had participated in the Division investigation. (Tr. 14)

22. On July 19, 2011 Chaney- Artis held a counseling session with Complainant and another co-worker on the issues associated with the census. (Tr. 301-302)

23. On July 25, 2011 Complainant changed all the color codes for the census reports. This resulted in bed counts being misreported. (Tr. 122-123; Complainant Exh. 6)

24. Complainant acknowledged he was not authorized to change the color code but shrugged it off to an error changing his personal settings. (Complainant's Exh. 6)

25. On July 28, 2011, Respondent held a counseling session with Complainant regarding his continuing issues with preparing an accurate census, with his time and attendance and with his attitude. This session was followed up with a disciplinary "write-up" (Tr. 36-38; Complainant's Exh. 3)

---

[2] The Division investigation was on a complaint brought by a co-worker against Respondent for actions committed by, among others, Ms. Chaney-Artis. (Tr. 294-299, 313-318)

26. Complainant admitted census errors were discussed with him both prior to his participation in a protected activity and after. (Tr. 95-96)

27. Complainant admitted time and attendance were issues discussed with him before he engaged in a protected activity. (Tr. 54-56, 165-167)

28. Complainant did not agree with the policy that the Shelter Attendants were to arrive at work fifteen minutes before the start of their shift to be updated on the conditions in the shelter. He "never understood" that rule especially as they were not paid so he just came late. (Tr. 56)

29. He justified his tardiness by saying at the public hearing "You know, I would call the next staff that was on just so they knew, so to let them know I might be five or ten minutes late. It was never a problem." (Tr. 55)

30. The counseling session did not go well. Complainant described himself as a "blunt" and "outspoken" person who does question supervisors and their directives. (Tr. 46-47) Complainant admitted he became upset at the counseling session. (Tr. 38) Respondent viewed his behaviour as loud, irate and disrespectful. (Respondent's Exh. 30) His conduct was unacceptable to his supervisors. (Respondent's Exh. 30)

31. Complainant grieved the write-up and in early August at the grievance interview with the member of the Interfaith Board of Trustees, Complainant told the member that he was uncomfortable with his supervisor, and that he felt the write-up was based on his participation in the Division investigation. (Tr. 61-65, 379-381; Complainant's Exh. 6)

32. Complainant admitted that the issues in the write-up had been verbally discussed with him prior to his participation in the Division investigation.(Tr. 132-133)

33. On August 19, 2011, after the receptionist discovered confidential documents in her copier, the video recording showed Complainant had entered the hallway leading to the receptionist office during his shift. (Tr. 72-73, 229-230)

34. Respondent's custodian, Nicholas Privitera, was questioned regarding access to the locked office and he admitted he had unlocked the office for Complainant. (Tr. 386) He saw Complainant in the receptionist office in the morning of August 19, 2011 prior to 9 a.m. (Respondent's Exh. 29)

35. Complainant had no reason to be in the receptionist office before 9 a.m. (Tr. 393, Respondent Exh. 30)

36. Complainant was unable to remember if he had gone into the office on August 19, 2011 (Tr. 72-73) His answer at the hearing was evasive.

37. Complainant's apparent entry into the office coupled with his failure to improve regarding the accuracy of his census taking, regarding his time and attendance and regarding his attitude, was the last straw for Respondent, and Respondent terminated Complainant August 23, 2011. (Tr. 31-32, 397-398; Complainant's Exh. 5; Respondent's Exh. 30)

38. Respondent had counseled, disciplined and terminated others before and would continue to terminated employees after Complainant for a variety of reasons relating to job performance. (Respondent's Exhibits 19, 20, 21, 22, 26, and 27)

39. When asked, Complainant admitted he based his charge of retaliation solely on the temporal proximity between his participation in the Division's investigation and his termination. (Tr. 74) He argued that he should have been let go at the time of the errors. (Tr. 167-171)

40. Complainant's attitude on the witness stand was contemptuous of his supervisors and demonstrated a lack of respect for his job duties. Even at the hearing he denigrated the

importance of accurate census taking. (Tr. 39-41, 48-49, 51-52) He testified that his reaction to being told he had to correctly take the census was " I get it, I get it I don't need all three of you guys sending me the same email" (Tr. 53)

41. Complainant was inconsistent. He asserted that nothing had been said to him regarding performance issues prior to his participation in the Division investigation. (Tr. 74) Yet over the course of the testimony he admitted to multiple sessions with his supervisor regarding time and attendance and census issues well before Complainant participated in the Division investigation. (Tr. 82-91, 96).

OPINION AND DECISION

Complainant charged Respondent with violating Executive Law section 296 (7)(retaliation) when he was terminated from his position shortly after participating in a protected activity. Respondent established it had business reasons for the termination. Complainant failed to show that the reasons articulated were a pretext for discrimination. He failed to meet his burden of proof that he was the victim of unlawful discrimination. The complaint should be dismissed.

In order to establish a prima facie case of retaliation, a complainant must show that (1) he engaged in activity protected by Human Rights Law § 296; (2) the respondent was aware that he participated in the protected activity; (3) he suffered from an adverse employment action; and, (4) there is a causal connection between the protected activity and the adverse action. *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101, 103, 692 N.Y.S.2d 220, 223 (3d Dept. 1999) (citing *Fair v Guiding Eyes for the Blind,* 742 F Supp 151, 154 (S.D.N.Y. 1990); *Matter of Town of Lumberland v New York State Div. of Human Rights*, 229 AD2d 631, 636 (3d Dept. 1996).

Complainant established his prima facie case in that he engaged in the protected activity

of participating in an investigation conducted by the Division, and that Respondent knew he had participated. He suffered an adverse employment action when he was terminated.

The combination of the short time of some six weeks between the July 15, 2011, protected activity investigation meeting and some two weeks from telling a Board member during the grievance hearing that he felt the write-up was based on his participation in the investigation, to Complainant's termination, is sufficient to give rise to an appearance of a causal connection between his participation in a protected activity and his termination, and thus gives rise to an inference of discrimination. *See: Little v. National Broadcasting Co.*, Inc. 210 F. Supp 2d 330 (2002) (A complainant may establish causal connection indirectly by showing that the protected activity was followed "closely in time" by alleged discriminatory conduct.); Bennett *v. Progressive Corp.* 225 F. Supp. 2d 190 (2002) (Six to seven day span between the protected activity and the adverse employment action is sufficient for casual connection.) *But See: Slattery v. Swiss Reinsurance America Corp.*, 248 F. 3rd 87, 95 (2d Cir. 2001) (" Where timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff has ever engaged in any protected activity, an inference of retaliation does not arise.")

The record is clear however, that Respondent had been attempting to correct Complainant's performance deficiencies for several months before his participation in the Division investigation. Respondent had brought Complainant's deficiencies to his attention beginning with his new supervisor Chaney-Artis in May and continuing in June and July, all before the protected activity. Complainant had resisted any constructive criticism made. Complainant continued to make the same errors in the census and he was blatantly dismissive of their suggestions for improvement. Complainant was openly disrespectful to his supervisors.

The same actions Respondent criticized Complainant for after his participation in the Division investigation including inaccuracies in the census and time and attendance were issues for which he was counseled before the protected activity. They are the same issues for which other employees both before and after Complainant, were counseled and/or discharged. These are the issues which, coupled with his attitude, led to Complainant's termination.

Complainant presented no evidence to rebut these reasons or even attempt to show pretext. In fact he argued he should have been terminated earlier. Complainant failed to show he was the victim of illegal discrimination.

The ultimate burden of proof of discrimination is on Complainant. Complainant failed to meet that burden. 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: March 18, 2013
Bronx, New York

Christine Marbach Kellett
Administrative Law Judge