

PRESENT: HON. THOMAS J. McNAMARA
Acting Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
EARL V. BELCHER, JR.

Petitioner,

-against-

NEW YORK STATE DIVISION OF
HUMAN RIGHTS and ALBANY
MEDICAL CENTER,

Respondents.

**DECISION AND
JUDGMENT**

Index No.: 1611-09
RJI No.: 01-09-095958

(Supreme Court, Albany County, Motion Term)

APPEARANCES:

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McNamara, J.



In this proceeding pursuant to Executive Law § 298, pro se petitioner Earl V. Belcher, Jr.

seeks to annual a determination by respondent New York State Division of Human Rights (NYSDHR) dated January 9, 2009 finding, upon investigation, no probable cause to believe that respondent Albany Medical Center (AMC) engaged in the complained of discriminatory practices and dismissing the complaint. NYSDHR submits the administrative record but otherwise has not actively participated in this proceeding. AMC opposes the petition, seeking its dismissal.

Since 2005, petitioner, an African American male approximately 50-years old, has applied for many positions with AMC in its Human Resources Department without receiving an interview for any of the positions. Most recently, those applications included three positions in 2008 – two applications for Human Resources Manager and one for Human Resources Associate. Asserting that he was otherwise qualified for the positions, petitioner filed a complaint with NYSDHR alleging age and race discrimination as against AMC. In part, he alleged that AMC knew his race since at the time of his applications he filled out a voluntary form disclosing that information.

On August 11, 2008, AMC answered the complaint, denying that petitioner was discriminated against on the basis of age, race or color. AMC noted:

An applicant's age and race/color are not solicited on the main application submitted to AMC and ultimately considered by the hiring manager. There is however an Albany Medical Center Employment Application Voluntary Background Information form that seeks voluntary self designation of the applicant as being in an ethnic or racial group. This Voluntary Background form is used for record keeping purposes by AMC's Human Resource Department and is not forwarded to hiring managers who review applications for the purpose of selecting candidates to interview. This is true even if the hiring manager is employed within the Human Resources Department. Lastly, the Voluntary Background form does not solicit age (Dolin Letter [dated 8-11-08], Certified Administrative Record).

AMC also denied that petitioner was qualified for the positions except for a Human Resources Associate position that was being reclassified. AMC further explained that a 2008 re-organization

of the Human Resources Department resulted in the creation of two new positions known as HR Representative, which were filled internally pursuant to AMC Employment Policy. Thus, AMC denied that any positions for which petitioner applied in 2008 had been filled by persons less qualified than him.

Thereafter, NYSDHR commenced an investigation into the complaint. On November 18, 2008, NYSDHR convened a two-party conference during which a Human Rights Specialist for NYSDHR questioned both parties regarding the complaint. At the conference, petitioner explained that he felt he was qualified for the last three positions because he had 13-years of Human Resource experience in training and development for Niagara Mohawk and three-years experience with the US Army Reserve. He further noted that he held a Bachelor's degree in Business Administration and a Masters in Science and Management. According to the notes of the conference, AMC's Human Resource Director, Sandy Castilla, in part, responded:

Basically, in reviewing Mr. Belcher's resume . . . I see a number of reasons why he would not be qualified: because the Master's isn't specifically HR and I look at his coursework, all of those things are a portion of what we do, but I don't see anything relating to labor relations, conflict resolution, employee relations. The three months experience with Hudson Mohawk isn't directly linked to what we do in HR; a clerical position that is 13 years old, primarily in training, program development, which again is not directly related to the experience that I would be looking for. I would be looking more for someone to tell me that they conducted investigations on sexual harassment, hostile work environment, etc.; someone who can fluently talk about ADA, Title 7, the Human Rights Law. I didn't see any of that in [Mr. Belcher's] resume. Although he does have a Master's Degree and some experience in HR, it just isn't directly related to the skill and qualifications I'm looking for (Two Party Conference notes, Certified Administrative Record).

In addition, during the conference, Ms. Castilla again explained that, in the pre-interview hiring process, the Human Resources Department is not aware of an applicant's racial background

or age. According to the notes of the conference, petitioner stated that “in 2005 there were entry level positions that Mr. Dolin [AMC’s counsel] admits I was qualified for, then why wasn’t I interviewed for the association positions? I felt what they were asking of people, I met the minimum qualifications” (*id.*). Again, according to the conference notes, Ms. Castilla responded that petitioner did not fully qualify for one of the positions since it required experience working with 403 B’s. As to the other position, she did not know but informed NYSDHR that the position was filled by a 32-year old African American female. Petitioner conceded that he did not have qualified pension experience and, if listed, he would not have applied for the position.

On January 6, 2009, NYSDHR produced a Final Investigation Report and Basis of Determination, which, in part, provided: “Comparative data indicates that respondent employs persons of varying races and ages in their Human Resources Department, including persons who are older than Complainant. Also, numerous other applicants have not been considered for vacant positions, due to their lack of experience or other qualifications” (Final Investigation Report and Basis of Determination [dated 1-6-09], *id.*).

On January 9, 2009, NYSDHR determined: “After investigation, and following opportunity for review of related information and evidence by the named parties, the Division has determined that there is NO PROBABLE CAUSE to believe that the respondent has engaged in or is engaging in the unlawful discriminatory practice complained of” (Determination and Order after Investigation [1-9-09], *id.* [emphasis in original]). After noting any voluntary disclosure by petitioner regarding his race was “kept separate from the application and . . . not given to any of [AMC’s] hiring managers, the determination provided:

Due to the positions' specific education and experience requirements, as well as a restructuring of the Human Resources department in April 2008, Complainant was not eligible for an interview. The investigation found that since Respondent had no knowledge of Complainant's race or age, the decision to not hire Complainant was a legitimate one, pertaining to the qualifications that Respondent felt Complainant did not possess. The investigation also found that Respondent employs persons of varying race and age, including persons who are older than Complainant, and numerous other applicants were not considered for a position due to their lack of qualifications (*id.*).

NYSDHR ordered the complaint dismissed and the file closed.

Petitioner commenced this proceeding pursuant to Executive Law § 298 to annul that determination. In this proceeding, petitioner argues that (1) NYSDHR's finding of no probable cause lacks a rational basis in the record and is arbitrary and capricious; (2) NYSDHR improperly allowed communication between its Regional Director Michael P. Kendall and AMC's counsel without including petitioner; (3) NYSDHR improperly allowed AMC to file a late answer instead of following its own procedures; and (4) there are inaccuracies and omitted items in the "transcript."

"Where, as here, 'a determination of no probable cause is rendered [by NYSDHR] without holding a public hearing pursuant to Executive Law § 297 (4) (a), the appropriate standard of review is whether the determination was arbitrary and capricious or lacking a rational basis'" (*Matter of Goston v American Airlines*, 295 AD2d 932, 932 [2002] [quoted source omitted]; see *Matter of Hone v New York State Div. of Human Rights*, 223 AD2d 761, 762 [1996]; *Matter of Giles v State Div. of Human Rights*, 166 AD2d 779, 780 [1990]). Moreover, NYSDHR "has broad discretion in determining the method to be employed in investigating a claim, and its determination will not be overturned unless the record demonstrates that its investigation was 'abbreviated or one-sided'" (*Bal v New York State Div. of Human Rights*, 202 AD2d 236, 237 [1994], *lv denied* 84 NY2d 805; see

Lee v New York State Human Rights Appeal Bd., 111 AD2d 748, 748-749 [1985]; 9 NYCRR 465.6).

Petitioner argues that the determination lacks a rational basis since he was qualified for the positions, concluding that AMC did not interview him for discriminatory reasons. For instance, petitioner contends that he had a Masters Degree as required and over 13-years of experience in the Human Resources field. Further, he contends that, even if AMC re-classified certain of the positions, it was a form of discrimination for it to fill such positions internally and not to exclude qualified external candidates. Additionally, he disregards the notion that those responsible for interviewing for the positions did not know his race since he filled out the voluntary form and would also have been subjected to a credit/background check before his interview.

Petitioner's contentions lack merit. While petitioner does not believe that AMC's hiring personnel did not view his voluntary disclosure form, the record before the agency shows that at the open conference AMC described the process regarding the voluntary disclosure form and stated that the hiring personnel did not see that information. Further, AMC noted that credit checks were not performed and background checks were only done after an offer had been made. Thus, a rational basis existed in the record for NYSDHR to conclude that AMC was neither aware of petitioner's race nor age when reviewing his application. Further, petitioner does not point to any authority that would deny AMC the right to fill positions internally, which it noted at the open conference was its policy. Finally, AMC also explained in detail why petitioner's experience was not satisfactory for the particular opening for which he applied and that the course work he did to obtain a Master's degree was not fully applicable to those openings. Thus, a review of the record before the agency shows that a rational basis existed for its determination. In other words, there was "a factual basis

in the evidence sufficient to warrant a cautious person to believe that discrimination” had not been practiced here (*Matter of Hone*, 223 AD2d at 762 [quoted source omitted]).

As to petitioner’s claim that NYSDHR’s Regional Director and AMC’s counsel had an improper interview excluding him, in its answer AMC admits that its representative spoke with the Regional Director regarding a “narrow issue of general procedure” but denies the rest of petitioner’s allegations (AMC’s Verified Answer at ¶ 25). Here, nothing in the record supports petitioners’s contention that the determination should be annulled based on this conversation (*see Matter of Mengoni v New York State Div. of Hous. & Community Renewal*, 279 AD2d 375, 376-377 [2001], *affd* 97 NY2d 630; *see also Miller v McMahon*, 240 AD2d 806, 808 [1997]). First, AMC’s averment that the matter discussed was only of a procedural nature and not substantive is unrefuted (*see generally* State Administrative Procedure Act § 307 [2]). Second, as discussed above, sufficient evidence in the record supports the determination (*see Matter of Marshall v New York State Div. of Human Rights*, 112 AD2d 234, 234 [1985]). Otherwise, the record shows that petitioner had a full opportunity to present his case to NYSDHR, including participation in an open conference (*see Matter of Maltsev v New York State Div. of Human Rights*, 31 AD3d 641, 641 [2006]). Thus, nothing in the record indicates that the investigation was either abbreviated or one-sided (*see Bal*, 202 AD2d at 237) and petitioner’s claim that the determination was a result of this conversation is merely speculative.

As to the timeliness issue, the record reflects that AMC was granted until August 1, 2008 to submit its response but did not do so until August 8, 2008 by facsimile followed by a original with

exhibits dated August 11, 2008. While NYSDHR may make an adverse inference upon a party's failure to comply with scheduled deadlines or to submit requested materials, this appears to be a discretionary rule. Here, petitioner has not shown he was prejudiced by the late submission nor does the record reflect that he objected to it during the open conference. Moreover, the submission was approximately a week late.

As to the claims of inaccuracies and omitted items not already addressed above, the Court has reviewed the same and finds them without merit. For instance, the record is clear about the number of applications submitted by petitioner although summarized as "several." Further, the record, in several places, notes that petitioner had obtained a Masters Degree. Many of the other matters complained of, while not specifically mentioned in the notes from the conference or in the determination, are contained in the record and presumptively were before NYSDHR when it rendered its determination. Otherwise, the Court has considered the parties' remaining arguments and finds them without merit. Since after a review of the record the Court concludes that NYSDHR's determination was neither arbitrary or capricious nor without a rational basis, the relief requested in the petition is denied and the petition is dismissed (*Matter of Hone* 223 AD2d at 762).

Accordingly it is

ORDERED and ADJUDGED that the petition is dismissed.

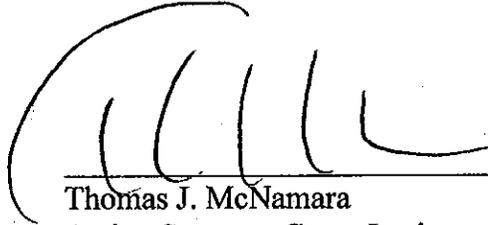
This constitutes the decision and judgment of the Court. The original decision and judgment are returned to the attorney for respondent Albany Medical Center. A copy of the decision and judgment and the supporting papers have been delivered to the County Clerk for placement in the

file. The signing of this decision and judgment, and delivery of a copy of the decision and judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED.

ENTER.

Dated: Saratoga Springs, New York
August 5, 2009



Thomas J. McNamara
Acting Supreme Court Justice

Papers Considered:

1. Notice of Petition dated March 2, 2009;
2. Petition unverified and undated, with accompanying Exhibits A-D;
3. Affidavit of Earl V. Belcher, Jr., sworn to April 2, 2009;
4. Petitioner's Memorandum of Law [undated];
5. Answer of respondent New York State Division of Human Rights verified March 27, 2009, with accompanying Exhibit A;
6. Administrative Record certified March 30, 2009;
7. Answer and Objection in Point of Law of respondent Albany Medical Center verified March 26, 2009;
8. Affidavit of Sandra J. Castilla sworn to March 26, 2009, with accompanying Exhibits A-N;
9. Respondent Albany Medical Center's Memorandum of Law dated March 27, 2009;
10. Supplemental Affidavit of Earl V. Belcher, Jr., sworn to May 8, 2009;
11. Petitioner's Supplemental Memorandum of Law [undated].