ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

ROBERT J. ELSNER,

Complainant,

v.

TOWN OF COLONIE,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10143913

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 February 28, 2012, by Thomas J. Marlow, 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: MAY 1 2012
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10143913**

SUMMARY

Complainant alleged that Respondent discriminated against him because of his disability and because he opposed unlawful discrimination. Because the evidence does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On September 14, 2010, 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 Thomas J. Marlow, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on October 17 and 18, 2011.

Complainant and Respondent appeared at the hearing. Complainant was represented by Scott M. Peterson, Esq., of the Peterson Law Firm. Respondent was represented by Earl T. Redding, Esq., of Roemer Wallens Gold & Mineaux LLP.

Complainant and Respondent filed proposed findings of fact and conclusions of law after the conclusion of the public hearing.

FINDINGS OF FACT

1. Since August 20, 1989, Respondent has employed Complainant as a Public Safety Dispatcher ("PSD"). (ALJ's Exhibit 1; Respondent's Exhibit 32; Tr. 42-43, 414-15)

2. As a PSD working for Respondent, Complainant is a member of the union known as the Civil Service Employees Association ("CSEA"). The terms and conditions of his employment are determined by the existing Collective Bargaining Agreement ("CBA") between Respondent and CSEA. (ALJ's Exhibit 1; Respondent's Exhibit 2; Tr. 102-03, 108-09, 128-30, 330, 399, 439, 459, 486-93, 585-91, 656-61)

3. The responsibilities of a PSD include receiving incoming emergency calls from the public, such as 911 calls, and dispatching appropriate personnel such as police officers. (Respondent's Exhibit 1; Tr. 43-45)

4. In September of 2004, Complainant was diagnosed with anxiety. Pursuant to this diagnosis, Complainant did not work for approximately four or five weeks. (Respondent's Exhibit 40; Tr. 54-55, 416-17)

5. On October 26, 2004, Complainant's doctor, Raymond Carrelle, M.D., completed a form for Respondent ("Return-to-Work form of October 26, 2004"), indicating that Complainant could return to work on November 1, 2004, but restricting Complainant's work to five days per week, eight hours per day. On the form, Dr. Carrelle also indicated that Complainant would have no work restrictions as of December 1, 2004. (Respondent's Exhibit 41; Tr. 55-57, 247)

6. As a PSD, pursuant to the CBA in existence in 2004, Complainant was subject to mandatory overtime, was subject to being recalled to work after the completion of a shift, and was subject to being on call to work a shift other than his normal shift. (Tr. 241-43, 487-88)

7. Because of the Return-to-Work form of October 26, 2004, Complainant was not considered for overtime, recall, or on call. Six months passed and Respondent requested that Complainant have his doctor complete a form with regard to Complainant's "return to full duty." In May of 2005, Dr. Carrelle completed the form, indicating that Complainant's condition had improved but advising that the restricted work schedule should continue.
(Respondent's Exhibit 42; Tr. 448-456)

8. In a letter to Dr. Carrelle dated October 5, 2005, Respondent referenced Complainant's restricted work schedule and indicated that it made it "increasingly difficult to deal with staffing issues" and that it was "causing a hardship within the department." The other PSDs had been assuming Complainant's responsibility for overtime and it was causing stress for them. Respondent asked Dr. Carrelle to complete another form. In November of 2005, Dr. Carrelle completed the form, indicating that the restricted work schedule should continue for nearly another year, until November 1, 2006. Dr. Carrelle did not indicate that Complainant's condition was permanent. (Respondent's Exhibits 39, 43; Tr. 455-61)

9. On November 24, 2006, Dr. Carrelle signed a form that was provided to Respondent in which he advised that the restricted work schedule should continue until May 24, 2007. On this form, Dr. Carrelle indicated that Complainant's disability was permanent and that he could be contacted for "possible Americans with Disabilities Act accommodations."

(Complainant's Exhibit 2; Tr. 461-67)

10. By letter dated February 20, 2007, Respondent asked Dr. Carrelle, among other things, what length of time would be required for the restricted work schedule and if there were any possible alternative accommodations. By letter dated March 5, 2007, Dr. Carrelle informed Respondent that he strongly encouraged continuing the restricted work schedule "indefinitely" and that he would continue to assess Complainant's progress.

(Complainant's Exhibit 23; Respondent's Exhibit 36; Tr. 462-65, 467)

11. On or about April 24, 2007, Complainant filed a complaint ("2007 EEOC complaint") with the U.S. Equal Employment Opportunity Commission ("EEOC") claiming that Respondent knew that he had a permanent disability and that Respondent was ignoring his reasonable accommodation request. On or about July 16, 2007, after its investigation, the EEOC closed its file ("2007 EEOC determination") regarding the 2007 EEOC complaint, indicating that it was unable to conclude that there was a violation of any statute. By letter dated July 16, 2007, the EEOC informed Complainant that the "investigation revealed that [Complainant] [has] been provided with adequate reasonable accommodation."

(Complainant's Exhibits 3, 24; Respondent's Exhibit 18; Tr. 79-86, 467-68)

12. After the 2007 EEOC determination, Respondent continued to allow Complainant to work a restricted work schedule with the understanding that it was a temporary accommodation.

(Tr. 84-86, 468)

13. In January and April of 2008, Complainant had surgeries on his neck performed by Edward H. Scheid, Jr., M.D., and was out of work from January 20, 2008 to November 6, 2008. Complainant returned to work with a restriction of working four hours per day for five days per week for the next two months. Since the neck surgeries, Complainant experiences headaches after six or seven hours of working and his neck stiffens. Complainant takes medication for the headaches but the medication doesn't alleviate the pain associated with the neck. (Respondent's Exhibit 21; Tr. 87-93, 221, 227-28)

14. In January of 2009, Dr. Scheid provided a form to Respondent indicating that the four-hours-per-day work restriction should continue into 2010. (Respondent's Exhibit 21; Tr. 93-94)

15. On March 17, 2009, Respondent had Complainant examined by Warren Silverman, M.D. Dr. Silverman opined in a report dated March 17, 2009, that the "prognosis for a return to a full duty capacity is non-existent." (Respondent's Exhibit 37; Tr. 625-28)

16. After receiving Dr. Silverman's report, Respondent determined that it would place Complainant on a leave of absence without pay pursuant to New York State Civil Service Law Section 72 ("Section 72"). (Tr. 626-33)

17. By letter dated June 22, 2009, Respondent informed Complainant that, effective July 10, 2009, he would be placed on Section 72 leave without pay. On June 22, 2009, after learning of Respondent's intent to place him on Section 72 leave without pay, Complainant filed another complaint with the EEOC ("2009 EEOC complaint"), claiming that Respondent was discontinuing his reasonable accommodations and was putting him out of work due to his disability and in retaliation for Complainant filing the 2007 EEOC complaint. (Complainant's Exhibit 7; Respondent's Exhibit 14; Tr. 101-09)

18. After Complainant filed the 2009 EEOC complaint, Respondent held "the imposition of any further Section 72 procedures in abeyance pending EEOC resolution." Complainant continued to work four hours per day, five days per week. (Respondent's Exhibit 32; Tr. 109, 112, 626-29, 634)

19. By letter dated April 26, 2010, and report dated May 3, 2010, Dr. Scheid informed Respondent that Complainant was "released to return to work on 5/3/10, 8 hours a day, 5 days a week only." (Complainant's Exhibits 9, 10; Tr. 113-16, 635-37)

20. In June of 2010, Respondent had Complainant examined by Frank L. Genovese, M.D. Dr. Genovese opined in a report that Complainant could "return to full duty." Dr. Genovese recommended "an even transition, possibly within 1-2 months, restricting him from immediate recall or mandatory overtime for the first 2 months and then slowly transition him into his normal work activities that do include overtime and recall." (Complainant's Exhibit 11; Respondent's Exhibit 34; Tr. 119-20, 642-45)

21. In September of 2010, Respondent, after considering Dr. Genovese's report, informed Complainant, in writing ("September 2010 memo"), that he would be returning to full time hours including overtime and on call. In the September 2010 memo, Respondent set forth a work schedule for Complainant that allowed him to transition into the normal 8 ¼ hour work shift by the week of September 27, 2010. The September 2010 memo informed Complainant that, as of October 4, 2010, he would be "required to work overtime as needed/wanted as stated in the current contract. [Complainant] [would] also be required to take on call as stated in the contract." (Respondent's Exhibit 9; Tr. 123-26, 160, 316-18, 540-41, 556, 593-94, 644-46)

22. On September 10, 2010, Thomas Bortle ("Bortle"), one of Complainant's supervisors, met with Complainant, gave Complainant the September 2010 memo, and read it to

Complainant. Complainant voiced no objections to the contents of the September 2010 memo to Bortle. (Respondent's Exhibit 9; Tr. 123-26, 131, 160, 316-18, 594-96, 679)

23. On September 14, 2010, Complainant filed the instant complaint (Case No. 10143913) with the Division, alleging that Respondent was unlawfully discriminating against him because of his disability and unlawfully retaliating against him because he had filed his complaint with the EEOC. Complainant included the allegations that Respondent was trying to coerce him to retire and was refusing to return him to an eight-hour work schedule without overtime, on call, or recall. (ALJ's Exhibit 1; Tr. 305-06, 432)

24. By letter dated October 5, 2010, Dr. Scheid informed Respondent that Complainant's work schedule should be restricted to five days per week, eight hours per day. (Complainant's Exhibit 13; Tr. 121-23, 646-49)

25. Thereafter, in October of 2010, one night, just after midnight, Complainant received a telephone call from a PSD. Complainant did not answer the telephone, but heard the following message left on his answering machine, "[Complainant's first name], we need you to come in, you're on call, we had a sick call, please give us a call back." A few minutes later, the PSD called again; Complainant did not answer; the PSD left the message that Complainant had to come into work. Getting a call regarding on call was not unusual. At approximately 12:20 AM a police officer came to Complainant's home and knocked on his door. Complainant knew that the officer was there to inform him of the on call assignment but Complainant did not respond or open his door. It was not unusual for Respondent to send a police officer to the home of a PSD who was needed. Michael Haller ("Haller"), another supervisor of Complainant, spoke with Complainant after this incident, and Complainant said that he did not know that he was on call. (Tr. 123-26, 131, 160, 316-18, 155-56, 160-72, 335-37, 537-38, 562-67)

26. On October 21, 2010, Respondent asked Complainant to sign up for on call shifts for 2011. Complainant refused. By Notice of Discipline dated November 16, 2010, pursuant to New York Civil Service Law Section 75 and the CBA in effect, Complainant was charged with intentionally disobeying a direct order. The proposed penalty by Respondent was a suspension without pay for five days. A hearing was held on January 12, 2011, before a hearing officer pursuant to the CBA, and Complainant testified at the hearing. After finding that there was substantial evidence to support the charge, the hearing officer recommended a 30-day suspension without pay and the recommendation was imposed. (Complainant's Exhibit 14; Respondent's Exhibits 10, 11, 12; Tr. 149-54, 318-19, 330-34, 523-31)

27. By letter dated March 1, 2011, Dr. Carrelle advised Respondent that Complainant has a permanent disability limiting him to work no more than eight hours per day, five days per week. By letter dated March 1, 2011, Dr. Scheid advised Respondent that the work restrictions of eight hours per day, five days per week are permanent. (Complainant's Exhibits 16, 17; Tr. 179-84)

28. Since Complainant's suspension and at least as of the last day of the hearing, October 18, 2011, Respondent was not holding Complainant responsible for performing any overtime, on call, or recall. Respondent is awaiting a decision in this case before it considers holding Complainant responsible for performing any overtime, on call, or recall.
(Tr. 172-74, 569, 571-72)

29. On May 17, 2011, when CSEA learned that Respondent considered Complainant capable of performing all of the duties and responsibilities of a PSD but was not holding Complainant responsible for performing any overtime, on call, or recall, the CSEA unit president for Complainant's unit, filed a class action grievance on behalf of the other PSDs in the unit claiming that Respondent was "creating a forced overtime issue that has to be covered by

[Complainant's] co-workers." Respondent subsequently reached a settlement on the grievance. (Respondent's Exhibit 13; Tr. 484-94, 506-08)

30. Other PSDs complained about the fact that they were responsible for covering Complainant's responsibilities regarding overtime, on call, and recall. The assumption of Complainant's responsibilities caused hardship for other PSDs who became responsible for covering unpopular shifts. Complainant noticed that "the animosity was increasing toward [him]." According to Jonathan M. Teale, Deputy Chief of Respondent's police department, PSDs felt that being responsible for covering Complainant's responsibilities was "impinging on their personal freedoms, their schedules, childcare, other issues. It is affecting morale." According to the CSEA unit president, "The problem with our job is that we are 24/7. We are almost always at a minimum staffing, which means if somebody calls in sick, somebody has to work. Sometimes that on call covers that. Sometimes that on call doesn't cover that based on if they worked before overtime or whatever. So when somebody is not there to work their on call week, it does create a hardship because people don't know when they are going to get called in." (Respondent's Exhibit 13; Tr. 379-80, 454-55, 458-61, 492-514, 533, 573, 586-87, 685-86)

31. Respondent considers overtime, on call, and recall as essential functions of the PSD position. Complainant agrees. A PSD must have the "physical condition commensurate to the demands of the position." When emergencies arise, Respondent must be able to have a staff in place that can best assure that the public is protected. If there is a natural disaster such as a flood or ice storm with tree branches falling and car accidents, Respondent must have a staff in place to effectively respond to the situation. (Respondent's Exhibits 1, 2; Tr. 240-43, 590-91, 656-60, 696-97)

32. Although Respondent has presented possible accommodations to Complainant if he worked overtime, on call, or recall, Complainant will not consider any accommodations to working overtime, on call, or recall. (Respondent's Exhibit 36; Tr. 341-44, 469)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's disability or to retaliate against an individual in the terms, conditions, or privileges of employment because that individual opposed unlawful discrimination. *See* Human Rights Law §§ 296.1(a), 296.7.

Complainant raised issues of unlawful discrimination, alleging that Respondent refuses to provide him with a reasonable accommodation and that he has experienced unlawful retaliation because he opposed discrimination.

After considering all of the evidence presented and evaluating the credibility and demeanor of the witnesses, I find that the credible evidence does not support Complainant's allegations. I credit the testimony of Pierri, O'Connor, Ray, Haller, Bortle, Newton, and Teale and find that no actions attributed to Respondent were motivated by or determined by discriminatory animus.

Everyone is in agreement that it is an essential function, or job duty, of a PSD to be available for overtime, on call, and recall. That may be perceived as demanding; however, the written job description indicates that, to be employed as a PSD, one's physical condition must be commensurate to the demands of the position. Further, the terms of the CBA set forth the requirement of overtime availability. The record is clear as to the importance of such a

requirement for the position of PSD and the potential consequences if these demands did not exist. All of these factors are considered in determining that, with regard to the position of PSD for Respondent, being available for overtime, on call, and recall is an essential function of the job. *See Davis v. Microsoft*, 109 Wash.App. 884, 37 P.3d 333 (Wash. Ct. App. 2002), aff'd, *Davis v. Microsoft,* 149 Wash.2d 521, 70 P.3d 126 (2003); 9 N.Y.C.R.R. §§ 466.11(f)(1), 466.11(f)(2).

Since 2004, Respondent reasonably accommodated Complainant when the request was presented as an accommodation in the form of a reasonable time for recovery. *See* 9 N.Y.C.R.R. §§ 466.11(i). Respondent has no obligation under the Human Rights Law to provide a permanent accommodation that would eliminate the essential job function, or duty, of being available for overtime, on call, and recall. *See Davis,* 109 Wash.App. at 890; 9 N.Y.C.R.R. §§ 466.11(d), 466.11, 466.11(f).

Complainant has the burden to establish by a preponderance of the evidence that discrimination occurred. *See Mittl v. New York State Div. of Human Rights,* 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003). Since Complainant has failed to meet his burden, the complaint 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: February 28, 2012
Bronx, New York

Thomas J. Marlow
Administrative Law Judge