



**Division of
Human Rights**

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

NOEL HARRIS,

Complainant,

v.

**PAUL TIRUMS, OSCAR PINHEIRO, NEW YORK
STATE, DEPARTMENT OF TRANSPORTATION,**
Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10210632

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 8, 2024, by Alexander Linzer, 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.

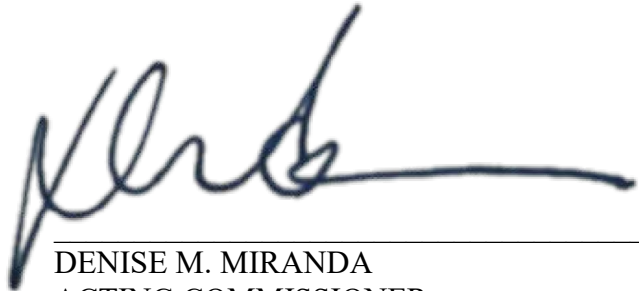
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE DENISE M. MIRANDA, ACTING COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been 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: 07/22/2024
Bronx, New York



DENISE M. MIRANDA
ACTING COMMISSIONER



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NOEL HARRIS,

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**PAUL TIRUMS, OSCAR PINHEIRO, NEW
YORK STATE, DEPARTMENT OF
TRANSPORTATION,**

Respondents.

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

Case No. **10210632**

SUMMARY

Complainant alleged that Respondents unlawfully discriminated against him based on his age, race, and color. Complainant has failed to meet his burden of proof and this case is dismissed.

PROCEEDINGS IN THE CASE

On January 15, 2021, Complainant filed a complaint with the New York State Division of Human Rights (“Division”), charging Respondents 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 Respondents 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 Alexander Linzer, an Administrative Law Judge (“ALJ”) of the Division. Virtual public hearing sessions were held on October 18, 2023, and October 19, 2023.

Complainant and Respondents appeared at the hearing. Complainant was represented by Alexandra T. Berke, Esq., of Berke-Weiss Law PLLC. Respondents were represented by Howard Beyer, Esq., Associate Counsel.

Permission to file post-hearing briefs was granted. Both parties timely filed post-hearing briefs which were considered and, where appropriate, adopted. Complainant filed a motion seeking attorney’s fees, which is entered into evidence as ALJ’s Exhibit 5.

FINDINGS OF FACT

1. Complainant is Black and was born on November 29, 1955. (Tr. 20; ALJ’s Exhibit 1)
2. Respondent New York State, Department of Transportation (Respondent “DOT”) is a department of the New York State government. (Tr. 68-70; Respondents’ Exhibit 2)
3. During the relevant period, Respondent DOT employed Respondent Tirums as a regional construction engineer in the Hudson Valley, New York. (Tr. 164-66)
4. As regional construction engineer in the Hudson Valley, Respondent Tirums was responsible for managing Respondent DOT’s highway and bridge projects, and for oversight of construction project management. (Tr. 165)
5. Respondent Tirums is White. (Tr. 227)

6. Respondent DOT employs Respondent Pinheiro as an area construction supervisor. (Tr. 230-31)

7. Respondent Pinheiro's duties include managing construction projects for Respondent DOT. (Tr. 231)

8. Respondent Pinheiro is Hispanic and White. (Tr. 259)

9. Respondent DOT maintains an equal employment opportunity policy that prohibits discrimination in the workplace based on protected categories, including age and race. (Tr. 68-69; Respondents' Exhibit 2)

10. Respondent DOT provides anti-discrimination training to its employees, including Respondents Tirums and Pinheiro. (Tr. 72-74; Respondents' Exhibit 3)

11. In September 1994, Respondent DOT hired Complainant as a junior engineer. (Tr. 16)

12. In or around 2004, Respondent Pinheiro supervised Complainant during a construction project. (Tr. 21-22, 242)

13. When Respondent Pinheiro supervised Complainant, he observed that Complainant was "very strict" and "by the book" with respect to specifications, which Respondent Pinheiro believed caused a "little bit of tension" with the contractors and subordinates. (Tr. 243-44, 251-52)

14. At least one of the contractors that Complainant worked with expressed concern to Respondent Pinheiro concerning Complainant's handling of the project and his strict interpretations of the specifications. (Tr. 251-52)

15. In Respondent Pinheiro's experience, a supervisor must have a "little bit of flexibility" or it can be difficult for that supervisor to complete a job while maintaining a good relationship with the contractor and subordinates. (Tr. 244)

16. In or around January 2011, Respondent DOT promoted Complainant to the position of construction liaison advisor for its local projects unit. (Tr. 17)

17. As construction liaison advisor, Complainant's duties included ensuring that Respondent DOT's projects were constructed in compliance with federal and state requirements. (Tr. 17-18)

18. Complainant also oversaw local construction projects, including building and rehabilitating roads, highways, bridges, and historic buildings. (Tr. 17-18, 48-50)

19. In 2017, the New York State Department of Civil Service offered Respondent DOT's employees the opportunity to take a promotional exam titled "Promotion Opportunities in Transportation Management at G-27/M-2" (the "promotional exam"). (Tr. 100-03; Respondents' Exhibit 7)

20. The promotional exam enabled Respondent DOT's employees to apply for various promotional opportunities offered by Respondent DOT, including engineering positions. (Tr. 100-03)

21. Complainant took the promotional exam and passed with a score of 85. (Tr. 104-06; Respondents' Ex. 8)

22. On January 21, 2020, Respondent DOT posted a promotional opportunity to area construction supervisor, professional engineer 2 ("ACS") in its Regional Construction Contracts Group. (Tr. 22-28, 166-68; Complainant's Exhibit 1; Respondents' Exhibit 17)

23. The duties of the ACS position included leading Respondent DOT's Regional Construction Contracts Group and Regional Technical Services Unit and managing and supporting technical managers, employees, and contractors. (Tr. 178-79; Complainant's Exhibit 1)

24. The ACS position reported directly to Respondent Tirums. (Tr. 178-79)

25. To be eligible for the position, candidates must have taken the promotional exam and have the appropriate education and experience. (Tr. 100-02, 107-08; Respondent's Exhibit 7)

26. Respondent DOT canvassed the eligible candidates to determine those who were interested in interviewing for the position. (Tr. 109-10, 114; Respondents' Exhibit 9)

27. Pursuant to New York State Civil Service law, to be hired, a candidate must have one of the top three exam scores of candidates interested in the position. However, candidates' exam scores do not limit the candidates who can be interviewed for the position. (Tr. 122, 146)

28. Respondents Tirums and Pinheiro conducted the interviews for the ACS position. (Tr. 178-79)

29. Respondents Tirums and Pinheiro interviewed nine eligible candidates, including Complainant. (Tr. 29, 117-120; Respondents' Exhibit 10)

30. Respondents Tirums and Pinheiro interviewed the candidates by asking them the same set of questions from a prepared list. (Tr. 182)

31. Respondent Tirums was responsible for making the final decision concerning who would be hired for the ACS position because the position reported to him. (Tr. 179)

Complainant's Interview

32. Complainant was scheduled to be interviewed for the ACS position on January 27, 2020. (Tr. 29; Respondents' Exhibit 10; ALJ's Exhibit 1)

33. On January 27, 2020, before Complainant's interview, Respondent Pinheiro asked Complainant when he planned to retire. Complainant responded that he could retire at any time because he was over 62 years old, but that he only had 25 years of service. Respondent Pinheiro responded, "So you want to make your 30 years then." Complainant said, "At least, because

when I retire from DOT, I don't plan to go and work elsewhere." The conversation then ended. (Tr. 22, 246-47)

34. Respondent Tirums was not present during Respondent Pinheiro's conversation with Complainant and Respondent Pinheiro did not tell him about the conversation. (Tr. 247)

35. On January 27, 2020, Respondents Tirums and Pinheiro interviewed Complainant. (Tr. 29, 193; ALJ's Exhibit 1; Respondents' Exhibits 10, 20)

36. At the time of Complainant's interview, he held a Bachelor of Science degree in civil engineering, and master's degrees in construction engineering and management, and civil engineering with a transportation specialty. (Tr. 19)

37. After interviewing Complainant, Respondent Tirums concluded that Complainant did not interview well for the position because he failed to establish a "good rapport" with Respondents Tirums and Pinheiro and did not communicate well. (Tr. 193-95, 197-98, 218-19; Respondents' Exhibit 20)

38. Respondent Tirums did not believe that Complainant demonstrated the communication skills that he believed were important for the ACS position. (Tr. 194-96)

39. Respondent Tirums was concerned that Complainant's poor communication skills might affect the morale of his subordinates. (Tr. 199, 216-17; Respondents' Exhibit 20)

40. Respondent Tirum's interview notes for Complainant indicated that Complainant met the selection criteria for the position but stated, "My concern with [Complainant] is how he would get along with the staff he would manage. His hiring has the possibility of affecting the morale of the group." (Respondents' Exhibit 20)

41. Respondent Pinheiro also believed that Complainant came into the interview with a negative mindset and that Complainant did not elaborate on how his skills and abilities could help the construction group. (Tr. 237-38, 240-41, Respondents' Exhibit 23)

42. Respondent Pinheiro was also concerned about hiring Complainant for the position because when he supervised Complainant in 2004, he observed that Complainant was "very strict," which caused tension with subordinates. (Tr. 243-44)

Interview of the Selected Candidate

43. On February 12, 2020, Respondents interviewed assistant project manager Greg Bendell for the ACS position. (Tr. 184-85; Respondents' Exhibits 10, 19)

44. Bendell is White and was born in 1974. (Tr. 138-140, 147-49; Respondents' Exhibits 11, 15; ALJ's Exhibit 1)

45. Respondent DOT hired Bendell as an assistant project manager in 2015. (Tr. 183-84; Respondents' Exhibit 18)

46. Complainant had approximately 20 more years of experience than Bendell working for Respondent DOT. (Tr. 183-84; ALJ's Exhibit 1; Respondents' Exhibit 18)

47. Respondent Tirums previously supervised Bendell when Bendell temporarily served as an acting regional construction engineer for approximately four months in 2019. (Tr. 137, 186-88, 213-14; Respondents' Exhibit 18)

48. During their time working together, Respondent Tirums believed that Bendell showed a high level of ability and demonstrated the skills necessary to be an ACS. (Tr. 188-89)

49. When the interview process for the ACS position began, Bendell was not reachable because he scored a 75 on the promotional exam, which was not one of the top three exam scores eligible candidates. (Tr. 123-34; Respondents' Exhibit 11)

50. During Bendell's interview, Respondent Tirums found that Bendell gave good, positive, and thoughtful responses to his questions and showed enthusiasm for the position. (Tr. 185-86, 190; Respondents' Exhibit 19)

51. Respondent Pinheiro also had a positive impression of Bendell following his interview. (Tr. 232-33)

52. Respondent Pinheiro believed that Bendell was positive, enthusiastic, and demonstrated how he could use his skills and abilities to improve the construction group. (Tr. 232-35; Respondents' Exhibit 22)

Respondents' Hiring Decision

53. The nine candidates interviewed for the position had the following scores on their promotional exams: one scored 95, one scored 90, two scored 85, one scored 80, and four scored 75. (Respondents' Exhibit 11)

54. Respondent Tirums initially offered the ACS position to the candidate who scored 95 on the promotional exam. That candidate subsequently withdrew from consideration because the position would have required the candidate to relocate. (Tr. 124-27, 180-81; Respondents' Exhibits 10, 11, 12)

55. Candidates who scored 85 and 80 on the promotional exam also withdrew from consideration for the ACS position. (Tr. 125-34; Respondents' Exhibits 10-14)

56. Once those candidates withdrew, the remaining candidates' promotional exam scores were 90, 85 (Complainant), and four scores of 75. At this point, any of the candidates, including Bendell, were reachable for the position because all had top-three promotional exam scores. (Tr. 134; Respondents' Exhibits 10-14)

57. Respondent Tirums believed that Bendell was the best remaining candidate for the ACS position and decided to hire him. (Tr. 189-90)

58. On or about February 20, 2020, Respondents announced that Bendell had been hired for the ACS position. (Tr. 32-33)

59. On an unspecified date, Complainant filed a complaint with the Anti-Discrimination and Investigations Division of the Governor's Office of Employee Relations ("GOER") concerning Respondents' decision to not hire him for the ACS position. (Tr. 34-35, 55)

60. On an unspecified date, GOER informed Complainant that it was unable to substantiate his allegations. (Tr. 34-35, 55)

61. On April 27, 2022, Complainant retired from his employment with Respondent DOT. (Tr. 45-46)

OPINION AND DECISION

It is unlawful for an employer to discriminate against an employee on the basis of race, color, or age. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a). To make out a prima facie case of unlawful discrimination in employment, a complainant must show that 1) he is a member of a protected class, 2) he was qualified for the position, 3) he suffered an adverse employment action, and 4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004) (citing *Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997)).

If a complainant makes out a prima facie case of unlawful discrimination, the burden shifts to the respondent to articulate a legitimate, independent, and non-discriminatory reason for

its actions. *Id.* If the respondent does so, the complainant must show that the reasons presented by respondent were merely a pretext for the unlawful discrimination by demonstrating both that the respondent's stated reasons were false and that the real reason was unlawful discrimination. *Id.* at 305, 786 N.Y.S.2d at 391. The "burden of persuasion of the ultimate issue of discrimination always remains" with the complainant. *Stephenson v. Hotel Empls. and Rest. Empls. Union Local 100 of the AFL-CIO*, 6 N.Y.3d 265, 271, 811 N.Y.S.2d 633, 636 (2006).

Complainant is a member of protected classes because he is Black, was born on November 29, 1955, and was over 60 years old at the time he interviewed for the position. Complainant had over 20 years of experience working for Respondent DOT and was qualified for the ACS position. Respondents subjected Complainant to an adverse employment action when he was not hired for the position. Complainant also established that Respondents did not hire him for the ACS position under circumstances giving rise to an inference of unlawful discrimination. Bendell, who Respondents hired, is White, younger than Complainant, and had 20 fewer years of experience working for Respondent DOT. Complainant also scored higher than Bendell on the promotional exam. Complainant has established a prima facie case of discrimination based on age, race, and color.

Respondents articulated a legitimate, independent, and non-discriminatory reason for hiring Bendell over Complainant. In Respondents' estimation, Bendell demonstrated superior communication skills during the interview, which Respondents believed was important for the ACS position. Respondent Tirums also previously supervised Bendell and believed he demonstrated the skills necessary for the position. Respondent Tirums was also concerned that Complainant's communication skills would affect the morale of his subordinates. Respondent Pinheiro also previously supervised Complainant in 2004 and observed that he was "very strict,"

which caused tension with subordinates. Based on these factors, Respondents decided to hire Bendell over Complainant.

Complainant failed to show that Respondents' reasons for hiring Bendell for the position were pretext for unlawful discrimination. That Respondents Tirums previously supervised Bendell likely played a significant role in allowing Bendell to develop a good rapport with him during the interview. While Bendell's prior experience working with Respondent Tirums may have given him an advantage in the interview process, it is not an unlawful advantage based on Complainant's age, race, or color. *See Citibank v. New York State Div. Of Human Rights*, 227 A.D.2d 322, 325, 643 N.Y.S.2d 68, 70 (1st Dept. 1996), *lv. denied*, 88 N.Y. 2d 815, 651 N.Y.S.2d 17 (1996) ("While we may disagree with the action taken and the manner in which it was taken, our function is not to substitute our business judgment for that of the employer.").

Respondent Pinheiro's conversation with Complainant concerning retirement, without more, is also insufficient to establish pretext. *See Raskin v. Wyatt Co.*, 125 F.3d 55, 62-63 (2d Cir. 1997) (holding that a manager asking a promotional candidate whether he would be interested in a promotion at a late stage in his career did not constitute evidence of age discrimination because the question reflected a legitimate concern about whether the Plaintiff

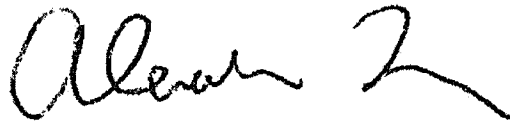
intended to stay in the position for a prolonged period); see also *Roundtree v. School Dist. of City of Niagara Falls*, 294 A.D.2d 876, 877, 741 N.Y.S.2d 633, 635 (4th Dept. 2002). This claim is dismissed.

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 this case be, and hereby is, dismissed.

DATED: April 8, 2024
Bronx, New York

A handwritten signature in black ink, appearing to read "Alexander Linzer", with a stylized flourish at the end.

Alexander Linzer
Administrative Law Judge