STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF THE REQUEST FOR REVIEW BY:	)	CHARGE NO.: **2014SA1255**
	)	EEOC NO.: **21BA40357**
Donald Brown	)	ALS NO.: **15-0100**
Petitioner	)	

ORDER

This matter coming before the Commission by a panel of three, Chair Rose Mary Bombela-Tobias and Commissioners Patricia Bakalis Yadgir and Duke Alden, presiding upon Donald Brown's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Illinois Department of Human Rights ("Respondent")[1] of Charge No. 2014SA1255 and the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW**, THEREFORE**, it is hereby **ORDERED** that the Respondent's dismissal of the Petitioner's charge is **SUSTAINED** on the following ground:

LACK OF SUBSTANTIAL EVIDENCE

DISCUSSION

On November 18, 2013, the Petitioner filed a charge of discrimination with the Respondent alleging that the Illinois Gaming Board ("IGB") discriminated against him when it failed to hire him due to his age, 74 (Count A) and his race, black (Count B), in violation of Sections 2-102 (A) of the Illinois Human Rights Act ("Act").

On December 17, 2014, the Respondent dismissed the Petitioner's charge in its entirety. Petitioner filed a timely Request for Review on March 23, 2015.

The Commission concludes that the Respondent properly dismissed all counts of the Petitioner's charge for lack of substantial evidence. If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. 775 ILCS 5/7A102(D). Substantial evidence exists when the evidence is such that a reasonable mind would find the evidence sufficient to support a conclusion. *In re Request for Review of John L. Schroeder*, IHRC, Charge No. 1993CA2747, 1995 WL 793258, *2 (March 7, 1995).

[1] In a request for review proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge requesting review of the Illinois Department of Human Rights's action shall be referred to as the "Petitioner."

The record shows that on December 16, 2012, Petitioner applied for the position of Gaming Special Agent, a position with 8 openings in Cook County and 4 openings in Will County, IL. To be eligible and qualified for the position, a candidate must receive an overall score of at least 5.0 out of 10 on the five criteria of the interview which were: Knowledge and Experience (30%), Education and Training (25%), Written Communication (20%), Organizational Skills (15%), and Ethics (10%) or be a veteran with preference rights. Based on Petitioner's score, he was ranked 22nd out of 24 Cook County candidates, and 10th out of 11 Will County candidates. Seven of the twelve individuals ultimately hired for the position were age 40 or older, and five were over the age of 50. Three of the 12 individuals hired were black and of the remaining none were non-black. None of the twelve individuals selected for the position received an overall score lower than 5.0 following the Rutan interview process. On May 29, 2013, IGB sent Petitioner a letter advising him that he was not selected as a candidate for the Gaming Special Agent position.

As to Counts A and B, Petitioner is unable to prove that he was not hired by IGB due to his age and race. To prove a *prima facie case* in a failure to hire context on the basis of age and race discrimination, Petitioner must show that: 1) he is a member of the protected class; 2) he applied and was qualified for the positions for which IGB was seeking an applicant; 3) Petitioner was rejected despite his qualifications; and 4) the respondent hired a person, not a member of the complainant's protected class, whose qualifications were similar to, or less than the complainant's qualifications.. *See In the Matter of: Brenda Roger and Commonwealth Edison Company*, IHRC, Charge No. 1991CF1450 (April 26, 1996) 1996 WL 311411 (Ill.Hum.Rts.Com.); *In the Matter of: Archibald Allen and Illinois Department of Transportation, HRC*, Charge No. 1993SA0498, ALS No. S-7835, June 2, 1998.

The Supreme Court set out a three-part analysis in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817. Even if Petitioner established a *prima facie case* of discrimination, the burden then shifts to IGB to rebut the presumption of discrimination and articulate a legitimate, nondiscriminatory reason for not hiring Petitioner. *See Clyde and Caterpillar, Inc*., IHRC, ALS No. 2794, Nov. 13, 1989, *aff'd sub nom Clyde v. Human Rights Com'n*, 206 Ill. App.3d 283, 564 N.E.2d 265 (4th Dist.1990); and *Texas Dep't. of Community Affairs v. Burdine*, 450 US 248, 254-55 (1981); adopted by the Illinois Supreme Court in *Zaderaka v. HRC*, 131 Ill.2d 172, 179. 545 N.E.2d 684, 687 (1989). If this is done, the Petitioner must then prove by a preponderance of the evidence that the articulated reason advanced by IGB is a pretext. *Id.*, *Chambers v. Metropolitan Property and Cas. Ins. Co*, 351 F.3d 848, 856 (C.A.8 (Minn.), 2003).

Petitioner fails to satisfy the second and fourth elements of his *prima facie case*. As to the second prong, it should be noted that most of the 12 individuals selected for the position were also in the protected class (age 40 or above). While it is true that an age disparity may not support an inference of age discrimination if there is only an insignificant difference, *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996), the Second Circuit has found that an eight-year age difference is significant. *Tarshis v. Riese Org.*, 211 F.3d 30, 38 (2d Cir.2000). Nevertheless, Petitioner was not hired simply because he did not meet the minimum score of 5.0 out of 10.0 required for Petitioner to move on to the next phase in the hiring process for the Gaming Special

Agent position as evidenced by his overall score of 4.40 in the Rutan Interview, despite the significant age difference. As to the fourth prong, Petitioner's race was similarly unrelated to IGB's decision to not hire him. Three of the individuals hired were black. The only other person disqualified based on failure to meet the minimum Rutan requirements was a white male. Petitioner does not allege that his interviewers made any comments or remarks that were indicative of discriminatory animus based on age or race. The Seventh Circuit has made it clear that an employee's failure to identify a comparator is detrimental to their ability to maintain an action for discrimination. *Erverroad v. Scott Truck Systems, Inc.*, 604 F3d 471, 480-482. There is no evidence of a nexus between Petitioner's protected categories and IGB's decision not to hire Petitioner.

Even still, IGB articulated a legitimate non-discriminatory reason for not hiring Petitioner which was not pretextual. In the absence of any evidence that the business consideration relied upon by IGB is a pretext for discrimination, it is improper to substitute judgment for the business judgment of the employer. *See Berry and State of IL, Dept. of Mental Health and Developmental Disabilities*, IHRC, ALS no. S-1946, Charge No. 1994SA0240 (December 10, 1997). Additionally, IGB is entitled to make employment decisions based on its reasonable belief surrounding the situation. "Respondent may take its action for good reason, bad reason, reason based upon erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason…The correctness of the reason is not important as there was good faith belief by Respondent in its decision…" *See Carlin v. Edsal Manufacturing Co.*, 1996 WL 652580, Charge No. 1992CN3428 (Ill.HRC, May 6, 1996). Thus, there is no substantial evidence that Petitioner was not hired because of his age or race.

In his Request for Review, there is no additional evidence provided by Petitioner that would warrant a reversal of Respondent's original determination.

Accordingly, the Petitioner has not presented substantial evidence to show that the Respondent's dismissal of the charge was not in accordance with the Act.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. The dismissal of the Petitioner's charge is hereby **SUSTAINED.**

2. This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and Illinois Gaming Board as Respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this Order.

STATE OF ILLINOIS)
)
HUMAN RIGHTS COMMISSION)

Entered this 17th day of December 2018.

Chair Rose Mary Bombela-Tobias

Commissioner Patricia Bakalis Yadgir

Commissioner Duke Alden