

Krasner

**-FOR IMMEDIATE RELEASE-
February 22, 2013**

KRASNER ADDRESSES CIVIL RIGHTS ALLEGATIONS

Supervisor Booth and the Town of Newburgh involved in ongoing civil rights case

TOWN OF NEWBURGH, NY – On October 23, 2012 a complaint was filed in the United States District Court for the Southern District of New York citing over 35 factual allegations against Town Supervisor Wayne Booth and others. The complaint names them as parties that violated the civil rights of an African American employee of the Town of Newburgh. Responses to the complaint were filed on December 6, 2012 and February 11, 2013 replete with denials to the majority of allegations.

The complaint is detailed and alleges that Supervisor Wayne Booth and prior administrations implemented a, “conscious municipal policy...not to hire African-Americans to town positions and, instead, to hire in a manner marked by nepotism and favoritism which favors Caucasians related to those already employed or politically active in the Town of Newburgh.”

Further into the complaint it states as a cause of action, “By failing to timely intervene and prevent the hostile work environment...defendants Booth and the Town of Newburgh subjected plaintiff to a hostile work environment on the basis of his race in violation of the equal protection clause of the Fourteenth Amendment”

“It is a crying shame when our elected officials fail to stand up to behavior that is racially discriminatory. Not only does this call to question the style and character of leadership that Supervisor Booth and others display, but it also demonstrates a complete breakdown in management and accountability. Mr. Booth is the chief administrator and executive officer of the Town of Newburgh and his actions in this situation, or lack thereof, are a complete failure of his ability to manage the town effectively. I would invite the public to review the complaint and other filed documents in this case in an effort to bring transparency to this situation,” said Stephen Krasner.

The complaint and all filed documents in this matter are publically available and can be accessed via the courts public records at: <http://www.pacer.gov>

A copy of the complaint and two responses are also included with this release.

###

Contact Information:
Stephen Krasner, Candidate

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

FILED
U.S. DISTRICT COURT
2012 OCT 23 AM 10:14
S.D. OF N.Y.

-----X
HASSAN GRAY,

Plaintiff,

COMPLAINT

vs.

DOUGLAS ELLIOTT, WAYNE BOOTH,
SUPERVISOR, TOWN OF NEWBURGH,
TOWN OF NEWBURGH,

12 CV 7880
JUDGE STEIN

Defendants.
-----X

HASSAN GRAY, by and through his attorney, Michael H. Sussman, hereby states as and for his Complaint, against defendants:

A. PARTIES

1. Plaintiff, Hassan Gray, is an African-American male of legal age who resides in this judicial district.

2. Defendant Douglas Elliott is a Caucasian, at all relevant times employed as a supervisor in the Town of Newburgh Water Department and, as such, plaintiff's superior. He, too, resides in this judicial district.

3. At all relevant times, defendant Elliott's conduct was state action and engaged in on behalf of the Town of Newburgh, his employer.

4. At all relevant times, defendant Wayne Booth was the Supervisor of the Town of Newburgh and its chief administrative and executive officer. The acts and omissions of Mr. Booth are, or may be, reflective of final policymaking done by the Town of Newburgh.

5. Defendant Town of Newburgh is a municipal corporation organized pursuant to the laws of the State of New York and it may sue and be sued.

6. Defendant Town is governed by the Town Board which may be the final-decision-maker for the Town when such authority is not vested in the supervisor or delegated by practice to him.

B. JURISDICTION

7. As plaintiff claims that defendants violated rights provided him by the Equal Protection clause of the Fourteenth Amendment, this Court has jurisdiction pursuant to 28 U.S.C. secs. 1343 (3) & (4) and 42 U.S.C. secs. 1983 and 1988.

C. FACTUAL ALLEGATIONS

8. On April 13, 2006, plaintiff commenced employment as a laborer with the Town of Newburgh Water Department.

9. On or about August 2008, defendant Town promoted plaintiff to the position of Maintenance Worker.

10. At all relevant times, defendant Elliott served as foreman of the water department's work force and functioned as plaintiff's supervisor.

11. During plaintiff's employment with the Town, he has been the sole African-American employed by and with the Town's Water Department.

12. Indeed, of about 150 municipal employees in the Town, in which African-Americans comprise at least 15% of the population, four employees are African-American.

13. Upon information and belief, this low proportion of African-American employees represents the result of a conscious municipal policy, implemented by defendant Booth and the defendant Town during his and prior administrations, not to hire African-Americans to town positions and, instead, to hire in a manner marked by nepotism and favoritism which favors Caucasians related to those already employed or politically active in the Town of Newburgh.

14. Defendant Elliott runs the water department on a day-to-day basis, providing workers assignments and maintaining records which are used as a basis for discipline against employees.

15. Throughout plaintiff's employment, defendant Elliott has treated him differently than he treated similarly-situated Caucasian employees.

16. Amongst the ways defendant Elliott has treated plaintiff differently during the last three years are the following:

a) he left plaintiff's name off of daily assignment sheets leaving plaintiff without an assignment and suggesting that plaintiff was incapable of doing the work required of his position;

b) he assigned plaintiff to menial jobs which should have been performed by persons in the laborer classification [as opposed to "Maintenance Worker"];

c) he forced plaintiff to remain outside in the cold while allowing otherwise similarly-situated Caucasian workers to remain in their heated trucks;

d) he entered false statements about plaintiff's job performance and used these as the basis for written discipline.

17. In October 2010, several of plaintiff's co-workers advised him that defendant Elliott had been overheard repeatedly referring to him as a "nigger" and a "lazy nigger."

18. Specifically, one co-worker reported that in the summer/fall of 2010, he overheard defendant Elliott speaking with DePew, the Assistant Highway Superintendent, as follows:

Mr. Depew: "What's the matter, your nigger giving you trouble?"

Mr. Elliott: "I hate the fucking nigger."

Mr. DePew: "These people are like that, you have to make them do what you want to do."

19. Plaintiff's co-worker also overheard Elliott and/or DePew, in Elliott's presence, refer to plaintiff as an "uppity nigger", as a "slave", remark about his odor and the smell and looks of all African-Americans, call him a "monkey" and a "nigger."

20. During the same time period, a co-worker advised plaintiff that Elliott was conferring with the Assistant Highway Superintendent about how to get him fired.

21. On November 9, 2010, the Deputy Supervisor of the Town of Newburgh, another member of the Town of Newburgh Town Board and the Town's personnel officer directed that plaintiff attend a meeting at Town Hall.

22. At this time, the Deputy Supervisor reviewed alleged infractions plaintiff had committed, though he refused to show plaintiff any documents or notes relating to these alleged incidents.

23. Contrary to the Town's collective bargaining agreement, defendant Town failed to afford plaintiff with union representation during this pre-disciplinary meeting.

24. At the end of this meeting, the Deputy Supervisor provided plaintiff with a vague “counseling memorandum,” which failed to provide any specific dates or details of plaintiff’s alleged infractions.

25. On November 22, 2010, plaintiff complained to the Town’s personnel officer that the motivation for the November 9, 2010 meeting was racial bias.

26. Plaintiff received no response to his November 22, 2010 complaint.

27. About five weeks after filing this complaint with the personnel officer, plaintiff asked the Deputy Supervisor to address it.

28. The Deputy Supervisor spoke with defendant Elliott and declined to address plaintiff’s complaint.

29. On December 29, 2010, plaintiff filed a complaint of harassment and discrimination against Elliott with the Town of Newburgh Police Department.

30. On January 6, 2011, the Town Supervisor, the Deputy Supervisor, the personnel officer, the CSEA President and business agent met with plaintiff and defendant Elliott.

31. At this meeting, the Deputy Supervisor asked plaintiff whether he was “anti-white” and the Supervisor criticized plaintiff for not adhering to the Town’s anti-discrimination policy when he filed a complaint with the police department.

32. Following this meeting, the Town appointed an outside attorney to investigate plaintiff's complaints of racial discrimination.

33. Plaintiff fully cooperated with this investigation.

34. Despite the serious allegations made against defendant Elliott, defendants Booth and the Town continued to allow Elliott to act as plaintiff's supervisor through September 2011.

35. During this time period, having been informed that defendant Elliott often referred to plaintiff as a "nigger" and having been the subject of false accusations which plaintiff knew his supervisor had initiated, plaintiff felt stress and anxiety on a daily basis, reasonably experienced his work place as hostile and had difficulties carrying out the elements of his job duties.

36. On September 16, 2011, the investigator hired by the Town of Newburgh concluded an investigation during which he interviewed twenty six individuals and reviewed numerous documents.

37. The Town's investigator concluded that "There is sufficient evidence that Mr. Elliott subjected Complainant to a hostile work environment on the basis of his race when he made racially biased remarks about Complainant."

38. The Town's investigator also concluded, "There is sufficient evidence that Mr. Elliott singled Complainant out on the basis of his race when he not only documented Complainant's performance but also incorrectly alleged that Complainant failed to perform, or incorrectly perform [sic], assignments, as he had previously referred to Complainant as a "nigger", stated that [he] hated the "fucking nigger" and repeatedly stated that he had to get rid of him (referring to Complainant)."

39. Following the conclusion of this investigation, defendant Town suspended defendant Elliott with pay.

40. Thereafter, defendant Town commenced a section 75 disciplinary hearing against defendant Elliott.

41. However, at such hearing, the Town, through its counsel, failed to call numerous witnesses identified in the investigator's report whose testimony would either have established that defendant Elliott engaged in discriminatory conduct [which he had denied] or was otherwise not credible.

42. Defendant Town intentionally failed to properly prosecute the disciplinary case against defendant Elliott.

43. In addition, despite sufficient evidence that Depew had engaged in discriminatory conduct at clear variance with the policies of defendant Town, the

defendant Town has neither charged nor subjected him to a disciplinary hearing concerning these matters.

44. Between November 1, 2009 and September 16, 2011, defendant Elliott subjected plaintiff to a hostile work environment.

45. During the period between November 22, 2010 and September 16, 2011, defendant Town had knowledge, or should have had known, of the hostile work environment to which defendant Elliott had subjected plaintiff and took insufficient timely remedial action to remedy this hostile environment.

46. As a consequence of his exposure to this hostile work environment which began in 2008 and continues to this day, plaintiff has suffered substantial emotional distress, humiliation and anxiety.

D. CAUSES OF ACTION

47. Plaintiff incorporates paras. 1-46, as if fully re-written herein.

48. By subjecting plaintiff to a hostile work environment on the basis of his race, defendant Elliott violated the equal protection clause of the Fourteenth Amendment, as made actionable against him by 42 U.S.C. sec. 1983.

49. By and through the conduct of plaintiff's supervisor, defendant Town of Newburgh subjected plaintiff to a hostile work environment on the basis of his race

in violation of the equal protection clause of the Fourteenth Amendment, as made actionable as to it by 42 U.S.C. sec. 1983.

50. By failing to timely intervene and prevent the hostile work environment to which their agent, Elliott, and they subjected plaintiff, defendants Booth and the Town of Newburgh subjected plaintiff to a hostile work environment on the basis of his race in violation of the equal protection clause of the Fourteenth Amendment, as made actionable as to it by 42 U.S.C. sec. 1983.

E. PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that this Honorable Court: accept jurisdiction over this manner, empanel a jury to hear and decide all issues within its authority, award to plaintiff compensatory damages against defendants with pre- and post-judgment interest; award to plaintiff and against defendant Elliott punitive damages with pre- and post-judgment interest; enjoin defendants, their assigns, successors in office and those acting in concert with them from engaging in racial discrimination or retaliation; award to plaintiff the reasonable attorneys' fees and costs arising from his prosecution of this matter and enter any other relief which the interests of justice and equity require.

Respectfully submitted,


MICHAEL H. SUSSMAN [3497]

SUSSMAN & WATKINS
PO BOX 1005
GOSHEN, NY 10924
(845)-294-3991

Counsel for plaintiff

Dated: October 23, 2012

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT

-----x
HASSAN GRAY,

Docket No. 12 CIV 7880
(CS)(LMS)

Plaintiff,

ANSWER

-against-

DOUGLAS ELLIOTT, WAYNE BOOTH,
SUPERVISOR, TOWN OF NEWBURGH, TOWN OF
NEWBURGH,

Defendants.
-----x

Defendants, TOWN OF NEWBURGH and WAYNE BOOTH, by and through their attorneys, SOKOLOFF STERN LLP, hereby answer plaintiff's Complaint (the "Complaint") as follows:

A. PARTIES

1. Deny knowledge or information sufficient to form a belief as to the allegations set forth in paragraph "1" of the Complaint, except admit upon information and belief that plaintiff is an African-American male who resides in this judicial district.

2. Deny the allegations set forth in paragraph "2" of the Complaint, except admit that, upon information and belief, Elliott resides in this judicial district and has been employed as a Senior Water Maintenance Worker for the Town, and refer all questions of law to the Court for adjudication.

3. Deny the allegations set forth in paragraph "3" of the Complaint, and respectfully refer all questions of law to the Court for adjudication.

4. Deny the allegations set forth in paragraph “4 of the Complaint, except admit that defendant Booth has been the Town Supervisor since January 2002, and respectfully refer all questions of law to the Court for adjudication.

5. Admit the allegations set forth in paragraph “5” of the Complaint.

6. Deny the allegations set forth in paragraph “6 of the Complaint, and respectfully refer all questions of law to the Court for adjudication.

B. JURISDICTION

7. Deny the allegations set forth in paragraph “7” of the Complaint, except admit that plaintiff purports that venue is proper.

C. FACTUAL ALLEGATIONS

8. Deny the allegations set forth in paragraph “8” of the Complaint, except admit that plaintiff’s date of hire as a Water Department laborer was April 16, 2006.

9. Deny the allegations set forth in paragraph “9” of the Complaint, except admit that the Town promoted plaintiff to Maintenance Worker on September 5, 2008.

10. Deny the allegations set forth in paragraph “10” of the Complaint.

11. Deny the allegations set forth in paragraph “11” of the Complaint.

12. Deny knowledge or information sufficient to form a belief as to the allegations set forth in paragraph “12” of the Complaint.

13. Deny the allegations set forth in paragraph “13” of the Complaint.

14. Deny the allegations set forth in paragraph “14” of the Complaint, except admit that Elliot has distributed assignments.

15. Deny the allegations set forth in paragraph “15” of the Complaint.

16. Deny the allegations set forth in paragraph “16” of the Complaint.

- a) Deny the allegations set forth in paragraph “16(a)” of the Complaint.
 - b) Deny the allegations set forth in paragraph “16(b)” of the Complaint.
 - c) Deny the allegations set forth in paragraph “16(c)” of the Complaint.
 - d) Deny the allegations set forth in paragraph “16(d)” of the Complaint.
- 17. Deny the allegations set forth in paragraph “17” of the Complaint.
 - 18. Deny the allegations set forth in paragraph “18” of the Complaint.
 - 19. Deny the allegations set forth in paragraph “19” of the Complaint.
 - 20. Deny the allegations set forth in paragraph “20” of the Complaint.
 - 21. Deny knowledge or information to form a belief as to the allegations set forth in paragraph “21” of the Complaint, except admit that plaintiff was directed to attend a counseling meeting at Town Hall on or about that date.
 - 22. Deny the allegations set forth in paragraph “22” of the Complaint, except admit that a counseling meeting was held at Town Hall on or about that date.
 - 23. Deny the allegations set forth in paragraph “23” of the Complaint.
 - 24. Deny the allegations set forth in paragraph “24” of the Complaint, and refer to the referenced document for its contents.
 - 25. Deny the allegations set forth in paragraph “25” of the Complaint, and refer to the referenced document for its contents.
 - 26. Deny the allegations set forth in paragraph “26” of the Complaint.
 - 27. Deny the allegations set forth in paragraph “27” of the Complaint.
 - 28. Deny the allegations set forth in paragraph “28” of the Complaint.

29. Deny the allegations set forth in paragraph “29” of the Complaint, except admit that plaintiff filed a complaint with the police department and refer to the referenced document for its contents.

30. Admit the allegations set forth in paragraph “30” of the Complaint.

31. Deny the allegations set forth in paragraph “31” of the Complaint.

32. Admit the allegations set forth in paragraph “32” of the Complaint.

33. Deny the allegations set forth in paragraph “33” of the Complaint.

34. Deny the allegations set forth in paragraph “34” of the Complaint.

35. Deny the allegations set forth in paragraph “35” of the Complaint.

36. Admit the allegations set forth in paragraph “36” of the Complaint.

37. Deny the allegations set forth in paragraph “37” of the Complaint, and refer to the referenced document for its contents.

38. Deny the allegations set forth in paragraph “38” of the Complaint, and refer to the referenced document for its contents.

39. Admit the allegations set forth in paragraph “39” of the Complaint.

40. Admit the allegations set forth in paragraph “40” of the Complaint.

41. Deny the allegations set forth in paragraph “41” of the Complaint.

42. Deny the allegations set forth in paragraph “42” of the Complaint.

43. Deny the allegations set forth in paragraph “43” of the Complaint.

44. Deny the allegations set forth in paragraph “44” of the Complaint.

45. Deny the allegations set forth in paragraph “45” of the Complaint.

46. Deny the allegations set forth in paragraph “46” of the Complaint.

D. CAUSES OF ACTION

47. As and for a response to paragraph “47” of the complaint, answering defendants repeat and reallege the allegations contained in paragraphs “1” through “46” of this answer with the same force and effect as if fully set forth at length herein.

48. Deny the allegations set forth in paragraph “48” of the Complaint.

49. Deny the allegations set forth in paragraph “49” of the Complaint.

50. Deny the allegations set forth in paragraph “50” of the Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

51. The complaint fails to state a claim upon which relief may be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

52. This action is barred, in whole or in part, by the applicable statute of limitations.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

53. Defendants have not violated any rights, privileges or immunities under the Constitution or laws of the United States or the State of New York, nor have the defendants violated any Act of Congress providing for the protection of civil rights.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

54. Any injury alleged to have been sustained by plaintiff was the result of plaintiff’s own culpable or negligent conduct or the culpable or negligent conduct of third-parties and was not the proximate result of any act of these defendants.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

55. Plaintiff has failed to mitigate his damages, if any, as claimed in this action.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

56. Defendants did not subject plaintiff to discrimination or retaliation in any form.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

57. Defendants' employment policies and practices conform to the requirements of all applicable laws including, but not limited to, the Fourteenth Amendment to the United States Constitution, and are administered in a matter that is consistent with defendant's legal obligations.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

58. Defendants possessed legitimate, non-discriminatory reasons for their actions.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

59. At all times relevant to the acts alleged in the complaint, the answering defendants acted reasonably, properly and in the lawful exercise of their discretion.

AS AND FOR AN TENTH AFFIRMATIVE DEFENSE

60. Plaintiff failed to avail himself of defendant's anti-discrimination policies.

AS AND FOR A ELEVENTH AFFIRMATIVE DEFENSE

61. Defendants took prompt, remedial action pursuant to its valid anti-discrimination policies.

AS AND FOR A TWELVTH AFFIRMATIVE DEFENSE

62. Defendants did not discriminate against plaintiff, either on the basis of race or any other protected class.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE

63. One or more of plaintiff's claims are barred by the failure to exhaust the remedies afforded under the collective bargaining agreement.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE

64. Defendants have acted within their discretion, and in accordance with the Town's needs, procedures, and requirements.

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE

65. Defendants have acted, at all times relevant to plaintiff's complaint, in conformity with all applicable statutes, laws, rules, and regulations.

AS AND FOR AN SIXTEENTH AFFIRMATIVE DEFENSE

66. Plaintiff's claims are barred by principles of res judicata and/or collateral estoppel.

AS AND FOR A SEVENTEENTH AFFIRMATIVE DEFENSE

67. Plaintiff was not treated differently than any similarly situated individuals outside of his alleged protected class.

AS AND FOR AN EIGHTEENTH AFFIRMATIVE DEFENSE

68. Defendants exercised reasonable care to prevent and correct promptly any racially harassing behavior.

AS AND FOR A NINETEENTH AFFIRMATIVE DEFENSE

69. Plaintiff unreasonably failed to take advantage of preventive or corrective opportunities provided by defendants or to avoid harm otherwise

AS AND FOR A TWENTIETH AFFIRMATIVE DEFENSE

70. The alleged harassing acts by Elliott were not within scope of his employment or to serve Town interests.

AS AND FOR A TWENTY-FIRST AFFIRMATIVE DEFENSE

71. The individual defendant should be afforded qualified immunity from suit.

AS AND FOR A TWENTY-SECOND AFFIRMATIVE DEFENSE

72. Plaintiff was not subjected to a severe, pervasive, and ongoing environment that was hostile on the basis of race such that it materially altered the terms and conditions of employment.

AS AND FOR A TWENTY-THIRD AFFIRMATIVE DEFENSE

73. Plaintiff was not subjected to conditions that were objectively or subjectively offensive.

AS AND FOR A TWENTY-FOURTH AFFIRMATIVE DEFENSE

74. The answering individual defendant was not personally involved in actions that caused the deprivation of constitutional rights.

AS AND FOR A TWENTY-FIFTH AFFIRMATIVE DEFENSE

75. There was no policy or custom under which unconstitutional practices occurred.

AS AND FOR A TWENTY-SIXTH AFFIRMATIVE DEFENSE

76. Defendants took prompt remedial action.

WHEREFORE, defendants request judgment dismissing the complaint and denying all relief requested therein, together with such other and further relief as the Court deems just and

proper.

Dated: Carle Place, New York
December 6, 2012

SOKOLOFF STERN LLP

By:



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12536-0022/dmf

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
HASSAN GRAY,

ANSWER

Plaintiff,

12 CV 7880 (CS)

-against-

DOUGLAS ELLIOTT, WAYNE BOOTH, Supervisor, Town
of Newburgh and TOWN OF NEWBURGH,

Defendants.
-----X

The defendant, Douglas Elliott, by his attorneys, McCabe & Mack LLP, as and for his answer to the complaint of the plaintiff, respectfully shows to the court and alleges as follows.

PARTIES

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered "1" and "4" of the complaint.
2. With regard to paragraph numbered "2" of the complaint, admits defendant Elliott's race and residence and denies the remaining allegations.
3. With regard to paragraph numbered "3" of the complaint, admits only that defendant Elliott is employed by the Town of Newburgh. The remaining allegations state legal conclusions.
4. With regard to paragraphs numbered "5" and "6" of the complaint, neither admits nor denies as states a conclusion of law.

JURISDICTION

5. With regard to paragraph numbered "7" of the complaint, neither admits nor denies as states a conclusion of law.

FACTUAL ALLEGATIONS

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered "8", "11", "12", "13", "21", "22", "23", "24", "25", "26", "27", "29", "33" and "36" of the complaint.

7. With regard to paragraph numbered "9" of the complaint, admits only that plaintiff is a Maintenance Worker.

8. Denies those allegations contained in paragraphs numbered "10", "15", "16", "28", "31", "34", "35", "39", "41", "42", "43", "44", "45" and "46" of the complaint.

9. With regard to paragraph numbered "14" of the complaint, admits only that Elliott is a Senior Maintenance Worker and as such does at times distribute work assignments.

10. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "17" of the complaint with respect to what plaintiff was told and denies Elliott ever referred to plaintiff as alleged.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "18" of the complaint with respect to what plaintiff was told and denies Elliott had conversation alleged.

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "19" of the complaint with respect to what plaintiff was told and denies ever making or hearing the remarks alleged.

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "20" of the complaint with respect to what plaintiff was told and denies the conduct alleged.

14. With regard to paragraphs numbered "37" and "38" of the complaint, neither admits nor denies and refer the court to the document for its content and import.

12536-0022/dmf

CAUSE OF ACTION

15. Repeats, reiterates and realleges each and every denial to each and every allegation contained in paragraphs numbered "1" through "46" and incorporated by reference in paragraph "47" of the complaint as if the same were more fully set forth herein at length.

16. Denies those allegations contained in paragraphs numbered "48", "49" and "50" of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

17. The complaint fails to state a claim against defendant Elliott.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

18. Defendant Elliott is entitled to qualified immunity.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

19. The complaint is barred by the statute of limitations in whole or in part.

WHEREFORE, the defendant, Douglas Elliott, demands judgment dismissing the complaint of the plaintiff herein, plus the costs and disbursements of this action and for such other and further relief as to the Court may seem just and proper.

DATED: Poughkeepsie, New York
February 8, 2013

Yours, etc.

McCABE & MACK LLP

By: 

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12536-0022/dmf

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179 Westbury Avenue
Carle Place, NY 11514

MEMORANDUM

TO: Mark Taylor, Esq.
FROM: Aron Karabel, Esq.
RE: Hasan Gray Investigation Report
DATED: September 16, 2011

I. INTRODUCTION

On February 2, 2011, Donoghue, Thomas, Auslander & Drohan, LLP was retained by the Town to both conduct an investigation and issue findings regarding allegations of discrimination which arose in the context of a meeting to discuss an employee counseling memorandum. On January 13, 2011, Complainant's attorney, Helen Ulrich, Esq., sent a letter to Town Supervisor Booth complaining of repeated harassment and discrimination against Complainant by Mr. Elliott and Mr. Depew and alleging that Town officials aided and abetted their conduct. I interviewed Complainant on February 25 and March 16, 2011. During Complainant's interviews, he expanded on the allegations set forth in his November 22, 2010 letter and Ms. Ulrich's January 13, 2011 letter. The specifics of Complainant's allegations and my findings as to each allegation are set forth below.

II. NON-DISCRIMINATION POLICY

The Town of Newburgh has a Non-Discrimination Policy located in Section 902 (Equal Employment Opportunity) of the Town's Employee Handbook. That Policy prohibits harassment or discrimination of any kind in the workplace and applies to all "terms and conditions of employment including, but not limited to, recruiting, hiring,

placement, promotion, termination, layoff, transfer, leave of absence, compensation, benefits, training, and social and recreational programs.”

III. SPECIFICS OF THE COMPLAINT

Complainant alleges improper activities by the following individuals:

- Douglas Elliott, Water Department Supervisor
- Todd Depew, Assistant Highway Superintendent
- Wayne Booth, Town Supervisor
- George Woolsey, Town Councilman
- Ernest Bello, Town Councilman
- Charlene Black, Town Personnel Director

(1) Complainant's allegations against Douglas Elliott.

Complainant alleges that, since 2006, Douglas Elliott has engaged in targeted harassment and discrimination against Complainant by:

- (a) making “racially biased remarks about [Complainant]” (Ex. 6);
- (b) singling Complainant out on the basis of race. Specifically, Complainant alleges that Mr. Elliott engaged in the following conduct:
 - i. Mr. Elliott only documented Complainant's performance (Complainant Tr., p. 179);
 - ii. Mr. Elliott provided the Town with false allegations that formed the basis of Complainant's November 9, 2010 counseling memorandum (Ex. 6);
 - iii. In or about January 2007, while Complainant was sitting in a vehicle at a worksite, Mr. Elliott told him “you haven't been here for a year, if you want to keep your job, don't let anybody see you sitting in that truck like that, just go stand by the hole” (Complainant Tr., p. 29-30);
 - iv. In or about 2007, while at a worksite, Mr. Elliott, in an attempt to provoke Complainant, directed Complainant to place cones that Complainant previously picked up on the road (Complainant Tr., pp. 73, 167);
 - v. In or about November 2008, while at a worksite, Mr. Elliott, in an attempt to provoke Complainant, told Complainant: (1) not to

urinate in the woods; and (2) to move his vehicle out of a homeowner's driveway (Complainant Tr., pp. 83, 167); and

(c) sending to co-workers a text message with a derogatory picture of a cartoon caricature depicting a black child (Complainant Tr., p. 101); and

(d) referring to a neighborhood called Meadow Winds as "Ghetto Winds because of the black population there" (Complainant Tr., p. 37).

(2) Complainant's allegations against Todd Depew.

Complainant alleges that, since 2006, Todd Depew has engaged in targeted harassment and discrimination against Complainant by:

(a) making "racially biased remarks about [Complainant]" (Ex. 6); and

(b) "Hanging a picture of a monkey in the Highway Department facility with [Complainant's] name on it" (Ex. 6).

(3) Complainant's allegations against Supervisor Booth, Personnel Director Black, Councilman Woolsey and Councilman Bello.

Complainant alleges that Town Supervisor Booth, Personnel Director Black, Councilman Woolsey and Councilman Bello "aided and abetted" Mr. Elliott and Mr. Depew by allegedly: (1) issuing Complainant a counseling memorandum on November 9, 2010 based upon false accusations; (2) ignoring Complainant's November 22, 2010 complaint of discrimination; and (3) lying about the existence of notes which documented Complainant's performance (Complainant Tr., pp. 245-51). Complainant does not allege that these individuals engaged in conduct similar to that of Mr. Depew and Mr. Elliott's alleged conduct (Complainant Tr., p. 251).

IV. INVESTIGATION

On February 4, 2011, I commenced an investigation into Complainant's allegations. During my investigation, I interviewed the following individuals:

1. Complainant, Water Maintenance Worker – February 25, 2011 and March 16, 2011

2. Ernest Bello, Town Councilman – April 18, 2011
3. Darrell Benedict, Highway Superintendent – March 31, 2011 and July 7, 2011
4. Charlene Black, Personnel Director – April 21, 2011, August 15, 2011 and September 13, 2011
5. Wayne Booth, Town Supervisor – April 21, 2011, June 24, 2011 and September 13, 2011
6. Kenneth Curtis, Highway Employee - July 7, 2011
7. Derek DeGroat, Water Maintenance Worker – April 1, 2011
8. Todd Depew, Deputy Highway Superintendent – June 9, 2011
9. Thomas Dickson, Motor Equipment Operator – March 31, 2011 and July 7, 2011
10. Karl Doderer, Water Maintenance Worker - April 1, 2011
11. Douglas Elliott, Water Department Supervisor - July 7, 2011 and July 22, 2011
12. Dave Ferguson, Highway Working Leader – April 13, 2011 and July 7, 2011
13. James Gucciardo, Motor Equipment Operator – March 31, 2011
14. Mark Hall, Motor Equipment Operator – March 31, 2011 and July 7, 2011
15. Cleon Hayes, Laborer – April 13, 2011
16. William Healey, Motor Equipment Operator – March 31, 2011
17. Cathy Hughes, Account Clerk – March 31, 2011
18. Howard Kramer, Motor Equipment Operator – March 31, 2011 and July 7, 2011
19. Richard Merrill, Highway Working Leader – April 13, 2011 and July 7, 2011
20. Jeffrey Meyer, Heavy Motor Equipment Operator – April 8, 2011
21. Justin O'Keefe, Junior Maintenance Worker – April 1, 2011

22. Jim Osborne, Town Engineer – April 1, 2011
23. Anthony Ponesse, Highway Working Leader – April 13, 2011 and July 7, 2011
24. Kris Waite, Motor Equipment Operator – March 31, 2011
25. Steve Wilson, Laborer – April 13, 2011 and July 7, 2011
26. George Woolsey, Sr., Town Councilman – April 21, 2011 and June 24, 2011

During my investigation, I also reviewed the following documents:

1. Undated handwritten notes of work-related incidents involving Complainant.
2. Counseling Memorandum from William Puchalski to Complainant dated November 20, 2008.
3. Town of Newburgh Police Report dated November 18, 2008.
4. Employee Handbook.
5. Letter from Helen Ulrich, Esq. to Wayne Booth regarding allegations of discrimination by Complainant dated January 13, 2011.
6. Town of Newburgh Police Report dated December 29, 2011.
7. Handwritten letter from Complainant dated November 22, 2010 regarding his counseling memorandum.
8. Counseling memorandum from Wayne Booth to Complainant dated November 9, 2010.
9. Handwritten letter from Complainant dated November 15, 2010.
10. Handwritten letter from Derek DeGroate dated July 1, 2011 regarding Complainant's work performance.
11. Water Department Assignment Report dated January 5, 2011.
12. Handwritten notes from Douglas Elliott dated February 7, 2011 regarding Complainant's work performance.
13. Letter from Jeff Dobans to Wayne Booth dated December 8, 2010 regarding Complainant's Counseling Memorandum dated November 9, 2010.

14. Typed notes of Councilman Woolsey of the November 9, 2010 meeting with Complainant regarding his counseling memorandum.
15. Personnel Files of the following individuals:
 - a. Complainant
 - b. Douglas Elliott
 - c. Todd Depew
 - d. Joseph Crisci
 - e. Kevin Shaw
 - f. James Gucciardo
 - g. Mark Hall
 - h. Jonathan Ciaccio
 - i. Thomas Dickson
 - j. Howard Kramer
 - k. Darrell Benedict
 - l. Jeffrey Meyer
16. Typed notes of Jeff Dobens regarding events surrounding Complainant's counseling memorandum.
17. Complaint filed by Douglas Elliott dated June (July) 5, 2011 against Complainant.
18. Handwritten notes of Karl Doderer dated July 1, 2011 regarding comments allegedly made by Complainant.
19. Grievance #2008-18-08 filed by CSEA against Todd Depew, and Town's investigation and response to Grievance.

V. FINDINGS OF FACT

Finding of Allegations #1(a) and #2(a):

The discussion to follow corresponds with Allegations #1(a) and #2(a).

Complainant alleges that he was the subject of harassment and discrimination by Mr. Elliott and Mr. Depew when they made racially biased remarks about him.

Complainant alleges that Mr. Elliott and Mr. Depew made racially biased remarks about him. When I asked Complainant to provide details regarding these remarks, he stated that he could not provide me with information regarding these remarks, as they never made them in his presence (Complainant Tr., pp. 45-46). Complainant stated that

he became aware of some of these remarks when, in or about November 2010, Jeffrey Meyer told him that Mr. Elliott and Mr. Depew had been referring to him as a "Nigger" (Complainant Tr., pp. 42-43).

I spoke with Mr. Meyer about Complainant's allegation and he confirmed that Mr. Elliott and Mr. Depew repeatedly made racially biased remarks about Complainant. Mr. Meyer stated that, while at the Highway Department, he overheard the following conversations between Mr. Elliott and Mr. Depew:

- In or about the summer/fall of 2010, Mr. Meyer overheard: (1) Mr. Depew ask Mr. Elliott "what's the matter, your Nigger giving you trouble;" (2) Mr. Elliott respond by stating, in words to the effect, "I hate the fucking Nigger"; and (3) Mr. Depew laugh and tell Mr. Elliott "those people [referring to African Americans] are like that, you have to make them do what you want them to do" and "well, there's ways to handle those people" (Meyer Tr., pp. 5-6, 21).
- On numerous occasions, Mr. Meyer overheard Mr. Depew tell Mr. Elliott that "all of his kind [referring to Complainant] climb in the trees, him and his family are monkeys, you don't worry too much about them kind of people" (Meyer Tr., p. 6).
- In or about the fall 2010, in the hallway at the garage, Mr. Meyer overheard: (1) Mr. Depew ask Mr. Elliott how was his "uppity Nigger"; (2) Mr. Elliott respond by stating "he says I can't, again, I can't stand him, I got to get rid of him;" and (3) Mr. Depew state "just sell him, we sell slaves" (Meyer Tr., p. 7).
- In or about the summer of 2010, on numerous occasions, Mr. Meyer overheard: (1) Mr. Depew tell Mr. Elliott that "he cannot stand his [Complainant's] odor;" and (2) Mr. Elliott or Mr. Depew state "they (referring to African Americans) all smell the same, they all look alike" (Meyer Tr., pp. 24-25).
- On numerous occasions, Mr. Meyer overheard Mr. Depew and Mr. Elliott refer to Complainant as a Nigger and a monkey (Meyer Tr., pp. 25-26, 28).
- In or about the winter of 2008, Mr. Meyer overheard: (1) Mr. Depew tell Mr. Elliott "I guess we have a Nigger in the White House now;" and (2) Mr. Elliott respond by stating "yeah, I guess they'll all want to have more rights or something like that" (Meyer Tr., p. 29).

- Sometime in 2010, Mr. Meyer overheard: (1) Mr. Elliott tell Mr. Depew "I got to get rid of him;" and (2) Mr. Depew tell Mr. Elliott "I can help you do that, I'll tell you how" (Meyer Tr., pp. 36).

Mr. Meyer also reported that, in or about the winter of 2008, Mr. Depew told him that "if it was his way they wouldn't have any Niggers working in the town" (Meyer Tr., p. 29). I asked Mr. Meyer how he responded to the comment and he stated that he told Mr. Depew that he had a problem (Meyer Tr., p. 29).

I also asked Mr. Meyer whether other employees had also overheard the conversations referenced above and he stated that he was unaware whether anyone else overheard these conversations (Meyer Tr., p. 29). He stated that Mr. Elliott and Mr. Depew would have private conversations outside the Highway break room where Mr. Meyer took his breaks (Meyer Tr., pp. 5-6). I asked Mr. Meyer what, if anything, he did after witnessing Mr. Depew and Mr. Elliott's conduct. He stated that he did nothing for fear of retaliation, as Mr. Depew made it clear that if you complain about him you will "come out on the short end of the stick" (Meyer Tr., pp. 10-12).

When I spoke to Mr. Elliott and Mr. Depew about the above statements, they both denied making any derogatory remarks about Complainant (Elliott Tr., p. 20) (Depew Tr., pp. 67-68). I do not find Mr. Elliott and Mr. Depew to be credible. With respect to Mr. Depew, I found that many statements he made were contradicted by statement given by others. Those statements were as follows:

- Mr. Depew stated that he never made off-colored or sexual remarks in the workplace or referred to others in a derogatory manner (Depew Tr., pp. 15-17). However, the Highway Superintendent confirmed that he had heard Mr. Depew make sexual jokes in the office and had previously cautioned him about that behavior (Benedict Tr., pp. 64, 65). Town Supervisor Booth also confirmed that, while he could not recall the specifics, he too heard Mr. Depew make off-color remarks in the workplace (Booth Tr., p. 37). Additionally, other highway employees heard Mr. Depew make sexual

comments in the workplace and refer to others in a derogatory manner (Wilson Tr., pp. 8, 9, 18 33-34) (Hall Tr., pp. 17-19, 29) (Healey Tr., pp. 24, 36) (Gucciardo Tr., p. 8) (Meyer Tr., pp. 32-34) (Kramer Tr., p. 5) (Benedict Tr. pp. 69-70). Councilman Bello also confirmed that complaints were lodged against Mr. Depew for this type of conduct (Bello Tr., pp. 45-46)

- Mr. Depew stated that he did not trust the Highway Superintendent and had told him that specifically (Depew Tr., pp. 128-29). Mr. Benedict denied the comment and stated, "he never heard that one" (Depew Tr., p. 67).
- Mr. Depew stated that he did not create an atmosphere in the Highway Department where employees feared retaliation (Depew Tr., p. 83). However, several employees including the Highway Superintendent and one of Mr. Depew's foreman confirmed that he would use his position to penalize employees (Merrill Tr., pp. 12, 14) (Hall Tr., pp. 20, 35) (Benedict Tr., p. 37) (Kramer Tr., p. 6) (Bello Tr., p. 39) (Wilson Tr., p. 14) (Gucciardo Tr., p. 13).
- Mr. Depew stated that "there is a little coup [Mark Hall, James Gucciardo, Thomas Dickson and Howard Kramer] in the highway department that has been trying to get my demise" and that "Hasan Gray was coerced by employees of the highway department" to make his allegations (Depew Tr., pp. 39, 44, 45, 116). Mr. Depew stated that the basis of his belief was that Dave Ferguson, Kenneth Curtis and Anthony Ponesse told him that they were trying to get him fired (Depew Tr., pp. 39, 44-45). Mr. Depew also stated that Steven Wilson told him that he spoke with Complainant and Complainant told Mr. Wilson that highway employees were pushing him to file a complaint against Mr. Depew (Depew Tr., p. 45). I spoke with Kenneth Curtis, Steve Wilson, Dave Ferguson, and Anthony Ponesse about these statement and each one of them denied that: (1) they had heard highway employees conspiring to get Mr. Depew fired with respect to Complainant's allegations; (2) they had information which would demonstrate that Complainant's allegations were false; (3) they spoke to Mr. Depew about Complainant's allegations; and (4) they had any reason to believe that James Gucciardo, Mark Hall, Thomas Dickson, and Howard Kramer would lie about things Mr. Depew did (Wilson Tr., pp. 26-28) (Depew Tr., pp. 26-28) (Curtis Tr., pp. 1-4) (Ferguson Tr., pp. 29-30) (Ponesse Tr., pp. 21-23). Mr. Wilson also denied ever speaking with Complainant about his allegations against Mr. Depew (Wilson Tr., pp. 26, 27).
- Mr. Depew stated that he told Supervisor Booth and Councilman Woosley that highway employees were prodding Complainant to allege that he and Mr. Elliott were discriminating against him (Depew Tr., p. 125). Both Supervisor Booth and Councilman Woosley denied having that conversation with Mr. Depew (discussions without transcriptions).

Additionally, Mr. Depew offered to give me evidence (i.e., facebook messages and emails), which would clearly demonstrate that Complainant's allegations were false (Depew Tr., pp. 65, 75-76). To date, Mr. Depew has not provided me with this evidence.

I also note that during my interview with Mr. Depew, he appeared to exaggerate facts and repeatedly failed to answer questions asked of him. Additionally, Councilman Bello remarked that he believed it would be possible for Mr. Depew to make racist remarks because of the way he treated his employees (Bello Tr., p. 44).

With respect to Mr. Elliott, I found many inconsistencies in statements he made during his interview. Those statements were as follows:

- Mr. Elliott initially denied documenting Complainant's performance issues (Elliott Tr., p. 5). However, during the course of his interview, he later admitted that he began documenting Complainant's performance after Mr. Depew advised him to (Elliott Tr., p. 57).
- Mr. Elliott stated that he did not have a problem with Complainant (Elliott Tr., p. 29). However, during the course of his interview, he later stated that: (1) he would avoid Complainant by not giving him his assignments directly (Elliott Tr., p. 63); (2) discussed with Mr. Depew a possible transfer of Complainant from the water department to the highway department to "get [Complainant] out of [Mr. Elliott's] hair" (Elliott Tr., p. 50); (3) he filed a police report against Complainant for threatening him (Ex. 3); and (4) he only documented Complainant's performance and no other employees as he only had problems with Complainant (Elliott Tr., pp. 64-65). Additionally, other employees in the water department confirmed that Mr. Elliott and Complainant would frequently "butt heads" and they did not get along (Doderer Tr., p. 18) (DeGroat Tr., p. 21) (O'Keefe Tr., p. 19).
- Mr. Elliott initially denied sending race related jokes to other employees (Elliott Tr., pp. 41-42). However, after confronting Mr. Elliott with a race related joke he had sent to Mr. O'Keefe, he admitted that he could have sent ethnic and/or race related jokes to other employees (Elliott Tr., pp. 42, 44) (O'Keefe Tr., pp. 33-34).
- Mr. Elliott stated that he never made a derogatory reference about Complainant. However, an employee, other than Mr. Meyer, stated that he overheard Mr. Elliott refer to Complainant as a "token" African American (Dickson Tr., pp. 7-8).

Further, Mr. Elliott stated that other employees would lie about conversations he had with Mr. Depew because they were associated with Supervisor Booth's political rival (Elliott Tr., p. 39). I asked Mr. Elliott to explain why an employee's connection to Supervisor Booth's political rival means that that employee would falsely target him and Mr. Depew. He stated that the basis of his belief was that during a Board meeting he was "looked at" by highway employees after making a comment about working conditions and had previously objected to the use of his picture in a political campaign (Elliott Tr., pp. 39-41). I asked Mr. Elliott if he had any documentation which would support his belief and he stated the only documentation he had was that Complainant noted on Facebook that he "liked" a particular message (Elliott Tr., p. 41).

I find Mr. Elliott's statement to be nothing more than conjecture as I uncovered no connection between the legitimacy of Complainant's allegations of discrimination and Supervisor Booth's political rival. In fact, there is no evidence that Mr. Dickson, Mr. Kramer and Mr. Meyer had any motive to lie about conversations between Mr. Elliott and Mr. Depew as they have never been disciplined or counseled by either of them.

Based upon the foregoing, I find that Mr. Elliott and Mr. Depew made racially biased remarks about Complainant.

Finding of Allegation #1(b)

The discussion to follow corresponds with Allegation 1(b):

Complainant alleges that Mr. Elliott singled him out on the basis of his race when Mr. Elliott only documented his performance (Complainant Tr., p. 168).

It is undisputed that Mr. Elliott documented Complainant's work performance (Woolsey Tr., p. 5) (Elliott Tr., pp. 11, 58, 64) (Ex. 1). It is also undisputed that Mr.

Elliott has never documented other employees in the Water Department (Elliott Tr., pp. 58, 64). When I asked Mr. Elliott why he only documented Complainant's work performance, he stated "Because I don't have any other problems with any other employees. Everybody I ask to do their job, they do their job." However, he later admitted that other employees in the Water Department have, at times, violated work rules which were similar to those Complainant allegedly violated (Elliott Tr., pp. 15, 16, 58, 59, 85). Additionally, Councilman Woolsey stated that he felt that Mr. Elliott was nitpicking when he documented Complainant's performance issues (Woolsey Tr., p. 20). Other employees also confirmed that Mr. Elliott asked them to keep tabs on Complainant's work performance (Doderer Tr., pp. 8, 26).

I find that Mr. Elliott singled Complainant out on the basis of his race because he had only documented Complainant's performance, and prior to that, Mr. Elliott had referred to Complainant as a "nigger," stated that hated the "fucking nigger," and repeatedly stated that he had to get rid of him (referring to Complainant).

Complainant alleges that Mr. Elliott singled him out on the basis of his race when Mr. Elliott provided the Town with false allegations that formed the basis of a counseling memorandum issued by the Town on November 9, 2010.

As mentioned above, Complainant received a counseling memorandum for the following conduct: (1) not wearing the appropriate work uniform, (2) leaving the worksite without notifying co-workers or a supervisor, and (3) failing to complete, or incorrectly completing, assignments.

It is undisputed that Complainant's counseling memorandum was issued based upon reports of his performance by Mr. Elliott to the Town Supervisor (Booth Tr. p. 33).

With respect to Item Nos. 1 and 2 above, Complainant admitted that, on one occasion, he wore shorts to work, and that, at times, he has left the worksite and failed to provide notice to his co-workers (Complainant Tr., pp.188-189) (Woolsey Tr., p. 14). In fact, Complainant had previously received a counseling memorandum for this conduct. Additionally, I confirmed that, according to employees in the Water Department, Complainant was hard to work with because he would not show up to certain jobs and would leave jobs unexpectedly, and that these complaints were ultimately reported to the Supervisor (Doderer Tr. p. 8) (DeGroat Tr. pp. 8, 16) (continued interview of Supervisor Booth without transcription).

However, with respect to Item No. 3, Complainant denied failing to complete assignments. I asked Mr. Elliott how he knew that Complainant was responsible for failing to trim and weed whack fire hydrants when multiple employees were assigned to the same work site, and Mr. Elliott stated that Complainant would have been ultimately responsible for the assignment because he was the senior worker (Elliott Tr., p. 76). However, Mr. Elliott did not know who actually failed to perform the work. I asked Supervisor Booth about this and he stated that he would not have issued that part of the counseling memorandum as that item should only have been issued to the individual responsible for the work that was not completed or completed incorrectly (September 13, 2011 telephone conversation with Supervisor Booth).

While Mr. Elliott may not have provided the Town with false allegations regarding Item Nos. 1 and 2, I find that he did not have sufficient proof to claim that Complainant failed to complete, or incorrectly completed, assignments, as he was

unaware of which specific work Complainant had performed incorrectly and presumed complainant was responsible for the work of his colleagues.

I find that Mr. Elliott's conduct was motivated by Complainant's race because prior to claiming that Complainant was responsible for failing to complete, or incorrectly complete, assignments, he had referred to Complainant as a "nigger," stated that he hated the "fucking nigger," and repeatedly stated that he had to get rid of him (referring to Complainant).

Complainant alleges that he was singled out by Mr. Elliott on the basis of his race when, in or about January 2007, while Complainant was sitting in a vehicle at a worksite near Route 300 and Route 17k, Mr. Elliott allegedly told him "you haven't been here for a year, if you want to keep your job, don't let anybody see you sitting in that truck like that, just go stand by the hole."

It is undisputed that Mr. Elliott told Complainant, in words to the effect, "you haven't been here for a year, if you want to keep your job, don't let anybody see you sitting in that truck like that, just go stand by the hole" (Elliott Tr., p. 46). I asked Complainant how this incident had anything to do with his race, and he stated that other employees were not asked stand outside their truck (Complainant Tr., pp.33-34).

When I asked Mr. Elliott about this incident, he stated that that he was only giving Complainant a "heads up" because he could have been terminated "if [management] [came] by and ... [saw] him sitting in the truck reading a newspaper" (Elliott Tr., pp. 46-47). Another employee who witnessed the incident confirmed that Complainant was the only employee sitting in his truck reading a newspaper in full view of the public while others continued to work and that Mr. Elliott did not threaten Complainant (DeGrote Tr. pp. 29, 45). Based on the foregoing, I find that Mr. Elliott had a legitimate reason for

asking Complainant not to sit in his truck, and that such request was unrelated to Complainant's race.

Complainant alleges that he was singled out by Mr. Elliott on the basis of his race when, in or about 2007, while at a worksite, Mr. Elliott, in an attempt to provoke Complainant, directed Complainant to place cones Complainant previously picked up back on the road.

It is undisputed that Mr. Elliott directed Complainant to place cones Complainant previously picked up on the road. I asked Complainant why he believed this incident had anything to do with his race and he stated that he believed every incident with Mr. Elliott was based upon his race (Complainant Tr., pp. 74-75).

I asked Mr. Elliott about this incident and he stated that he told Complainant to place the cones back on the road because of a safety concern as other employees were continuing to work on the road and there was a 4-5 ft hole in the middle of the road. Another employee confirmed Mr. Elliott's account of the incident (DeGroat Tr. pp. 26-28).

Based on the foregoing, I find that Mr. Elliott had a legitimate reason for asking Complainant to place cones back on the road, and that such request was unrelated to Complainant's race.

Complainant alleges that he was singled out by Mr. Elliott on the basis of his race when, in or about November 2008, while at a worksite near Stony Run, Mr. Elliott, in an attempt to provoke Complainant, told Complainant : (1) not to urinate in the woods and (2) to move his vehicle out of a homeowner's driveway.

It is undisputed that Mr. Elliott told Complainant to: (1) not urinate in the woods and (2) move his vehicle out of a homeowner's driveway (Elliott Tr., pp. 83, 167). I asked Complainant why he believed this incident had anything to do with his race and he again stated that he believed every incident with Mr. Elliott was based upon his race.

I asked Mr. Elliott about this incident and he stated that he told Complainant not to urinate in the woods because he was "in plain view of a few different homes" (Elliott Tr., p. 23). Mr. Elliott also stated that he told Complainant to move his vehicle because it was in a homeowner's driveway. Other employees confirmed Mr. Elliott's account of the incident and did not believe Mr. Elliott was the initial aggressor or attempted to provoke Complainant (O'Keefe Tr., pp. 7-8; Doderer Tr., pp.15-16). Additionally, Complainant received a counseling memorandum for threatening Mr. Elliott (Ex. 2), but never challenged the counseling memorandum or reported to Mr. Puchalski, the former Department Head, that he believed the incident was related to his race (Complainant Tr., p. 86).

I find that Mr. Elliott had a legitimate reason for asking Complainant to: (1) not urinate in the woods; and (2) move his vehicle out of a homeowner's driveway, and that these requests were unrelated to Complainant's race.

Finding of Allegation #1(c)

The discussion to follow corresponds with Allegation 1(c):

Complainant alleges that Mr. Elliott sent a text message with a derogatory picture of a cartoon caricature depicting a black child to co-workers.

Complainant alleges that Mr. Elliott sent to co-workers a text message with a derogatory picture of a cartoon caricature depicting a black child (Complainant Tr., pp. 100-102). I asked Complainant if he saw the picture and he stated that he did. I also asked Complainant why he believed the caricature was related to his race (Complainant Tr. pp. 100-102), and he stated that the picture was a stereotypical example of "old-style racism with the big pink lips" (Complainant Tr., p. 132).

I asked Mr. Elliott about the text message and he stated that he could not recall sending it (Elliott Tr., p. 45). Another employee in the Water Department stated that he received a text message from Mr. Elliott with a picture of a black cartoon caricature, but no longer had it and could not recall the specifics of the picture (O'Keefe Tr., p. 31). The employee, however, did confirm that he showed the picture to Complainant (O'Keefe Tr. p. 31).

Based upon the foregoing and my earlier finding that Mr. Elliott had sent race-related jokes to co-workers, I find that Mr. Elliott, did, in fact, send a co-worker a text message with a picture of a cartoon caricature depicting a black child in a stereotypical fashion.

Finding of Allegation #1(d)

The discussion to follow corresponds with Allegation 1(d):

Complainant alleges that Mr. Elliott referred to a neighborhood called Meadow Winds as "Ghetto Winds because of the black population there."

It is undisputed that Mr. Elliott referred to Meadow Winds as Ghetto Winds (Elliott Tr., p. 45). I asked Mr. Elliott why he made that reference and he stated that it was "because of all the police going up there all the time for all the domestics" (Elliott Tr., p. 45). Other employees also stated that many employees refer to Meadow Winds as "Ghetto Winds" because of the way the buildings are built (Doderer Tr., p. 30) (DeGroat Tr., p. 64).

Based upon the foregoing, I find these statements to be credible and do not find that Mr. Elliott made the reference based upon the individuals who reside in Meadow Winds.

Finding of Allegation #2(b)

The discussion to follow corresponds with Allegation 2(b):

Complainant alleges that Mr. Depew "h[ung] a picture of a monkey in the Highway Department facility with [Complainant's] name on it."

It is undisputed that Complainant did not witness Mr. Depew hanging a picture of a monkey in the Highway Department facility with Complainant's name on it. I spoke with Mr. Depew about this allegation and he denied it (Depew Tr., p. 78).

I spoke with Mr. Gucciardo about this allegation and he stated that he observed Mr. Depew holding up a picture of a monkey and stating "hey, it's Hasan" (Gucciardo Tr., p. 9). I asked Mr. Gucciardo if there were other employees who witnessed the incident and he was not sure, but believed Ms. Hughes, the office secretary, witnessed the incident because she "put a piece of paper in front of her face and put her head down" (Gucciardo Tr., p. 9). I asked Ms. Hughes about the allegation and she said she was not a witness to the incident. However, during my interview with Ms. Hughes, she appeared extremely nervous and did not look at me when I asked her the question. I spoke to Mr. Meyer about this incident and he stated that he was not a witness to it, but that, in or about late summer/fall of 2010, he did observe Mr. Depew coming out of his office carrying a stuffed animal (a monkey) with a noose around its neck and laughing about it (Meyer Tr. p. 50).

While the picture was never produced, there is sufficient evidence to find that Mr. Depew, did in fact, refer to Complainant as a monkey and that this was consistent with his conversations with Mr. Elliott when he would refer to Complainant as a monkey and

stated that "all of his kind [referring to Complainant] climb in the trees, him and his family are monkeys.

Finding of Allegation #3

The discussion to follow corresponds with Allegation 3:

Complainant alleges that Supervisor Booth, Personnel Director Black, Councilman Woolsey and Councilman Bello "aided and abetted" Mr. Elliott and Mr. Depew in creating a hostile work environment by allegedly: (1) issuing Complainant a counseling memorandum on November 9, 2010 based on false accusations of Complainant's performance; (2) ignoring Complainant's November 22, 2010 complaint of discrimination; and (3) lying about the existence of notes on Complainant's performance.

Complainant alleges that these individuals "aided and abetted" Mr. Elliott and Mr. Depew by:

- a) issuing Complainant a counseling memorandum on November 9, 2010 based upon false accusations of Complainant's performance.

While it appears that other employees were not issued counseling memorandums for engaging in conduct similar to Complainant (Black Tr., p. 23; Woolsey Tr., p. 7; Booth Tr., p. 21), I spoke to Supervisor Booth about the counseling memorandum and he stated that he relied upon the accusations made by Mr. Elliott to create the counseling memorandum as he did not observe Complainant's work performance and that his motivation in issuing the counseling memorandum was to "address possible problems that had occurred and to possibly cure any problem behavior before it became a disciplinary issue" (Booth Tr., pp. 24, 45).

When I asked Supervisor Booth how counseling memorandums are typically issued, he stated that they are issued by a Department Head and not his office, but that in this case he issued the memorandum because there was no Department Head in the Water Department (Booth Tr., p 34). Supervisor Booth also confirmed that the type of conduct

which was reported to him by Mr. Elliott is the type of conduct that would warrant a counseling memorandum (Booth Tr., p. 36). I also asked Supervisor Booth whether he was aware of Complainant's allegations against Mr. Elliott at the time the memorandum was issued and he stated that he was not aware of Complainant's allegations. Mr. Booth also stated that had he been aware of it he would have taken a closer look at the alleged conduct (continued interview of Supervisor Booth without transcription).

Based on the foregoing, I do not find that the Town issued Complainant a counseling memorandum on the basis of his race.

b) ignoring Complainant's November 22, 2010 complaint of discrimination;

While it appears that Complainant's November 22, 2010 was not addressed by the Town until January 6, 2011, I do not find that Councilman Bello, Councilman Woolsey, Personnel Director Black and Supervisor Booth ignored the Complaint in an effort to aid and abet Mr. Depew and Mr. Elliott's conduct.

It is undisputed that Supervisor Booth, Personnel Director Black, Councilman Woolsey and Councilman Bello were not aware of Mr. Depew and Mr. Elliott's conduct prior to January 6, 2011 (Booth Tr., pp. 20, 39-40) (Black Tr., p.45-47) (Woolsey Tr., pp. 30-31; 34-35) (Bello Tr., pp. 31-33). In fact, Complainant states that his November 22, 2010 letter was the first time he reported to management that he believed Mr. Elliott was targeting him on the basis of race. It appears that upon receipt of Complainant's November 22, 2010 letter, the Town mistakenly filed the document as an objection to the Complainant's counseling memorandum and did not consider it a complaint of discrimination under the Town's discrimination policies (Booth Tr., p. 6; Black Tr., p. 24). While it should have been treated as a formal complaint of discrimination, this alone

does not demonstrate that Town officials were complicit in Mr. Depew and Mr. Elliott's conduct. In fact, immediately after Complainant made the Town aware of his specific allegations of discrimination at a meeting with Town officials on January 6, 2011, the Town addressed the allegations (Booth Tr., pp. 18-19).

Based on the foregoing, I do not find that Town officials were complicit in Mr. Elliott and Mr. Depew's conduct by not treating Complainant's November 22, 2010 letter as a formal complaint of discrimination.

c) lying about the existence of notes documenting Complainant's performance.

Complainant alleges that Councilman Woolsey and Personnel Director Black lied about the existence of notes which documenting Complainant's performance (Complainant Tr., p. 245). I asked Councilman Woolsey and Personnel Director Black about this allegation and both stated that they did not have multiple notes documenting Complainant's performance (Woolsey Tr., p. 17; Black Tr., p. 44).

Even assuming, *arguendo*, that these notes existed, the fact that these notes were not disclosed to Complainant does not demonstrate that Councilman Woolsey and Personnel Director Black were complicit in Mr. Depew and Mr. Elliott's conduct.

VI. CONCLUSIONS

- a. There is sufficient evidence that Mr. Depew subjected Complainant to a Hostile Work Environment on the basis of his race when he made racially biased remarks about Complainant;
- b. There is sufficient evidence that Mr. Elliott subjected Complainant to a Hostile Work Environment on the basis of his race when he made racially biased remarks about Complainant;
- c. There is sufficient evidence that Mr. Elliott singled Complainant out on the basis of his race when he not only documented Complainant's performance but also incorrectly alleged that Complainant failed to perform, or incorrectly perform,

assignments, as he had previously referred to Complainant as a "nigger," stated that hated the "fucking nigger," and repeatedly stated that he had to get rid of him (referring to Complainant); and

- d. There is no evidence that Councilman Woolsey, Councilman Bello, Town Supervisor Booth and Personnel Director Black condoned and/or acquiesced in Mr. Depew and Mr. Elliott's conduct.