**NEW YORK STATE**
**DIVISION OF HUMAN RIGHTS**

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| **NEW YORK STATE DIVISION OF HUMAN RIGHTS**<br>on the Complaint of<br><br>**JEAN M. KRUGER, LAUREN KALIBAT, PATRICIA MORGENTHALER AND AUGUSTUS C. LORE**<br>Complainant,<br>v.<br><br>**CONNETQUOT CENTRAL SCHOOL DISTRICT OF ISLIP,**<br>Respondent. | **NOTICE OF FINAL ORDER AFTER HEARING**<br><br>Case Nos. 6840944, 6841195,6840938,6840963 3504505 |

**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 January 11, 2007, by Robert J. Tuosto, 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 KUMIKI GIBSON, 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,** this 21st day of May, 2007.

KUMIKI GIBSON
COMMISSIONER

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STATE OF NEW YORK: EXECUTIVE DEPARTMENT
NEW YORK STATE DIVISION OF HUMAN RIGHTS
OFFICE OF ADMINISTRATIVE LAW JUDGES

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| NEW YORK STATE DIVISION OF HUMAN RIGHTS<br>On The Complaints Of<br><br>JEAN M. KRUGER,<br>LAUREN KALIBAT,<br>PATRICIA MORGENTHALER,<br>AUGUSTUS C. LORE,<br><br>Complainants,<br><br>-against-<br><br>CONNETQUOT CENTRAL SCHOOL DISTRICT OF ISLIP,<br><br>Respondent. | RECOMMENDED FINDINGS OF FACT, DECISION AND OPINION, AND ORDER<br><br>Case Nos:<br>2-E-AD-97-6840944<br>2-E-DO-99-6841195<br>2-E-A-97-6840938-A<br>2-E-A-97-6840963<br>2-E-A-98-3504505 |

## NATURE OF THE CASE

The N.Y.S. Human Rights Law (Executive Law § 290 *et seq.*) protects employees, as well as applicants for employment, from discriminatory treatment. Jean M. Kruger, Lauren Kalibat and Patricia Morgenthaler, all of whom were employed by Connetquot Central School District of Islip ("respondent"), each alleged that respondent failed to waive them from its teacher hiring process and promote them to tenure track, probationary teaching positions because of their respective ages. Kruger also alleged unlawful discrimination by the respondent on the bases of disability and retaliation. Augustus C. Lore, an individual who applied the following year for a tenure track, probationary teaching position, also made an allegation of discriminatory treatment based upon age when not selected to take respondent's 1998 teacher hiring examination.

Based on the facts and law articulated below, I find that the claims of Kruger, Kalibat and Morgenthaler have been proven. Lore's claim is hereby dismissed.

## PROCEDURAL HISTORY

On August 15, 1997 and January 20, 1999, Jean M. Kruger filed verified complaints with the N.Y.S. Division of Human Rights ("Division") charging respondent with an unlawful discriminatory practice relating to employment in violation of the N.Y.S. Human Rights Law.

On September 5, 1997, Lauren Kalibat filed a verified complaint with the Division charging respondent with an unlawful discriminatory practice relating to employment in violation of the N.Y.S. Human Rights Law.

On October 24, 1997, Patricia Morgenthaler filed a verified complaint with the Division charging respondent with an unlawful discriminatory practice relating to employment in violation of the N.Y.S. Human Rights Law.

On June 9, 1998, Augustus C. Lore filed a verified complaint with the Division charging respondent with an unlawful discriminatory practice in violation of the N.Y.S. Human Rights Law.

After investigation, the Division found that it had jurisdiction over the complaints, and that probable cause existed to believe that respondent had engaged in unlawful discriminatory practices. Thereafter, the Division referred the cases to a Public Hearing.

After due notice, the cases came on for a Public Hearing before Robert J. Tuosto, an Administrative Law Judge of the Division.

All of the complaints were joined for hearing pursuant to 9 N.Y.C.R.R. 465.12 (a). A 35 day Public Hearing was held commencing in July, 2004 and closing in March, 2006. Complainants appeared at the Public Hearing. Lawrence F. Spirn, Esq., and Jennifer Spirn, Esq., represented Kruger. Howard E. Gilbert, Esq., represented Kalibat. Gina M. Lopez Summa,

Esq., General Counsel of the Division, by Bellew S. McManus, Esq., represented the complaint filed by Morgenthaler. Alan Podhaizer, Esq., represented Lore. Thomas M. Volz, Esq., represented respondent.

The parties were granted permission to submit Post-Hearing Briefs. Counsel for Kruger, Kalibat, Lore and respondent each submitted post-hearing briefs.

## FINDINGS OF FACT

### THE PARTIES

1. Kruger, Kalibat and Morgenthaler alleged that they were the victims of unlawful discrimination based upon their ages when they were denied the equal terms, conditions and privileges of employment due to respondent's having failed to grant them a waiver of the teacher hiring process and promote them to tenure track, probationary teaching positions in 1997. Kruger also alleged unlawful discrimination by the respondent on the bases of disability and retaliation. Kruger, Kalibat and Morgenthaler have taught in various capacities for respondent other than in tenure track, probationary teaching positions; Kruger and Kailbat were still employed by respondent at the time of the Public Hearing. (ALJ Exhibits 1, 3, 5, 7)

2. Lore alleged that he was the victim of unlawful discrimination based upon age when denied the opportunity to take respondent's teacher hiring examination in 1998. (ALJ Exhibit 9)

3. Respondent is a school district which encompasses various public schools located in Suffolk County, New York. (ALJ Exhibits 12-16, 17-21)

4. Kruger, was born on August 20, 1947 and was, at the relevant time, 50 years old. (ALJ Exhibit 1, ¶ 1)

5. Kalibat was born on February 9, 1946 and was, at the relevant time, 51 years old. (Tr.

545)

6. Morgenthaler, was born April 24, 1948 and, at the relevant time, was 49 years old. (Tr. 1650-1651)

7. Lore was born on November 20, 1951 and, at the relevant time, was 46 years old. (Tr. 2189)

**BACKGROUND**

8. Starting in approximately the 1996-97 school year, respondent's Board of Education ("Board") directed administrators to come up with a proposal which would improve the hiring process for new teachers. However, the Board did not offer specific directives or criteria to those charged with creating the new hiring process. (Tr. 2655, 2658, 2689-2690, 2707-2708, 2908-2909, 2912, 2925, 2927, 2950, 3436, 6597)

9. Respondent created a six-part teacher hiring process after researching other school districts and receiving input from principals, teachers and members of the teachers union. (Complainant's Exhibits 38, 72, 99; Tr. 2659, 2661, 2668-2672, 2679, 2780, 2849, 2856-2857, 2909-2911, 2930, 2933, 4486, 5053)

10. The six parts consisted of the submission of applications, the screening of applications, a written examination ("the examination"), a demonstration lesson, an interview, and recommendation. (Tr. 5212-5216)

11. Reading comprehension passages were selected for the examination from past high school English Regents examinations from the 1970's and 1980's. (Tr. 4865, 4866, 4870)

12. The examination had never been used before by respondent. (Tr. 3471, 3495)

13. Respondent had not previously undertaken any studies to insure that the examination to be employed was valid and reliable. (Tr. 5451-5453)

14. The following are teaching terms of art applicable to this case: a substitute teacher replaces a teacher who might be out ill, and who is a paid a per diem fee. A leave replacement ("LR") teacher replaces a teacher who may be out for an extended period of time. An instructional assistant ("IA") is a reading and remediation teacher working part-time under the direct supervision of the classroom teacher while teaching a small group of students having pedagogical challenges. An IA has a college degree and, possibly, teacher certification (although that is not required). (Tr. 2630-2631, 4815, 4820, 4822, 4840, 4891-4892)

15. An IA may work only three and one half hours per day for a total of 600 hours per school year; IA's were compensated at an hourly rate (as of January, 1996) of $15.80 per hour. (Complainant's Exhibit 28; Tr. 335)

16. An IA position is not a tenure-bearing position, nor is it a full-time position. (Tr. 73, 4589)

17. A new teacher is hired for a probationary period of three years. At the end of this period the teacher may be recommended for tenure. (Tr. 4547-4548)

18. A tenured teacher is a teacher who has taught successfully for three years during a probationary period and is granted tenure by respondent's Board of Education ("Board"). A tenured teacher subsequently has tenure for life, absent serious violations of the N.Y.S. Education Law, and is no longer on probation. (Tr. 2646)

## I. JEAN M. KRUGER, LAUREN KALIBAT and PATRICIA MORGENTHALER

### Kruger's Prior Qualifications and Teaching Experience

19. Kruger began part-time study for a Master's degree in Elementary Education in 1985 and graduated in 1991. (Complainant's Exhibit 6; Tr. 55-56, 169)

20. As a condition of her Master's degree Kruger was required to obtain unpaid employment as a student teacher. In 1989, Kruger taught for six months in one of respondent's schools. (Tr. 57-58, 234)

21. In 1990, Kruger began employment with respondent as a substitute teacher. (Tr. 62, 234-235, 5980)

22. For the 1994-95 school year, Kruger was a LR, and in the 1995-96 and 1996-97 school years was an IA. In 1997, her school principal termed Kruger an "*effective*" IA in ten separate teaching areas for the previous school year; the three possible ratings for each were "*effective*", "*needs improvement*" and "*not effective*". (Complainant's Exhibit 14; Tr. 5942)

23. In 1995, Kruger was provisionally certified to teach Nursery, Kindergarten and Grades 1-6. Kruger was also separately certified to teach Social Studies Grades 7-12. (Complainant's Exhibits 15, 16; Tr. 88-89)

**Kalibat's Prior Qualifications and Teaching Experience**

24. Kalibat began her teaching career as a full-time teacher in the New York City school system in 1968, after graduating from college. At that same time, Kalibat was provisionally certified for five years in the areas of Nursery, Kindergarten and Grades 1-6. (Complainant's Exhibit 25)

25. In 1971, Kalibat was granted tenure as a teacher, and also received a Master of Science degree in Elementary Education which enabled her to teach Kindergarten and Grades 1- 6. Kalibat taught in the New York City school system for a total of eight years until 1976. (Tr. 549, 550, 553)

26. Kalibat went out on a leave of absence without pay for child care until 1980. (Tr. 555)

27. Kalibat stayed at home raising her children until she began employment with

respondent in 1989 as a substitute teacher. (Complainant's Exhibit 26; Tr. 561, 562, 1023, 1109, 1111-1112)

28. In 1989, after having passed the National Teachers Examination, Kalibat was permanently certified to teach in the areas of Nursery, Kindergarten, and Elementary Education Grades 1-6. (Complainant's Exhibits 26; Tr. 1106-1111, 1204)

29. Kalibat was a substitute teacher from 1989 until 1996, except for a time during the 1994-95 school year when she was a LR. Principal Susan White, the principal at the school in which Kruger and Kalibat taught, agreed that Kalibat did a terrific job and that she (White) was happy with her in the position. White agreed with a June 30, 1994 letter written by a principal in one of the respondent's schools that described Kalibat as, "*...an asset to any staff*". (Complainant's Exhibit 55; Tr. 6174-6176)

30. From January, 1996, to September, 1996, Kalibat was employed by the respondent as an IA; White agreed that Kalibat did a good job in that capacity. (Tr. 579, 1026, 1462, 5994, 6146)

31. Teachers with whom Kalibat worked viewed her as "*pleasant*", "*effective*", "*very competent*", "*phenomenal*", a "*very good teacher*" and having an "*understanding of a child's needs*". Additionally, Kalibat was commended for her performance as an IA by respondent's Title One Administrator Janet McConnell. (Complainant's Exhibit 159; Tr. 2487-2488, 2502, 2505, 2526-2528, 3604, 5589)

32. In September, 1996, Kalibat was "*ebullient*" and "*ecstatic*" upon becoming a full-time LR after starting the school year as an IA and then taking over for a third grade teacher, Maureen Dobbert, who was expected to be out for the remainder of the 1996-97 school year. Kalibat was paid a teacher's salary as a LR that was approximately three times her former salary. (Complainant's Exhibits 31, 33, 43, 61; Tr. 595, 600, 771, 977-978, 1079, 1080, 1089, 1113,

1479, 1488, 1630, 3591, 3592, 3593, 3696-3697, 3715)

33. Kalibat's teaching abilities were summarized by White as an "...*effective period of reading instruction*" when the former was observed by the latter on January 17, 1997. (Complainant's Exhibit 49)

34. Richard Lerer was accepted as an expert in the field of educational consultation and consultancy services, with an expertise in the recruitment of teachers, administrators and personnel. Lerer was also qualified as an expert in the field of handicapped employment within a school context. (Tr. 4036-4074, 4238)

35. Lerer had a "*very positive*" opinion of Kalibat's qualifications and abilities as an elementary school teacher, and that as a former superintendent he would have recommended hiring her or, alternatively, would have had her waive the examination. (Tr. 4162-4163, 4170, 4542, 4571)

36. Lerer based this, in part, on the fact that Kalibat possessed the more stringent New York City teacher certification, as opposed to those who had a New York State teacher certification. (Tr. 4562)

37. Lerer also had no doubt that Kruger was qualified to be a tenure track, probationary teacher. (Tr. 4280)

**Morgenthaler's Prior Qualifications and Teaching Experience**

38. In 1970, Morgenthaler first started her teaching career. (Tr. 1652)

39. In 1973, Morgenthaler became permanently certified to teach Nursery, Kindergarten and Grades 1-6. (Complainant's Exhibit 68; Tr. 1655, 1657)

40. Morgenthaler began employment with respondent in 1979 and became an IA in 1980. (Tr. 1655, 1660, 1843)

41. Morgenthaler worked as an IA until 1985. (Tr. 1660, 1844)

42. In the spring of 1986, Morgenthaler became a substitute teacher and was employed in that capacity until 1995. (Complainant's Exhibit 69; Tr. 1663, 1664, 1853, 1863)

43. In 1995, Morgenthaler was hired as a LR which was the position that she held intermittently until June, 1997. (Complainant's Exhibit 71, 80; Tr. 1673-1674, 1677-1678, 1685, 1687, 1819, 1825, 1871, 1958)

44. As of June, 1997, Morgenthaler was evaluated as "*effective*". (Complainant's Exhibit 82; Tr. 1827)

**EACH APPLY FOR TENURE TRACK, PROBATIONARY TEACHING POSITIONS**

45. Kruger submitted a cover letter, resume and a transcript and was selected to take the examination. (Tr. 239, 240)

46. Kalibat also applied for a tenure track, probationary teacher position with respondent. (Complainant's Exhibit 45; Tr. 777-783)

47. Although she had noticed that examinations had not been administered in the past and thought it "*outrageous*" that she would have to test, Morgenthaler nonetheless applied and was subsequently selected to take the examination. (Complainant's Exhibit 73; Tr. 1671, 1700, 1712, 1725)

**RESPONDENT'S EXAMINATION WAIVER/PROMOTION POLICY**

48. On January 21, 1997, the respondent issued a memorandum announcing a waiver/promotion policy with respect to those designated Leave Replacements, Instructional Assistants, and Substitute Teachers who were interested in probationary, tenure-track teaching positions for 1997-98. The memorandum stated, in pertinent part, that, "*Instructional Assistants,*

*Substitute Teachers, etc. will be identified as being entitled to be interviewed based upon Building Principal recommendations.*" The memo went further to state that, "*Any teacher currently working as a long term replacement (leave of absence, sick leave) is to be considered as a "'permanent" Connetquot employee and not subject to the interview process.*" (Complainant's Exhibit 38)

49. On May 6, 1997, the respondent issued a second memorandum which reiterated the waiver/promotion policy but amended it to the extent of stating that, "*It is understood that any teachers currently working in full-time replacement positions or part-time positions will be selected for permanent full-time positions for the1997-98 school year provided they are recommended by their Building Principals or Central Office Administrators.*" (Complainant's Exhibit 39)

**EACH IS REJECTED FOR A WAIVER/PROMOTION**

50. Kruger and Kalibat were not recommended by White to be waived out of the teacher hiring process because White thought there were better candidates available. (Tr. 3458-3459, 3461-3462, 3493, 3500, 3514, 3517, 3520, 3521)

51. Specifically, White took the position that, "*I recommended all the teachers in my building who were applying for a job go through the entire process.*" White took this position because, "*I was looking for the best candidates for my building, as well as for Connetquot.*" (Tr. 6051, 6500)

52. Morgenthaler was also not excused from the teacher hiring process despite making such a request. Morgenthaler was never given a reason why she was not granted a waiver. (Tr. 1944-1947)

## RESPONDENT'S MAY, 1997 EXAMINATION

53. In anticipation of open teacher positions, respondent advertised that it would administer its examination on May 3, 1997. (Complainant's Exhibit 145; Tr. 2661, 2702, 2703, 2857, 3472, 4342, 4905, 5545)

54. That advertisement sought educators with "*exceptional qualifications*" who had appropriate New York State certification for anticipated vacancies in 1997-98 in the following areas: Chairperson, English 7-12; Chairperson, Social Studies 7-12; Guidance Counselors 7-12; Elementary K-6; Special Education; School Psychologist; Reading Specialists; School Library/Media Specialists; Mathematics; English; Science (Earth Science & Biology Certification); Industrial Technology; Instrumental Music; and Registered Nurse. The advertisement was reprinted in a memorandum the following day which was distributed to all IA's in the event they wished to submit their credentials for consideration. (Respondent's Exhibit 1)

## RESPONDENT'S AUGUST, 1997 EXAMINATON

55. In August, 1997, an examination similar to the May, 1997, examination was administered because not enough candidates had passed the latter. (Tr. 2729, 3473-3474, 4915, 4926-4927)

56. Respondent filled all of its teacher vacancies after the August, 1997 examination. (Tr. 4942)

57. Respondent did not produce information for 13 teacher appointees. I make an adverse finding of fact against respondent that, had that information been produced, it would have revealed that the appointees, relative to Kruger, Kalibat and Morgenthaler, were

younger, less experienced and were waived out of respondent's teacher hiring process and promoted to tenure track, probationary teaching positions.

## THE PROMOTION OF KRISTIN BRUNNER

58. In September, 1997, respondent hired at least one LR (Brunner) who was younger than Kruger, Kalibat and Morgenthaler. Brunner was certified in the same subject areas, and granted a waiver of respondent's teacher hiring process. (Tr. 4271, 5555)

59. Specifically, Brunner graduated high school in 1989, subsequently became a LR, and was waived from the teacher hiring process which included not having to take the May, 1997 examination. Lerer credibly testified that he would not even have allowed Brunner to take the examination given the "appalling" spelling errors, misuse of language and grammatical deficiencies contained in her employment application; he also stated that he had never known anyone who had written so poorly that had ever been hired to a tenure track, probationary teaching position. (Complainant's Exhibit 100; Tr. 4270-4274, 4534, 4613-4614)

60. Brunner became a LR approximately two weeks prior to the instituting of the new teacher hiring process. (Complainant's Exhibits 125, 134)

61. Brunner was only provisionally certified, and had earned credits towards a pending Master's degree. (Complainant's Exhibit 100; Tr. 4542, 4544-4546)

## THE RESULT OF EACH NOT HAVING BEEN WAIVED AND PROMOTED

### Kruger Is Forced to Take the Examinations

62. Kruger failed the May, 1997, hiring examination. (ALJ Exhibit 1, Tr. 101)

63. On May 15, 1997 and June 5, 1997, respectively, Kruger expressed her complaints

about the examination to Assistant Superintendent John Walsh. (Complainant's Exhibits 17, 18; Tr. 107, 111, 283, 439, 442)

64. Kruger requested a retest (Tr. 287-288) of the examination and requested various accommodations during the August, 1997 examination. (Tr. 110-113,168, 281-282)

65. In 1985, Kruger, who is right-handed, was diagnosed as suffering from permanent "*severe spasticity of the right side extremities*" as a result of an accident several years earlier. (Complainant's Exhibits 1, 2, 3; Tr. 23-30, 67)

66. On the day of the August, 1997 examination, respondent provided Kruger with the following reasonable accommodations: placing traffic cones in the parking lot to allow her to park as close as possible to the test site, allowing her to test in the library--which was in close proximity to the rest room--which had large desks and chairs, assigning her two female staff assistants to be at her disposal, and not having her wait in line with the other candidates and escorting her to the examination. (Tr. 2724-2725, 2733-2735, 2872-2874, 2876, 2878, 2886, 2889-2901, 2903, 4529, 4936-4938)

67. Respondent denied Kruger both additional time to take the test and a writer. (Tr. 129, 131, 444, 455, 457, 2884, 2887-2888, 2894-2895, 5317)

68. Kruger also failed the August, 1997 examination and, as a result, was not appointed to a tenure track, probationary teaching position. (Tr. 138, 334)

69. On August 15, 1997, Kruger filed her first Division complaint alleging unlawful discrimination on the bases of age and disability. (ALJ Exhibit 1)

70. In 1998, Kruger applied for the upcoming examination known as the 'Praxis'. (Complainant's Exhibit 19; Tr. 138, 142)

71. In a letter dated March 26, 1998, Kruger was informed that her candidacy was no longer under further consideration. No reason was given for this decision. (Complainant's

Exhibit 19)

72. On January 20, 1999, Kruger filed her second Division complaint alleging unlawful discrimination on the bases of disability and retaliation. (ALJ Exhibit 3)

**Kalibat is Forced to Take the Examinations**

73. Kalibat received a letter that she was no longer under consideration for a permanent, tenure track teaching position because she also failed the May, 1997 examination. (Tr. 785, 829, 830, 1151, 3596)

74. Kalibat then reverted back to being an IA and suffered a reduction in salary. (Tr. 829, 832, 863, 978, 1190, 1192, 1193, 1615-1616, 1635)

75. Kalibat applied for the August, 1997 examination and passed after having prepared for it by utilizing review books. (Tr. 1265, 1266, 1297, 4518, 4566, 4942) However, despite making it to the interview stage, she was not offered a tenure track, probationary position. (Tr. 835, 850, 1270, 1298, 6248)

76. On September 15, 1997, Kalibat filed her Division complaint alleging unlawful discrimination on the basis of age. (ALJ Exhibit 5)

**Morgenthaler is Forced to Take the Examinations**

77. Morgenthaler failed the May, 1997 examination. (Tr. 1745)

78. Morgenthaler then sent a letter of complaint to the Board. (Complainant's Exhibit 71; Tr. 2010-2011)

79. Morgenthaler was offered another opportunity to take the August, 1997 examination and she accepted; Morgenthaler did not prepare for this examination beforehand nor did she ask for a waiver. (Tr. 1752, 1759, 1920, 1973, 1977, 1979, 2010, 2014-2015, 2020)

80. Morgenthaler failed the August, 1997 examination and did not receive an offer of employment for the 1997-98 school year. (Tr. 1770-1771)

81. On October 24, 1997, Morgenthaler filed her Division complaint alleging unlawful discrimination on the basis of age. (ALJ Exhibit 7)

**Kruger Suffers a Subsequent Emotional Impact**

82. After May, 1997, Kruger was depressed, upset, and became introverted. (Tr. 2447-2448)

83. Kruger felt "*humiliated*" because she twice failed the examinations; she also became even more depressed and introverted for many years. (Tr. 165-166, 417-418, 2449, 2453)

84. In 1997, Kruger was seen by Ted Dubinsky, a clinical social worker, who noted that as a result of failing the examinations she was anxious, depressed, angry, frustrated, having difficulty sleeping and tearful. (Tr. 3164, 3169, 3170, 3172)

85. Dubinsky diagnosed Kruger as suffering from 'Adjustment Disorder with Mixed Anxiety and Depression.' (Tr. 3165)

86. Kruger was treated five or six times from September, 1997 to December, 1997 and showed improvement during the course of her treatment. (Tr. 3171, 3208, 3225)

**Kalibat Suffers a Subsequent Emotional Impact**

87. Kalibat had been increasingly energetic while a LR but, upon reverting back to being an IA, became extremely depressed, preoccupied, and experienced trouble sleeping. (Tr. 3594, 3599-3600, 3614, 3720-3723, 3725-3728)

88. Kalibat and her family also experienced tension. The condition of the household

deteriorated and their social life dwindled. (Tr. 3606-3610, 3612, 3615-3618)

89. Kalibat had no significant marital stress prior to this event but suffered it subsequently when, in 1999, she moved out of the bedroom that she shared with her husband. Kalibat did not see a mental health professional because she could not afford it, and because she was unable to discuss her feelings with a stranger. (Tr. 1436, 1447, 1450, 1617-1618, 1627-1628, 1639-1640, 3613, 3619-3620, 3673-3674, 3702, 3728)

90. Kalibat's husband credibly testified to his wife's mental anguish when he said that there was "*real damage*" that was done to her as a result of not receiving a tenure track, probationary teaching position when he observed her neglecting household pets. (Tr. 3618)

**Morgenthaler Suffers a Subsequent Emotional Impact**

91. Morgenthaler, in the period from 1998-2002, inclusive, was credited with $450 as income in 2002 towards her Social Security retirement as a result of having worked as a substitute teacher; other than that she did not work during those four years. (Complainant's Exhibit 79; Tr. 1811-1812, 1988, 1990)

## MITIGATION AND DAMAGES

**Kruger's Mitigation and Damages**

92. Kruger applied for tenure track, probationary teaching positions in other school districts but was not offered a position. (Complainant's Exhibit 20; Tr. 162-164, 422, 424-425)

93. In February, 1999, Kruger applied for a tenure track, probationary teaching position with respondent but was not granted an interview during the 1999 hiring process and, as a result, was not offered a position. (Tr. 4969-4971)

94. Kruger's back pay award is limited to three years insofar as damages beyond that point are speculative as it is unknown whether the discretion of the Board would have been exercised in granting her tenure at that time. Kruger is entitled to a back pay award of $75,262 based on the difference between what she earned while employed by respondent based on her actual income during the school years 1997-98 and 1999-00, inclusive ($31,239), and what she would have earned had she been appointed to a tenure track, probationary teacher position based on respondent's collective bargaining agreements for the same time period ($106,501). Kruger's total lost sick and personal leave is $8,682 based on an amount equal to 10 sick days per school year with each day equal to 1/184th of each year's salary, and 5 personal days per year with each day equal to 1/184th of each year's salary, for the school years 1997-98 to 1999-00, inclusive. (Complainant's Exhibits 20, 282, 285)

**Kalibat's Mitigation and Damages**

95. Kalibat, from 1997 to 2002, resumed work as an IA after unsuccessfully reapplying each year for tenure track, probationary teaching position in school districts throughout Long Island. (Complainant's Exhibit 56; Tr. 911-912, 1307-08, 1499)

96. From 1997 to 2004, Kalibat also undertook an unsuccessful job search for tenure-track, probationary positions within respondent's school district. (Complainant's Exhibit 57; Tr. 917-919, 1311, 1319, 1321-1330)

97. Kalibat, had she been appointed to a tenure track, probationary position, would have had health insurance under respondent's employee benefits plan for both her family and herself and, as a result of not being appointed, her husband would not have incurred costs for health care under his employment benefits plan as IA's do not receive health benefits. The amount incurred for the years 1997-1998 to 1999-00, inclusive is $8,614. (Complainant's Exhibits 113, 114; Tr.

1608, 3575, 3643, 3686, 3687, 3707)

98. At least one of respondent's employee benefits plan did not require a contribution. (Tr. 1608-1609)

99. As with Kruger, Kalibat's back pay award is also limited to three years. Therefore, Kalibat is entitled to a back pay award of $93,837 based on the difference between what she earned while employed by respondent for the 1997-98 to 1999-00 school years, inclusive ($33,691), and what she would have earned had she been appointed by respondent to a tenure track, probationary position based on respondent's collective bargaining agreements for the same time period ($127,528). Kalibat's total lost sick and personal leave is $10,829 based on an amount equal to 10 sick days per school year with each day equal to 1/184th of each year's salary, and 5 personal days per school year with each day equal to 1/184th of each year's salary, for the school years 1997-98 to 1999-00, inclusive. (Complainant's Exhibit 114)

**Morgenthaler's Mitigation and Damages**

100. Morgentahler applied for unemployment insurance benefits in September, 1997, and received $255 per week. (Complainant's Exhibits 76, 78; Tr. 1772, 1781, 1807-1809).

101. Morgenthaler then made numerous inquiries for teaching jobs as a requirement of receiving unemployment insurance benefits; Morgenthaler never applied for a teaching position with respondent after August, 1997 other than for a LR position which she did not receive. Morgenthaler essentially abandoned any search for a job after fulfilling the job search requirements that were necessary for her to obtain those benefits. (Complainant's Exhibit 76; Tr. 1783-1804, 1988, 1990, 1991-1992, 2030-2031)

102. Morgenthaler is entitled to a back pay award of $19,377 based on the difference between what she received in unemployment benefits ($13,260) and what she would have

received had she been appointed by respondent to a tenure track, probationary teaching position ($32,637) during the period that she collected these benefits. Morgenthaler's lost sick and personal leave is $2,661 based on an amount equal to 10 sick days per school year with each day equal to 1/184th of her 1997-1998 teacher salary, and 5 personal days per school year equal to 1/184th of the same salary.

## II. AUGUSTUS C. LORE

### Prior Qualifications and Teaching Experience

103. Lore began teaching as a student-teacher in 1973. (Tr. 2061)

104. Lore graduated in 1974 and started teaching as a substitute teacher. (Tr. 2076)

105. From 1975 to 1979, Lore taught as a full-time teacher. He then taught for a year as a full-time teacher on a per diem basis in the hope of receiving a tenure track, probationary teaching position. (Tr. 2085, 2097, 2249-2250, 2262-2263)

106. In 1979, Lore received his Master's degree in Education. (Tr. 2135, 2395)

107. Lore was certified to teach Social Studies/Grades 7-12 in the State of New York in 1979; he was certified to teach Nursery, Kindergarten and Grades 1-6 in 1988. (Complainant's Exhibit 87; Tr. 2166, 2169, 2183, 2184, 2186, 2381)

108. At the conclusion of the school year in 1980, Lore was told that he would not be receiving a tenure, track, probationary teaching position which led him to be hurt, angry, depressed, disgusted and shaken. Subsequently, he started and ran his own business from 1980 to 1985. (Tr. 2104-2112, 2267, 2272-2273, 2339, 2402)

109. After holding a non-teacher position in late 1985 subsequent to ending his business, Lore was accepted by the U.S. Postal Service ("U.S.P.S.") as a Mail Carrier in March, 1986. (Tr.

2112-2114)

110. While at the U.S.P.S. from 1990 to1995, Lore worked on an "as needed" basis at its Carrier Academy as an instructor to newly hired Mail Carriers. (Tr. 2115, 2150-2154, 2252, 2256, 2278-2279)

111. In 1995, Lore voluntarily changed his job duties at the U.S.P.S. from 'Mail Carrier' to a 'Maintenance Operations Supply Clerk', a position which paid him less than his former position. (Tr. 2117, 2148-2150, 2279- 2281)

**RESPONDENT'S 1998 'PRAXIS' EXAMINATION**

112. On March 8, 1998, respondent placed a newspaper advertisement for teachers to fill vacancies for the following September. The advertisement announced anticipated vacancies in the following areas: all elementary and secondary grades and subjects, all secondary grades and subjects. Additionally, applicants were sought for the following special areas: Computer, Reading Specialist, School Psychologist, Library Media Specialist, Music (Instrumental/Vocal), Technology, Health and Social Worker. Applicants had until March 23, 1998 to provide to the respondent their name, address and telephone number, teacher certification(s), and Social Security number. Applicants were directed to be available for respondent's written examination scheduled for Saturday, April 4, 1998. Applicants who met the March 23, 1998 deadline were also directed to await further testing information. (Complainant's Exhibits 19, 86)

113. Respondent considered whether there would be a vacancy in particular teaching areas upon receiving expressions of interest. However, at some point during the process it abandoned this search due to the enormous volume of applicants and randomly selected candidates who would be eligible to sit for the written examination. (Complainant's Exhibits 19, 86; Tr. 4959-4960, 5345-5351, 5653-5654)

114. Respondent did not use the examinations previously employed and, instead, used the Praxis. (Tr. 1579, 3469, 4956, 4957, 5068-5069)

## LORE APPLIES FOR A TENURE TRACK, PROBATIONARY POSITION

115. After seeing a newspaper advertisement placed by respondent, Lore applied for the Praxis. (Complainant's Exhibit 86; Tr. 2163)

116. Lore submitted a cover letter with his name, address, telephone number, Social Security number and teacher certifications, and expected that he would automatically be allowed to sit for the Praxis once respondent received his credentials. (Tr. 2412, 2437-2439)

## LORE SUFFERS AN ADVERSE EMPLOYMENT ACTION

117. Lore subsequently received a letter from respondent which informed him that his candidacy was no longer under consideration. The letter did not give a reason for this decision. (Complainant's Exhibit 88; Tr. 2173-2180, 4967)

## CIRCUMSTANCES WHICH GIVE RISE TO AN INFERENCE OF DISCRIMINATION

118. Of the18 appointees who sat for the Praxis and were hired by the respondent in September, 1998, all those with known dates of birth were younger than Lore. Three had dates of birth which were unknown. Of the aforementioned 18 appointees, 12 taught in the same subject areas as Lore. Susanne Anker, was hired by respondent in September, 1998 as a tenure track, probationary teacher. Anker was younger than Lore and, unlike him, had only provisional certification to teach in the same subject area (Social Studies/Grades 7-12). (Complainant's Exhibits 21, 195, 196, 197)

## THE SUBSEQUENT EMOTIONAL IMPACT UPON LORE

119. Lore, as a result of not being able to take the Praxis, felt upset, miserable, irritable, lethargic and old. This situation also caused sleep problems, as well as bickering with members of his family that were greater in frequency and intensity than before this incident. These feelings were more pronounced than in 1980 when he lost his last teaching position. (Tr. 2230-2234, 2336-2338, 2350-2354, 2383-2388, 2404-2407, 2419, 2423, 2987, 3007, 3013, 3016-3017)

## MITIGATION AND DAMAGES

120. Lore's current salary ($44,808) is lower than what he would have earned had he received a tenure track, probationary teaching position with respondent starting in September, 1998 ($46,947). However, this is soley because of Lore's admittedly voluntary decision to take a lesser-paying position with his employer. (ALJ Exhibits 27, 28; Complainant's Exhibit 90)

## DECISION AND OPINION

All four complainants asserted that respondent unlawfully discriminated against them on the basis of age; Kruger additionally alleged that she was unlawfully discriminated against by respondent on the bases of disability and retaliation. Respondent denied engaging in unlawful discrimination.

For the reasons which follow, I find that Kruger, Kalibat and Morgenthaler have proven their respective cases, and that Lore's case should be dismissed.

## STATUTE OF LIMITATION

Initially, I must decide whether to allow the consideration of those matters outside the one year statute of limitation. N.Y.S. Human Rights Law § 297.5. Complainants, in support of such a contention, suggest that a continuing violation has occurred. *See* 9 NYCRR 465.3 (e).

Both Kruger's second complaint and Lore's complaint were timely filed solely as to the Praxis examination in April, 1998. Generally, the consideration of issues outside the one year statute of limitation is not allowed absent resort to the continuing violation doctrine. Clark v. State of New York, 302 A.D.2d 942, 754 N.Y.S.2d 814 (4th Dept 2003)(in which a continuing violation is found where there is "...proof of ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continued unremedied for so long as to amount to a discriminatory policy or practice.")

Here, respondent's teacher examinations were singular, discrete acts and, as such, the continuing violation doctrine does not apply.

Respondent takes the position in its Post-Hearing Brief that consideration should not be given to Morgenthaler's claim of unlawful discrimination concerning the August, 1997 teacher hiring examination because she failed to include such a claim in her complaint. (Respondent's Post-Hearing Brief, page 10-11) However, given the evidence concerning this issue which was adduced in the Public Hearing, the undersigned amends the complaint to conform the pleadings to the proof. 9 N.Y.C.R.R. 465.12 (f) (14).

## DISCRIMINATION ANALYSIS

N.Y.S. Human Rights Law § 296 (1) (a) and (e), state, in pertinent part, that it shall be an unlawful discriminatory practice for an employer, "...because of the age...[or] disability...of any

individual...to refuse to hire or employ...such individual...", or, "...to otherwise discriminate against any person because he has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article."

It is well settled that in discrimination cases that a complainant has the burden of proof and must, at the outset, establish a prima facie case of unlawful discrimination. A complainant's burden in establishing a prima face case has been found to be '*de minimis*'. *See* Schwaller v. Squire Sanders & Dempsey, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dept 1998). Once a complainant establishes a prima facie case of unlawful discrimination, a respondent must subsequently produce evidence showing that its action was legitimate and non-discriminatory. Should a respondent articulate a legitimate, non-discriminatory reason for its actions, a complainant must then show that the proffered reason is pretextual. St. Mary's Honor Ctr. v Hicks, 509 U.S. 502. The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden. Pace v. Ogden Servs. Corp., 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept 1999).

**Kruger's, Kalibat's and Morgenthaler's Age Discrimination Claims**

It should be noted that the respondent's waiver policy acted, in effect, as a "promotion" for those employees who sought tenure track, probationary positions.

In order to make out a prima facie case in the failure to promote context, Kruger, Kalibat and Morgenthaler must show that they: 1) belong to a protected class; 2) applied for and were qualified for a job promotion for which the employer was seeking applicants; 3) were rejected despite their qualifications; and 4) the promotion was given to someone not a member of their protected class. Muszak v. Sears, Roebuck & Co., 63 F. Supp.2d 292 (WD N.Y. 1999).

I find that Kruger, Kalibat and Morgenthaler each make out prima facie cases.

First, all three are within a protected class. All expressed an interest in a tenure track, probationary position for which each was qualified. All were denied a waiver/promotion. Finally, Brunner, a younger and less-experienced teacher who taught in Kruger, Kalibat and Morgenthaler's subject areas, was waived out of the teacher hiring process and promoted to a position similar to that which each sought.

Respondent articulated a legitimate, nondiscriminatory reason for its actions when it deemed Kruger, Kalibat and Morgenthaler ineligible for waivers/promotions because it wanted all three to compete with others taking part in the teacher hiring process in order to identify the best teacher candidates.

As to proof of pretext, the initial waiver/promotion policy dictated that IA's could bypass the examinations and be interviewed if they obtained the recommendation of their building principal; LR's were not subject to the interview process. The second version of the policy was more liberal insofar as it waived/promoted all non-permanent, full or part time employees with the recommendation of either the candidate's building principal or central office administrators. A candidate would then be hired upon meeting these requirements. However, the waiver and subsequent promotion of Brunner to a tenure track, probationary teaching position (with perhaps up to an additional 13 similarly situated appointees) renders respondent's reason incredible. More to the point, age discrimination was likely the real reason for such a deviation. Specifically, respondent's decision to grant a waiver and promote Brunner, an individual who was both younger and demonstrably less experienced, is explicitly opposite White's stated reason that there were better candidates to be identified through the teacher hiring process. Thus,

Kruger, Kalibat and Morgenthlaer have "shown *both* that the reason was false, *and* that discrimination was the real reason." St. Mary's, 509 U.S. at 515 (emphasis in original). In sum, respondent may have sought educators with "*exceptional qualifications*" who were the *"best candidates"* but it clearly reneged on that promise upon promoting Brunner at the expense of Kruger, Kalibat and Morgenthaler.

Therefore, I find that Kruger, Kalibat and Morgenthaler were the victims of unlawful discrimination.

**Kruger's Disability Claims**

To make out a prima facie case of disability discrimination, Kruger must show that she suffers from a disability and that the disability engendered the behavior for which she was discriminated against in the terms, conditions or privileges of her employment. Thide v. New York State Dept. of Transp., 27 A.D.3d 452, 2006 N.Y. Slip Op 1609, * (2d Dept, March 7, 2006) If Kruger succeeds in establishing a prima facie case, the burden shifts to respondent to demonstrate that Kruger's disability prevented her from performing the duties of the job in a reasonable manner or that respondent's action was motivated by legitimate, nondiscriminatory reasons. If respondent establishes that its actions were legitimate and nondiscriminatory, the burden shifts back to Kruger to prove that the actions were a pretext for unlawful discrimination. *Id.* at 453.

Kruger makes out her prima facie case insofar as she was clearly disabled. I find that Kruger's diagnosis of right side spasticity renders her "disabled" as that term is used in the N.Y.S. Human Rights Law. The second requirement of the prima facie case is also met as Kruger's disability was the basis for the accommodations in question.

Respondent's legitimate, nondiscriminatory reason in response to the above was that Kruger was nonetheless reasonably accommodated when put on notice of her disability prior to the August, 1997, examination (it is unclear from the record whether respondent was on notice as to Kruger's disability prior to the May, 1997, examination) other than for providing a writer, and allowing additional time in which to take the examination. It should be noted that, despite respondent's objection to the imposition of a legal duty to reasonably accommodate Kruger (Respondent's Post-Hearing Brief, pp. 117-118), the Division nonetheless takes the position that such a duty existed prior to January 1, 1998 given the legislative history of the amendment to the N.Y.S. Human Rights Law which became effective on that date. *See* Governor Pataki's statement

upon approval of L. 1997, Ch. 269, that the legislation makes "explicit for persons with disabilities and their employers those rights and responsibilities already implicit in state law."

Kruger's attempt to show pretext was based upon her assertion that she was not reasonably accommodated given that respondent failed to provide her with a writer, and did not allow her additional time in which to take the examination. However, Kruger cannot show that unlawful discrimination was the real reason for that failure even assuming the falsity of respondent's position that she was reasonably accommodated. St. Mary's, 509 U.S. at 519; Ferrante v. American Lung Ass'n., 90 N.Y.2d 623 (1997). It is obvious from the record that respondent never would have provided Kruger with the reasonable accommodations that it did had it been intent on discriminating against her on the basis of her disability. *Ante* at ¶ 66. Additionally, the reasonable accommodations not provided were different in character than the others, i.e.,

contingent solely on Kruger not having a spasmodic episode. Nothing in the record suggest that such an episode occurred and Kruger was not disadvantaged as a result.

Therefore, Kruger cannot prevail upon this claim.

As to Kruger's second disability discrimination claim arising out of not being selected to take the Praxis, respondent's legitimate, nondiscriminatory reason for its decision was that the overwhelming number of applicants forced respondent to engage in the random selection of applications.

Kruger attempted to show that the use of random selection by respondent was a pretext for unlawful discrimination. However, it was once again incumbent upon Kruger to show that this reason was false and that intentional discrimination was the real reason for respondent's actions. Here, the record shows that respondent was legitimately overwhelmed with applicants such that it had to resort to random selection. However, even if one disbelieves this reason, intentional discrimination could not have been the real reason for such a decision given that nothing could be more nondiscriminatory for all potential applicants than to be selected randomly.

Therefore, Kruger cannot prevail on this claim.

**Kruger's Retaliation Claim**

In order to make out a prima facie case of retaliation, Kruger must show that: 1) she engaged in a protected activity; 2) her employer was aware that she engaged in the protected activity; 3) she suffered an adverse employment action as a result of the protected activity; and 4) a causal connection between the protected activity and the adverse employment action. Pace, 692 N.Y.S.2d at 223-224.

The record shows that Kruger has failed to demonstrate a nexus between respondent's failure to allow her to take the Praxis and the filing of her Division complaint. The seven month duration between the filing of Kruger's first Division complaint (August, 1997) and the decision by respondent not to select her to take the Praxis (March, 1998) is too great a time period by which to show causation. *Id.* at 225 (in which an absence of evidence that alleged retaliatory acts took place within two months of complaint was deemed not proximate enough to establish the causal connection element).

Therefore, Kruger cannot prevail on this claim.

**Lore's Age Discrimination Claim**

A different prima facie case analysis applies to Lore insofar as he was not an employee of respondent. Instead, Lore was merely a job applicant who sought the opportunity to be selected to take the Praxis.

In order to make out a prima facie case of age discrimination in the employment context, Lore must show: 1) membership in a protected class; 2) that he was qualified for the position; 3) an adverse employment action; and 4) circumstances giving rise to an inference of discrimination. Keady v. Nike, Inc., 116 F. Supp.2d 428 (SD N.Y. 2000).

I find that Lore makes out a prima facie case.

Here, Lore is clearly within the protected class and qualified for the position in question. Lore suffered an adverse employment action by way of respondent's decision not to select him to take the Praxis, especially given that the Praxis was an employment prerequisite. Finally, the adverse employment action was made under circumstances giving rise to an inference of discrimination given the ages and subject areas of respondent's appointees subsequent to the

administration of the Praxis. Most notably, this included at least one individual who was younger and had objectively lesser qualifications, i.e., someone who was only provisionally certified in Lore's subject areas (Anker).

Respondent's legitimate, nondiscriminatory reason for its treatment of Lore, as with Kruger, was based on its decision to randomly select applicants once it concluded that the enormous volume of application materials prevented their individual consideration.

As stated above, proof of pretext centered on this deviation from the individualized consideration of Praxis candidates in favor of the random selection of their application materials. However, Lore was similarly unable to show that the reason given for the use of random selection was incredible and, additionally, that intentional discrimination was the real reason for respondent's implementation of such a selection process.

Therefore, Lore cannot prevail on this claim.

**DAMAGES**

The N.Y.S. Human Rights Law provides various remedies to restore victims of unlawful discrimination to the economic position that they would have held had their employers not subjected them to unlawful conduct. *See* N.Y.S. Human Rights Law § 297.4. c (i)-(iv); Ford Motor Co. v. EEOC, 458 U.S. 219 (1982). Awards of back pay compensate a complainant for any loss of earnings and benefits sustained from the date of the adverse employment action until the date of verdict. Iannone v. Frederic R. Harris, Inc., 941 F Supp. 403 (SD N.Y. 1996). Back pay consists not only of lost wages, but also fringe benefits and pension accruals. Albemarle v. Moody, 422 U.S. 405 (1975). Front pay or, alternatively, reinstatement, may also be awarded. Further, besides back pay, "an award of...damages to a person aggrieved by an illegal

discriminatory practice may include compensation for mental anguish." Cosmos Forms, Ltd. v. New York State Division of Human Rights, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dept 1989). Such compensation may be based solely on a complainant's testimony. *Id.* at 442. It must, however, be reasonably related to a respondent's discriminatory conduct. Quality Care v. Rosa, 194 A.D.2d 610, 599 N.Y.S.2d 65 (2d Dept 1993). Finally, an award of pre-determination interest of nine percent per annum, accruing from the date of discrimination, complements the back pay award and is appropriate. Aurecchione v. New York State Division of Human Rights, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002).

Nonetheless, any interim earnings from employment, whether in a comparable or non-comparable position or type of work, may properly be offset from a back pay award. Ford Motor Co., 458 U.S. at 231; Club Swamp Annex v. White, 167 A.D.2d 400, 561 N.Y.S.2d 609 (2d Dept 1990). A complainant also has an affirmative duty to mitigate back pay damages. New York City Board of Education v. Simley, 96 A.D.2d 947, 466 N.Y.S.2d 401 (2d Dept 1983).

Finally, the imposition of affirmative action is also allowed under the N.Y.S. Human Rights Law. N.Y.S. Human Rights Law § 297.4 c (ii). However, while public employers are not excluded from the sanctions directed towards discriminatory practices under the N.Y.S. Human Rights Law, the Division lacks the power to deprive the appointing authority--in this case the Board--of the power of selection. City of Schenectady v. State Division of Human Rights, 37 N.Y. 2d 421, 430, 373 N.Y.S.2d 59, 68 (1975). This is especially so given the fact that the N.Y.S. Education Law, in pertinent part, vests the Board with exclusive control in the appointment of probationary teachers. N.Y.S. Education Law § 2573; *Cf.* Board of Education v. State Division of Human Rights, 38 A.D.2d 657, 327 N.Y.S.2d 110 (3d Dept 1971)(Division

divested of jurisdiction as N.Y.S. Education Law has "exclusive control" over the termination of a teacher during the probationary period). Under these circumstances, the Board can be directed that an individual be "fairly considered" for an appointment. State Div. of Human Rights (Cottongim) v. County of Onandaga Sheriff's Dep't., 71 N.Y.2d 623, 528 N.Y.S.2d 802 (1988)(Court of Appeals contrasting this remedy with reinstatement for terminated employee who previously held position). The remedy provision of the N.Y.S. Human Rights Law cannot be used to award the complainants more than that to which they are reasonably entitled, i.e., automatic appointment to teaching positions. Unlike here, it is only unlawful discrimination which resulted in the termination of a preexisting position that mandates returning a complainant to that which was previously possessed:

> "...where a person has not been considered fairly for an appointment by a public employer, the remedy that generally will make the individual whole, in addition to whatever money damages are warranted, is that the individual be fairly considered for the appointment. These cases recognize that it may be improper to go further and require that the person be appointed to the position because this could award more than a complainant was entitled to before the discrimination took place."

*Id.* at 634.

Lore's Post-Hearing Brief requests attorney's fees. (Lore's Post-Trial Brief, p. 6) The N.Y.S. Human Rights Law only allows for such an award in housing discrimination cases. N.Y.S. Human Rights Law § 297.10.

Respondent's Post-Hearing Brief takes the position that damages, if any, should end at the point the Praxis was administered in April, 1998. (Respondent's Post Hearing Brief, p. 143) I conclude that such a determination would be contrary to the mandate of the N.Y.S. Human Rights Law which requires that damages should serve to make a complainant "whole".

**Kruger's Damages**

As to award of a teaching position, respondent is hereby directed to fairly consider Kruger for a tenure track, probationary teaching position within her area of licensure, effective at the start of the 2006-07 school year or, if such is position is not available, as soon thereafter as such a position should become available.

As to an award of back pay, Kruger is awarded $75,262. Respondent shall also credit Kruger's pension with an adjustment equal to the back pay award.

As to an award of pre-judgment interest, respondent shall pay nine percent per annum on the back pay award from September 1, 1997 until payment is made.

As to an award for lost benefits during the school years 1997-98 to 1999-00, inclusive, Kruger is awarded $8,682 as an amount which equals her lost sick and personal leave.

As to an award for mental anguish, the record shows that Kruger felt depressed, upset, introverted and "*humiliated*" after having failed respondent's teacher examinations on two occasions. In 1997, Kruger saw a therapist who diagnosed her as suffering from an 'Adjustment Disorder with Mixed Anxiety and Depression'. This diagnosis was a result of Kruger's displaying symptoms of anxiousness, depression, anger, frustration, sleep difficulties, and being tearful. As a result, Kruger is awarded $20,000 for her mental anguish. *See* Town of Lumberland v. New York State Div. of Human Rights, 229 A.D. 2d 631, 644 N.Y.S. 2d 864 (3rd Dept 1996)(damage award of $20,000 justified based upon testimony of upset, humiliation, embarrassment and depression).

**Kalibat's Damages**

As to award of a teaching position, respondent is hereby directed to fairly consider Kalibat for a tenure track, probationary teaching position within her area of licensure, effective at the start of the 2006-07 school year or, if such a position is not available, as soon thereafter as such a position should become available.

As to an award of back pay, Kalibat is awarded $93,837. Respondent shall also credit Kalibat's pension with an adjustment equal to the back pay award.

As to an award of pre-judgment interest, respondent shall pay nine percent per annum on the back pay award from September 1, 1997 until payment is made.

As to an award for lost benefits during the period 1997-98 to 1999-00, inclusive, Kalibat is awarded $10,829 as an amount which equals her lost sick and personal leave.

The record shows that Kalibat should also be awarded $8,614 in health care costs that were expended by her husband for the years 1997-98 and 1999-00, inclusive, and that would not have been expended had she been awarded a tenure track, probationary teaching position with respondent.

As to an award for mental anguish, the record shows that Kalibat had been "*ebullient*" and "*ecstatic*" about being appointed a LR position in September, 1996, only to revert to an IA position after not receiving a waiver. As a result, Kalibat became extremely depressed preoccupied, suffering sleep problems, and having increased family tensions (including the 1999 move from the bedroom that she shared with her husband) as a result. However, while it is true that Kalibat did not seek medical treatment, I nonetheless credit the testimony of Kailbat's

husband in this regard when he testified that she had suffered "*real damage*" as a result of this experience. As a result, Kalibat is awarded $20,000 for her mental anguish.

**Morgenthaler's Damages**

As to award of a teaching position, respondent is hereby directed to fairly consider Morgenthaler for a tenure track, probationary teaching position within her area of licensure, effective at the start of the 2006-07 school year or, if such a position is not available, as soon thereafter as such a position should become available.

As to an award of back pay, Morgenthaler is awarded $19,377. Respondent shall also credit Morgenthaler's pension with an adjustment equal to the back pay award.

As to an award of prejudgment interest, respondent shall pay nine percent per annum on the back pay award from September 1, 1997 until payment is made.

As to an award of lost benefits for the period 1997-98, Morgenthaler is awarded $2,661 as an amount which equals her lost sick and personal leave.

As to an award for mental anguish, the record shows that Morgenthaler essentially stopped teaching--something she had been doing since 1970--after unsuccessfully taking the respondent's teacher hiring examinations; she has never returned to teaching. However, there was no proof in the record concerning the severity and duration of any mental anguish Morgenthaler may have suffered. As a result, Morgenthaler is awarded $5,000 for her mental anguish. *See* Quality Care, 194 A.D. 2d 610 (damage award for mental anguish and humiliation could not exceed $5,000 without evidence of duration of employee's condition, severity or consequences, and in the absence of medical treatment).

## ORDER

Based on the foregoing, and pursuant to the provisions of the N.Y.S. Human Rights Law, and the Rules of Practice of the Division, it is

**ORDERED**, that respondent, its agents, representatives, employees, successors and assigns shall take the following affirmative action to effect the purposes of the N.Y.S. Human Rights Law:

1. Within 30 days from the date of the Commissioner's Final Order, respondent shall fairly consider Kruger, Kalibat and Morgenthaler for tenure-track, probationary teaching positions within their respective areas of licensure for the start of the 2006-2007 school year, or if such a positions are not available, as soon thereafter as such positions should become available.

2. Within 30 days from the date of the Commissioner's Final Order, respondent shall pay Kruger a back pay award composed of the difference in salary she would have earned, together with all the increases, rights, benefits and privileges to which she would have been entitled, less standard deductions and earnings, if any, which has been calculated at $75,262. Respondent shall pay interest in the amount of nine percent per annum, from the date of the violation until the date of payment. Respondent shall also credit Kruger's pension with an adjustment equal to the back pay award. Respondent shall pay Kruger sick and personal time equal to $8,682.

3. Within 30 days of the date of the Commissioner's Final Order, respondent shall pay Kalibat a back pay award composed of the difference in salary she would have earned, together with the increases, rights, benefits and privileges to which she would have been entitled, less standard deductions and earnings, if any, which has been calculated at $93,837. Respondent shall pay interest in the amount of nine percent per annum, from the date of the violation until

the date of payment. Respondent shall also credit Kalibat's pension with an adjustment equal to the back pay award. Respondent shall pay Kalibat's sick and personal time equal to $10,829. Respondent shall pay Kalibat $8,614 as an amount equal to that which was expended for health care costs.

4. Within 30 days of the date of the Commissioner's Order, respondent shall pay Morgenthaler a back pay award composed of the difference in salary she would have earned, together with the increases, rights, benefits and privileges to which she would have been entitled, less standard deductions and earnings, if any, which has been calculated at $19,377. Respondent shall pay interest in the amount of nine percent per annum, from the date of the violation until the date of payment. Respondent shall also credit Morgenthaler's pension with an adjustment equal to the back pay award. Respondent shall pay Morgenthaler sick and personal time equal to $2,661

5. Within 30 days of the date of the Commissioner's Final Order, respondent shall pay retroactive contributions to Kruger, Kalibat and Morgenthaler's Social Security Funds for the period from September 1, 1997 to the date of the Commissioner's Final Order.

6. Within 30 days from the date of the Commissioner's Final Order, respondent shall pay to Kruger damages for mental anguish and humiliation, without any deductions or withholding whatsoever, in the amount of $20,000; respondent shall pay to Kalibat damages for mental anguish and humiliation, without any deductions whatsoever, in the amount of $20,000; and respondent shall pay to Morgenthaler damages for mental anguish and humiliation, without any deductions whatsoever, in the amount of $5,000.

7. The aforesaid payments shall be made by respondent in the form of certified checks made payable to the order of the respective complainants and delivered to their attorneys: (Kruger) Lawrence Spirn, Esq., Spirn & Spirn, 33 Walt Whitman Rd., Ste. 204, Huntington, New York 11746; (Kalibat) Howard E. Gilbert, Esq., Law Offices of Howard E. Gilbert, One Huntington Quadrangle, Suite One North Four, Melville, New York 11747; (Morgenthaler) Bellew S. McManus, Esq., New York State Division of Human Rights, One Fordham Plaza, 4th Fl., Bronx, N.Y. 10458, by registered mail, return receipt requested.

8. Respondent shall simultaneously furnish written proof to Caroline J. Downey, Esq., Acting General Counsel of the New York State Division of Human Rights, at her office address, One Fordham Plaza, 4th Fl., Bronx, New York 10458, of its compliance with the directives contained in this Order and shall cooperate with the representatives of the Division during any investigation into their compliance with the directives in this Order.

9. Respondent shall not retaliate against complainants in any way for their having filed the instant complaints with the Division.

Dated: January 11, 2007
Bronx, New York

NYS DIVISION OF HUMAN RIGHTS

ROBERT J. TUOSTO
Administrative Law Judge