



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**LOUISE M. LINDSEY,**

Complainant,

v.

**BELMONT MANAGEMENT CO, INC., ROBERT J.  
MILLER, JR.,**

Respondents.

**NOTICE AND  
FINAL ORDER**

Case No. 10151502

Federal Charge No. 16GB200360

**PLEASE TAKE NOTICE** that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on February 21, 2013, by Martin Erazo, Jr., an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

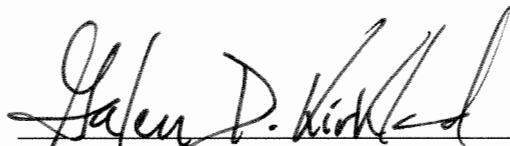
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any

member of the public during the regular office hours of the Division.

**PLEASE TAKE FURTHER NOTICE** that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

**ADOPTED, ISSUED, AND ORDERED.**

DATED: *5/7/2013*  
Bronx, New York

  
\_\_\_\_\_  
GALEN D. KIRKLAND  
COMMISSIONER



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**LOUISE M. LINDSEY,**

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**BELMONT MANAGEMENT CO, INC.,  
ROBERT J. MILLER, JR.**

Respondents.

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

Case No. **10151502**

**SUMMARY**

Respondents failed to reasonably accommodate Complainant's disability and unlawfully terminated her employment. Therefore, Respondents are liable to Complainant in the amounts of \$1,112.17 in lost wages and \$4,000 for pain and suffering. Respondents are also liable to the State of New York in the amount of \$1,000 in civil fines and penalties.

**PROCEEDINGS IN THE CASE**

On October 27, 2011, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Martin Erazo, Jr., an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on August 29, 2012.

Complainant and Respondents appeared at the hearing. The Division’s prosecutions unit was represented by Richard J. Van Coevering, Esq., Senior Attorney (“Van Coevering”). Respondents were represented by the law firm of Ward, Brenon, Lipman & DiVita, L.L.P., Robert D. Lipman, Esq., of counsel (“Lipman”).

### **FINDINGS OF FACT**

#### **Parties**

1. Robert J. Miller, Jr., (“Miller”) is the president of Belmont Management Co, Inc. (Joint Exhibit 6; Tr. 101)
2. Miller participated in the Division’s investigatory and hearing process. (ALJ Exhibit 4; Tr. 5)
3. Complainant’s October 27, 2011 verified complaint with the Division, placed Miller on notice that his personal actions were at issue. The verified complaint specifically charges that the unlawful discriminatory activity alleged by Complainant was performed by Miller. (ALJ Exhibit 1, pages 4-5)
4. Respondents manage approximately 70 low-income housing complexes that are owned by different groups. (Tr. 14)

5. On July 8, 2002, Respondents hired Complainant as an administrative assistant. (Joint Exhibit 1)

6. In 2009, Respondents promoted Complainant to site manager of the Saint James Homes that are comprised of 28 housing units. (Tr. 31, 33, 45-47)

#### Job Duties

7. Complainant office is located in a rear, first floor, two-bedroom apartment. The other bedroom is the office of another site manager for different group of housing units. (Tr. 49-50)

8. The majority of Complainant's work time involves sitting at the office desk and interacting with tenants by telephone. Complainant's office activities also consist of reviewing tenant files, collecting rents, posting rents, and annual certifications. These activities require the physical activities of opening a filing cabinet, opening a desk drawer, and computer work. (Tr. 31)

9. Complainant performed rent collection primarily by mail except in cases where the tenant was ill or frail. In those instances, Complainant might personally collect the rent from the tenant. (Tr. 38-40, 47)

10. Annual certifications serve as the basis of yearly lease renewals. (Tr. 41, 47-48)

11. Complainant was required to conduct an inspection each of the 28 units under her charge as part of the annual certifications. All of the units are located within a nine-block area and are only accessible by stairs. The apartments are two level units. (Tr. 45-47, 53-54, 74, 102)

#### Complainant's Disability

12. On June 28, 2011, Complainant had surgery performed on her right shoulder. Complainant had a complete rotator cuff replacement, and a bone spur that was surgically shaved down. (Tr.18-19)

13. On July 12, 2011, Complainant submitted a Family and Medical Leave (“FMLA”) request for the period of June 28, 2011 to August 30, 2011. (Respondent’s Exhibit 1)

14. On August 12, 2011, Miller approved Complainant’s FMLA leave request, for the 12-week period of June 28, 2011 to September 20, 2011. (Joint Exhibits 1,6)

15. On September 15, 2011, Complainant gave Miller a medical note dated September 9, 2011, written by Marc Fineberg, M.D., (“Fineberg”) which stated:

“return to work light duty; ruptured rotator cuff complete; bursar & tendon disorders, shoulder region unspecified;”

“may return to work with limitations as of 9/19/11. No overhead use of right arm/ no lifting greater than 5#/ no pushing/pulling/no climbing until further notice-s/p right shoulder surgery” (Joint Exhibits 1,10; Tr. 19-20, 103-04)

16. On September 15, 2011, Miller told Complainant that Respondents did not offer light duty work or accept releases which included restrictions. (Tr. 20-21, 60-61, 72)

17. Miller also expressed to Complainant his concerns about her ability to open and close the filing cabinet, reach on top of the file cabinet, and reach overhead to the shelf in her closet. (Tr. 22, 78)

18. Complainant responded that she could open and close the file cabinet drawers, that the items in the closet shelf contained overflow supplies she did not use often, and that co-workers agreed to retrieve those items when needed. (Tr. 22)

19. There was no discussion about Complainant’s ability to climb stairs or lift files. (Tr. 79)

20. Complainant could perform her primary office functions without use of her right arm. (Tr. 32, 78)

21. I find that Miller testified that he did not let Complainant return to work because “the restrictions that the doctor placed on her return...were so encompassing that it didn’t appear that she would be able to do any of her job.” (Tr. 104)

22. Miller also conceded at the public hearing that he could have given Complainant a reasonable accommodation. (Tr. 113)

23. However, on September 15, 2011, Miller asked Complainant to have her doctor lift all the restrictions. (Tr. 21)

24. On September 19, 2011, Complainant went to her doctor, Fineberg, and asked for the removal of the medical restrictions. Fineberg responded, “I’m not going to do that.” (Tr. 23)

25. Instead, Fineberg prepared and mailed a second medical note to Respondents on that same date. (Joint Exhibit 11; Tr. 24)

26. Fineberg’s second medical note, dated September 19, 2011, stated:

“may return to work with limitations as of 9/19/11. No overhead use of right arm/ no lifting greater than 5#/ no pushing/pulling/no climbing until further notice-s/p right shoulder surgery. If Louise is unable to return with the above restrictions, she is to remain out of work completely until further notice.” (Joint Exhibits 1, 11)

27. On September 24, 2011, Complainant received Respondents’ letter of termination. (Tr. 24-25)

28. Miller testified that he decided to terminate Complainant’s employment “because based on her doctor’s note with all of her restrictions, all of her job requires either some pushing, pulling, lifting or climbing of stairs, and, so, it didn’t seem that she would be able to do her job.” (Tr. 105)

29. On October 27, 2011, Complainant filed this complaint with the Division. (ALJ Exhibit 1; Joint Exhibit 3)

30. On November 4, 2011, Complainant received from Miller a letter dated the previous day. Miller made an unconditional offer of reinstatement to the position of site manager that required a response by November 11, 2011. (Joint Exhibits 1, 7)

31. On November 10, 2011, Complainant gave Respondents a third medical note written from Fineberg that stated:

“Louise had surgery on her right shoulder and in unable to use the right arm while working until further notice. She is able to use her left arm while working.” (Joint Exhibits 1, 12)

32. On November 18, 2011, Complainant returned to work. (Joint Exhibit 1; Tr. 29)

33. On December 12, 2011, Complainant gave Respondents a fourth medical note written from Fineberg that stated, “return to work-full duty-no restrictions beginning 12/13/11” (Joint Exhibits 1, 13)

#### Economic Losses

34. Complainant suffered lost wages for period of September 19, 2011 to November 4, 2011, the period of time Respondents did not allow her to return to work. (Tr. 24, 29)

35. Complainant earned \$13.25 per hour and worked an average of 21.17 hours a week. 21.17 divided by 5 days totals 4.234 hours per day. (Joint Exhibits 1, 8)

36. During the weeks ending on October 9, 2011, to November 20, 2011, Complainant collected \$1,086.75 in New York State Unemployment Insurance Benefits. (Joint Exhibits 1, 9)

37. At the public hearing, the parties stipulated that Complainant’s net lost wages, after subtracting unemployment benefits, was \$1,112.17. (Joint Exhibit 1)

#### Emotional Damages

38. Complainant was retired from her 28-year employment with the Roswell Park Cancer Institute and had never been fired. (Tr. 29-30, 64)



39. Complainant was “devastated” by Respondents’ termination of her employment. (Tr. 30)

40. As a retiree, Complainant relied on Respondents’ income. Complainant had to readjust her household budget, had “to go through” unemployment, had “sleepless nights”, had difficulty “focusing;” and had problems “eating.” (Tr. 30, 95)

41. I find that Complainant’s emotional reaction to her dismissal ended when she returned to work on November 18, 2011. (Tr. 95)

### **OPINION AND DECISION**

#### **Amendment**

The complaint is amended to properly name Robert J. Miller, Jr., individually, as president of Belmont Management Co, Inc. The amendment conforms the pleadings to the proof. 9 NYCRR §465.12(f)14.

Robert J. Miller, Jr. is properly added as a Respondent as per the relation back doctrine. Miller suffered no unfair surprise as to claims of his individual liability. Miller made the decision to terminate Complainant’s employment when she attempted to return to work with medical restrictions. Miller was clearly on notice that his decision, as the president of Belmont Management Co, Inc., was at issue in this case. Miller participated in the Division’s investigatory and hearing process. There is no proof that Miller suffered any prejudice in not having been originally named. *Rio Mar Restaurant et. al. v. State Div. of Human Rights*, 270 A.D.2d 47, 704 N.Y.S. 230 (1<sup>st</sup> Dept. 2000). As corporate president, Miller is individually liable, for his own unlawful discriminatory conduct as he had the authority “to do more than carry out personnel decisions made by others.” *Patrowich v. Chemical Bank*, 63 N.Y.2d 541,

542; (1984); *State Div. of Human Rights, et.al. v. ABS Electronics, Inc., et.al.*, \_\_AD 3<sup>rd</sup> \_\_, 2013 NY Slip Op 00490, (2<sup>nd</sup> Dept. Jan. 30, 2013).

#### Complainant's Disability

A disability is defined under the Human Rights Law as “a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.” Human Rights Law § 292.21. This definition has been interpreted to include medically diagnosable impairments and conditions which are merely “diagnosable medical anomalies.” *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 219, 491 N.Y.S.2d 106, 109 (1985).

Complainant suffered from a ruptured rotator cuff and bone spur which required surgery in her right shoulder. Complainant was unable to work during the period of June 28, 2011 to September 18, 2011. The Complainant's physician released her to work starting September 19, 2011, with medical restrictions. The medical restrictions prohibited Complainant from reaching overhead with her right arm from pushing, pulling, climbing, and lifting more than 5 pounds. Complainant's medical condition constitutes a disability under the Human Rights Law.

#### Reasonable Accommodation

Once an employer is aware of an employee's disability, that employer is obligated to provide a reasonable accommodation. *See* Human Rights Law § 296.3(a). Forms of reasonable accommodation include, but are not limited to: “. . . job restructuring; modified work schedules; adjustments to work schedule for treatment or recovery; reassignment to an available position.” 9 N.Y.C.R.R. § 466.11(a)(2).

In determining a reasonable accommodation, employee and employer are obligated to

engage in an individualized interactive process, which includes discussion and exchange of pertinent medical information in order to arrive at a reasonable accommodation which allows a disabled employee to perform the necessary job requirements. *See* 9 N.Y.C.R.R. § 466.11(j)(4). A failure to consider the accommodations is a violation of the Human Rights Law. *See Phillips v. City of New York*, 66 A.D.3d 170 (1st Dept. 2009).

On September 15, 2011, Complainant presented Miller with a medical note allowing her to return to work on September 19, 2011, with medical restrictions. Complainant's medical note was a request for a reasonable accommodation. Respondents argue that Complainant and her physician never clarified whether she could use her left hand to push or pull, to manipulate weights greater than five pounds, or to open and close files and cabinet drawers. Respondents also argue that they understood the prohibition against climbing to mean she could not use stairs. However, despite Miller's testimony that on September 15, 2011 he was concerned with understanding Complainant's ability to do the essential functions of her job, Miller simply wanted an employee with no restrictions.

Respondents are liable for failing to provide Complainant with a reasonable accommodation for her disability. Miller did not engage in an individualized interactive process with Complainant to see if she could perform any of the essential functions of the job. Miller conceded at the public hearing that he did not allow Complainant to return to work because, in his view, the doctor's note contained restrictions that "were so encompassing that it didn't appear that she would be able to do any of her job." The proof established otherwise. There were essential job functions that Complainant could perform with medical restrictions. A significant portion of Complainant's work was sedentary office work she could perform with her left hand. Miller also could have chosen to understand Complainant's medical note as not allowing her to

use a ladder, as opposed to stairs where a right arm overreach may not have been necessary. Instead, Miller chose to make his own interpretations about the meaning of the medical information. The burden was on Miller to ask and clarify. Complainant was interested in providing answers but could not guess Respondents' specific concerns. Miller's September 15, 2011 decision prohibiting Complainant's return to work, and his September 24, 2011 termination of her employment, were violations of the Human Rights Law.

### Mental Anguish Damages

Complainant is entitled to recover compensatory damages caused by Respondents' violation of the Human Rights Law. Human Rights Law § 297.4(c)(iii). The award of compensatory damages may be based solely on a complainant's testimony. Indeed, "[m]ental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct." *New York City Transit Auth. v. N.Y. State Div. of Human Rights (Nash)*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991); *Cullen v. Nassau County Civil Service Commission*, 53 N.Y.2d 452, 442 N.Y.S.2d 470 (1981). The severity, frequency, and duration of the conduct may be considered in fashioning an appropriate award. *New York State Dep't of Corr. Servs. v. N.Y. State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996). In considering an award of compensatory damages for mental anguish, the Division must be especially careful to ensure that the award is reasonably related to the wrongdoing, supported in the record, and comparable to awards for similar injuries. *N.Y. State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991).

Respondents' actions had a markedly negative effect on Complainant.

Complainant testified that she was “devastated” by Respondents’ termination of her employment. Complainant had never felt the impact of losing a job as she worked as a manager for 28 years for Roswell Park Cancer Institute. As a retiree, Complainant relied on Respondents’ income. Complainant had to readjust her household budget, had “to go through” unemployment, had “sleepless nights”, had difficulty “focusing;” and had problems “eating.” Complainant’s emotional reaction to the unlawful dismissal ended when she returned to work on November 18, 2011.

Accordingly, Complainant is entitled to \$4,000 for the mental anguish she suffered for the period of September 19, 2011 to November 18, 2011, because of Respondents’ discriminatory actions. *See Niagara Falls v. New York State Div. of Human Rights (Arya)*, 94 A.D.3d 1442 (4th Dept. 2012) (\$4,000 supported by Complainant’s testimony he was frustrated and angry).

#### Lost Wage Damages

The parties do not dispute that Complainant’s lost wages are \$1,112.17. Respondents prohibited Complainant’s return to work on September 19, 2011 and made an unconditional offer of reinstatement on November 4, 2011. Respondents are liable to Complainant for predetermination interest on the back pay award at a rate of nine percent, per annum, from October 12, 2011, a reasonable intermediate date between September 19, 2011 and November 4, 2011, through the date of the Commissioner’s Final Order. *Aurecchione v. New York State Division of Human Rights*, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002). In addition, Respondents are liable to Complainant for interest on the back pay award at a rate of nine percent, per annum, from the date of the Commissioner’s Final Order until payment is made.

## Civil Fines and Penalties

Human Rights Law § 297 (4)(c)(vi) permits the Division to assess civil fines and penalties, “in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious.”

Human Rights Law § 297 (4)(e) requires that “any civil penalty imposed pursuant to this subdivision shall be separately stated, and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article.”

There are several factors that determine if civil fines and penalties are appropriate: the goal of deterrence; the nature and circumstances of the violation; the degree of respondent’s culpability; any relevant history of respondent’s actions; respondent’s financial resources; other matters as justice may require. *119-121 East 97th Street Corp, et. al., v. New York City Commission on Human Rights, et. al.*, 220 A.D.2d 79; 642 N.Y.S.2d 638 (1st Dept.1996)

A penalty of \$1,000 is appropriate in this matter. *Starr v. Hurlimann, et.al.*, SDHR Case No. 10146477, January 30, 2013, (Commissioner awarded a \$1,000 civil fine); *Jones v. NYS Office of Children & Family Services*, SDHR Case No. 10137251, November 15, 2007, (Commissioner awarded a \$1,000 civil fine);

The goal of deterrence; Respondents’ degree of culpability; and the nature and circumstances of Respondents’ violation warrant a penalty. Respondents cannot engage in a practice of summarily not considering reasonable accommodation requests. However, Respondents’ actions are mitigated by a number of relevant factors. The record shows that Respondents believed they were acting properly at the time they denied Complainant’s return to

employment. Respondents mitigated their wrongdoing when they offered to reinstate Complainant unconditionally, soon after she filed this Division complaint. To this end, Complainant was out of work for a short duration and continues to work for Respondents.

There was no proof that Respondents were adjudged to have committed any previous similar violation of the Human Rights Law or were incapable of paying any penalty.

### **ORDER**

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that Respondents, their agents, representatives, employees, successors, and assigns, shall cease and desist from discriminating against any employee in the terms and conditions of employment; and it is further

ORDERED, that Respondents, their agents, representatives, employees, successors and assigns shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within sixty days of the date of the Commissioner's Final Order, Respondents Belmont Management Co, Inc., and Robert J. Miller, Jr., individually, shall pay to Complainant, Louise M. Lindsey, the sum of \$1,112.17 as damages for economic loss. Interest shall accrue on this award at the rate of nine percent per annum, from October 12, 2011, a reasonable intermediate date between September 19, 2011 and November 4, 2011, until the date payment is actually made by Respondents.
2. Within sixty days of the date of the Commissioner's Final Order, Respondents Belmont Management Co, Inc., and Robert J. Miller, Jr., individually, shall pay to Complainant,

Louise M. Lindsey, the sum of \$4,000 as compensatory damages for mental anguish and humiliation Complainant suffered as a result of Respondents' unlawful discrimination against him. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until payment is actually made by Respondents.

3. The payments shall be made by Respondents Belmont Management Co, Inc., and Robert J. Miller, Jr., individually, shall pay to Complainant, Louise M. Lindsey, in the form of a certified check, made payable to the order of Louise M. Lindsey, and delivered by certified mail, return receipt requested, to her address 987 Fillmore Avenue, Buffalo, New York 14211. A copy of the certified check shall be provided to Caroline Downey, Esq., General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

4. Within sixty days of the date of the Commissioner's Final Order, Belmont Management Co, Inc., and Robert J. Miller, Jr., individually, shall pay to the State of New York the sum of \$1,000 as a civil fine and penalty for their violation of the Human Rights Law. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until payment is actually made by Respondents.

5. The payment of the civil fine and penalty shall be made by Respondents Belmont Management Co, Inc., and Robert J. Miller, Jr., individually, in the form of a certified check, made payable to the order of the State of New York and delivered by certified mail, return receipt requested, to Caroline Downey, Esq., General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

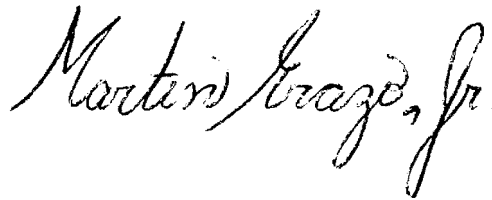
6. Within sixty days of the Final Order, Respondents Belmont Management Co, Inc., and Robert J. Miller, Jr., individually, shall establish a reporting mechanism for all employees in the event of discriminatory behavior or treatment. Respondents shall also provide a training session



in the proper review of reasonable accommodation requests, and in the prevention of unlawful discrimination, in accordance with the Human Rights Law. Training shall be provided to all Respondents' employees in New York State including Robert J. Miller, Jr. A copy of the reporting mechanism and proof of the training session shall be provided to Caroline Downey, Esq., General Counsel of the New York State Division of Human Rights, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

7. Respondents Belmont Management Co, Inc., and Robert J. Miller, Jr., individually, shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained in this Order.

DATED: February 21, 2013  
Buffalo, New York

A handwritten signature in cursive script that reads "Martin Erazo, Jr." The signature is written in black ink and is positioned above the printed name and title.

Martin Erazo, Jr.  
Administrative Law Judge