NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

CYNTHIA T LOWNEY,

Complainant,

v.

NEW YORK STATE DEPARTMENT OF LABOR, UNEMPLOYMENT INSURANCE APPEAL BOARD,

Respondent.

NOTICE OF FINAL ORDER AFTER HEARING

Case No. 5800172

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on March 27, 2007, by Elaine A. Smith, Associate Attorney, Order Preparation Unit, after a hearing held before Jerome P. Vanora, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). Objections to the Alternative Proposed Order were received from Complainant and Respondent.

PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED 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 25th day of April, 2007.

KUMIKI GIBSON
COMMISSIONER

TO:

Complainant
Cynthia T. Lowney
112 Norwood Avenue
Staten Island, NY 10304

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STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS
On the complaint of

CYNTHIA T. LOWNEY,

Complainant,

-against-

STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF LABOR, UNEMPLOYMENT INSURANCE APPEAL BOARD,

Respondent.

ALTERNATIVE PROPOSED ORDER

CASE No: **5800172**

PROCEEDINGS IN THE CASE

On April 24, 1992, Complainant filed a verified complaint, thereafter amended, with the State Division of Human Rights ("Division") charging Respondent with an unlawful discriminatory practice relating to employment in violation of the Human Rights Law of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint, and that probable cause existed to believe that Respondent had engaged in an unlawful discriminatory practice.

After due notice, the case came on for hearing before Jerome P. Vanora, an Administrative Law Judge ("ALJ") of the Division. A public hearing was conducted over 37 days, commencing on April 27, 2004 and concluding on August 10, 2005.

Complainant and Respondent appeared at the hearing. The Division was represented by Gina M. Lopez Summa, General Counsel, by Arlyne Zwyer, Esq., of Counsel. Respondent was represented by Alan Deutsch, Esq.

Respondent filed a post-hearing brief by Stephanie Pardo, Esq., and Complainant filed a post-hearing "statement" in support of her complaint.

On July 3, 2006, ALJ Vanora issued a Recommended Findings of Fact, Decision on Opinion, and Order ("Recommended Order"). Objections to the Recommended Order were filed by Respondent, the Division's General Counsel on behalf of Appeals Unit of the Bureau of Legal Enforcement of the Division, and by Complainant, by her attorney, David Raff, Esq., Raff & Becker, LLP.

This Alternative Proposed Order is issued to correct the damages portion of the Recommended Order, which awarded an amount for back pay not permitted by law. The back pay accrual has been limited to the period of time permitted by law. The Alternative Proposed Order also increases the award for mental pain and suffering to $50,000, and permits Complainant to submit documentary evidence to the Compliance Unit of the Division with regard to any out-of-pocket losses incurred during the period covered by the award of back pay.

FINDINGS OF FACT

1. Complainant, a former ALJ employed by the Respondent, alleged, in her complaint, that she "had gone to [Respondent's] … EEO/Affirmative Action Office to complain of what [she] …viewed as discriminatory behavior by [her] …supervisor;" that the Chief Administrative Law Judge became aware of this on November 18, 1991 and, on the following day, requested her

"immediate termination;" and that she was "discharged in retaliation for having discussed [her] … concerns of what [she] … believed was unlawful behavior by a supervisor." (ALJ's Exhibit I)

2. In their answer to the complaint, Respondent denied Complainant's charge and affirmatively alleged that her termination from employment "was not as a result of any desire … to retaliate against the Complainant for her making … a complaint of gender-based unfair treatment, but rather was made as an appropriate response to the Complainant's deficiencies in work quality, work quantity, and work practices which did not improve following repeated counseling." (ALJ's Exhibit III)

3. Respondent employs "Administrative Law Judges" at the Appeals Section of Respondent Unemployment Insurance Appeal Board to review appeals and prepare proposed decisions to be issued by the Board. "Administrative Law Judge" (or "ALJ") is an unofficial or in-house title; the official Civil Service title is "Unemployment Insurance Referee". In their answer, Respondent affirmatively alleges that, while the Appeal Board exercises supervision and control over its ALJs, "[f]inal actions regarding the hiring and firing of Administrative Law Judges assigned to the Unemployment Insurance Appeal Board are taken by the Department of Labor." (ALJ's Exhibit III; Tr. 1896-98, 2631, 3365, 3377-79, 4097-4101, 4749-50, 4812-22)

4. In early 1991, a backlog of cases at Respondent Appeal Board necessitated the recruitment and hiring, on a provisional basis, of a new class of ALJs. A recruitment notice was issued and, in response, on or about April 23, 1991, Complainant, an attorney with hearing officer/ALJ experience, applied for the position and submitted a resume. (Complainant's Exhibits 1, 47; Tr. 3371-74)

5. Effective May 28, 1991, Respondent hired a class of 13 ALJs, including Complainant, to work at Respondent Appeal Board's Brooklyn office. After a training period of

approximately two weeks, the new ALJs were assigned to Senior ALJs, who would supervise them and "clear" their work for the Board. Able and experienced ALJs (referred to as "clearers") assisted the senior judges in reviewing or "clearing" the work of newly hired ALJs, before submission to Appeal Board members. Frank Graffeo and Allen Brenner were two such "clearers". In fact, they spent most of their time "clearing" the cases of others. (Complainant's Exhibit 2; Tr. 2042, 2340, 4154, 4164-65, 4572)

6. On or about June 14, 1991, Complainant was assigned to Senior ALJ Ronald Moss, one of three senior judges at that time reporting to Chief ALJ Laurance Paver. Paver, in turn, reported to Timothy Coughlin, the Appeal Board's Executive Director (or Executive Secretary). The Executive Director, who reports to the Chairman of the Board, acts as a general manager overseeing the Board's operations, and both contributes to, and implements, Appeal Board policy. (Complainant's Exhibit 92; Tr. 1913-18, 3259-60, 3358, 3747, 4736-38)

7. Moss' team included, in addition to Complainant, three other newly hired ALJs as well as Graffeo and Brenner. Moss specifically assigned Graffeo to work with Complainant on a daily basis, and did not begin to review her work himself until July of 1991. Brenner, who was Moss' original trainer, and is a person to whom Moss goes for advice on cases even today, also cleared Complainant's work. Even after July, 1991, Graffeo and Brenner continued to review her work for Moss. (Complainant's Exhibit 92; Tr. 1943-44, 2153, 2159, 2588-90)

8. Initially, Moss and Complainant had a good supervisor-subordinate relationship. Moss found Complainant's work to be "very good for a person of her experience". He testified that it continued to improve until as late as November of 1991. On August 29, 1991, he wrote a note referring to Complainant as "an excellent worker". In September of 1991, he recommended that she do "timeliness hearings", which was an assignment requiring a level of knowledge of law

and the appeal process other recently hired ALJs did not possess. Graffeo testified that Complainant was very good at such hearings. (Complainant's Exhibit 4; Tr. 47-48, 1152-54, 2530-33, 2555-56, 4218-19)

9. Although she found Moss friendly at first, Complainant, for her part, developed an uneasiness with Moss and the attention he was paying her. She began to prepare a diary at home of incidents involving Moss. Complainant testified that during the summer of 1991, Moss seemed jealous when she was with other men, once referred to ALJ Melvin Meer, who was married, as her new "boyfriend", and criticized her lunches with Graffeo and the amount of time otherwise spent with him. According to Complainant, Moss described Graffeo as "clingy". In addition, Moss made her uncomfortable with conversations of a personal nature and, as an excuse to enter her cubicle, left her numerous notes, including one directing her to say "Hi" to him daily, or be written up. He invited her to his "pie of the month club", whose members were women. Complainant further testified that Moss commented on her hair and clothing. He would also follow her around, and she often found him outside the door to the ladies' room at the office. Complainant did admit that Moss did not pursue her for sex. (Complainant's Exhibits 3, 5; Tr. 57-70, 90, 100-12, 165-66, 285-86)

10. In his testimony, Moss admitted having personal conversations with Complainant but denied following her or hanging around the ladies' room. He denied the Melvin Meer "boyfriend" remark. His "pie of the month club" included men. Moss admitted that he told Complainant she was spending too much time with Graffeo but denied saying Graffeo was "clingy" or that she should not go to lunch with him. Moss further admitted that he made one comment about the length of Complainant's hair, and that he may have commented occasionally on clothing she wore. Moss also admitted that he would leave her notes intended to be

"humorous", including the one directing her to say "Hi" to him each morning. (Complainant's Exhibit 3; Tr. 2160-75, 2232-53, 2535-44, 2564-84)

11. According to Paver, Moss' humor included sarcasm. Paver also testified that Moss knew the law and wanted "excellence" from his subordinates. ALJ James Levin, who worked for Moss for part of the time in question, testified that Moss was not only not easy to work for, but more "brusque" or "disdainful" with females than males. A witness for Complainant, Levin, did testify that he did not observe sex discrimination at the office by Moss or others. Two of Complainant's other witnesses, Graffeo and Brenner, likewise testified that they observed no difference in Moss' treatment of employees on the basis of sex. Brenner did testify that Moss is "argumentative", and others do not like working for him. Senior Judge Margaret O'Brien, a colleague at the time in question, testified that Moss was a "stickler for detail" but did not engage in inappropriate behavior or comments toward women in the office. (Tr. 1147-48, 1276-77, 1802-08, 1815, 1850-55, 1862-63, 3394, 3425-27, 3822, 4168-70, 4649-50)

12. Moss did issue critical memos or notes to subordinates more often than the other senior judges. He issued to Complainant fewer such memoranda than to others (including certain more experienced male judges) because her work was "satisfactory". In fact, Moss found her work to be of "very good" quality. He testified that he didn't believe he "ever had any serious complaints about her work." Moss did testify that Complainant's productivity was generally "less than what was standard". The productivity standard for ALJs at that time was 2.2 cases per day. (Respondent's Exhibits E, F; Tr. 1964-65, 2106-10, 2218-19, 2290, 2310-11, 2556, 2641, 3420-25, 3700-02)

13. Moss further testified that his problem with the Complainant was that when he did find fault, Complainant was "hypersensitive to correction" and confrontational. On September 23,

1991, he met with her and criticized her socializing at the office, and she responded by complaining about physical conditions at the office. According to Moss, after he prepared a memo on September 24, 1991, documenting the meeting between them, their relationship "deteriorated". (Respondent's Exhibit G; Tr. 2221-30, 2254, 2312-13, 2654-57)

14. By the beginning of November of 1991, and because of her problems with Moss, Complainant was seeking the assistance of Respondent's Division of Equal Opportunity Development ("DEOD"). This was the division within Respondent Department of Labor dealing with affirmative action and EEO issues, including training on discrimination issues, and the investigation of internal complaints of discrimination. As set forth in a memorandum for all staff from the Executive Deputy Commissioner, dated July 8, 1991, Respondent Department of Labor officially encouraged all its divisions and offices "to use the [DEOD] … as a resource in furthering equal employment … opportunities." Respondent's Policy Statement on Sexual Harassment, issued a month earlier, gave aggrieved employees phone numbers to contact the EEO office. Complainant met with Tom Green and/or Robert Taylor of DEOD three times before November 18, 1991. According to Complainant, they told her it appeared that she had a discrimination or harassment problem and suggested a change in supervisor. They also encouraged her to file a formal complaint with DEOD but, fearing retaliation as a "provisional" employee, Complainant declined to do so until April of 1992, after it became clear to her that a case was being built for her termination. Complainant further testified credibly that the DEOD told her they had contacted her supervisors, but the latter had refused to cooperate. Paver testified that he never had contact with DEOD concerning Complainant. Moss denied any recall of such contact. It was certainly normal procedure for DEOD, upon receiving a complaint, to contact the supervisor for information. Taylor is still a supervisory-level employee with the

15. On November 7, 1991, Moss issued a formal memo to Complainant repeating in writing oral comments he had made to her regarding Respondent's 15 minute break policy, the format for Appeal Board decisions, and her recent return from lunch approximately 15 minutes late. In a memorandum, dated November 8, 1991, Complainant responded by denying she was late returning from lunch, and by accusing Moss of " 'watching, following or harassing' only [her]…" She noted that his criticisms were about "somewhat inconsequential matters", and raised a number of concerns of her own. Complainant concluded the memorandum by alleging that Moss was treating her differently because she was "an outspoken and assertive female". Moss, in turn, responded by memorandum on November 15, 1991. He denied Complainant's allegation and accused her of being "unprofessional". Chief ALJ Paver was copied on this entire exchange of memoranda. The relationship between Complainant and Moss was now "very unproductive". Moss conceded at the hearing that Complainant did not have a time and attendance problem when he supervised her, and was generally not late returning from lunch. (Complainant's Exhibits 13, 14, 18; Tr. 2255-57, 2311-17, 2613)

16. Chief ALJ Paver testified that he was concerned about Complainant's allegation of gender bias. Paver told his superior, Timothy Coughlin, that he would investigate, and did, in fact, interview Complainant, on November 18, 1991, with Senior ALJ Margaret O'Brien present as an observer. According to Paver and O'Brien, Complainant was not very specific about the nature of her complaints but did indicate that she had gone to the DEOD. Paver took this as a

"threat". At one point, Complainant asked for the DEOD to be present but Paver denied the request. At the hearing, Paver admitted that it's possible that he had been told earlier in the day about another female employee's complaint to the DEOD. At their meeting on November 18, 1991, Paver told Complainant that he had observed her engaging in excessive socializing. She accused him of siding with Moss and, calling him "immature" and "ridiculous", left the meeting despite his warning that such action would be considered insubordination. At Coughlin's request, both Paver and O'Brien submitted written accounts to him of the meeting. Paver's memorandum, dated November 19, 1991, recommended that Complainant's employment be terminated for insubordination. The memo concedes that Moss found her work quality to be "acceptable", even if her case production was "low". Paver further stated that Complainant told him she had been in contact with the DEOD and he "asked if she intended that as a threat". O'Brien's memo noted that Complainant had claimed at the meeting that DEOD had informed her that she had a right to representation, and that Paver had told her she did not. (Complainant's Exhibits 23-24; Tr. 3437-51, 3731-40, 4184-98, 4632-34)

17. According to Complainant, at the meeting on November 18, 1991, Paver yelled and pointed his finger at her while referring to her complaints against Moss. Complainant felt threatened and asked for DEOD representation, as that office had suggested she do. Paver denied the request. Believing that the meeting was getting out of hand, Complainant left to contact the DEOD, despite Paver's warning that he would consider such action insubordination. At DEOD's request, Complainant submitted to Robert Taylor a memorandum the following day setting forth her account of the meeting with Paver. In the memorandum, she noted, inter alia, that when she spoke to Tom Green after leaving Paver' office, he indicated, by way of possible explanation for Paver's apparent hostility, that he had called Paver earlier in the day about a

complaint by another, unnamed female ALJ. At DEOD's suggestion, Complainant sent Paver (with a copy to Executive Director Timothy Coughlin) a somewhat apologetic memorandum, dated November 22, 1991, explaining that she became "unnerved" at their meeting but was willing to continue their discussion. She acknowledged that she was "not entitled to representation under circumstances when one is merely asking questions and doing a fact finding." (Complainant's Exhibits 19, 26; Tr. 194-212, 277-78, 1505-08)

18. Complainant met with Executive Director Timothy Coughlin, on November 25, 1991, to discuss her complaints about Moss. She testified credibly that Coughlin was "very upset that [she]… went to DEOD" and was "airing dirty laundry" and told her that she "should have gone to perhaps him sooner instead of DEOD." Coughlin's own memorandum concerning the meeting dated December 2, 1991, not only details some of her stated grievances against Moss, but also notes her claim that she had gone to "Equal Employment" (DEOD), was told she "could ask to excuse [herself] …" from the Paver meeting, and was further told that "Equal Employment can take care of the insubordination issue and … they are behind [her] …. all the way." (Complainant's Exhibit 27; Tr. 305-13)

19. By memorandum, dated December 9, 1991, Coughlin recommended to Joseph Kearney, the Labor Department's Associate Commissioner for Human Resources Management, that Complainant's employment be terminated. He noted his agreement with Paver that Complainant had been insubordinate in "walking out of the meeting". To explain his recommendation for termination, Coughlin, referring to his own conversation with Complainant, set forth a number of factors ("themes") considered, including the following:

> 7. *When I met with Ms. Lowney, she made a number of comments about the opinions and advice she was receiving from D.E.O.D. If they are true, I have a serious problem in managing my agency in this Department.* If they are not true or if Ms. Lowney has misconstrued otherwise sound advice from D.E.O.D., then I

> think that Ms. Lowney has the serious problem. She comes across as relying on the "comments" of other to defend her actions. This is not my idea of the kind of personal responsibility which is expected of a legal staff reviewing cases and preparing quality decisions.

(Complainant's Exhibit 28) (Emphasis supplied)

20. Kearney testified that, upon reviewing Coughlin's memorandum and documentation, he concluded that Coughlin's recommendation was "hasty" and "premature", as there was no evidence of prior counseling. It was Respondent's practice to afford even provisional employees counseling and an opportunity to improve before their employment was terminated. Kearney admitted that Coughlin's memorandum had not raised any issue as to the quality or quantity of Complainant's work. In responding to Coughlin by memorandum, dated December 23, 1991, Kearney stated that a termination should not be based "almost exclusively as it is, on the incident of November 18", especially since Complainant "did make a written apology of sorts for her conduct and explicitly expressed a willingness to continue the discussion." Kearney's memorandum acknowledged that DEOD may have given Complainant misinformation about her right to representation at the meeting with Paver. Kearney specifically suggested as the next step "a counseling meeting" with Complainant, the substance of which "should be reduced to a written counseling memo to be placed in her personnel file." As Kearney explained at the hearing, Kearney had the final say in the matter, but had removed himself from the situation with his memo to Coughlin, and the direction to thereafter use "normal channels", i.e., the personnel office, which handles the involuntary separation of nonpermanent staff. Kearney testified that he trusted Coughlin to do "whatever he deemed to be necessary". (Complainant's Exhibit 29; Tr. 4748-50, 4770-77, 4812-13, 5002, 5176-77, 5293-94)

21. According to Paver, Coughlin told him that Complainant would be given another chance but would be counseled for the insubordination. Although Paver disagreed, Coughlin

insisted on making himself Complainant's immediate supervisor, explaining that her complaints included Paver and, thus, Paver himself should be removed from the chain of her supervision. Paver testified that he was opposed and told Coughlin that her complaints about him were no problem. Paver had had no problem with Complainant prior to their meeting, and would have assigned her to another supervisor in New York City. In any event, Paver was to retain supervisory authority over Complainant, at least as to non-legal aspects of the job. Coughlin did not supervise any other ALJ, but did supervise a special unit in Albany, where his primary office was located. (This unit was concerned with ongoing federal litigation, and referred to as the "MLC" or "Municipal Labor Committee" unit.) Graffeo testified that it was "unique", even "bizarre" for Coughlin, who was managing the entire agency, to designate himself as Complainant's supervisor. Brenner likewise found it "unusual" and called it "a hatchet job" to build a case for termination. Paver testified that when Joyce Rawlings, another member of the class of May of 1991 assigned to Moss, complained about Moss being "picky", Coughlin (and Chairman Pugh) transferred her to Senior Judge Al Coletti. And Moss himself testified that when ALJ Gorton had a problem with his senior judge, he was assigned to a new senior. Kearney acknowledged in his testimony that if Complainant had been reassigned to a new supervisor in Brooklyn, she would have had the benefit of face-to-face contact, clearly a helpful circumstance. (Tr. 1172-73, 1239, 1277-79, 2874-75, 3474-76, 3484, 3585-87, 3705, 3741-49, 3785-86, 3809-11, 4072-73, 5164-67)

22. On January 3, 1992, Coughlin became Complainant's new immediate supervisor. A memorandum to staff by Paver, dated January 7, 1992, shows Complainant as the only staff person under the Executive Director, with all other ALJs assigned to one of four senior judges. Complainant testified credibly that Coughlin was generally unavailable and would not tell her

when he would be at the Brooklyn office. On the day he became Complainant's supervisor, Coughlin began a counseling session with her, which continued until January 7, 1992. Complainant further testified credibly that Coughlin again criticized her going to DEOD to "air the dirty laundry". He also admitted that he had yet to read any of her work. Coughlin's version of the meeting is set forth in his counseling memorandum to Complainant dated February 6, 1992. After noting that Complainant was counseled for insubordination to Paver and "poor attitude", Coughlin states that, while "[i]t might be appropriate to assign [Complainant] … to another supervisor", he was now her immediate supervisor because, by complaining about Paver, she had limited his options. Complainant was instructed to submit all her cases to Coughlin and was "not to consult with the Chief or with any Senior on any matter related to [her] … work." And yet, the Chief ALJ and the senior judges would retain authority over her and could "direct [her] … to do things." After noting that "it is [his] … duty to help [her] … to be a better employee", Coughlin concluded his memo by warning Complainant that "failure to comply with [his] … expectations can result in the termination of ... employment." (Complainant's Exhibits 30, 32A and B; Tr. 348-57, 481-82)

23. Statistics on appeals completed by Appeal Section ALJs were routinely prepared and maintained, in order to track ALJ productivity. Complainant's case production was tracked from August through December of 1991. However, a "Monthly Productivity" chart for the ALJs, for the six month period from October of 1991 through March of 1992, has no entries for the Complainant for January through March of 1992, which was her last full quarter at the Appeal Board. Moss' only explanation was that Complainant "wasn't at the Board" but under Coughlin's supervision at that time. Paver, likewise, could not explain why Complainant's statistics were not tracked after Coughlin became her supervisor in January of1992. (For other

ALJs for whom no entries appear on the chart, the explanation is that such ALJs were either clearing cases prepared by others or conducting hearings rather than preparing decisions for the Board). (Complainant's Exhibits 71, 72; Respondent's Exhibits K, U, V; Tr. 2481-83, 3801-02, 3964)

24. Complainant never received a formal performance evaluation, although one was due after six months, in December of 1991. Moss testified that he did evaluations for the members of his team, unless they were already at the job rate, but not for Complainant. His explanation was that he never got around to it because of the "confusion and turmoil concerning her status" in December of 1991. Senior Judge O' Brien did evaluations in December of 1991 for all the new ALJs on her team. (Tr. 364-65, 2848-49, 3003-04, 4223-24)

25. By memorandum dated February 13, 1992, Complainant responded to Coughlin's counseling memo of February 6, 1992. She questioned whether she had been insubordinate in leaving the meeting with Paver to contact DEOD, indicated that her repeated request that he investigate her allegations against Moss was ignored, and suggested that she could have been assigned to either Senior Judge Shapiro or Senior Judge Colletti. (Although she is not mentioned in Complainant's memorandum, it would appear that Senior Judge O'Brien was also available for any such reassignment.) She further complained about her isolation from other ALJs and supervisors, especially the prohibition against consulting any local supervisor and the resulting lack of feedback and guidance. During his testimony, Paver admitted that it was unique and not an "optimum" situation that Complainant could only discuss her cases with Coughlin. (Complainant's Exhibit 35; Tr. 3804-09)

26. On February 24, 1992, Complainant received a second formal counseling memorandum from Coughlin. It was dated February 11, 1992, and memorialized a meeting he had with her on

February 10, 1992, during which he warned her that continued poor work performance would mean her discharge from state service. The memorandum stated, inter alia, that Coughlin had reviewed 25 of her cases, of which "only 7 were cleared and submitted for the Board's review", with the remaining 18 cases having "a variety of problems", including "a failure to proofread". Coughlin noted that while an increase in Complainant's daily production, from 2.0391 cases per day in December of 1991 to 2.386 per day in January of 1992, "was an improvement", it was "still not acceptable especially when [he] … considered the poor quality … found in the cases … reviewed." (Complainant's Exhibit 34)

27. Complainant testified credibly that the "hostile work environment" caused her to seek medical help. Complainant's memorandum to Coughlin, dated February 13, 1992, states that their counseling meeting on February 10, 1992, left her sick, and that "severe chest pains" the following day prompted her to see her doctor on February 12, 1992. The doctor recommended a stress test. On February 24, 1992, after receiving Coughlin's counseling memo concerning the February 10, 1992, meeting, Complainant went to see the nurse on duty at work. An outbreak of hives at work resulted in her returning to the nursing station on March 6, 1992. The nurse's notes from these visits were submitted into evidence. An attachment to the March 6, 1992, note shows that stress is a risk factor for hives. (Complainant's Exhibits 35, 61, 66; Tr. 454-58, 503-05, 774-76, 883-85)

28. As for Coughlin's claim in his counseling memo, dated February 11, 1992, of poor work performance on the part of Complainant, both Graffeo and Brenner, the two "clearers" who reviewed her work for Moss, testified credibly that her work was "quite good", even "superior". Brenner, who has reviewed for Respondent the work of many ALJs over the years, added that her work was "better than most" and that other ALJs not as good as Complainant were retained.

With respect to Coughlin's criticisms of Complainant, Brenner further testified that Coughlin "nitpicked" her cases, and could have done the same to anyone else, including Brenner himself. Paver admitted that the mistakes described by Coughlin are made by other ALJs. And, in a memorandum to Respondent's Director of Employee Relations, dated May 1, 1992, Graffeo, who was "one of the more experienced attorneys at the Board", wrote the following:

> Ms. Lowney's decisions that I have seen, contain no more typographical or spelling errors than any other person with her level of experience. The same holds for errors of form. *The errors that are mentioned in the counseling memo dated February 11, 1992 are no more egregious than those I regularly encounter while working as a clearer*. Additionally, it should be noted that as to the formats of decisions, there is currently a wide range of differences of opinion among supervisors and other "clearers". …

(Complainant's Exhibit 85; Tr. 1139, 1269-70, 1287-92, 3817-21) (Emphasis supplied)

29. In a memorandum to Antonio Murphy, Respondent Labor Department's Director of Personnel, dated March 18, 1992, and copied to Kearney, Coughlin again requested the termination of Complainant's provisional appointment. This time the reason given was poor work performance. Complainant's productivity was not mentioned. Coughlin noted the prior counseling sessions, in early January and early February, and his March 14th review of nine of Complainant's cases submitted after the February counseling session. He stated in the memorandum that "[t]wo [cases] had substantial due process problems" and "[o]ne had a quality problem which [Complainant] … had not corrected." The due process problem in each case was a "failure to again offer the opportunity for cross examination" on the recall of a witness. A note attached to the memorandum dated "3-14" makes clear that Coughlin "cleared" the remaining six cases submitted by Complainant and reviewed by him. Coughlin concluded that Complainant "is not a satisfactory employee even after two counseling sessions …". (Respondent's Exhibit DD; Tr. 5182, 5184-87)

30. Kearney testified that Respondent's personnel office (and implicitly Kearney himself) accepted Coughlin's March 18, 1992, recommendation and supporting documentation. In a memorandum to Murphy, dated April 2, 1992, Senior Personnel Administrator J. Wayne Dessingue stated, inter alia, that the Complainant had been "given in depth written counseling memoranda on November 7, 1991, November 15, 1991, and February 6, 1992", but "has not improved". Apart from Coughlin's formal counseling memo of February 6, 1992, the apparent reference is to Moss' memoranda to Complainant, dated November 7 and November 15, 1991, which had been sent to Kearney by Coughlin as attachments to his memorandum of December 9, 1991. Apparently, Kearney did not consider the Moss memos to be evidence of "counseling" as his response to Coughlin and his testimony was that he had found no evidence of prior counseling upon reviewing Coughlin's December of 1991 memorandum and attached documentation. (Complainant's Exhibits 28, 29, 48; Tr. 4770-77, 4826-29, 5189-94, 5228-30)

31. By letter dated April 8, 1992, Murphy informed Complainant that, based on the recommendation of her supervisors, her employment was being terminated as of April 17, 1992. By letter, dated April 16, 1992, he informed her that the termination date had been changed to April 22, 1992. (Complainant's Exhibits 44, 46 A and B)

32. In a letter to Complainant, dated April 20, 1992, Executive Deputy Commissioner of Labor Thomas M. Hines explained the reason for the termination as follows:

> Your separation is governed by Section 75 of the Civil Service Law which affords tenure protection and the assurance of continued employment only to permanently-appointed employees. *In this case, the Chairman of the Board and the Executive Director have provided great detail on their dissatisfaction with the quality of your work and have provided specific examples of such unacceptable performance*. Based on information available at this time, I see no reason to disregard their judgment on that issue.

(Complainant's Exhibit 52) (Emphasis supplied.)

33. Contrary to the reason given by Hines, the Division finds, based on the above findings and all the credible evidence of record, that Complainant's employment was terminated because she had complained about her male supervisor to the DEOD. That office, within Respondent Department of Labor, supported Complainant and encouraged her allegations of sex discrimination, which had been reasonably made and pursued in good faith. The result of such support and encouragement was that her superiors, especially Timothy Coughlin, found DEOD's involvement threatening, with the potential of making management of the operation more difficult. Coughlin was motivated to retaliate against Complainant because she had "upset" him by involving the DEOD in the first place. The proffered reason for termination—poor work quality—was false and fabricated by Coughlin as a pretext to justify Complainant's discharge.

34. At a meeting with Respondent's representatives on August 25, 1992, Complainant sought reinstatement to her former position. On October 1, 1993, the Civil Service Department certified a list of eligible candidates for permanent appointment to the ALJ/unemployment insurance referee position at Respondent Department of Labor. Although Complainant was tied for first place on the list (with a score of 100) and, thus, reachable, she was admittedly not even considered because of the circumstances of her prior separation. In December of 1993, many of the provisional ALJs from the class of May of 1991 were given permanent appointment from the Civil Service list. (Complainant's Exhibits 65, 77; Tr. 347, 3985-86, 3992-95, 4020-21, 4620-23, 5009-14, 5511-28) The last provisional positions were abolished on January 26, 1994. (Respondent's Exhibits BB and TT)

35. Between February and August of 1992, the Complainant filed a number of grievances under the union contract alleging that her employer had violated the contract, including Article 36, the "No discrimination" provision, which provides, in pertinent part, that "[t]he State agrees

to continue its established policy against all forms of illegal discrimination with regard to race, creed, color, national origin, sex, age or handicap, or the proper exercise by an employee of the rights guaranteed by the Public Employees' Fair Employment Act." The grievances were consolidated and taken to arbitration. On March 13, 1996, the arbitrator issued an opinion and award in which he found that "Article 36.2 as applied to the Grievant forbade the State from engaging in 'illegal discrimination with regard to … sex'." He further found that "Grievant was not discharged from her position under circumstances giving rise to an inference of unlawful discrimination." Finally, he found that "by failing, in 1992, to investigate Grievant's allegations against Moss, Coughlin violated Article 36.2", and he directed Respondent Department of Labor to pay $1,200 to the Grievant as compensation. Kearney testified that the arbitrator's award was not appealed and Respondent considered it a final disposition of the matter. (Respondent's Exhibits HH, PP; Tr. 4997-5008, 5367-68)

36. Complainant suffered mental anguish and emotional distress as a direct result of Respondent's unlawful actions. As already found (*see*, Finding No. 27), even before the retaliatory discharge, stress at work, at times accompanied by physical symptoms, prompted the Complainant to seek medical attention. As for the discharge itself, Complainant testified credibly that the job loss itself was "very traumatic", leaving her feeling "nauseous", "very upset" and "frustrated", as she was at the time divorced with two daughters to support. Furthermore, Complainant lost weight, went into "extreme debt", and found that her relationship with her children had been adversely affected. (Tr. 660-61, 681-93)

37. Respondent's unlawful actions caused Complainant severe financial loss. Although Complainant has made extensive efforts to find work, both legal and non-legal, which continue to the present, she has found nothing comparable to the job she lost and is presently unemployed.

Complainant has documented that, over the years, she has sent out numerous resumes and letters. For various periods after her discharge, Complainant has worked for various employers, including the Public Employees Federation ("PEF") (as a field representative), Tiffany's (as a sales associate), the National Broadcasting Company ("NBC") (assistant to Senior Vice President), the New York City Taxi and Limousine Commission (as a per diem ALJ), the New York City Department of Education (and its predecessor, the Board of Education) (as a per diem attorney), and Local 74 of the Service Employees International Union ("SEIU") (as a business representative). Complainant has submitted evidence (including tax returns and information from PEF and the PEF–State contracts) as to what she would have earned as an ALJ if she had been retained, as well as what she actually earned from various jobs since the discharge, and what she received as unemployment insurance benefits. (Complainant's Exhibits 56-58, 78-82, 84, 90, 131-33; Tr. 685, 693-705, 720-24, 812-76, 5885)

38. Had Complainant's employment not been terminated she would have continued in the provisional position until approximately the end of 1993, when permanent appointments were made from the civil service list. She would have earned as an ALJ the following, from the April 22, 1992, date of termination, until December 31, 1993:

4/22/1992-3/31/1993	$43,127
4/1/1993-12/31/1993	$35,706
	$78,833

(Complainant's Exhibits 56, 78)

39. During the period of time from April 22, 1992, to December 31, 1993, Complainant received $14,451 in unemployment insurance benefits, and $17,726 from other employment, for a total of $32,177. (Complainant' Exhibits 57, 58) Therefore, Complainant's loss wages for this period are $46,656.

40. Complainant argued that it is likely that she would have been promoted at some point if her employment had not been terminated. This is unsubstantiated speculation. Likewise, her claim that she lost benefits equal to 28% of salary is of same nature, supported not by competent evidence in the record but only by a conclusory reference to "research" and "cases". (Tr. 696) Actual out-of-pocket losses incurred during the period April 22, 1992, to December 31, 1993, were not documented.

DECISION AND OPINION

The gravamen of the complaint herein is that Respondent terminated Complainant's employment in retaliation for complaints she made against her male supervisor to Respondent's EEO office, the DEOD. The Division sustains the charge of retaliation. At the outset, it is noted that while Respondent denied Complainant's charge and defended on the merits, they raised a defense of res judicata and collateral estoppel based on a prior arbitration award. Respondent's contention that the award is dispositive is without merit.

Res Judicata and Collateral Estoppel

In their post-hearing brief (p. 18), Respondent argues that "[t]he allegations and claims of discrimination alleged by Complainant in the arbitration proceedings are identical to those raised by the Complainant before the State Division of Human Rights." As shown below, this is not the case.

It is true that conclusive effect is to be given the quasi-judicial determinations of an administrative agency rendered pursuant to the agency's adjudicatory authority. *Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 478 N.Y.S.2d 823 (1984). The doctrine applies to arbitration awards rendered pursuant to a collective bargaining agreement. *Simpson v. County of*

Westchester, 5 A.D.3d 780, 773 N.Y.S.2d 881 (2d Dept. 2004); *Metro-North Commuter Railroad v. N.Y. State Div. of Human Rights*, 271 A.D.2d 256, 707 N.Y.S.2d 50 (1st Dept. 2000). However, res judicata and collateral estoppel apply only to preclude claims that either were or could have been litigated in the previous arbitration proceeding, but not one that was not arbitrable. *ICN Pharmaceuticals, Inc. v. Bristol-Myers Co.*, 245 A.D.2d 182, 666 N.Y.S.2d 185 (1st Dept. 1997).

In the instant case, the issue is whether Complainant's termination was retaliation in violation of the Human Rights Law. That was not the issue in the prior arbitration of Complainant's work-related grievances. In that proceeding, the arbitrator, after finding that the State-PEF contract protected Complainant from "illegal discrimination with regard to … sex", concluded that she had not been discharged "under circumstances giving rise to an inference of unlawful discrimination." The arbitrator emphasized that Complainant had not accused Coughlin of gender discrimination. But while the arbitrator found that he had the authority to pass on whether Complainant's termination was because of her sex and, in fact, did address that question, it is clear from his opinion's silence on the matter that he did not purport to pass on the key element of a retaliation claim, i.e., whether there was a causal connection between protected activity engaged in by Complainant and the termination of her employment. Nor could the arbitrator have asserted the authority to decide the question of retaliation inasmuch as the "No discrimination" provision in the contract relied on (Article 36) does not list retaliation (as it does "sex") as a form of discrimination included within the scope of the contract's prohibitions. It is concluded that because the retaliation claim under N.Y. Exec. Law, Art. 15 (Human Rights Law) §296.1(e) is separate and distant from a claim of sex discrimination under Human Rights Law §296.1(a), and could not have been arbitrated as one covered by the applicable union contract,

the Division is not precluded from deciding the issue in this proceeding. *See, ICN Pharmaceuticals, supra*.

In light of the nature of the claim raised by the instant complaint, it is unnecessary to determine whether the arbitrator's prior finding of no sex discrimination in violation of the collective bargaining agreement would preclude the Division from making in this proceeding an affirmative finding of sex discrimination in violation of the Human Rights Law.

Retaliation

The Human Rights Law makes it an unlawful discriminatory practice for "any employer … to discharge, expel or otherwise discriminate against any person because he or she has opposed any practice forbidden under this article [Human Rights Law] or because he or she has filed a complaint, testified or assisted in any proceeding under this article." Human Rights Law §296.1(e). *See also*, Human Rights Law §296.7.

The Complainant need not establish that she was in fact a victim of sex discrimination in violation of Human Rights Law §296.1(a). To establish a prima facie case of retaliation under Human Rights Law §296.1(e), Complainant must show: (1) that she engaged in protected activity; (2) that Respondent was aware that she had engaged in such activity; (3) that she suffered adverse action by the employer based on the activity; and (4) that there is a causal connection between the protected activity and the adverse action taken against her. Once Complainant has met this burden, Respondent must then present legitimate, independent and nondiscriminatory reasons for its action. If this is done, the Complainant must show that the proffered reasons were merely a pretext for unlawful retaliation. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept. 1999).

In the instant case, Complainant has met her burden to establish a prima facie case. She engaged in protected activity when she complained about alleged harassment by her male supervisor in November of 1991. At that time, she went to Respondent's DEOD with her allegations of gender bias, as she was encouraged to do by Respondent's own declared policy against sexual harassment. Complainant also, in a memo to her supervisor (and copied to his supervisor, the Chief ALJ), dated November 8, 1991, put in writing her allegation that she was being harassed because she was an "assertive female". There is no dispute that Complainant met with Chief ALJ Paver on November 18, 1991, with regard to her complaint, and made him aware that she had previously gone to the DEOD to complain. Paver considered the disclosure a threat. It is also clear that one week later, on November 25, 1991, Complainant met with Respondent's Executive Director, Timothy Coughlin, and also made him aware not only that she had complaints against her supervisor, Ronald Moss, but also that she had gone to the DEOD, which was supporting and encouraging her. Such support and encouragement could only serve to reinforce in Complainant a reasonable belief that she was engaging in protected activity. *See*, *Mohawk Finishing Products, Inc. v. State Division of Human Rights*, 57 N.Y.2d 892, 456 N.Y.S.2d 749 (1982). She thus had every reason to believe that her allegations against Moss would be taken seriously and investigated by Coughlin. But, as found by an arbitrator, they were not. Instead, "upset" that Complainant had gone to the DEOD rather than to him initially, Coughlin commenced adverse action against her, including twice recommending the termination of her employment. As a result, Complainant was ultimately discharged on April 22, 1992.

With respect to the final prong of the prima facie case test, a causal connection, between the protected activity Complainant engaged in and the adverse action taken against her, is shown by the temporal proximity between Complainant's meeting with Coughlin on November 25 and

Coughlin's recommendation to terminate her employment just two weeks later on December 9, 1991. *See, Pace, supra* ; *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1178 (2d Cir. 1996). In addition, the required nexus is also shown by Coughlin's own words. Complainant testified credibly that, at their November 25, 1991, meeting, Coughlin was "very upset" that she had gone to the DEOD to air dirty laundry within the Appeal Board he supervised instead of going to him first with her complaints. Coughlin's own memorandum to the file regarding that meeting, dated December 2, 1991, notes Complainant's claim that the DEOD was supporting her, even as to the insubordination issue raised by Paver, to justify an immediate termination. And one week later, on December 9, 1991, Coughlin sent Kearney a recommendation that Complainant be terminated. Significantly, his memo cites, inter alia, his concern about DEOD's involvement and how it might pose for him "a serious problem in managing [his] … agency in this Department." Thus, Coughlin appears to have been motivated to get rid of Complainant. By involving the DEOD, she was, in Coughlin's own words, at least potentially making his management of the Respondent Appeal Board more difficult. As already noted, Chief Judge Paver also took as a threat the DEOD's involvement in the matter. Unfortunately, neither Coughlin nor anyone from the DEOD was called as a witness to testify and possibly clarify the nature and extent of DEOD's involvement with the Complainant.

Kearney's response to Coughlin's recommendation was a memorandum, dated December 23, 1991, which acknowledged that the DEOD may have given Complainant misinformation, but cautioned that a termination should not be based on a single incident as to which an apology of sorts had been provided. Kearney recommended counseling and an official counseling memorandum for the record. Coughlin's response was to make himself Complainant's supervisor and do the counseling himself. In their brief (on p.7), Respondent argues that this was

done to "address the concerns raised by Complainant." Although Coughlin effectively made this claim in his memo to Complainant, dated February 6, 1992, Complainant, in her response, noted that she could have been reassigned from Moss to another senior judge. At the time, Coughlin was not only supervisor of her supervisor's supervisor but also, as the Executive Director of Respondent Appeal Board, the overall manager of the entire agency, with his own office located primarily in Albany, while Complainant was located in Brooklyn. That Coughlin, with all the responsibility he was already carrying, should insist on becoming Complainant's immediate supervisor over the objections of the Chief Judge, who at that time had three senior judges other than Moss to whom Complainant could have been reassigned, does not make sense. After all, Paver was not the one with whom Complainant had had a history of problems. There was really no need to undercut his authority by removing him, to a degree only, from Complainant's chain of command. Under the circumstances, Coughlin's decision on its face was "bizarre", as characterized by Graffeo, an experienced and respected judge at the Appeal Board. It can be explained by Coughlin's retaliatory motivation and need, in light of the Kearney memorandum, to build and document a case for Complainant's termination.

An employer's departure with respect to a particular employee "from its usual employment practices and procedures" supports an inference of discriminatory motive. *Norville v. Staten Island University Hospital*, 196 F.3d 89, 97 (2d Cir. 1999). Apart from the above noted adverse action of removing Complainant from Paver's unit and making her the only ALJ in New York City reporting directly to him, Coughlin subjected her to other unique treatment. Instead of giving Complainant a second chance or fresh start as he claimed, Coughlin effectively isolated her by forbidding her from normal consultation with local supervisors about the work, even if she had difficulty reaching him in Albany. And yet such supervisors retained the authority to

give her direction. Thus, Coughlin was not consistent in removing Paver and his senior judges from Complainant's chain of command. In addition, ALJ productivity was considered important, with ALJ case statistics routinely tracked to determine whether the 2.2 cases per day standard was being met. After Complainant was assigned to Coughlin, however, her statistics were no longer included in the productivity charts prepared and kept for the Appeal Board's ALJs. Respondent's witnesses at the hearing could not explain this departure from the normal practice. Moss' testimony that Complainant "wasn't at the Board" while under Coughlin is not a satisfactory explanation but does underscore her isolation at the time. And Respondent's failure to ever give Complainant a formal performance evaluation (due after six months) was another departure from the usual practice and also served to deprive her of helpful feedback from management.

Clearly, as set forth above, Complainant made out a prima facie case. She engaged in protected activity of which management was aware, and there was a nexus or causal connection between such activity and the adverse action taken against her. Thus, the burden shifts to Respondent to articulate legitimate, non-discriminatory reasons for the adverse action taken. If that is done, Complainant must show that the reasons proffered were merely a pretext for unlawful retaliation. To justify Complainant's termination, Coughlin, after little more than two months of supervision, claimed that Complainant's work was of poor quality and that Complainant was therefore "not a satisfactory employee". The claim is patently not credible and was fabricated as a pretext for terminating Complainant's employment.

At the public hearing of this matter, there were three witnesses familiar with Complainant's work and competent to testify as to it in that it was their job to review it for Respondent—her initial supervisor, Moss, and his two "clearers", Graffeo and Brenner, both

highly experienced judges. All three were positive in their appraisal of Complainant's work. Significantly, even Moss, the target of her complaints and a leading witness for Respondent, testified that Complainant's work was "very good for a person of her experience". Indeed, Moss testified that he never had any serious complaints about her work. He supervised her for over six months—the greater part of Complainant's period of employment—and his appraisal of her work performance is entitled to weight. It is true that Moss and Complainant clashed and their relationship deteriorated. Complainant may well have been hypersensitive to criticism and Moss was clearly, for his part, abrasive and sarcastic, apart from any conduct he engaged in which Complainant did not welcome. In addition, Moss may well have been more brusque with women than men, as Levin testified. In any event, reassignment to another senior judge was the logical solution to the problem, as suggested by the DEOD. But Coughlin, "upset" that Complainant was "airing dirty laundry" within his operation, was motivated to build a case for termination. He therefore made himself Complainant's immediate supervisor and began to document errors in Complainant's work. No doubt, her work contained errors, but those found by Coughlin were typically made by other ALJs as well, as Graffeo pointed out, and as Paver himself conceded. As Brenner put it, Coughlin engaged in "nitpicking" Complainant's cases and could have done so with anyone, including Brenner himself.

As Complainant's final supervisor, Timothy Coughlin himself should have been a witness at the hearing, as the ALJ observed. After all, Coughlin was in charge at Respondent Appeal Board and the one primarily responsible for her discharge. Furthermore, it may be noted that he co-signed Respondent's answer to the complaint. Normally, one would have expected the Respondent to call him as a witness. An unfavorable inference can be drawn from a party's failure to produce available evidence. *See*, Prince, *Richardson on Evidence,* §92 (9th ed.). *See*

also, *Romero v. Martinez*, 280 A.D.2d 58, 721 N.Y.S.2d 17 (1st Dept. 2001), *lv. denied*, 96 N.Y.2d 721 (2001). However, it appears that Coughlin, after leaving the Respondent, retired to Florida and was not shown to be still available to Respondent. Thus, no adverse inference is drawn from Respondent's failure to call him as a witness. In any case, Coughlin's memoranda concerning Complainant from the period in question were preserved and put into evidence. As shown above, they do shed light on his motivation. They also shed light on the question of whether alleged deficiencies in Complainant's work for Coughlin were the reason for her termination, or simply a pretext for such action.

Significantly, Coughlin's own memoranda show that Complainant's work did actually improve during his supervision. After the initial counseling in January of 1992 for insubordination and "poor attitude", Coughlin issued his counseling memorandum based thereon, dated February 6, 1992. The only counseling memorandum to Complainant about the quality of her work was issued a few days later, on February 11, 1992. In that memorandum Coughlin cites a lack of quality in her decisions such that he could clear only seven out of 25 cases reviewed. That amounts to an approval or clearance rate of only 28% of the total reviewed. Little more than a month later, Coughlin, in his memo of March 18, 1992, recommending Complainant's termination, indicated that he had cleared six out of nine cases reviewed. That amounts to an approval or clearance rate of 66.6% —clearly an improvement on the part of Complainant in just one month. As for the three cases not cleared, the focus of his memorandum, it may be argued that, with an expected daily production rate of 2.2 cases, three deficient cases represent little more than an off day—surely, no basis for terminating the employment of an ALJ whose work quality had been satisfactory in the view of her prior supervisor.

Respondent now contends that low productivity as a result of too much socializing on the job was also a factor in Complainant's termination. While it may be conceded that Complainant's productivity (when it was tracked) was generally lacking in terms of the standard imposed, and may well have been affected by her office socializing, it is a fact that Coughlin's February 11, 1992, counseling memorandum to Complainant, referring to her case production, acknowledges an improvement from 2.04 cases per day in December of 1991, to 2.386 cases per day in January of 1992. The improvement put Complainant above the 2.2 cases per day standard but was discounted by Coughlin based on the alleged lack of quality of the work. Coughlin's memorandum several weeks later to the Director of Personnel, dated March 18, 1992, recommending termination of employment makes no mention of Complainant's productivity or the lack thereof. It would seem that productivity was simply not a factor at the time action was taken. Indeed, as previously noted, Complainant's productivity was no longer tracked along with that of all other Appeal Board ALJs after Coughlin became her supervisor. In their brief (at pp. 15-16), Respondent further contends that "Complainant's inability to accept supervision or direction" was "plainly on display in the form of Complainant's behavior during the hearing." Although Complainant's deportment at hearing and willingness to take direction from the ALJ clearly left something to be desired, the fact remains that Coughlin did not cite any such alleged inability to accept direction in his recommendation but made the false claim that Complainant's work was deficient and did not improve in quality after counseling.

Coughlin's recommendation and documentation to the Director of Personnel in March of 1992 were, apparently, given only a cursory review by Respondent's personnel office. In his memo of April 2, 1992, endorsing the recommendation, Senior Personnel Administrator Dessingue cited three "counseling memoranda" given to Complainant. One was Coughlin's

memo of February 6, 1992, concerning insubordination—an issue which did not again arise after Coughlin became Complainant's supervisor. The other two were Moss' memoranda, dated November 7, and November 15, 1991. Neither one was designated a "counseling memorandum" and neither was viewed as such by Kearney, who had received copies in December of 1991, but found no evidence of prior counseling at that time. More importantly, while it was surely appropriate for the personnel office to consider Complainant's performance under Moss, who had been her supervisor for the better part of her employment with Respondent, there was nothing in the two memos, or otherwise from Moss, showing that Complainant's work quality was other than satisfactory. Significantly, there is no mention in Dessingue's memo of the absence from Complainant's record of any formal six month evaluation by Moss, which had been due in December of 1991. There is reason to believe, from Moss' testimony at the hearing, that if such an evaluation had been required of him, it would have been favorable. In any event, it should have been clear to Respondent's personnel office that Complainant, unlike other recently hired employees, never had the benefit of a formal evaluation, either before or after Coughlin became her supervisor. And, contrary to Respondent's claim of "repeated counseling", Complainant received only one counseling memo for allegedly poor work—the one from Coughlin, dated February 11, 1992. It is concluded that the record amply demonstrates that Respondent's justification for its action was pretextual and Complainant's discharge was in fact retaliatory.

Damages

Human Rights Law §297.4(c) provides various remedies to make whole a victim of discrimination. The statutory remedies expressly include reinstatement, back pay, and compensatory damages. As the Court of Appeals has noted, in employment discrimination

cases, "an award of back pay would seem to be a rather normal sanction to be imposed." *Mize v. State Div. of Human Rights*, 33 N.Y.2d 53, 56, 349 N.Y.S.2d 364, 367 (1973). However, a limitation is placed upon the power of the Commissioner to order appointment to a civil service position for which a certified list of eligibles was utilized. The Commissioner may neither order a person be appointed from a list, nor may the Commissioner order that a person be considered, from an expired list, for the next available position. *City of New York v. N.Y. State Div. of Human Rights (Ricks)*, 93 N.Y.2d 768, 698 N.Y.S.2d 594 (1999). Back pay that would have accrued pursuant to such an appointment cannot be awarded. *Id.*; *City of Schenectady v. State Div. of Human Rights*, 37 N.Y.2d 421, 430, 373 N.Y.S.2d 59, 68 (1975). Furthermore, the Commissioner may not, in effect, order the creation of a provisional position to which Complainant can be appointed. Nor, may the provisional position held by Complainant be extended beyond the point in time where a certified list of eligibles existed, and the existing provisional positions were abolished. Civil Service Law requires that all provisional positions be abolished within two month of the creation of a certified list of eligibles for the position. N.Y. Civil Service Law §65.3. The Respondent, in fact, took almost four month to accomplish this.

Therefore, Complainant should be awarded damages in the form of loss wages she would have earned, absent the unlawful retaliation, in the provisional position she held. This period of back pay should begin April 22, 1992, the date of termination, and continue to December 31, 1993, the approximate date that the provisional position would have ended. These damages are within the powers of the Commissioner to award.

The cases cited to the contrary by the General Counsel are distinguishable. In *Peddice v. Callanan* (69 N.Y.2d 812, 513 N.Y.S.2d 958 (1987)), no discrimination or other statutory violation was alleged, only a termination from a provisional position, "in bad faith". The Court

stated, "While other remedies may be available to provisional employees terminated in violation of a constitutional provision or some statute reinstatement and back pay are not available in this case."

In *Crehan v. Thom* (16 A.D.2d 664, 226 N.Y.S.2d 850 (2d Dept. 1962)), under the unique circumstances of that case, it was found that the petitioners should have been transferred, from their positions as provisional Village police officers, to provisional police officer positions with the County (which provisional positions apparently did not otherwise exist). However, their back pay award would be limited to the period of nine months from when they should have been transferred, nine months being the limit on the period of time a provisional employee may hold the provisional position, according to Civil Service Law §65.2. In creating provisional positions retroactively and by judicial fiat, those positions could only be created to exist for nine month. In the Complainant's case, however, the positions actually existed and continued to exist until the end of December 1993.

In *O'Connor v. Frawley* (175 A.D.2d 781, 573 N.Y.S.2d 675 (1st Dept. 1991)), the petitioner was removed from his provisional promotional position by a new supervisor; he filed an Article 78 alleging that his removal from his provisional position of many years was arbitrary and capricious, because of the city's failure to hold an exam for the position for 12 years. The Appellate Division found that the violation of the Civil Service Law requirement, that provisional appointments could last only nine months, was "fully remedied" when the exam was given, and petitioner had the opportunity to take it. Therefore, no award of reinstatement and back pay was warranted. The petitioner's age discrimination claim *had not been considered* by the court below; the Appellate Division found that petitioner had made out a prima facie case of discrimination, and sent the matter back for consideration of the merits of that claim. There is no

indication in this case, that if discrimination was found, the petitioner could not be given lost wages for the period of time of would have held the provisional position, but for the discrimination.

The Court of Appeals has furthermore stated that a public employee in an "at will" position may be ordered reinstated to that position, and awarded the related back pay, in compensation for discriminatory termination. *State Div. of Human Rights (Cottongim) v. County of Onondaga*, 71 N.Y.2d 623, 528 N.Y.S.2d 802 (1988). There is no significant distinction between the "at will" position in *Cottongim*, and the provisional positions at issue here, for so long as those provisional positions in fact continued to exist.

A victim of employment discrimination has a duty to mitigate his or her damages by making diligent efforts to find other suitable employment. *Epstein v. Kalvin-Miller Intern., Inc.*, 139 F.Supp.2d 469 (S.D.N.Y. 2001). Complainant herein has made such efforts, and Respondent has failed to prove otherwise. *See*, *Walter Motor Truck Co. v. State Human Rights Appeal Board*, 72 A.D.2d 635, 421 N.Y.S.2d 131 (3d Dept. 1979). Complainant has documented continuing efforts since the termination of her employment by Respondent to find other employment and has even accepted, on a temporary basis, non-legal employment.

Complainant, a provisional employee at the time of the termination, was on a Civil Service list, issued in October of 1993, for the position of ALJ/Unemployment Insurance Referee at the Respondent Department of Labor. Although she was tied for first place and, thus, clearly reachable on the list for appointment, Complainant was not even considered because of the nature of her prior separation. Thus, the wrong of a retaliatory termination of employment was compounded at the time permanent appointments were made. Absent the retaliatory termination, one would expect that, in the normal course of events, Complainant would have received a

permanent appointment to the position, as had many of her colleagues from the class of May 1991. Because the Civil Service list she was on has expired, the remedy of a permanent appointment cannot be granted. *Ricks, supra*. However, if at any time in future the Complainant's name is reachable on a certified list of eligibles for a position with Respondent, then she must be considered for the position, without the influence of any discrimination or retaliation.

According to Complainant's figures, which were not challenged by Respondent, Complainant's lost earnings for the period April 22, 1992, to December 31, 1993, total $46,656. Thus, Complainant is entitled to back pay in this amount, minus all withholdings and deductions for federal, state and local income taxes. Complainant is entitled to pre-determination interest on the back pay awarded at a rate of nine percent per annum from the reasonable intermediate date of March 1, 1993, until the date of this Order. *Aurecchione v. State Div. of Human Rights,* 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002); CPLR 5001(b), 5004. Complainant is also entitled to interest at a rate of nine percent per annum from the date of this Order until the date payment is made. *State Div. of Human Rights v. Marcus Garvey Nursing Home*, 249 A.D.2d 549 (2d Dept. 1998), CPLR 5002, 5004.

In addition to lost wages, Complainant is entitled to compensatory damages for the mental anguish and humiliation suffered as a result of Respondent's unlawful discriminatory practice. Such an award may be based solely on Complainant's testimony. *Cullen v. Nassau Co. Civil Service Comm.*, 53 N.Y.2d 492, 442 N.Y.S.2d 470 (1981); *Cosmos Forms, Ltd. v. State Div. of Human Rights*, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dept. 1989). Any such testimony must be corroborated by competent medical evidence or by the circumstances of the case. *121-129 Broadway Realty, Inc. v. N.Y. State Div. of Human Rights*, 49 A.D.2d 422, 376 N.Y.S.2d 17

(3d Dept. 1975). *See also*, *AMR Services Corp. v. State Div. of Human Rights*, 11 A.D.3d 609, 783 N.Y.S.2d 61 (2d Dept. 2004). Complainant's claim of mental anguish is credible and corroborated by the facts and circumstances of the case. Stress at work caused Complainant to seek medical attention. She saw her doctor and twice saw the nurse on duty at work. She lost her job at a time when she was divorced with two daughters to support. She lost weight and went into "extreme debt". Her relationship with her children was adversely affected. Furthermore, Complainant's career was irreparably damaged. She has had to accept non-legal employment when available as she has been unable to find long-term legal employment, despite continuing efforts to find such work. Her emotional distress as a result of Respondent's unlawful action is readily apparent from all the circumstances of the case as well as her testimony at hearing.

Considering the severity of Respondent's conduct, the impact it had on Complainant, and the number of years Complainant was impacted, an award of compensatory damages for mental anguish and humiliation to the aggrieved Complainant of $50,000 will effectuate the purposes of the Human Rights Law. Clearly, this award is reasonably related to Respondent's discriminatory conduct and appropriate under the circumstances.

ORDER

Based on the foregoing Findings of Fact, Opinion and Decision, and pursuant to the Human Rights Law, it is

ORDERED that Respondent, their agents, representatives, employees, successors and assigns shall cease and desist from discriminating in any way against any employee because the employee has engaged in any activity protected by the Human Rights Law; and it is further

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

1. If at any current or future time, Complainant's name appears and is reachable on a certified list of eligibles for an ALJ or any other position with Respondent, Respondent shall consider Complainant for the position without the influence of any discrimination or retaliation as prohibited by the Human Rights Law.

2. Within sixty days of the date of this Order, Respondent shall pay to Complainant the sum of $46,656, minus all withholdings and deductions for federal, state and local income taxes, as damages for back pay for the period April 22, 1992, to December 31, 1993. Interest shall accrue on the award at the rate of nine percent per annum from the reasonable intermediate date of March 1, 1993, until the date of this Order. Interest shall continue to accrue on these damages, including the accrued interest, at a rate of nine percent per annum from the date of this Order until paid, unless payment is timely made.

3. Within sixty days of the date of this Order, Respondent shall pay to Complainant the sum of $50,000.00 without any withholdings or deductions, as compensation for the mental anguish she suffered as a result of Respondent's unlawful actions. Interest shall accrue on the award at a rate of nine percent per annum from the date of this Order until paid, unless payment is timely made.

4. Respondent shall make the aforesaid payments in the form of two certified checks made payable to the order of Complainant, Cynthia T. Lowney, and delivered to her attorney, David Raff, Esq., Raff & Becker, LLP, 470 Park Avenue South, 3rd Floor North, New York, NY 10016, by certified mail, return receipt requested.

5. Respondent shall also make payment to Complainant for any actual out-of-pocket losses incurred by Complainant during the period April 22, 1992, to December 31, 1993, caused by loss of benefits due the termination of employment, for which the Complainant provides adequate documentary evidence. Respondent Such documentary evidence, if any, should be provided to the Division's Compliance Unit within the General Counsel's Office of the Division. Interest shall accrue on any such amounts at the rate of nine percent per annum from the date incurred, until the date of this Order. Interest shall continue to accrue on these amounts, including the accrued interest, at a rate of nine percent per annum from the date of this Order until paid, unless payment is timely made.

6. Respondent shall simultaneously furnish written proof of compliance with the directives contained in this Order to the General Counsel of the Division of Human Rights, at her office address of One Fordham Plaza, 4th Floor, Bronx, New York 10458.

7. Respondent shall cooperate with the Division during any investigation into compliance with the directives contained in this Order and make available to the duly authorized representatives of the Division such documents and information as may be necessary for the Division to ascertain whether there is compliance with this Order.

DATED: MAR 27 2007
BRONX, NEW YORK

STATE DIVISION OF HUMAN RIGHTS

ELAINE A. SMITH
Associate Attorney
Order Preparation Unit