



DAVID A. PATERSON
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

RONALD MAHER,

Complainant,

v.

ALLIANCE MORTGAGE BANKING CORP., AND
JOHN MURPHY, INDIVIDUALLY,

Respondents.

NOTICE AND
FINAL ORDER

Case No. 10110840

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 December 7, 2009, by Robert M. Vespoli, 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.

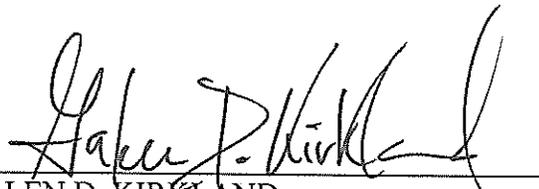
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: **FEB 05 2010**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

RONALD MAHER,

Complainant,

v.

**ALLIANCE MORTGAGE BANKING CORP.,
AND JOHN MURPHY, INDIVIDUALLY,**

Respondents.

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

Case No. **10110840**

SUMMARY

Respondents retaliated against Complainant by constructively terminating his employment because he opposed sexual harassment in the workplace. Accordingly, Complainant is entitled to relief in the form of lost wages in the amount of \$79,827.00 and compensatory damages for mental anguish in the amount of \$50,000.00.

PROCEEDINGS IN THE CASE

On April 10, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent Alliance Mortgage Banking Corp. ("Alliance") 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 Alliance 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 Robert M. Vespoli, an Administrative Law Judge (“ALJ”) of the Division. A preliminary conference was held on October 5, 2007. (Tr. 5) Complainant appeared at the preliminary conference, and the Division was represented by Bellew McManus, Esq. (Tr. 5-6) Alliance appeared at the preliminary conference by its attorney, Joshua Marcus, Esq., of the law firm Franklin, Gringer & Cohen, P.C. (Tr. 6) On January 2, 2008, Marcus sent a letter stating that his firm no longer represented Alliance. (ALJ’s Exh. 6) On January 11, 2008, the Division’s Calendar Unit sent letters to all parties informing them of the designated time and location of the public hearing in this matter scheduled for January 30 and 31, 2008. (ALJ’s Exh. 7) None of these letters were returned to the Calendar Unit, and they are presumed to have been delivered.

A public hearing was held on January 30, 2008. Complainant appeared at the hearing, and the Division was represented by McManus. Alliance did not appear and has defaulted.

On July 25, 2008, the Commissioner amended the instant complaint to include John Murphy as an individual Respondent and returned this matter to the presiding ALJ for further proceedings to allow Murphy to defend against the complaint. (ALJ’s Exh. 8) On February 26, 2009, the Calendar Unit served a Notice of Hearing on each party in this matter designating the time and location of the public hearing scheduled for March 16 and 17, 2009. (ALJ’s Exhibits 9, 10) None of these notices were returned to the Calendar Unit, and they are presumed to have been delivered.

A public hearing session was held on March 16, 2009. Complainant and McManus appeared at the hearing. Murphy did not appear and a default was entered. On June 26, 2009, the Commissioner reopened the hearing record in this matter to allow Murphy an opportunity to appear and defend against the complaint. (ALJ’s Exh. 12)

A public hearing session was held on September 14, 2009. Complainant and Murphy appeared at the hearing. The Division was represented by Sandra S. O'Neil, Esq. Murphy was represented by David M. Namm, Esq. and William Yurus, Esq. (Tr. 240) At the conclusion of the hearing session, the presiding ALJ granted Complainant leave to submit documents in support of Complainant's alleged damages. (Tr. 305-07) Complainant did not submit those documents in a timely fashion. Murphy submitted a timely verified answer which was received into evidence as ALJ's Exhibit 16. (Tr. 240-41, 307, 310; ALJ's Exh. 16)

Murphy submitted a timely post-hearing brief.

FINDINGS OF FACT

1. In or about June 1998, Complainant began working for Alliance, a mortgage banking company, as a branch manager.- (Tr. 15)
2. From 2000 to 2006, Complainant worked under the supervision of Raymond Agoglia, Alliance's senior vice president of sales. (Tr. 18, 23-25; ALJ's Exh. 1)
3. In or about 2002, Complainant's daughter, Jessica Maher, began working part-time for Alliance. In or about 2004, she began working full-time for Alliance. (Tr. 28-30)
4. In or about September 2005, Jessica informed Complainant that Agoglia forcibly touched her and sexually abused her in the workplace. (Tr. 30; ALJ's Exh. 1)
5. On October 3, 2005, Complainant took Jessica to the Nassau County Police Department where she filed a criminal complaint against Agoglia. (Tr. 31; Complainant's Exh. 2) On or about October 14, 2005, detectives came to Alliance's place of business to investigate the complaint. (Tr. 34, 46) Agoglia was arrested on November 15, 2005, and charged with multiple

criminal counts, including forcible touching in violation of New York Penal Law § 130.52.

(Complainant's Exh. 3)

6. On October 17, 2005, Complainant informed Agoglia that he was upset about Agoglia's harassing conduct toward Jessica. (Tr. 146-47)

7. Prior to October 2005, Complainant received a bi-weekly salary check from Alliance in the amount of \$2,500.00. (Tr. 44; Complainant's Exh. 5) However, Complainant's bi-weekly paycheck for the period ending October 28, 2005, showed that Alliance paid Complainant the same amount of money, but changed Complainant's pay status from a salary to a draw against commission. (Complainant's Exhibits 5, 6)

8. In September 2005, prior to Jessica's complaint against Agoglia, Alliance established an office for Complainant in Mastic Beach, New York as a convenience to Complainant because it was near his home. (Tr. 52-53, 55; Complainant's Exh. 10)

9. In or about December 2005, Complainant spoke with Murphy, Alliance's president and sole shareholder. During this conversation, Complainant objected to Agoglia's harassing conduct toward Jessica. Complainant also told Murphy that Respondents' efforts to eliminate the Mastic Beach office and to change the form of Complainant's compensation were done "in retaliation for [Complainant] helping [his] daughter." (Tr. 18, 48-51, 151-53, 243, 250, 261, 286) Murphy then told Complainant that Complainant would not be employed by Alliance much longer. (Tr. 49, 152-53)

10. In or about January 2006, Agoglia told Complainant that he knew Complainant assisted Jessica in filing a discrimination claim against Agoglia and Alliance. (Tr. 38-41, 148-50; Complainant's Exh. 4)

11. On January 31, 2006, Alliance terminated its lease on the Mastic Beach office where Complainant worked. (Tr. 54-57; Complainant's Exhibits 8, 9, 10)

12. The Division does not credit Murphy's assertion that he changed Complainant's pay status from salary to draw as an incentive for Complainant to produce business from the Mastic Beach office. Murphy acknowledged that by changing Complainant's pay status to draw, it would not cost Alliance very much to operate the Mastic Beach office if Complainant did not produce business. (Tr. 250-52)

13. Complainant's earnings statement for the period ending February 17, 2006, shows that Alliance reduced Complainant's bi-weekly earnings to \$1,000.00. (Complainant's Exh. 11) At that time, Complainant had earned \$8,500.00 working for Alliance in 2006. (Complainant's Exh. 11) This was the last paycheck Complainant received from Alliance. (Tr. 75-76, 156; Complainant's Exh. 13)

14. The record establishes that Alliance did not reduce Complainant's earnings until his final paycheck. (Tr. 66; Complainant's Exhibits 6, 11)

15. In or about February 2006, Alliance stopped paying for Complainant's car and cell phone. (Tr. 68-72, 155)

16. On April 5, 2006, Alliance sent a letter to Complainant advising him of his right to elect continuation of his medical benefits under COBRA. (Complainant's Exh. 12) Complainant did not elect to continue medical coverage under COBRA because he could not afford to make the payments. (Tr. 75)

17. Complainant claimed that Respondents owed him additional monies for building projects. However, there are no written agreements describing the relationship, if any, between Complainant and Respondents regarding this work. The record does not establish that

Respondents were a party to these alleged agreements, and is ambiguous regarding the existence, terms and enforceability of these alleged agreements. (Tr. 82, 97-103; Complainant's Exh. 16)

18. Although Alliance did not formally terminate his employment, Complainant concluded that Alliance terminated his employment in or about February 2006 when it stopped paying his wages and business expenses. (Tr. 155)

19. Complainant did not submit his 2005 income tax return despite being requested to do so by the presiding ALJ. (Tr. 102, 166-67)

20. Complainant's tax return for the year 2006 shows that his earned income was \$12,763.00 (i.e., \$10,475.00 + \$2,288.00). (Complainant's Exh. 14)

21. Complainant testified that he "worked full-time trying to find another job" after he left Respondents' employ. (Tr. 114)

22. In July 2006, Complainant applied for a job as an investment representative with Edward Jones, a financial consulting firm. Complainant was not hired for this position due to information provided to Edward Jones by a consumer reporting agency. (Tr. 116; Complainant's Exh. 17) The record shows that Alliance did not timely respond to requests for employment verification from this consumer reporting agency. (Complainant's Exh. 17)

23. On his application for employment with Edward Jones, Complainant reported that he earned \$69,000.00 per year in salary and commissions working for Alliance. (Complainant's Exh. 17) This amount is consistent with Complainant's earnings from Alliance in previous years. (Tr. 44, 139; Complainant's Exhibits 1, 18, 19, 21)

24. In late 2006 and early 2007, Complainant began working for Interstate Home Loan Center. He worked there for about five months and earned approximately \$8,000.00. (Tr. 90-91)

25. In early 2007, Complainant earned approximately \$2,300.00 working for Southern Star Mortgage. (Tr. 91-92)

26. Complainant began working for Lend America as a mortgage planner in June 2007. (Tr. 92, 94-95) Complainant earned approximately \$35,000.00 in almost six months working for Lend America in 2007. (Tr. 93; Complainant's Exh. 15)

27. In October 2005, Complainant began seeing a psychiatrist to address his anger towards Agoglia resulting from Agoglia's harassing conduct toward his daughter. (Tr. 30) Complainant testified that he visited a psychiatrist at that time because he felt that he wanted to harm Agoglia. (Tr. 30-31, 129-30)

28. Complainant testified that he was scared, angry and hurt as a result of Respondents' conduct toward him after he confronted Agoglia in October 2005. (Tr. 159, 161, 234) Complainant stated that he was financially devastated and that his relationship with his family was severely damaged when Respondents stopped paying him. (Tr. 125-28, 132-34, 162, 234) During emotional testimony on this issue, Complainant stated that he felt betrayed and emotionally distraught as a result of Respondents' conduct. (Tr. 159-60, 163, 234-35)

29. Complainant continues to see a psychiatrist, Dr. Richard Pitch, for treatment related to his feelings of anxiety and panic resulting from the circumstances surrounding his separation of employment from Alliance. Complainant, who also has difficulty sleeping, is currently taking the prescription medications Xanax and Ambien to treat his feelings of anxiety, panic and sleeplessness. (Tr. 95, 222-23, 232-36)

OPINION AND DECISION

It is unlawful for an employer to retaliate against an employee for having opposed discriminatory practices or assisted in any proceeding under the Human Rights Law. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.7.

Complainant bears the burden of establishing a prima facie retaliation claim by showing that he engaged in protected activity, Respondents were aware that he participated in this activity, he suffered an adverse employment action, and there is a causal relationship between the protected activity and the adverse action. Once Complainant has met this burden, Respondents have the burden of coming forward with legitimate, nondiscriminatory reasons in support of their actions. Complainant then must show that the reasons presented are a pretext for unlawful retaliation. *Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3d Dept. 1999).

In the instant case, Complainant has established a prima facie case of retaliation. Complainant engaged in protected activity in October 2005 when he informed Agoglia, an executive officer employed by Alliance, of his opposition to Agoglia's sexually harassing conduct toward Jessica, Complainant's daughter and co-worker. Complainant also engaged in protected activity when he informed Murphy, Alliance's president and sole shareholder, of his opposition to Agoglia's conduct toward Jessica and the related changes made by Respondents regarding the Mastic Beach office and the form of Complainant's compensation. The record also establishes that Respondents knew Complainant assisted Jessica in filing a discrimination claim against Agoglia and Alliance.

Next, Complainant suffered an adverse employment action when Respondents constructively terminated his employment in February 2006. An employee is constructively

discharged when an employer deliberately makes working conditions so intolerable that a reasonable person would feel compelled to resign. *Polidori v. Societe Generale Groupe*, 39 A.D.3d 404, 405, 835 N.Y.S.2d 80, 82 (1st Dept. 2007).

The Division does not credit Murphy's assertion that he did not constructively discharge Complainant. Almost immediately after Complainant informed Agoglia of his opposition to Agoglia's sexually harassing conduct toward Jessica, Respondents systematically engaged in a course of conduct designed to force Complainant to resign. First, Respondents immediately changed Complainant's pay status from salary to draw in October 2005. Subsequently, Respondents reduced Complainant's pay and ultimately stopped paying his wages, rent and office expenses.

When Complainant complained to Murphy about Agoglia's sexual harassment and Respondents' subsequent retaliatory conduct, Murphy informed Complainant that Complainant would not be working for Alliance much longer. On April 5, 2006, Alliance sent a letter to Complainant advising him of his right to elect continuation of his medical benefits under COBRA. Under these circumstances, a reasonable person would feel compelled to seek employment elsewhere.

Finally, Complainant established causation by showing that Respondents immediately engaged in conduct designed to constructively discharge Complainant after he engaged in protected activity. *See Gorman-Bakos v. Cornell Coop. Extension of Schenectady*, 252 F.3d 545, 554 (2d Cir. 2001) (reviewing cases that found temporal proximity to indicate a causal connection for time periods ranging from twelve days to eight months).

The Division does not credit Murphy's assertion that he changed Complainant's pay status from salary to draw as an incentive for Complainant to produce business from the Mastic

Beach office. Murphy acknowledged that by changing Complainant's pay status to draw, it would not cost Alliance very much to operate the Mastic Beach office if Complainant did not produce business. Nevertheless, Respondents summarily closed the Mastic Beach office just a few months after it began operating and shortly after Complainant engaged in protected activity. After Alliance terminated its lease on the Mastic Beach office, it reduced Complainant's wages and then stopped paying his wages and business expenses approximately two weeks later.

Complainant has established that Respondents retaliated against him by constructively terminating his employment because he opposed sexual harassment in the workplace. Alliance has defaulted and is liable for its unlawful retaliatory conduct. Murphy, the president and sole shareholder of Alliance, became a party to the retaliation. Therefore, Murphy is individually liable as an employer along with his corporation. *Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 544, 483 N.Y.S.2d 659, 661 (1984); *State Div. of Human Rights v. Koch*, 60 A.D.3d 777, 777-78, 875 N.Y.S.2d 180, 181 (2d Dept. 2009).

The Division is granted broad discretionary powers to redress an injury by way of an award of reasonable compensatory damages. *Imperial Diner, Inc. v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 79, 436 N.Y.S.2d 231, 235 (1980). However, the award must bear a reasonable relationship to the wrongdoing, be supported by substantial evidence and be comparable to awards for similar injuries. *State of New York v. New York State Div. of Human Rights*, 284 A.D.2d 882, 884, 727 N.Y.S.2d 499, 501 (3d Dept. 2001).

Complainant diligently began looking for work after Respondents constructively terminated his employment. He received his final paycheck from Alliance on February 17, 2006. The record establishes that Alliance reduced Complainant's bi-weekly pay from \$2,500.00 to \$1,000.00 in his final paycheck. Complainant is entitled to be compensated for this \$1,500.00

deficiency. He fully mitigated his damages when he found comparable employment working for Lend America as a mortgage planner in June 2007, where he earned approximately \$1,346.00 per week (i.e., \$35,000.00 ÷ 26 weeks). Therefore, Complainant is entitled to back pay damages from February 17, 2006, until June 2007, an approximate 70 week time period.

The record establishes that Complainant earned \$69,000.00 in annual salary and commissions working for Alliance at the time of his constructive discharge. This computes to weekly wages of approximately \$1,327.00 (i.e., \$69,000.00 ÷ 52 weeks). Therefore, Complainant would have earned approximately \$92,890.00 working for Alliance during this 70 week time period (i.e., \$1,327.00 x 70 weeks).

After February 17, 2006, Complainant received approximately \$4,263.00 in earned income for the rest of 2006 (i.e., \$12,763.00 – \$8,500.00). Complainant earned approximately \$10,300.00 in income between January 2007 and June 2007 (i.e., \$8,000.00 + \$2,300.00). These earnings are offset against the amount Complainant would have earned from Alliance during this time period plus the \$1,500.00 deficiency in his final paycheck. Therefore, Complainant is entitled to \$79,827.00 in damages for back pay (i.e., \$92,890.00 + \$1,500.00 - \$4,263.00 - \$10,300.00).

Complainant claimed that Respondents owed him additional monies for building projects pursuant to oral agreements he entered into with certain individuals and entities. However, the record does not establish that Respondents were a party to these alleged agreements and is ambiguous regarding the existence, terms and enforceability of these purported agreements.

Complainant is entitled to recover compensatory damages for mental anguish caused by Respondents' unlawful conduct. Such an award must be reasonably related to the wrongdoing, supported in the record, and comparable to awards for similar injuries. *State Div. of Human*

Rights v. Muia, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991). However, because of the “strong” anti-discrimination policy of the Human Rights Law, a complainant seeking an award for pain and suffering “need not produce the quantum and quality of evidence to prove compensatory damages he would have had to produce under an analogous provision.” *Batavia Lodge No. 196 v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 147, 359 N.Y.S.2d 25, 28 (1974). 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. State Div. of Human Rights*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991).

Complainant was scared, angry and hurt as a result of Respondents’ retaliatory conduct. He was financially devastated, and his relationship with his family was severely damaged when Respondents stopped paying him. Complainant’s emotional testimony on this issue established that he felt betrayed and emotionally distraught as a result of Respondents’ unlawful conduct.

Complainant is currently being treated by a psychiatrist. However, Complainant did not proffer supporting medical records or expert medical testimony into the record. In October 2005, Complainant began visiting a psychiatrist because of his feelings of anger toward Agoglia for sexually abusing his daughter. However, Complainant continues to see his psychiatrist, Dr. Richard Pitch, for treatment related to feelings of anxiety, panic and sleeplessness resulting from Respondents’ unlawful retaliatory conduct. Complainant is currently taking the prescription medications Xanax and Ambien to treat these conditions.

Accordingly, the Division finds that an award of \$50,000.00 for mental anguish is consistent with similar cases and will effectuate the remedial purposes of the Human Rights Law. *State Div. of Human Rights v. ARC XVI Inwood, Inc.*, 17 A.D.3d 239, 796 N.Y.S.2d 238

(1st Dept. 2005); *Greenville Bd. of Fire Comm'rs v. New York State Div. of Human Rights*, 277 A.D.2d 314, 716 N.Y.S.2d 685 (2d Dept. 2000); *Marcus Garvey Nursing Home, Inc. v. New York State Div. of Human Rights*, 209 A.D.2d 619, 619 N.Y.S.2d 106 (2d Dept. 1994); *Gleason v. Callanan Indus., Inc.*, 203 A.D.2d 750, 610 N.Y.S.2d 671 (3d Dept. 1994).

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, and their agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and it is further

ORDERED that Respondents shall take the following action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within sixty (60) days of the date of the Commissioner's Order, Respondents shall pay to Complainant the sum of \$79,827.00 as damages for back pay. Interest shall accrue on the award at the rate of nine percent per annum from October 20, 2006, a reasonable intermediate date, until the date payment is actually made by Respondents.

2. Within sixty (60) days of the date of the Commissioner's Order, Respondents shall pay to Complainant the sum of \$50,000.00 without any withholdings or deductions, as compensatory damages for the mental anguish and humiliation suffered by Complainant as a result of Respondents' unlawful conduct. Interest shall accrue on the award at the rate of nine percent per annum from the date of the Commissioner's Order until payment is actually made by Respondents.

3. The aforesaid payments shall be made by Respondents in the form of two certified checks made payable to the order of Complainant, Ronald Maher, and delivered by certified mail, return receipt requested, to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Respondents shall furnish written proof to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of their compliance with the directives contained within this Order.

4. Within sixty (60) days of the date of the Commissioner's Order, Respondents shall promulgate policies and procedures for the prevention of unlawful discrimination, retaliation and harassment in accordance with the Human Rights Law. These policies and procedures shall include the establishment and formalization of a reporting mechanism for employees in the event of discriminatory, retaliatory and/or harassing behavior or treatment, and shall contain the development and implementation of a training program in the prevention of unlawful discrimination, retaliation and harassment in accordance with the Human Rights Law. Training shall be provided to all employees. A copy of these policies and procedures shall be provided, simultaneously, to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

5. Respondents shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained within this Order.

DATED: December 7, 2009
Hauppauge, New York

A handwritten signature in black ink that reads "Robert M. Vespoli". The signature is written in a cursive style with a large, sweeping initial 'R'.

Robert M. Vespoli
Administrative Law Judge