



DAVID A. PATERSON  
GOVERNOR

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

NORMAN PARNASS,

Complainant,

v.

BEN ROTTENSTEIN ASSOCIATES INC., JACK  
JAFFA,

Respondents.

NOTICE AND  
FINAL ORDER

Case No. 10112745

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 March 31, 2010, by Thomas S. Protano, 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.

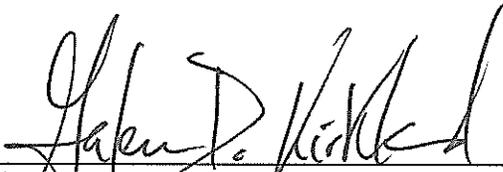
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER").** In accordance with the Division's Rules of Practice, a copy of this Order has been 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: **JUN 07 2010**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER



DAVID A. PATERSON  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

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HUMAN RIGHTS**

on the Complaint of

**NORMAN PARNASS,**

Complainant,

v.

**BEN ROTTENSTEIN ASSOCIATES INC.,  
JACK JAFFA,**

Respondents.

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

Case No. 10112745

**SUMMARY**

Complainant alleged that Respondents harassed him and discriminated against him because of his age in an effort to force him from his job. After Complainant complained about the discriminatory treatment, the harassment continued and Complainant was ultimately fired. Respondents have not provided a credible, legitimate, non-discriminatory reason for their actions. Therefore, Complainant is hereby awarded damages owing to Respondents' discriminatory treatment of Complainant.

**PROCEEDINGS IN THE CASE**

On July 14, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

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

After due notice, the case came on for hearing before Thomas S. Protano, an Administrative Law Judge ("ALJ") of the Division. A Public Hearing session was held on May 11, 2009.

Complainant appeared at the hearing. Complainant was represented by William Keith Watanabe, Esq. Respondents failed to appear even though they were properly served with a Notice of Hearing. (ALJ Exhibit 1) The notice was not returned to the Division by the Postal Service and is, therefore, presumed received. In accordance with Section 465.11(e) of the Division's Rules of Practice, Respondents' default was noted and the hearing proceeded on the complaint.

On July 22, 2009, ALJ Protano issued a recommended order after hearing. Respondents, by their attorney, then asserted that they had not received notice of the hearing and applied to reopen the hearing process. Respondents' application was granted on October 8, 2009 and an additional public hearing session was held on December 7, 2009.

Complainant and Respondents appeared at the hearing on December 7, 2009. Complainant was represented by Mr. Watanabe. Respondents were represented by Jacob Zelmanovitz, Esq.

Permission to file post-hearing briefs was granted. Complainant's attorney filed a timely submission. The Division records show that on January 21, 2010, Respondents' attorney sent an empty envelope to the Division. Although both the Division and Complainant's attorney

informed Respondents' attorney of the empty envelope, Respondents never provided another submission.

### **FINDINGS OF FACT**

1. Complainant is 86 years of age. (Tr. 19) He worked for Respondent Ben Rottenstein Associates, Inc. ("Rottenstein") from 2001 to 2006. (Tr. 19-20)
2. Respondent Jack Jaffa is the owner of Rottenstein. (Tr. 20)
3. Complainant was Rottenstein's Chief Executive Officer ("CEO"). Pursuant to an employment agreement between Complainant and Rottenstein, Complainant's base salary while working for Rottenstein was \$60,000.00 per year, plus 25 percent of Rottenstein's net profits. Complainant was also given the use of an automobile. The agreement did not provide for any salary increases. (Complainant's Exhibit 5; Tr. 33-34, 55)
4. Rottenstein is a real estate business. Rottenstein and Complainant worked with building owners who were either building new buildings or renovating existing buildings in an attempt to get tax exemptions or tax abatements from various city agencies. (Tr. 34-36)
5. As CEO, Complainant was responsible for administration, management and the supervision of seven employees. (Tr. 36)
6. Complainant obtained lists of individuals who had filed for building permits with the City of New York. He then dictated letters, which he had composed, to those individuals in an attempt to secure them as customers for Rottenstein. (Tr. 129-30)
7. Complainant dealt with prospective clients and, after Rottenstein secured their business, Complainant turned the accounts over to employees who handled them. (Tr. 130-31)

8. During Complainant's tenure as CEO, Rottenstein's gross revenues increased nearly every year. In 2001, gross receipts were \$53,011; in 2002 they were \$495,788; in 2003 they were \$761,415; in 2005, they were \$722,159; in 2006, they were \$1,013,875. (Complainant's Exhibits 47-51; Tr. 46, 208-13)

9. Despite the revenue increases, Rottenstein showed a total of \$95,875 in profit for the years 2001-2006. In 2006, Rottenstein's profits were \$28,270.00. (Complainant's Exhibits 47-51)

10. During the period between 2001 and 2006, Jaffa was aware that Rottenstein's gross revenues were increasing. (Tr. 216)

11. In early August of 2005, Jaffa directed Complainant to interview a candidate for a sales position, A.J. Sabo. Although Complainant did not think Sabo was a suitable candidate, Jaffa hired him anyway. Sabo was about 30 years of age. (Tr. 40-41)

12. Sabo's salary upon hire was \$100,000.00. Up to that point Sabo had worked in sales in the health care industry and had no housing or tax abatement experience at all. (Tr. 44-45, 221, 264)

13. Jaffa claims he initially hired Sabo hired strictly as a salesman. (Tr. 223-24) Sabo stated that he had no employment title or position, but "was there in a way to see if there was any growth, if they can grow, if what was going (*sic*) was everybody was doing their job..." (Tr. 238) Sabo later said he was "hired to try and grow the business," and that "maybe I was a salesman in the beginning." (Tr. 260-61)

14. Immediately after Sabo was hired, Complainant took a vacation, from August 22, 2005 until September 3, 2005. Sabo began his employment while Complainant was on vacation. (Tr. 38, 45)

15. When Complainant returned to work, he found that his duties had been taken away from him and given to Sabo. Rottenstein's employees told Complainant that they had received an email informing them that Sabo was in charge of Rottenstein's operations. Complainant was shielded from clients, prevented from developing new business and ignored by Jaffa. (Tr. 47-49)

16. Sabo began using the letters Complainant had composed to solicit business and signing his own name to them, rather than Complainant's. (Tr. 46)

17. Jaffa had no problems with Complainant's performance prior to 2006 and never discussed any performance deficiency with Complainant. (Tr. 188, 217, 254)

18. Jaffa also stated, however, that Complainant failed to properly supervise Daniel Isakov, one of Rottenstein's employees. According to Jaffa, Isakov did not listen to his voicemail messages and did not return clients' phone calls. (Tr. 217-18)

19. Sabo claimed Isakov was "a violent person" who was "scary, very scary." (Tr. 242) According to Sabo, while Complainant was on vacation in August of 2005, Isakov became angry, "punched a couple of holes" in the wall of Sabo's office and ran out. Sabo later stated that Isakov "kicked a hole" in the wall. (Tr. 244-45)

20. Sabo, who was then a salesman for Rottenstein, stated that despite Isakov's behavior, he "still didn't fire him." Sabo did not explain how, as a new salesperson, he had the authority to fire anyone, particularly in Complainant's absence. Sabo stated that he terminated Isakov's employment shortly thereafter when Isakov refused to agree to modify his behavior. (Tr. 245-46)

21. In addition to Isakov, Sabo fired Avi Birnbaum, Yuliya Iglanova and Joshua Hammer. (Tr. 247-49)

22. Isakov contradicted Sabo's testimony by stating in an affidavit that he resigned after Sabo was hired. (Complainant's Exhibit 34)

23. Although Sabo claimed that clients were dissatisfied with Rottenstein because of Complainant, he cited only two customers and then said that "not many people complained, not many people just a couple of people." (Tr. 252-54)

24. The only customer complaints that are in the record are two letters from the same customer, dated November 7, 2005 and November 18, 2005. The customer in this instance complains that he had not received a response to his November 1, 2005 phone call and that he had been told that "the office 'was in a state of confusion.'" The letters and the events they describe took place more than two months after Sabo took over Complainant's duties. (Complainant's Exhibits 44 & 45)

25. During the fall of 2005, Complainant tried to speak to Jaffa about his working conditions at Rottenstein. However, Jaffa refused to speak to Complainant. (Tr. 49)

26. On January 1, 2006, Complainant's salary was cut in half, to \$30,000.00. Jaffa explained to Complainant that this was done because Respondents did not have enough money to pay Complainant. (Complainant's Exhibit 5; Tr. 51)

27. In February of 2006, Complainant's attorney wrote to Jaffa and complained that the treatment of Complainant was discriminatory. No investigation was ever conducted in response to the complaint. (Complainant's Exhibit 38; Tr. 52-53, 220)

28. On or about June 6, 2006, Jaffa gave Complainant a new insurance card ("FS-20") for the car he had been driving. When Complainant received the FS-20, he noticed that the car was insured under the names of Jonah Jaffa and Norman Parnass, even though the listed owner of the car was Ben Rottenstein Associates, Inc. Because the insurance did not coincide with the car

registration, Complainant could not use the car. As a result of that situation, the car sat in Complainant's driveway, unused. (Complainant's Exhibit 32; Tr. 54-55)

29. By the late spring of 2006, Complainant was left with no duties. Respondents used Complainant's office to store supplies, such as cartons of copy paper. (Tr. 56-57)

30. On October 11, 2006, Complainant was informed by letter that his employment had been terminated. The letter did not state a reason for the termination, but demanded the return of the car. In late November of 2006, Respondents took possession of the car. (Complainant's Exhibit 23; Tr. 58-59)

31. Despite the fact that the termination letter is part of the record in the instant case, Jaffa stated at the hearing that "nobody terminated [Complainant's] position, Mr. Parnass left on his own free will..." (Tr. 196) Jaffa later testified that he "didn't make the decision to" terminate Complainant's employment. But, later on, Jaffa stated that he did make the decision to fire Complainant. (Tr. 204)

32. After being let go by Respondents, Complainant sought re-employment. In January of 2007, Complainant found temporary work for about eight months at a salary comparable to his salary with Rottenstein. He has not worked since. (Tr. 67, 157-58, 169-70)

33. As a result of his experience while working for Respondents and thereafter, Complainant felt insulted and experienced anxiety and "terrible stress." He had trouble sleeping and was forced to take time off from work due to hypertension. (Tr. 62, 80-81)

34. Complainant's employment agreement with Respondents provided that any unused sick and/or vacation time could be accumulated and "if unused, will be payable upon termination." Complainant had accumulated 113 and one-half unused sick and vacation days when his

employment was terminated. Complainant was not paid for those days. (Complainant's Exhibits 5 & 42; Tr. 65)

### OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in compensation or in terms, conditions or privileges of employment because of that person's age. It is also a violation of the Human Rights Law to retaliate against any person who "has opposed any practices forbidden under this article." Human Rights Law §§ 296.1(a); 296.7.

In order to prevail, Complainant must first make out a prima facie case of discrimination and/or retaliation. To make out a prima facie case of unlawful discrimination under the Human Rights Law, a complainant must show (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004). In order to establish a prima facie case of retaliation, a complainant must show that (1) he engaged in activity protected by Human Rights Law § 296; (2) the respondent was aware that he participated in the protected activity; (3) he suffered from an adverse employment action; and, (4) there is a causal connection between the protected activity and the adverse action. *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101, 103, 692 N.Y.S.2d 220, 223 (3d Dept. 1999) (citing *Fair v. Guiding Eyes for the Blind*, 742 F Supp 151, 154 (S.D.N.Y. 1990)); *Matter of Town of Lumberland v New York State Div. of Human Rights*, 229 AD2d 631, 636 (3d Dept. 1996).

If a complainant can establish a prima facie case of discrimination or retaliation, the

respondent must then articulate a legitimate, non-discriminatory business reason for its actions. If the respondent does so, then the complainant must show that the proffered reason is a pretext for discrimination. *Pace University v. N.Y. City Comm. on Human Rights*, 85 N.Y.2d 125, 128, 623 N.Y.S.2d 765 (1995)

Complainant in the instant complaint makes out prima facie cases for age discrimination and retaliation. He was in his 80's and clearly qualified for the job he held for several years prior to the hiring of Sabo. His duties were removed from him and given to Sabo, a much younger employee, who had no experience in the relevant field. Thereafter, Complainant's salary was cut. Even though Jaffa explained that he did not have the money to pay Complainant, Jaffa was paying Sabo significantly more than Complainant. When Complainant complained about discrimination, the complaints were ignored and Complainant was eventually fired from his position. He has satisfied all requirements for prima facie cases of age discrimination and retaliation.

Respondents have not offered a legitimate reason for terminating Complainant's employment. Sabo and Jaffa are not worthy of belief. Their testimony was contradictory, evasive and illogical. Jaffa was unable to even state with conviction that Complainant's employment had, indeed, been terminated by Respondents. Sabo's testimony regarding his job title and duties when he was hired clearly contradicts Jaffa's testimony that he was hired strictly for sales as does Sabo's statements that he fired several employees upon his arrival. After examining the content of the testimony and the demeanor of the witnesses at hearing, I have determined that their testimony is not worthy of credit.

Sabo was clearly brought in to replace Complainant and not strictly as a salesman. Sabo was immediately given Complainant's duties and had the power to fire Rottenstein's employees.

Complainant's salary was then cut, his office was used for storage, and he was marginalized and cut out of Rottenstein's operations. When he sought to complain, he was ignored and his employment was eventually terminated. In his place, Respondents retained Sabo, who, by October of 2006, had taken over Complainant's duties and used Complainant's letters to secure new business. Moreover, the record does not bear out Respondents' assertions that Complainant's salary was reduced for financial reasons, given the fact that Sabo had recently been hired for significantly more than Complainant received and Rottenstein's gross revenues had grown significantly under Complainant's direction.

As a result of Respondent's discriminatory act, Complainant is entitled to damages. Pursuant to Human Rights Law § 297.4, the Division has the authority to award back pay and compensatory damages in order to make a victim of discrimination whole. Complainant's salary was cut from \$60,000.00 to \$30,000.00 on January 1, 2006. Thus, he was underpaid for ten and one-half months. He is therefore entitled to \$26,250.00 for that period. After his employment was terminated, Complainant was out of work for one and one-half more months before he found comparable employment. He is entitled to \$7,500.00 for that period. In January of 2007, Complainant found comparable, temporary work and, therefore, his wage claim ceased at that point until September of 2007. From September of 2007 until the present day, Complainant would have earned \$155,000.00 if he had remained in Respondents' employ. He is entitled to that amount in damages for back wages. (See, *Club Swamp Annex v. White*, 167 A.D.2d 400, 561 N.Y.S.2d 609 (2<sup>nd</sup> Dept. 1990), appeal denied, 77 N.Y.2d 809, 575 N.E.2d 398, 571 N.Y.S.2d 912 (1991), which held that a back pay award can be offset by comparable work during the period in which the Complainant was otherwise unemployed.)

Complainant was also entitled to be paid for his unused sick and vacation days upon the

termination of his employment. When his employment was terminated, he had accumulated 113 and one-half days. Based upon a salary of \$60,000.00 per year, he would have earned \$230.77 per day (\$60,000.00 divided by a 260 day work year). Complainant is therefore entitled to \$26,192.40 for unused sick and vacation days.

In accordance with the terms of his employment contract with Respondents, Complainant was also entitled to a percentage of Rottenstein's profits and the use of a car. Respondent made a profit in 2006 of \$28,270. Therefore, Complainant is entitled to \$7,067.50. Complainant has neither shown nor alleged that he suffered any out of pocket costs associated with his inability to use the car Respondents provided and, thus, no damages can be awarded for that.

Complainant is entitled to pre-determination interest on the back wage award at a rate of nine per cent per year, from February 15, 2008, a reasonable intermediate date. He is entitled to interest on the award for annual profits for 2006 from the end of the year, or December 31, 2006. He is entitled to interest on the award for unused sick and vacation days at a rate of nine percent per year from the date Complainant's employment was terminated, October 11, 2006. "An award of interest is often appropriate from the time which a party was deprived of the use of money since without the addition of interest, the aggrieved party is not made whole."

*Aurecchione v. New York State Division of Human Rights*, 98 N.Y.2d 21, 771 N.E.2d 231, 744 N.Y.S.2d 349 (2002). Under New York law, prejudgment interest is calculated on a simple interest basis. See, *Epstein v. Calvin-Miller Intern, Inc.*, 139 F.Supp.2d 469 (S.D.N.Y. 2001), citing, *Marfia v. T.C. Ziraat Bankasi*, 147 F.3d 83, 90 (2d. Cir. 1998); *Donovan v. Diary Farmers of America, Inc.*, 53 F.Supp.2d 194, 197 (N.D.N.Y. 1999).

The Human Rights Law authorizes the "awarding of compensatory damages to the person[s] aggrieved by" Respondent's discriminatory actions, "as in the judgment of the

[D]ivision will effectuate the purposes” of the law. Human Rights Law §297.4(c)(iii); 300 *Gramatan Ave. Assoc. v. State Division of Human Rights*, 45 N.Y.2d 176, 183.

“Mental 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 (Nash)*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991). “An award of damages for mental anguish will be upheld where...it is reasonably related to the wrongdoing, is supported by substantial evidence, and is comparable to awards for similar injuries.” *Kondracke v. Blue*, 277 A.D.2d 953, 716 N.Y.S. 2d 533 (4<sup>th</sup> Dep’t. 2000); *State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991).

As a result of Respondents’ actions, Complainant suffered stress and anxiety; he had trouble sleeping. Complainant is entitled to be compensated for his emotional distress. Accordingly, an award of \$15,000 will effectuate the remedial purposes of the Human Rights Law and is consistent with similar cases. *Bemis v. New York State Div. of Human Rights*, 26 A.D.3d 609 (3d Dep’t. 2006)

### **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 Respondent, and its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and it is further

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

1. Within 60 days of the date of the Commissioner’s Final Order, Respondent shall establish

policies regarding the prevention of unlawful discrimination. These policies shall include an official anti-discrimination policy and a formalized reporting mechanism for employees who believe they have been discriminated against. The policies shall also contain the development and implementation of a training program relating to the prevention of unlawful discrimination in accordance with the Human Rights Law. Training and a copy of the policies shall be provided to all employees, and the policies shall be posted prominently where they may be viewed by employees in the workplace.

2. Within 60 days of the Commissioner's Final Order, Respondents shall pay to Complainant \$15,000 as compensatory damages due to his emotional distress. Payment shall be made in the form of a certified check made payable to Complainant, Norman Parnass, and delivered to his attorney, William Keith Watanabe, Esq., at The Watanabe Law Firm, 444 Madison Avenue, New York, New York, 10022, by certified mail, return receipt requested. Interest on the award shall accrue from the date of the Commissioner's Final Order until the date payment is made at a rate of nine percent per year in accordance with Division practice and C.P.L.R. §5004.

3. Within 60 days of the Commissioner's Final Order, Respondents shall pay to Complainant \$188,750.00 as back wages. Payment shall be made in the form of a certified check made payable to Complainant, Norman Parnass, and delivered to his attorney, William Keith Watanabe, Esq., at The Watanabe Law Firm, 444 Madison Avenue, New York, New York, 10022, by certified mail, return receipt requested. Interest on the award shall accrue from February 15, 2008 until the date payment is made at a rate of nine percent per year in accordance with Division practice and C.P.L.R. §5004.

4. Within 60 days from the Commissioner's Final Order, Respondents shall pay to

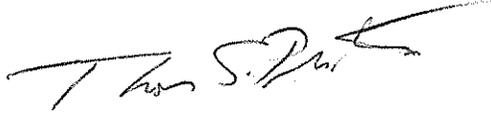
Complainant \$26,192.40 as compensation for Complainant's unused vacation and sick days. Payment shall be made in the form of a certified check made payable to Complainant, Norman Parnass, and delivered to his attorney, William Keith Wattanabe, Esq., at The Wattanabe Law Firm, 444 Madison Avenue, New York, New York, 10022. Interest on the award shall accrue from October 11, 2006 until the date payment is made at a rate of nine percent per year in accordance with Division practice and C.P.L.R. §5004.

5. Within 60 days from the Commissioner's Final Order, Respondents shall pay to Complainant \$7,067.50 as compensation for Complainant's share of Rottenstein's profits for 2006. Payment shall be made in the form of a certified check made payable to Complainant, Norman Parnass, and delivered to his attorney, William Keith Wattanabe, Esq., at The Wattanabe Law Firm, 444 Madison Avenue, New York, New York, 10022. Interest on the award shall accrue from December 31, 2006 until the date payment is made at a rate of nine percent per year in accordance with Division practice and C.P.L.R. §5004.

6. Respondents shall simultaneously furnish written proof of their compliance with all of the directives contained within this Order to Caroline Downey, General Counsel of the Division at her office address at One Fordham Plaza, 4<sup>th</sup> Floor, Bronx, New York, 10458.

7. Respondents shall cooperate with the Division during any investigation into their compliance with the directives contained in this Order.

DATED: March 31, 2010  
Bronx, New York

A handwritten signature in black ink, appearing to read "Thomas S. Protano". The signature is stylized with a large, sweeping initial "T" and a long, horizontal flourish extending to the right.

Thomas S. Protano  
Administrative Law Judge