COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D & SHAHADAT HUSSAIN SUHRAWARDY,
Complainants

v. DOCKET NO. 06-BEM-01199

KELLY HONDA & KELLY AUTOMOTIVE GROUP, INC.,
Respondents

Appearances:
William J. Royal, Esq. for Complainant
Donald L. Conn, Jr., Esq. for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On May 8, 2006, Complainant Shahadat Suhrawardy, a Muslim man of East Indian national origin, filed a complaint with this Commission charging Respondents Kelly Honda and Kelly Automotive Group with discrimination on the basis of his religion, national origin, and retaliation. Specifically, Complainant alleges that Respondents unlawfully discriminated against him on account of his race, religion and national origin, refused to accommodate his religious beliefs, and terminated his employment in retaliation for his protesting their directive to remove his hijab. The Investigating Commissioner issued a split decision, finding probable cause to credit Complainant's allegations of race, religion and national origin discrimination and retaliation, but dismissing his claim of failure to accommodate his religion for lack of probable cause. Attempts to conciliate the matter failed, and the case was certified for

public hearing. A public hearing was held before me on June 21, 2011. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Shahadat Hussain Suhrawardy is a man of East Indian (Bangladeshi) national origin and a Muslim. He has resided in the United States for 25 years and became a U.S. citizen in 2001. Complainant is currently employed as an electrical engineer in Washington, D.C. He has worked in the engineering field for more than 40 years.

2. Respondent Kelly Honda is a car dealership located in Lynn, Massachusetts. It is one of several automobile dealerships owned by Respondent Kelly Automotive Group, Inc. Complainant worked for Kelly Honda from March 15 to March 28, 2005.

3. Thomas Solone is currently general manager of Kelly Nisson in Beverly, Massachusetts. He has been a General Manager for the Kelly Group for 14 years. In 2006, he was the general manager of Respondent Kelly Honda where he oversaw the day to day business of the departments and had the ultimate responsibility for hiring and firing employees. Solone has been in the automobile business for 31 years.

4. Michael Tarasuik is currently general sales manager at Kelly Nissan. From 2005 to 2009 he was general sales manager at Respondent Kelly Honda. Tarasuik has worked for the Kelly Group for 13 years and has held management positions in the car sales business since 1992. Tarasuik hired and fired employees in consultation with Solone.

5. Ghassan Doughman worked at Kelly Honda from 2005 to 2008, where he was one of three sales managers. Doughman directly supervised the sales staff, including Complainant and he reported to Tarasuik. Doughman is a native of Jordan and is a self-described non-practicing Muslim.

6. In 2005, Complainant resided in Massachusetts and had been employed as an engineer for a firm involved with the Big Dig. Complainant was laid off following the completion of that project. He had difficulty obtaining engineering work at the time, and he subsequently became employed as an automobile sales representative, working for one week at a Burlington dealership. He left the Burlington position because of the high pressure atmosphere and obtained employment with Honda of Boston where he worked for approximately 18 months. Complainant testified that he earned $40,000 to $45,000 per year at Honda of Boston and was a very good salesman. In 2006, Complainant resigned from Honda of Boston, as he planned to return to Bangladesh. However, those plans fell through and he remained in Massachusetts.

7. In March 2006, Complainant applied for a sales position at Kelly Honda, a brand new dealership. After interviewing with Tarasuik and Solone, he was hired and began working at Kelly Honda on March 15, 2006. Tarasuik stated that Complainant was a desirable job candidate because of his prior experience selling Hondas and knowledge of the various Honda models.

8. Tarasuik testified that Respondent's dress code required sales representatives to be clean-shaven and to wear light-colored shirts. Leather jackets and sweatshirts with lettering were prohibited. Sales representatives were permitted to wear hats only

outdoors when engaged in snow removal or during inclement weather. [1] Complainant testified that he wore pants, a shirt and tie and a suit coat to work and was never told there was a dress code. I credit his testimony.

9. Complainant occasionally wears a small cap, or hijab, that is slightly larger than a yarmulke. He testified that wearing the hijab is preferred, but not required of his religion and is a common tradition in his culture. He stated that by wearing the hijab, he is emulating the prophet. He wears the hijab more often in the winter because it keeps his head warm. I credit his testimony.

10. Complainant testified that up until March 26, Respondents had no complaints about his performance and he had already made some sales. Complainant testified that, prior to March 26, he wore a hijab at least once during his employment at Kelly Honda, without repercussions.

11. Tarasuik testified that after taking customers for test-drives, Complainant often failed to return cars to the parking lot. On a busy Saturday, Complainant left several cars out, cluttering up the dealership and causing complaints from other sales representatives. Tarasuik stated that when he instructed Complainant to return cars after test-drives, Complainant "barked" at him, as he did whenever Tarasuik asked him to perform a task. Complainant denied that Tarasuik complained to him about not returning cars to the parking lot. I credit Tarasuik's testimony that he may have complained to Complainant about leaving cars out and received some push-back from Complainant. However, I believe that Tarasuik exaggerated the extent of the problem.

12. Sales manager Doughman testified that during Complainant's brief employment, he never observed Complainant break any company rules prior to March

[1] Respondents did not offer a written dress code into evidence.

26. He stated that, like all new employees, Complainant bragged about his skills and recommended changes in Kelly Honda's practices.

13. Solone testified that Complainant once complained vehemently about Kelly Honda shutting its back gate. He also engaged in heated discussions with co-workers. However, Solone stated that Complainant's conduct was typical of new sales persons, who were always "persnickety." Respondents' position statement stated that Complainant was repeatedly insubordinate. When questioned about his position statement, Solone responded that all new employees were insubordinate and were not terminated for this reason during their trial period.

14. Tarasuik testified that Complainant once came to work in a bulky leather jacket, and he told Complainant not to wear the jacket in the showroom. He stated that Complainant never wore the jacket again. Respondents' position statement stated that Complainant wore a leather jacket for his first three days of work. (Ex. C-2) Complainant denied ever wearing a leather jacket in the showroom and testified that he did not even own a leather jacket. I credit Complainant's testimony in this regard, as it is more credible than Tarasuik's testimony.

15. On Sunday, March 26, 2006, Tarasuik arrived at work about 15 minutes before the showroom was to open at 11:30 a.m. Complainant arrived shortly thereafter. He was wearing a hijab. Complainant testified that when Tarasuik told him he could not wear the hijab, he challenged Tarasuik's directive, explaining that it was his religious right to wear the hijab.

16. Tarasuik testified that Complainant was speaking loudly and continued to do so, even after the showroom opened. Tarasuik took him into his office to calm down and discuss the matter, with Doughman as a witness.

17. In his office, Tarasuik told Complainant that sales people were not allowed to wear hats of any kind. He stated that Complainant became angrier and continued to make "Jewish references." Complainant testified that he told Tarasuik that he had originally come to the United States because of its freedoms and reiterated that it was his right to wear the cap. According to Complainant, Tarasuik told him, "I don't give a fuck about your religion," or words to that effect. I credit Complainant's testimony that Tarasuik made this remark. Tarasuik denied making the comment about Complainant's religion. I do not credit his testimony. Complainant testified that Tarasuik fired him and told him to go home.

18. Tarasuik testified that he told Complainant to go home and return the following day to determine what action Respondents would take. Tarasuik's testimony in this regard is inconsistent with Respondents' position statement, signed by Tarasuik and Solone, stating that Tarasuik terminated Complainant's employment on Sunday. I conclude that it is more likely than not that Tarasuik intimated that Complainant's employment was terminated, but directed him to return the following day to discuss the matter with Solone, who had the ultimate authority to hire and fire.

19. Complainant testified that he was very shocked and went home. He did not remember whether anyone else was present when he spoke with Tarasuik and he did not remember whether he returned to the work place or talked to anyone else at Respondents after that day.

20. Doughman testified that on Sunday, March 26, he and Tarasuik were sitting behind the desk in the sales area, when Complainant came in wearing a skull cap. Tarasuik asked him to remove it and Complainant refused, stating it was his religious duty to wear the skull cap. Doughman responded that Complainant had never worn the hat before and that Sunday was not a religious day in the Muslim faith.

21. According to Doughman, Tarasuik calmly explained Respondents' no hat policy. Complainant then launched into a speech about his right as a Muslim to wear the cap. Doughman testified that Tarasuik did not tell Complainant, "Fuck your religion," or any other comment about Complainant's religion. Doughman stated he would have remembered such a remark and as a Muslim he would have been offended. He testified that he was present during the entire conversation. Doughman testified that Tarasuik never exhibited any religious bias against him. I credit Doughman's testimony to the extent that he did not hear Tarasuik make any statements about Complainant's religion. However, I find that Tarasuik made the remark out of earshot of Doughman, consistent with his testimony that part of his argument with Complainant was between the two of them.

22. On Monday, March 27, 2006, General Manager Thomas Solone came to work between 7:30 and 8:00 a.m. Solone testified that Tarasuik arrived shortly thereafter and immediately informed Solone he had argued with Complainant about a hat the day before and had sent Complainant home. While Solone was talking with Tarasuik, Complainant appeared at his office. Complainant and Solone then spoke privately in Solone's office.

23. Solone testified that in their private discussion, Complainant said that Solone did not understand the religious significance of his hat. Complainant also told Solone that he came from a prominent family and repeatedly referred to his family's history. Solone repeatedly countered that the issue was Complainant's violation of the company's no hat policy. Solone testified that the discussion was "getting nowhere," and he terminated Complainant's employment.[2] Complainant testified that he did not recall returning to Kelly Honda the next day in order to meet with Solone and could not say whether it happened or not. I credit Solone's testimony. I find, given that Solone was the ultimate decision-maker with respect to hiring and firing and that he met with Complainant and terminated his employment.

24. Solone testified that in his 14 years with the Kelly Auto Group, he had never before fired a sales representative.

25. Tarasuik testified that he has supervised a diverse group of employees of various religions and nationalities. He testified while employed as a manager at another dealership, he once accommodated the request of Muslim employees by providing them with a private place to pray. I credit his testimony.

26. After his termination on March 27, 2006, Complainant was unemployed for approximately two months. Complainant's salary at Respondents was approximately $40,000 to $45,000 per year.[3] He testified that he was hired by Clair Honda in late May or early June, 2006. [4] While it is impossible to precisely calculate Complainant's lost wages, taking the figure $42,500.00 as an approximate yearly wage, Complainant's

[2] Both Tarasuik and Solone were vague when testifying as to whether they terminated Complainant's employment. Only after questioning from the undersigned, did Solone acknowledge that he terminated Complainant's employment on Monday, March 27.
[3] Complainant did not submit W-2s or pay stubs. His salary is estimated.
[4] Complainant does not seek lost wages subsequent to the time he began working at Clair Honda.

weekly salary would have been $817.30. Assuming he was out of work for eight weeks, Complainant's total lost wages are $6,538.40 ($817.30 x 8 weeks)

27. Complainant testified that after he was terminated he felt very bad. He believed that the Respondent's conduct was an insult to him, to his religion and to his community. He testified that he had never before been treated in such a manner in his 25 years in the United States, a country he first came to because of its freedoms. He testified that he discussed the matter with his wife. He testified that he continued to feel bad about the incident to this day. I credit his testimony.

III. CONCLUSIONS OF LAW

A. Discrimination

M.G.L. c. 151B, s. 4(1) prohibits discrimination in the terms and conditions of employment based on religion, race and national origin. Absent direct evidence of discrimination, Complainant must establish that: (1) he is a member of a protected class; (2) he was performing his position in a satisfactory manner; (3) he suffered an adverse employment action; and (4) similarly-situated, qualified persons not of his protected class were not treated in a like manner in circumstances that give rise to an inference of religion, race and national origin discrimination. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000); Matthews v. Ocean Spray Cranberries, Inc., 326 Mass. 122, 129 (1997).

As a Bengali and a Muslim, Complainant is a member of several protected classes. Complainant performed his job as an automobile salesman in a satisfactory manner, and his employment was terminated. Respondents testified that they employed a multi-cultural workforce. Respondents hired Complainant knowing he was Muslim and

Bangladeshi and his direct supervisor was Muslim. Since the policy of no head covering was neutral and applied to everyone, there was no animus against his religion per se. I conclude that Complainant was not singled out or treated differently on account of his religion and therefore I conclude that Complainant has failed to establish a prima facie case of discrimination based on his religion and national origin.

B. Retaliation

Complainant has alleged that Respondents fired him in retaliation for having sought an accommodation to his religion and insisting on his rights to exercise his religious custom in the workplace. In order to establish a prima facie case of retaliation, Complainant must show that he engaged in a protected activity, that Respondent was aware of the protected activity, that Respondent subjected him to an adverse action, and that a causal connection existed between the protected activity and the adverse action. Mole v. University of Massachusetts, 58 Mass.App.Ct. 29, 41(2003). In the absence of any direct evidence of retaliatory motive, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass 107,116 (2000); Wynn & Wynn v. MCAD, 431 Mass 655, 665-666 (2000); Under M. G. L. c. 151B, s. 4 (4), a plaintiff has engaged in protected activity if "he has opposed any practices forbidden under this chapter or . . . has filed a complaint, testified or assisted in any proceeding under [G. L. c. 151B, s. 5]." While proximity in time is a factor, "…the mere fact that one event followed another is not sufficient to make out a causal link." MacCormack v. Boston Edison Co., 423 Mass. 652, 662 n.11 (1996), citing Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996). The Commission

interprets Chapter 151B's anti-retaliation provisions to apply to protected activity in the form of both formal and informal complaints as long as they challenge practices reasonably believed unlawful under c. 151B. See e.g., Auburg v. American Drug Stores, 21 MDLR 238, 242 (1999) (voicing of informal complaint protected under c. 151B); Proudy v. Trustees of Deerfield Academy, 19 MDLR 83, 88 (1997) (same). Protected activity requires a reasonable and good faith belief that the conduct being challenged could be construed as violating c. 151B. See Clark County School District v. Breeden, 532 U.S. 286 (2001) The EEOC has taken the position that requests for religious accommodation are protected activity. EEOC Compliance Manual, Section 8, "Retaliation," May 20, 1998. (stating that requests for religious accommodation and for disability accommodation are protected activity). See, also, Richardson v. Dougherty County, Ga., 2006 WL 1526064 (11th Cir. June 5, 2006) (district court found request for accommodation one year before adverse employment action was insufficiently close in time, and court of appeals affirmed on alternative grounds); Virts v. Consol. Freightways Corp. of Delaware, 285 F.3d 508 (6th Cir. 2002) (employer conceded prima facie case of retaliation in religious accommodation case where plaintiff's refusal to work without accommodation was deemed a voluntary resignation by management). Ollis v. HearthStone, 495 F.3d 570 (8th Cir. 2007) (employee's complaints about required participation in activities which violate his religious beliefs constituted protected activity under Title VII). Wright v. CompUSA, Inc., 352 F.3d 472, 478 (1st Cir. 2003) (requesting an accommodation is protected activity for purposes of the ADA) Thus, I conclude that Complainant's opposition to his supervisors' directive to remove his head

covering and his insistence that he had a right to religious freedom that included the right to wear the head covering constitutes protected activity.

The fact that Complainant's claim of failure to accommodate his religion was dismissed for lack of probable cause by the Commission does not automatically defeat his retaliation claim. An underlying claim of discrimination need not be successful for a related claim of retaliation to be meritorious. As long as Complainant has a reasonable and good faith belief that he was engaging in protected activity when he protested Respondent's policy of no head covering and was treated adversely by Respondent for doing so, his retaliation claim is unaffected by the outcome of his underlying claim. See Clark County School District. v. Breeden, 532 U.S. 286 (2001) (complainant need only have a reasonable and good faith belief that the conduct he opposes constitutes unlawful discrimination); Trent v. Valley Electric Assn. Inc., 41 F.3d 524, 526 (9th Cir. 1994); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208 (2000). Abramian v. President and Fellows of Harvard College, 432 Mass. 107, 121 (2000) A complainant must demonstrate he, "'reasonably and in good faith believed that the [employer] was engaged in wrongful discrimination and that he acted reasonably in response to his belief." In this case, Complainant complained vigorously to his supervisors that their prohibiting him from wearing a hijab violated his religious rights. I conclude from his actions and from observing his demeanor at the public hearing, that Complainant had a good faith belief that raising his religious rights was protected activity. I also conclude that his actions were a reasonable response to his belief. Complainant's supervisors terminated his employment after he objected to the policy. Therefore, I conclude that the

evidence establishes a direct, causal connection between Complainant's challenging the no hat policy on the grounds of religious freedom and the termination of his employment.

Once Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its actions. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. As stated above, Respondents' articulated reasons for terminating Complainant's employment were his poor performance, his violations of dress code, including wearing a leather jacket, and his protesting management's directive to remove a skull cap while on the sales floor. I find that Respondents have articulated legitimate, non-discriminatory reasons for terminating Complainant's employment.

Once Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass 493, 504 (2001); see, Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass at 504. However, Complainant retains the ultimate burden of proving that Respondent's adverse action was the result of retaliatory animus. Id.; Abramian, 432 Mass at 117. I conclude that Respondents' articulated reasons regarding Complainant's performance were a pretext for unlawful retaliation as Respondents' testimony in this regard was patently contradictory. While Respondents' witnesses pointed to Complainant's failure to return cars to their proper location and to his arguing with managers about policies as performance issues, the same witnesses stated that Complainant was similar to other new

employee in this regard and that such conduct did not merit termination. Thus, I am persuaded that one of Respondents' non-discriminatory reasons for terminating his employment was a pretext for retaliatory termination. Respondents acknowledge that the other reason for terminating Complainant's employment was his vigorous objection to its prohibition of hats, including religious garb, in the showroom. I conclude that Complainant's opposing Respondent's no hat policy on religious grounds, as described above, was the real reason for his termination. Thus I conclude that Respondents' actions were motivated by unlawful retaliatory animus and not by lawful considerations as they contend.

C. Dress Code

In this case, Respondents' articulated dress code as it was enforced against Complainant, excludes all employees from wearing hats. Such a policy which is neutral on its face would compel employees whose sincerely held religious belief requires them to wear a head covering to choose between their religion and their job. Under such circumstances, the rigid enforcement of such a policy would conflict with M.G.L.c.151B4 (1A) which requires employers to reasonably accommodate employees' sincerely held religious beliefs and practices, unless to do so would cause undue hardship. An employer's dress code must be sufficiently flexible to anticipate the need for religious accommodation, as required by the statute.

While the facts in the present case as determined by the investigating commissioner did not support a failure to accommodate claim, Respondents' policy fails to recognize that there is a requirement to accommodate sincerely held religious beliefs and, in some circumstances, to allow employees to wear religious head coverings where

there is no undue hardship. The statute requires Respondent to undergo a case-by-case analysis of each employee to determine whether an exception to the no hats policy is permissible. Thus I conclude that Respondents per se no hat policy violates M.G.L.c.151B 4(1). I further conclude that training of Respondents' supervisory personnel in discrimination, with an emphasis on religious accommodation, is warranted.

IV. REMEDY

Pursuant to M.G.L. c.151B § 5, the Commission is authorized to grant remedies in order to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of his unlawful treatment by Respondents. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

A. Lost Wages

After his termination on March 27, 2006, Complainant was unemployed for approximately two months. Complainant's salary at Respondents was approximately $40,000 to $45,000 per year. He testified that he was hired by Clair Honda in late May or early June, 2006. Taking the figure $42,500.00 as an approximate yearly wage, Complainant's weekly salary would have been $817.30. Assuming he was out of work for eight weeks, Complainant's total lost wages are $6,538.40 ($817.30 x 8 weeks)

B. Emotional Distress

An award of emotional distress "must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the

length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication)." Stonehill College vs. Massachusetts Commission Against Discrimination, et al, 441 Mass. 549, 576 (2004). In addition, Complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. "Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable." Id. at 576.

Based on the credible testimony of Complainant I am persuaded that he suffered some emotional distress as a result of Respondents' unlawful actions. Complainant testified that he felt very bad about his termination. He felt that Respondents' conduct was an insult to him, his religion and his culture, and he testified credibly that he had never experienced such conduct in his 25 years in the United States, and that he continues to feel very bad about it. I conclude that an award of $10,000.00 is sufficient to compensate him for the emotional distress he suffered as a result of Respondents' unlawful conduct.

V. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

1. Respondents immediately cease and desist from engaging in unlawful retaliation.

2. Respondents pay to Complainant the amount of $10,000.00 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue. Payment shall be made within 60 days of receipt of this order.

3. Respondents pay to Complainant the amount of $6,538.40 in damages for back pay with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

4. Respondents conduct two training sessions with an emphasis on the potential discriminatory disparate impact of dress codes on employees' sincerely held religious beliefs.

a. An initial training session must be provided that is at least four (4) hours in length. All supervisors are required to attend. Respondents shall repeat the initial training at least one time for new supervisors who are hired or promoted after the date of the initial training session.

b. Within thirty (30) days of the receipt of this decision, Respondents shall select a trainer to conduct the initial training. The training may be provided by the Commission, may be provided by a trainer who is a graduate of the MCAD's certified "Train the Trainer" course, or may be provided by a trainer whose resume is approved by the Commission's Director of Training. The training shall take place within sixty (60) days of selection of a trainer.

c. At least thirty (30) days prior to the training date, Respondents must submit a draft training agenda to the Commission's Director of Training for approval and provide notice of the date and time of the training. If the Commission decides to send a representative to observe the training, Respondents will allow the Commission representative unfettered access.

d. Within thirty (30) days of completion of the training, Respondents must submit to the Commission's Director of Training the following information: the training topic(s), the names of persons required to attend the training, the names of persons who attended the training, and the date and time of the training.

e. For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.

Payment shall be made within 60 days of receipt of this decision.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this the 8th day of November, 2011

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JUDITH E. KAPLAN
Hearing Officer