CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

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In the Matter of

Complaint No. M-H-G-10-1023579

COMMISSION ON HUMAN RIGHTS
ex. rel. FRANK HOWE,

OATH Index No. 2602/14

Petitioner,

-against-

BEST APARTMENTS, INC. and JULIAN CALENDAR,

Respondents.

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DECISION AND ORDER

Complainant Frank Howe initiated this housing discrimination action with the Law Enforcement Bureau of the New York City Commission on Human Rights (the "Bureau") against Respondents Best Apartments, Inc. ("Best Apartments") and Julian Calendar ("Calendar") (collectively, "Respondents"). On June 15, 2010, the Bureau filed a complaint alleging violations of Sections 8-107(5)(a) and (c) of the Administrative Code of the City of New York ("New York City Human Rights Law" or "NYCHRL"). (Bureau Exhibit ("Ex.") 2 ("Complaint").) On December 22, 2011, eighteen months after the Bureau filed the Complaint, Respondent Best Apartments filed a Verified Answer pursuant to 47 RCNY 1-14, denying most of the allegations in the Complaint. (Bureau Ex. 3 ("Answer").) Respondent Calendar did not file an answer.

After issuing a Probable Cause Determination pursuant to Section 8-116 of the NYCHRL against both Respondents, the Bureau referred the matter to the Office of Administrative Trials and Hearings ("OATH") for trial and a recommendation ("Report and Recommendation" or "R&R"). The first pre-trial conference was held on July 16, 2014 before Administrative Law

Judge Faye Lewis. (R&R at 2.) Respondent Best Apartments appeared and requested an adjournment of the conference. (*Id.*) Judge Lewis granted Best Apartments' request and adjourned the conference until September 11, 2014. (*Id.*)

Respondents failed to appear at the September 11, 2014 conference with Judge Lewis or provide any explanation for their non-appearance. (*Id.*) Despite Respondent Best Apartments' failure to attend the conference rescheduled at their request, Judge Lewis consulted with a Best Apartments' representative via email and set the trial date for December 9, 2014. (*Id.*) On October 15, 2014, Respondent Best Apartments' representative requested that the trial be adjourned based upon his need to obtain counsel. (*Id.* at 2-3.) Judge Lewis denied that request because Respondent Best Apartments' representative failed to demonstrate why he could not obtain counsel during the two month period prior to trial. (*Id.* at 3.) Judge Lewis "strongly urge[d]" that Respondent Best Apartments appear at trial, and warned that the entity could be held in default if it failed to appear. (*Id.*) Again, despite Judge Lewis's efforts to accommodate Best Apartments and her warnings of default for failure to appear, neither Respondent appeared at trial. (*Id.*) A trial was held by the Honorable Tynia D. Richard, Administrative Law Judge, on December 9, 2014. (*Id.*)

On February 18, 2015, Judge Richard issued a Report and Recommendation (1) finding Respondents in default; 2) finding Respondents violated Sections 8-107(5)(a) and (c) of the NYCHRL by refusing Mr. Howe's prospective tenancy because he sought to use a Section 8 voucher; and (3) recommending (i) an award of $7,500 to Mr. Howe for emotional distress damages, and (ii) the imposition of $25,000 in civil penalties to be paid to the general fund of the City of New York. (*Id.* at 10.)

The parties had the right to submit written comments and objections to the Report and Recommendation within twenty days after the Commission commenced consideration of the Report and Recommendation, unless good cause for additional time was shown. 47 RCNY § 1-76. The Bureau submitted written comments on March 20, 2015, requesting that the Commission adopt the Report and Recommendation, and that the Commission, in addition to imposing the damages and penalties recommended, also require Respondents to undergo anti-discrimination training. (Bureau Comments to the Report and Recommendation at 2, 4.) Neither Respondent submitted comments.

The Commission has reviewed Judge Richard's Report and Recommendation, the trial transcript, the trial exhibits, and the Bureau's comments to the Report and Recommendation. For the reasons set forth in this Decision and Order, the Commission adopts the Report and Recommendation, except as indicated below.

I. STANDARD OF REVIEW

In reviewing a Report and Recommendation, the Commission may accept, reject, or modify, in whole or in part, the findings or recommendations made by the administrative law judge. Though the findings of an administrative law judge may be helpful to the Commission in assessing the weight of the evidence, the Commission is ultimately responsible for making its own determinations as to the credibility of witnesses, the weight of the evidence, and other assessments to be made by a factfinder. *Cardenas v. Automatic Meter Reading Corp.*, OATH 1240/13, Dec. & Ord., 2015 WL 7260567, at *2 (Oct. 28, 2015); *Comm'n on Human Rights v. Crazy Asylum LLC*, OATH 2262/13, 2263/13, 2264/13, Dec. & Ord., 2015 WL 7260568, at *3 (Oct. 28, 2015); *Comm'n on Human Rights v. CU29 Copper Rest. & Bar*, OATH 647/15, Dec. & Ord., 2015 WL 726057, at *2 (Oct. 28, 2015).

The Commission is also tasked with the responsibility of interpreting the NYCHRL and ensuring the law is correctly applied to the facts. *Politis v. Marine Terrace Holdings, LLC*, OATH 11-1673/74, Dec. & Ord., 2012 WL 1657556, at *8 (Apr. 24, 2012) (Commission rejected R&R, finding that the Administrative Law Judge did not properly apply NYCHRL); *Cardenas*, 2015 WL 7260567, at *2; *Crazy Asylum*, 2015 WL 7260568, at *3; *CU29 Copper Rest. & Bar*, 2015 WL 726057, at *2. Therefore, the Commission has the final authority to determine "whether there are sufficient facts in the record to support the Administrative Law Judge's decision, and whether the Administrative Law Judge correctly applied the [New York City Human Rights Law] to the facts." *Comm'n on Human Rights v. Ancient Order of Hibernians*, Comp. No. MPA-0362, Dec. & Ord., 1992 WL 814982, at *1 (Oct. 27, 1992); *see Orlic v. Gatling*, 844 N.Y.S.2d 366, 368 (App. Div. 2007) ("[I]t is the Commission, not the Administrative Law Judge, that bears responsibility for rendering the ultimate factual determinations"); *see also Cutri v. Comm'n on Human Rights*, 977 N.Y.S.2d 909, 910 (Sup. Ct. 2014) (Commission not required to adopt the Administrative Law Judge's recommendation).

When parties submit comments, replies, or objections to a Report and Recommendation pursuant to 47 RCNY § 1-76, the Commission must review the comments, replies, or objections in the context of the Commission's other factual determinations and conclusions of law. *Cardenas*, 2015 WL 7260567, at *2. Accordingly, the Commission reviews the Report and Recommendation and the parties' comments and objections *de novo* as to findings of fact and conclusions of law. *CU29 Copper Rest. & Bar*, 2015 WL 726057, at *2.

II. TRIAL TESTIMONY

Knowledge of the facts as described in Judge Richard's Report and Recommendation is assumed for purposes of this Decision and Order. Because Respondents chose not to appear at

trial, Judge Richard could only consider the testimony and documentary evidence of the Bureau's witness, and the Commission's review is limited to the trial record. Therefore, the facts described below are based on the Bureau's presentation of their case.

Mr. Howe testified that he moved from Massachusetts to New York City in July 2010 and had a Section 8[1] transfer voucher from Massachusetts that he could use to rent an apartment in New York. (Trial Transcript ("Tr.") at 10-11.) The voucher was valid from April 1, 2010 until July 31, 2010. (*Id.* at 11-12.) If Mr. Howe was unable to secure an apartment by the end of July, the voucher would expire and he would have to reapply to the program. (*Id.* at 12.) After receiving the voucher in April, Mr. Howe took several trips from Massachusetts to New York to look for apartments, checked rental websites multiple times a day, and searched newspaper ads. (*Id.*) Mr. Howe testified that he was looking for a one-bedroom apartment for under $1,200 and identified several neighborhoods in Manhattan, Brooklyn, and Queens, before focusing his search in Washington Heights and west of Broadway in Inwood, which he had heard was a nicer area than east of Broadway. (*Id.* at 12-13.)

Mr. Howe testified that on April 18, 2010, he saw an advertisement on Craigslist from Respondent Best Apartments for an apartment in Inwood that was within his price range. (*Id.* at 13; Bureau Ex. 4.) The advertisement identified a one-bedroom apartment in Inwood for $1,000

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[1] Created by the Housing and Community Development Act of 1978, the Housing Choice Voucher program, also known as "Section 8," provides assistance to eligible low- and moderate-income families to rent housing in the private market. Eligibility for this program is based on a family's gross annual income and family size. The program works as a rental subsidy that allows families to pay a reasonable amount of their income toward their rent. Eligible families receive a voucher to begin searching for housing. Generally, families will pay no more than 40 percent of their adjusted monthly income toward their rent share. In New York City, the New York City Housing Authority pays the remaining amount to the owner on the family's behalf. Approximately 90,000 Section 8 vouchers and over 29,000 housing providers currently participate in the program in New York City. *See* New York City Housing Authority, "About Section 8," *available at* http://www1.nyc.gov/site/nycha/section-8/about-section-8.page (last accessed Feb. 29, 2016).

per month, listed Respondent Calendar as the contact person, and included Calendar's phone number and email address. (Tr. at 14; Bureau Ex. 4.) The email address had a "bestaptsnyc.com" domain. (*Id.*) Mr. Howe contacted Respondent Calendar at the email address listed on the advertisement to inquire about the apartment. (Tr. at 14; Bureau Ex. 5.) Respondent Calendar called Mr. Howe that day, identified himself as Julian Calendar from Best Apartments, and informed Mr. Howe that the apartment in the advertisement was in Marble Hill, not Inwood, but that he had other apartments available in Inwood and would take a look at his listings and give him a call back. (Tr. at 16-17.) Respondent Calendar called Mr. Howe back a few minutes later and stated that he had an apartment to show him in Inwood on Seaman Avenue, a block or two west of Broadway, which Respondent Calendar described very positively and which appeared to meet all of Mr. Howe's needs. (*Id.* at 17.) Mr. Howe arranged to meet Respondent Calendar the following Monday. (*Id.*) At this point in the conversation, Mr. Howe mentioned that he had a Section 8 voucher. (*Id.* at 18.) According to Mr. Howe's testimony, Respondent Calendar told him that "it's a problem," that "no landlords are going to take it," "that [he] should tell people right away about the voucher," "that [Mr. Howe] was wasting his time," and that "[he] wouldn't show [Mr. Howe] any apartments." (*Id.* at 18-19.) Mr. Howe told Respondent Calendar that "legally they can't discriminate based on a Section 8 voucher." (*Id.* at 19.) Respondent Calendar responded that "no landlords [Best Apartments] work with would take [the Section 8 voucher]." (*Id.*) Mr. Howe testified that Respondent Calendar "ended the phone call," after making that statement. (*Id.*)

Mr. Howe testified that he continued to look for an apartment for about six weeks and faced difficulties finding a landlord who would accept his Section 8 voucher. (*Id.*) Mr. Howe eventually found an apartment after approximately three months, two weeks before the voucher

was set to expire, but explained that the apartment was riddled with problems, including water leaks, a lack of heat and hot water, and vermin. (*Id.* at 25-26.) Mr. Howe testified that he was "pretty upset" that Respondents never showed him the Inwood apartment they had offered to show him before he told them about his Section 8 voucher. (*Id.* at 19.)

The Bureau entered into evidence an image of Respondent Best Apartments' website taken around the time of the incident, which stated that the business has "over 5000 apartments available for rent and specialize[s] in all of Manhattan." (*Id.* at 23; Bureau Ex. 5.) The image indicates that Respondent Best Apartments has two offices in Manhattan, a downtown office as well as an uptown office. (Bureau Ex. 5.)

III. DISCUSSION

A. Legal Standard

The NYCHRL "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed." N.Y.C. Admin. Code § 8-130. Pursuant to the Local Civil Rights Restoration Act of 2005, "[i]nterpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of the New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise." N.Y.C. Local Law No. 85 ¶ 1 (2005).

This statutory language makes plain that while the Commission may cite federal and state anti-discrimination jurisprudence, it has neither precedential nor persuasive authority over the Commission's interpretation of the NYCHRL. Further, while the Commission's interpretation and application of state and federal case law addressing the NYCHRL informs the Commission's

jurisprudence, "'an agency's interpretation of the statutes it administers must be upheld absent demonstrated irrationality or unreasonableness.'" *Cardenas*, 2015 WL 7260567, at *6 (quoting *Lorillard Tobacco Co. v. Roth*, 99 N.Y.2d 316, 322 (2003) (citing *Seittelman v. Sabol*, 91 N.Y.2d 618, 625 (1998)).

B. Liability

Section 8-107(5)(a)(1) of the NYCHRL prohibits discrimination based on lawful source of income, providing that it is an "unlawful discriminatory practice" for any "person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation...or any agency or employee thereof" to "refuse to sell, rent, lease or approve the sale, rental or lease or otherwise deny to or withhold from any person or group of persons such a housing accommodation or an interest therein...because of any lawful source of income of such person...." Section 8-107(5)(c)(1) of the NYCHRL prohibits any "real estate broker, real estate salesperson or employee or agent thereof" from refusing to sell, rent or lease any housing accommodation, or refusing to negotiate for the sale, rental or lease, of any housing accommodation "because of any lawful source of income of such person." "Lawful source of income" is defined as "income derived from...any form of federal, state, or local public assistance or housing assistance including section 8 vouchers." *Id.* § 8-102(25).

The Bureau bears the burden of establishing a *prima facie* case of discrimination. *See Romo v. ISS Action Sec.*, OATH 674/11, Rep. & Rec., 2011 WL 12521359, at *5 (Apr. 12, 2011), *adopted*, Dec. & Ord. (June 26, 2011). To do so under Section 8-107(5), the Bureau must show that: (1) the complainant is a member of a protected class as defined by the NYCHRL; (2) respondents are covered entities under the NYCHRL; (3) respondents refused to sell, rent or lease, or approve the sale, rental or lease of a housing accommodation; and (4) respondents acted

in such a manner and circumstances as to give rise to the inference that its actions constituted discrimination in violation of Section 8-107(5). *See id.*

Once the Bureau establishes a *prima facie* case of discrimination, respondent may advance a legitimate, non-discriminatory reason for its actions. *See Lukasiewicz v. Cutri*, OATH 2131/10, Rep. & Rec., 2011 WL 12472971, at *7 (Dec. 8, 2010), *modified on penalty*, Dec. & Ord. (Feb. 17, 2011). If the respondent articulates a clear and specific non-discriminatory reason for its actions, the burden shifts to the Bureau to demonstrate that discriminatory animus was at least a factor in the adverse action. *See Melman v. Montefiore Med. Ctr.*, 946 N.Y.S.2d 27, 31 (App. Div. 2012). The Bureau may also establish its *prima facie* case with direct evidence of discrimination. *See Lukasiewicz*, 2011 WL 12472971, at *7 (citations omitted). Claims of discrimination under the NYCHRL must be proven by a preponderance of the evidence. *See Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 110 (2d Cir. 2013).

The Bureau established that Mr. Howe was a member of a protected class under the NYCHRL based on his attempt to use a Section 8 voucher to obtain housing. N.Y.C. Admin. Code §§ 8-102(25), 8-107(5). The Bureau also established that Respondents were covered entities with respect to the housing provisions of the NYCHRL. Section 8-107(5)(o)(ii) of the NYCHRL provides that the lawful source of income provisions of the NYCHRL extend to "all housing accommodations, regardless of the number of units contained in each, of any person who has the right to sell, rent, or lease or approve the sale, rental or lease of at least one housing accommodation within New York City that contains six or more units." Respondent Best Apartments admitted that it was a "real estate brokerage firm licensed to represent landlords with apartments available to be leased by the public" and did not deny the allegation that it "has the rights to sell, rent, or lease or approve the sale, rental or lease of at least one housing

accommodation within New York City that contains six or more housing units." (Bureau Ex. 2 ¶ 2; Bureau Ex. 3 ¶ 2.)

In its Verified Answer, Respondent Best Apartments denied the allegation that Respondent Calendar was "employed" by Best Apartments, but asserted instead that Calendar "was an independent contractor associated with Best Apartments for the purpose of leasing apartments in buildings owned and managed by landlord clients of Best Apartments." (Bureau Ex. 3 ¶ 3.) Respondent Best Apartments also included an affirmative defense to this effect, stating: "Respondent Calendar was an independent contractor, rather than an employee of Respondent Best Apartment [sic]. Best Apartments at no time exercised managerial control over the actions of Calendar, including but not limited to Calendar's interaction with Complainant." (*Id.* ¶ 14.) Had Respondent Best Apartments cooperated in the investigative and adjudicatory processes and presented evidence to support its position at trial, it would have had the opportunity to meet its burden of proof to establish that Respondent Calendar was an independent contractor rather than an employee, and may have been able to insulate itself from liability. *See* N.Y.C. Admin. Code § 8-107(13)(c) ("An employer shall be liable for an unlawful discriminatory practice committed by a person employed as an independent contractor, other than an agent of such employer, to carry out work in furtherance of the employer's business enterprise only where such discriminatory conduct was committed in the course of such employment and the employer had actual knowledge of and acquiesced in such conduct."). Respondent Best Apartments, however, neither presented any evidence supporting its affirmative defense, nor did it oppose the Bureau's case. Indeed, Respondent Best Apartments did not present any case whatsoever at trial. Therefore, there is no evidence in the record to contradict the Bureau's claim that Respondent Calendar was Respondent Best Apartments' employee. *See*

Gardner v. I.J.K. Serv. Inc., OATH 08-1921, Dec. & Ord., 2009 WL 6929883, at *2 (Feb. 19, 2009) (party asserting affirmative defense carries the burden of proof at trial). Accordingly, the Commission finds that Respondent Calendar was Respondent Best Apartments' employee when he spoke to Mr. Howe in April 2010.

The Bureau has also met its burden in establishing that Respondents engaged in unlawful behavior by presenting direct evidence of discrimination. At trial, Mr. Howe credibly testified that he responded to Respondent Best Apartments' advertisement and that when he mentioned his Section 8 voucher, Respondent Calendar informed him that the landlords they work with do not accept vouchers and that it was a waste of Respondent Calendar's time to work with Mr. Howe. (Tr. at 19.) The Bureau has established its *prima facie* case based on Complainant's credible testimony and documentary evidence. Because Respondents failed to appear at trial, they missed their opportunity to put forth non-discriminatory justifications for their behavior or, with respect to Respondent Best Apartments, prove any asserted affirmative defenses.

IV. DAMAGES, PENALTIES, AND SPECIFIC PERFORMANCE

Where the Commission finds that respondents have engaged in an unlawful discriminatory practice, the NYCHRL authorizes the Commission to order respondents to cease and desist from such practices and order such other "affirmative actions as, in the judgment of the commission, will effectuate the purposes of" the NYCHRL. N.Y.C. Admin. Code § 8-120(a). The Commission may also award the complainant compensatory damages for emotional distress. *Id.* § 8-120(a)(8). In addition, the Commission may impose civil penalties on respondents who engage in discriminatory practices of not more than $125,000, unless the "unlawful discriminatory practice was the result of the respondent's willful, wanton or malicious act," in which case a civil penalty of not more than $250,000 may be imposed. *Id.* § 8-126(a);

see Cardenas, 2015 WL 7260567, at *15 (finding $250,000 civil penalty appropriate where respondent engaged in willful and wanton sexual harassment over a three year period). The penalties are paid to the general fund of the City of New York. N.Y.C. Admin. Code § 8-127(a).

A. Emotional Distress Damages

Judge Richard recommended an award of emotional distress damages of $7,500. (R&R at 9.) The NYCHRL empowers the Commission to award "compensatory damages," a category of damages that includes compensation for emotional distress. *See id.* § 8-120(8). Compensatory damages, including emotional distress damages, are intended to redress a specific loss that the complainant suffered by reason of the respondent's wrongful conduct. *See Vasquez v. N.Y.C. Dep't of Educ.*, No. 11 Civ. 3674, 2015 WL 3619432, at *13 (S.D.N.Y. June 10, 2015) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003)); *see also Patrolmen's Benevolent Ass'n of City of N.Y. v. City of New York*, 310 F.3d 43, 55 (2d Cir. 2002) (citing cases). The complainant must present evidence establishing actual injury in order to be awarded compensatory damages for emotional distress. *See Patrolmen's Benevolent Ass'n*, 310 F.3d at 55; *Najnin v. Dollar Mountain, Inc.*, No. 14 Civ. 5758, 2015 WL 6125436, at *3 (S.D.N.Y. Sept. 25, 2015). Such evidence may consist solely of complainant's credible testimony. *See N.Y.C. Transit Auth. v. N.Y. State Div. Human Rights*, 577 N.E.2d 40, 44, 45 (N.Y. 1991); *DiLeo v. Shahbain*, OATH 2439/13, Dec. & Ord., 2014 WL 4211292, at *7 (May 22, 2014).

Where evidence regarding complainant's emotional harm, which encompasses humiliation, shame, shock, moodiness, and being upset, is limited to complainant's own testimony without other evidence of actual injury, such as medical treatment or physical manifestation, tribunals generally award between $30,000 and $125,000 in emotional distress

damages. *See Dotson v. City of Syracuse*, No. 04 Civ. 1388, 2011 WL 817499, at *14 (N.D.N.Y. Mar. 2, 2011) *aff'd*, 549 F. App'x 6 (2d Cir. 2013). Courts have also awarded emotional distress damages at a lower range when "evidence of mental suffering is generally limited to the testimony of the [complainant] who describes his or her injury in vague or conclusory terms...." *Holness v. Nat'l Mobile Television, Inc.*, No. 09 Civ. 2601, 2012 WL 1744847, at *5 (E.D.N.Y. Feb. 14, 2012), *rep. & rec. adopted as modified*, No. 09 Civ. 2601, 2012 WL 1744744 (E.D.N.Y. May 15, 2012) (quoting *Rainone v. Potter*, 388 F. Supp. 2d 120, 122 (E.D.N.Y. 2005); *see Najnin*, 2015 WL 6125436, at *3; *see also Manson v. Friedberg*, No. 08 Civ. 3890, 2013 WL 2896971, at *7 (S.D.N.Y. June 13, 2013); *Fowler v. N.Y. Transit Auth.*, No. 96 Civ. 6796, 2001 WL 83228, at *13 (S.D.N.Y. Jan. 31, 2001).

In the employment context, where aggrieved parties have presented courts with bare evidence of emotional distress, courts have commonly approved awards in the range of $2,500 to $30,000. *See Perez v. Jasper Trading, Inc.*, No. 05 Civ. 1725, 2007 WL 4441062, at *9 (E.D.N.Y. Dec.17, 2007) (noting that evidence in such cases "usually consists of the plaintiff's own testimony describing the emotional distress, with little or no supporting medical evidence" and noting typical awards of between $2,500 and $15,000); *see also, e.g.*, *Holness*, 2012 WL 1744847, at *5; *Fowler*, 2001 WL 83228, at *13; *Bick v. City of New York*, No. 95 Civ. 8781, 1998 WL 190283, at *25 (S.D.N.Y. Apr. 21, 1998) (surveying cases in which emotional distress awards ranged between $5,000 and $30,000).

Mr. Howe credibly testified to being upset, and his credible testimony alone justifies an emotional distress award. Mr. Howe testified to feeling "pretty upset," described having trouble finding an apartment that would accept a Section 8 voucher, and ultimately being forced to accept a substandard apartment. (Tr. at 19, 25-26.) Mr. Howe did not testify, and the Bureau did

not solicit any testimony, regarding the severity or physical manifestations of his being "pretty upset"; the impact on Mr. Howe of the apartment search or living in substandard conditions; or any feelings of humiliation, shame, or stress. Without any further testimony regarding shame, humiliation, stress, or physical manifestations of the distress, or any other testimony regarding the impact of the discriminatory act on Mr. Howe's emotional or physical well-being, the Bureau's claim for emotional distress damages is predicated completely on Mr. Howe's testimony of being "pretty upset." Mr. Howe may have suffered more, but the record does not reflect it. Given Mr. Howe's limited testimony describing the emotional impact of his experience, the Commission finds an award of $2,500 appropriate. *Compare Perez*, 2007 WL 4441062, at *8 (awarding $2,500 in emotional distress damages where plaintiff testified that defendants' threats caused him to be "scared," but did not elaborate further about any emotional distress), *with Press v. Concord Mortgage Corp.*, No. 08 Civ. 9497, 2009 WL 6758998, at *8 (S.D.N.Y. Dec. 7, 2009) *rep. & rec. adopted as modified*, No. 08 Civ. 09497, 2010 WL 3199684 (S.D.N.Y. Aug. 11, 2010) (finding $5,000 award for emotional distress appropriate where plaintiff submitted an affidavit stating that he "suffered substantial emotional distress" but did not put forth any evidence showing specific and concrete examples of mental anguish and/or emotional injuries); *and Manson*, 2013 WL 2896971, at *8 (finding $10,000 in emotional distress damages appropriate where plaintiff alleged in testimony that she "had low self-esteem, felt 'unworthy,' ... 'was having a difficult time feeling trust,'... 'didn't have confidence' in herself anymore, that her 'thinking process was difficult,' that she didn't have any energy, and that she only wanted to find a job 'that didn't require too much'").

B. Remedial Action/Civil Penalties

In arriving at her recommendation of a $25,000 civil penalty, Judge Richard considered the following factors: 1) any attempts by Respondents to prove mitigation; 2) whether Respondents cooperated in the adjudicatory process; and 3) the impact on the public, which relates directly to the size of Respondent Best Apartments' business and the amount of business it conducts. (R&R at 9-10.) These factors are properly considered in assessing whether to issue civil penalties to vindicate the public interest and effectuate the purposes of the NYCHRL. *See Lukasiewicz*, 2011 WL 12472971, at *13.

In determining the civil penalty necessary to vindicate the public interest, the Commission may consider several additional factors, including, but not limited to: 1) respondents' financial resources; 2) the sophistication of respondents' enterprise; 3) respondents' size; 4) the willfulness of the violation; 5) the ability of respondents to obtain counsel; 6) whether respondents cooperated with the Bureau's investigation and the OATH proceedings; and 7) the impact on the public of issuing civil penalties. *Cardenas*, 2015 WL 7260567, at *15; *CU29 Copper Rest. & Bar*, 2015 WL 726057, at *4. In considering these factors, the Commission is limited to a maximum penalty of $125,000 because the Bureau failed to put forth any evidence or arguments that Respondents' actions were "willful, wanton, or malicious." N.Y.C. Admin. Code § 8-126(a).

Applying these factors, the Commission finds that the imposition of civil penalties is warranted in this case. Respondents chose to flout Commission and OATH procedures by not appearing at either the scheduled hearing or trial dates. In doing so, they failed to provide information helpful to the analysis of civil penalties. Consequently, factors regarding Respondents' financial resources, sophistication of the enterprise, and willfulness of the violation

will be construed against Respondents. The Commission will infer other information helpful to the analysis from the evidence presented by the Bureau, which remains undisputed due to Respondents' default. For example, evidence presented by the Bureau indicates that Respondent Best Apartments' website touted that they have 5,000 apartments to rent in Manhattan and two office locations in Manhattan. (Tr. at 23, 29; Bureau Ex. 5.) From that information, the Commission can infer that Respondent Best Apartments is a sizable and sophisticated operation. This leads the Commission to further infer that Respondent Best Apartments had the ability to obtain counsel. Additionally, neither Respondent cooperated with the OATH proceedings, and Calendar failed to even submit an Answer. While Respondent Best Apartments did submit an Answer, it submitted it approximately 18 months after the Bureau served the Complaint, sought lengthy adjournments, and then failed to appear at trial. Respondents' steadfast refusal to take this process seriously militates in favor of a higher penalty "[b]ecause it is in the public interest to have individuals respond and participate in a process designed to cure discriminatory practices." *Crazy Asylum*, 2015 WL 7260568, at *6 (internal quotation omitted). All of these factors confirm the appropriateness of imposing civil penalties in this matter.

The Commission is aware of four other cases litigated by the Bureau in which a Decision and Order was issued on a source of income discrimination case, all of which are highly distinguishable from the circumstances present here. *Comm'n on Human Rights v. Britati Realty*, OATH 13-0778, Dec. & Ord., 2013 WL 9600130, at *4 (Oct. 31, 2013) (issuing a $7,500 penalty where there was no information in the record as to the size or sophistication of respondent); *Comm'n on Human Rights v. Shahid*, OATH 1381/13, Dec. & Ord., 2013 WL 5912811, at *2 (July 26, 2013) (issuing $10,000 penalty where respondent owned one building with eight units); *Comm'n on Human Rights v. Rent The Bronx, Inc.*, OATH 1619/11, Dec. &

Ord. (Oct. 27, 2011) (issuing a $5,000 penalty where respondent provided evidentiary support for mitigation, cooperated in the OATH and Commission processes, and had one employee); *Comm'n on Human Rights v. Tantillo*, OATH 105/11, 106/11, 107/11, Dec. & Ord., 2011 WL 7809912 (May 23, 2011) (issuing a $20,000 civil penalty where respondents controlled 17 housing units throughout the City and failed to cooperate in the OATH and Commission processes). Therefore, in determining the appropriate amount of civil penalties to vindicate the public interest and effectuate the purposes of the NYCHRL, the Commission turns to the intent of the law. N.Y.C. Admin. Code §§ 8-102(25), 8-107(5)(a)(1)-(3), 8-107(5)(c)(1)-(3), 8-107(5)(o).

The source of income amendments to the NYCHRL were added in 2008 to combat the substantial difficulties voucher holders faced in trying to find housing, including outright discrimination on the basis of their use of a voucher. *See* New York City Council, Report of the Governmental Affairs Division, Committee on General Welfare (Mar. 26, 2008) at 5-6. The legislative history reflects the belief that protection against source of income discrimination is vital to protect prospective tenants, which include some of the City's most vulnerable residents, and help them secure affordable housing. *Id.* at 9. Individuals seeking to pay for their housing with the use of Section 8 or other types of public assistance vouchers should be viewed by housing providers in the same way as people paying for their housing through other means. Moreover, in accepting public assistance vouchers as payment for housing, housing providers are not prejudiced in their ability to recoup the same rent for their housing units as they would, had they rented their units to people paying with cash.

Discrimination based on a person's source of income is no less reprehensible as discrimination based on another category of protection under the NYCHRL. Discriminating

against people solely based on race, national origin, or other categories is repugnant to the "health, morals, safety and welfare of the city and its inhabitants." N.Y.C. Admin. Code § 8-101. Refusing to show apartments to a prospective renter solely based on the fact that the renter would be paying for the apartment using rental assistance rather than cash is equally as repugnant. Individuals using Section 8 vouchers or other rental assistance are some of New York City's most vulnerable residents, which makes this form of discrimination particularly harmful. Here, the undisputed evidence in the record shows that Respondents were initially willing to show Mr. Howe available apartments, and decided against doing so solely based on his source of income being a Section 8 voucher. These facts militate in favor of a significant civil penalty.

The Commission may also consider the amount of civil penalty necessary to deter Respondents from future violations of the NYCHRL. *See Capitol Records, Inc. v. MP3tunes, LLC*, 48 F. Supp.3d 703, 728 (S.D.N.Y. 2014) (it is the tribunal's task "to make certain that the [civil penalties] are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition" (internal quotation marks and citations omitted)). In this case, where Best Apartments has the ability to impact the disposition of 5,000 New York City apartments, future deterrence has a significant impact on the public. Accordingly, the Commission orders Respondents Best Apartments and Calendar to pay $100,000 as a civil penalty to the general fund of the City of New York.

In considering the need to deter future instances of source of income discrimination, the Commission orders the Bureau to notify the New York Department of State, at the Bureau's discretion, when the Bureau has issued a probable cause finding of such discrimination, such that the Department of State may consider such a finding when considering the suitability of licenses.

The Department of State has the authority to seek the revocation or suspension of the license of a real estate broker or salesperson if such licensee has been found guilty of fraud, dishonest or misleading advertising, or has demonstrated untrustworthiness or incompetency as a real estate broker or salesperson. *See* N.Y. Real Prop. L. § 441-C. In all cases currently under investigation at the Commission and in all future cases involving source of income discrimination by real estate brokers or salespersons, the Commission is directing the Bureau to take such action in its discretion to effectuate the purposes of the NYCHRL and vindicate the public interest by informing the Department of State of unlawful activity that may warrant revocation of such licenses. N.Y.C. Admin. Code §§ 8-120, 8-126.

In addition, consistent with the Commission's desire to assist respondents' understanding of their obligations under the NYCHRL, the Commission regularly orders respondents to complete training and finds such training appropriate here for Respondent Calendar and Respondent Best Apartments' real estate brokers and managerial employees.

IT IS HEREBY ORDERED, that Respondents Julian Calendar and Best Apartments immediately cease and desist from engaging in discriminatory conduct;

IT IS FURTHER ORDERED, that no later than thirty (30) calendar days after service of this Order, Respondents Best Apartments and Calendar pay Mr. Howe $2,500 in emotional distress damages;

IT IS FURTHER ORDERED, that no later than thirty (30) calendar days after service of this Order, Respondents Best Apartments and Calendar pay a total of $100,000 in civil penalties to the general fund of the City of New York;

IT IS FURTHER ORDERED, that no later than sixty (60) calendar days after service of this Order, Respondent Calendar and all of Respondent Best Apartments' real estate brokers and

managerial staff attend a training on the NYCHRL at Best Apartments' expense, and provide proof of attendance at the training in a form to be provided by the Bureau;

IT IS FURTHER ORDERED, that no later than thirty (30) calendar days after service of this Order, Respondent Best Apartments post a notice of rights, in a form to be provided by the Bureau, in a conspicuous location where it will be visible to both employees and members of the public for a period of three (3) years after the date of this Order.

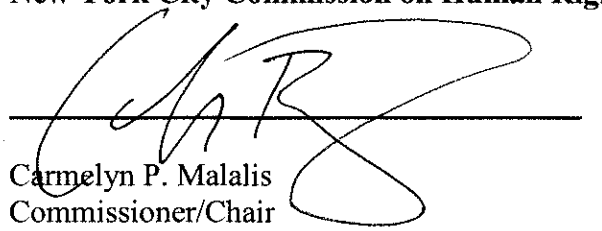
Failure to comply with any of the foregoing provisions in a timely manner shall constitute non-compliance with a Commission Order. In addition to any civil penalties that may be assessed against Respondents, Respondents shall pay a civil penalty of one hundred (100) dollars per day for every day the violation continues. N.Y.C. Admin. Code § 8-124.

Failure to abide by this Order may result in criminal penalties. *Id.* at § 8-129.

Dated: New York, New York
March 14, 2016

SO ORDERED:

New York City Commission on Human Rights



Carmelyn P. Malalis
Commissioner/Chair