

via Individual Determination (AVID) at another school within the Japan District?

The bold emphasis was added to show which language was deleted from issue two in accordance with the reasons discussed herein and added to issue one.

The original phrasing of the issues were accepted by the prior Administrative Judge as though the reassignment within Zama High School was a separate issue and not an action related to issue one, but in all fairness to her, she did not have a complete factual record to be able to ascertain the difference, and make the changes necessary. Dr. Ashby was required to follow the MOU on Excessing Procedures. He did not do so when he refused to accept the offer of one teacher to be voluntarily excessed and then decided to excess Complainant and her position without following the seniority provisions of the MOU. The excessing procedures required Dr. Ashby to consider seniority in teaching fields and subject matter areas before deciding to excess an employee, and Complainant had seniority over Ms. Rolen, for Complainant was also qualified to to teach AVID. In other words, any decision Dr. Ashby made concerning the excessing of Complainant's position and excessing her because he chose not to reassign her within Zama High School are part of issue one, which is supported by the preponderance of the evidence at the hearing. Accordingly, I find that issue one includes the denial of her reassignment within Zama High School and issue two only includes reassignment outside of Zama High School, but within the Japan District, and they are hereby rephrased as follows to comply with the evidence presented at the hearing:

Issue One: Was the Complainant discriminated against on the bases of her race (African-American), color (black), age (DOB: 5/22/37), and/or reprisal for prior EEO activity when, on January 13, 2006, Zama High School Principal Dr. Jerry Ashby declared Complainant's teaching position excessed, resulting in her being excessed because he did not reassign her to another position within Zama HS in accordance with the seniority provisions of the Agency's Memorandum of Understanding (MOU) on Exceeds Procedures for DODEA Pacific Area?

Issue Two: Was the Complainant discriminated against on the bases of her race (African-American), color (black), age (DOB: 5/22/37), and/or reprisal for prior EEO activity when Complainant was not reassigned from her position at Zama High School to another position in Career Practicum (CP) or Advancement *via* Individual Determination (AVID) at another school within the Japan District?

III. PROCEDURAL BACKGROUND

After the close of the hearing, the parties were allowed to submit written closing arguments. On or about July 3, 2008, the Commission received Complainant's written closing argument. [The argument is hereby admitted into the record as Post-Hearing Submission (PHS) 1.] On or about July 14, 2008, the Commission received the Agency's written closing argument. [Admitted into the record as PHS2.] On August 28, 2008, the Commission received Complainant's motion for attorneys' fees and costs (fee petition). [Admitted into the record as PHS3.] On or about September 10, 2008, the Commission received the Agency's response to Complainant's fee

petition. [Admitted into the record as PHS4.] On or about September 15, 2008, Complainant's counsel submitted a reply memorandum to the Agency's response to the fee petition.¹ [Admitted into the record as PHS5.] On April 29, 2009, the Commission received Complainant's supplemental motion for fees for the preparation of the fee petition. [Admitted into the record as PHS6.]

IV. SUMMARY OF DECISION

Issue One – Excess of Complainant's Teaching Position and Failure to Reassign Complainant within Zama HS

The preponderance of evidence established that Dr. Jerry Ashby (Caucasian, white, 58, no prior EEO activity) engaged in unlawful discrimination on the bases of Complainant's race, color, age, and reprisal when he exceeded Complainant's teaching position at Camp Zama High School, and he did not reassign her to another position in Zama HS.

Dr. Ashby became the Zama High School (HS) principal in August 2005. In December 2005, he was notified that he was losing one full-time equivalent (FTE) teacher position, or specifically, a .5 FTE Middle Teacher's position and a .5 FTE Secondary Teacher's position. Rather than apply the FTE losses to the applicable departments where the losses occurred, Dr. Ashby chose to combine the two half positions and apply it to a department that was not projected any losses, *i.e.*, the Professional Technical Studies (PTS) department where Complainant had been working since arriving on station at Zama HS in 1997. Complainant was the oldest African-American teacher at Zama HS, second oldest teacher overall, and she had ongoing EEO activity. She also had the largest career practicum (CP) – PTS student load at Zama HS. In addition, Complainant taught cosmetology and modeling. Complainant previously filed an EEO complaint, asserting race, color, and age discrimination because she was routinely required to teach more students than authorized under the Department of Defense Dependent Schools' (DODDs) policy (45 students per day), did not have an assistant to help her, did not have enough equipment and supplies, and did not have a large enough classroom to accommodate her students. [HT43-45.] At one point Complainant was required to teach as many as 100 students in a day while no other PTS teacher was required to do anything similar. The remedy she demanded in her pending EEO case was an assistant, more supplies, more equipment, and a larger classroom.²

At the time Dr. Ashby assumed the position of principal of Zama HS, Assistant Principal Pat Jorgenson informed him that Complainant had filed an EEO complaint and requested that he evaluate Complainant's performance since Jorgenson felt "conflicted." Dr. Ashby agreed. Towards the latter part of the fall semester in School Year (SY) 2005-2006, Complainant

¹ The Complainant's reply memorandum was misplaced and on April 29, 2009, the AJ requested Complainant's counsel resubmit by fax. However, since the original was later found and I verified that it was identical to the replica sent on April 29, 2009, I marked the original as PHS5, and did not mark the April 29, 2009 copy.

² This remedy is relevant because management was aware of it, gave her part of it, then took it away immediately after the Commission issued a ruling granting SJ in favor of the Agency.

complained to Dr. Ashby about having too many students in her CP and PTS classes in violation of DODDs policy. In response, Dr. Ashby promised to reduce her student load to a more manageable level in the second semester of the school year. Dr. Ashby fulfilled this promise by reducing Complainant's student load from 61 (first semester) to a total of 48 students for the second semester. Additionally, immediately after the second semester started, Dr. Ashby promised Complainant that he would expand her classroom size by knocking down a wall. However, shortly after this conversation, the Commission issued a decision without a hearing on Complainant's then-pending EEO case described just above. Dr. Ashby neither admitted nor denied that he was aware of the Commission's ruling in favor of the Agency before he decided to excess Complainant's position, but as discussed below, I find his explanations, *i.e.*, for excessing Complainant's position and not reassigning her to another position at Zama HS in accordance with the requirements of the seniority provision of the MOU on Excess Procedures, lacked credence.

After allowing for testimonial evidence from all parties and considering the totality of the circumstances, I discredit Dr. Ashby's articulated reasons for targeting Complainant's position and conclude that they were a mere pretext for race, color, age, and reprisal discrimination. Under the Agency's Memorandum of Understanding (MOU) for Excessing, volunteers should be considered first and then seniority, but Dr. Ashby did not follow the MOU in either area. He chose not to excess a white teacher who was substantially younger (20 years) than Complainant even though the teacher volunteered to be excessed and he had sufficient coverage in that subject matter area to allow for his voluntary excess. Further, he did not excess a less senior, significantly younger (by 18 years), black teacher when Complainant had more seniority and was qualified to teach the subject matter area that the younger black teacher taught. The preponderance of the evidence established that Dr. Ashby's articulated reasons for not following the MOU were pretextual and were infected with unlawful discriminatory animus on the bases of race, color, age, and reprisal. Reprisal is established because of Complainant's protected EEO activity being so close in time to Dr. Ashby's decisions, the fact that Complainant established a *prima facie* case of reprisal, Dr. Ashby's articulated reasons were found to be false, and there were no other credible explanations lurking in the record.

Issue Two – Denial of Reassignment within the Japan District

Concerning the rephrased issue two, I do not find that Complainant carried her burden of proving unlawful discrimination. Specifically, Complainant failed to show that of the two schools in the Japan District for which she wanted to be considered for reassignment, there was a position available for which she was qualified, she had seniority, she should have been considered for that position, and she was not considered and/or recommended because of her race, color, age, and/or reprisal. Even though I find that Dr. Ashby would not have fairly applied the rules of the MOU on Excessing when considering or making recommendations concerning the Complainant for one of the two schools in the Japan District for which she wanted to be considered,³ Complainant did not

³ This conclusion is based upon my finding that Dr. Ashby intentionally failed to apply the MOU when deciding to excess Complainant's teaching position and ultimately her by failing to consider her seniority and teaching

carry her burden of establishing that such a position existed. Therefore, I conclude that she failed to establish *prima facie* cases of race, color, age, and/or reprisal concerning issue two.

V. FINDINGS OF FACT

1. Complainant is a career educator for the Department of Defense Dependents Schools (DoDDs), an overseas division of the Department of Defense Education Activity (DoDEA),⁴ who is certified to teach in the areas of Cosmetology, Career Practicum (CP), and Advancement via Individual Determination (AVID), to middle and high school students. [Hearing Transcript (HT) 92-93; Investigative Report (IR) No. PE-FY-06-043, pp.33, 257.]
2. Cosmetology is a professional technical studies (PTS) course that introduces students to manicuring, hairstyling, facial treatments, and make-up applications. [IR, pp.98, 111, 193-94; Administrative Judge Exhibit (AJE) 25, AE3.] Cosmetology was not taught at any other school in the Japan district after school year (SY) 2005-2006. [HT96; HT290.]
3. Career Practicum (CP) is a professional technical studies course that facilitates a work experience toward a particular career goal. [AJE25, Tab 3.⁵] Career Practicum was previously known as Career Work Experience (CWE) which differed from CP by offering students various internship-like opportunities not necessarily connected to a course of study. [HT282.] The current emphasis of CP in DoDEA is to adopt national standards for connecting a final “capstone” work experience to one of twenty-one career field “clusters,” for example architectural design, culinary arts, cosmetology, computer programming, computer networking, engineering, audio visual, *etc.*, and a particular course of study “pathways” for each cluster. [HT76-77.] In some cases a cluster may have several pathways, for example, information technology. [HT133-134.] The goal of CP is to provide practical experience for a particular pathway. [HT135; HT146-147.]
4. AVID is a tutorial program used to assist and encourage underachieving middle and high school students to prepare for college by teaching study skills, note-taking, and time management. [HT50-51; IR, p.52; AJE25, Tab 3.] The Complainant was qualified to teach AVID training and served as an AVID site team member at Zama High School (HS), but she was not assigned to serve as an AVID classroom teacher. [HT42-48; HT51.]

qualifications for reassignment within Zama HS. However, the facts and circumstances of this case render such a conclusion moot since Complainant failed to carry her burden of showing there were other positions available in the Japan District for which Dr. Ashby did not render her favorable recommendations or proactively seek her reassignment.

⁴ DoDEA provides education to eligible Department of Defense (DoD) military and civilian dependents from preschool through grade 12 at over 200 schools located in 12 foreign countries and the United States. Administrative Exhibit 25, Tab 1.

⁵ I marked the documents that Agency submitted to AJ Mulligan as AJE25; though the documents therein were tabbed as AE1-30, I asked the parties to refer to them on the record as tab1-30 to minimize confusion because they are part of AJE25. For example, AJE25, Tab 1 instead of AJE25, AE1.

5. In SY 2005-2006, the Complainant was Zama HS' only cosmetology and CP instructor and she had an extremely large number of students. [HT95; HT147; HT173-174; HT184-86.] At all times relevant to this complaint, the Complainant was also the only educator at Zama HS, who was certified in the course combination of Cosmetology, CP, and AVID. [AJE24, Tab 4; AJE25, Tab 2; IR, pp.23, 51, 68.] Zama HS was authorized 50.5 full-time equivalent (FTE) teachers in SY 2005-2006 and 49.5 FTE teachers in SY 2006-2007. [IR, pp.106-107.] Of those 50.5 authorized FTE teachers assigned to Zama HS, five (5) were black, three (3) were Hispanic, and the remaining 42.5 FTE teachers (84%) were white, not of Hispanic origin; in total, 90% (45.5 FTE teachers) were not in the same protected classes (race – African-American; color – black) as Complainant. [AJE24, Tab 1.] Further, only one (1) FTE teacher (white, not of Hispanic origin) was older than Complainant; the remaining 49.5 FTE teachers (98%) were white, not of Hispanic origin and younger than Complainant. [Id.] Ten employees were within nine years of Complainant's age (3 within 4, 3 within 5, 1 within 6, 1 within 7, 1 within 8, and 1 within 9), and the remaining 39.5 FTE teachers were significantly younger (10 years or more) than Complainant. [Id.] Further, of the ten FTE teachers within 9 years of Complainant's age, only one was black (Daisy Fulford) and the remaining 9 were white, not of Hispanic origin. [Id.]

6. In August 2005, Dr. Jerry Ashby became the principal of Zama HS and the Complainant's immediate supervisor. [HT126-127; IR, pp.49, 50, 176.] At all relevant times, Dr. Ashby had 11 years of experience as a principal at three schools and 27 years of experience in DoDDS. [HT126-127.] Prior to becoming principal of Zama HS, Dr. Ashby was unaware that Complainant had prior EEO activity. [HT171; IR, pp. 22, 57.] Dr. Ashby first became aware of Complainant's ongoing EEO activity immediately after taking over as Principal of Zama HS in August 2005 from Zama HS Assistant Principal Pat Jorgenson and then from Union Representative Brian Chance. [Id; AJE25, Tab 4 pp.41-42, 44.] Assistant Principal Jorgenson informed Dr. Ashby of Complainant's pending EEO complaint filed against her (Jorgenson) and the prior Zama HS principal. She requested that Dr. Ashby supervise Complainant, and he agreed to do so. [HT43-44; HT171-172.]

7. Dr. Ashby's major duties and responsibilities as a DoDDS principal included designing and managing the school curriculum, developing a school master schedule, and evaluating student learning needs, available resources, school environment, local culture, and/or any supplemental curricula. [HT128; AJE25, Tab 5; IR, pp. 98, 110.] When he arrived at Zama HS, Dr. Ashby analyzed the courses in the curriculum as well as how many teachers were available to teach each subject area, and upon assuming his position he made a significant change to previous departmental policy by discontinuing the past policy of allowing the departments to recommend their own department heads. Instead, Dr. Ashby began to personally appoint all department heads without regard to, or preference for, the department's recommendations. [HT34-38; HT212-224; HT362-367.] As one of his first appointment decisions, he refused to accept the PTS department's recommendation of long-time department chair Daisy Fulford (African-American female, 60), and instead, selected first year teacher Jeremy D. Woodward (white male, 39) who had no previous experience as a PTS teacher at Zama HS, nor as a department chair at any other institution. [HT34-38; HT167; HT212; HT366.] When questioned about his decision because of

Mr. Woodward's lack of experience, lack of knowledge about the department, and his apparent disrespect for the PTS department's recommendations, Dr. Ashby's explanation for his actions was that it was his "prerogative." [*Id.*] In fact, Dr. Ashby later testified "I have been thinking about" why I selected new teacher, Mr. Woodward, over a long-term teacher who had been the PTS department chair for many years, but "I don't recall why I selected him rather than her." [HT366.]

8. The number of classroom teaching and support positions allocated to each DoDDS school, including Zama HS, is determined annually by DoDEA Headquarters based on student enrollment data captured from the previous September. [HT268-69; IR, pp.50, 96, 106-07, 110.] From 2004 to the date of hearing, the total student enrollment in the Japan District had decreased by more than 1,000 students, and in particular, Zama HS had lowered its enrollment by approximately 125 students. [HT268; HT272; AJE25, Tab 22.] This declining student population resulted in a loss of total teaching positions allocated to Japan District schools by DoDEA Headquarters. [HT268; HT273.] Twelve Japan District schools were cut staffing in SY 2005-2006 and were required to declare 35 classroom teaching positions "excess" for the following school year. [IR, pp.96, 110; AJE 25, Tab 6.] As a result, Zama HS lost one full-time equivalent (FTE) classroom teaching position for SY 2006-2007. [HT139; HT271; HT304-305; IR, pp.106-107.] However, by November 29, 2005, DoDEA Headquarters increased Zama HS authorizations by 1.5 FTE teachers to an allotment of 51 FTE teachers; the additional authorizations were designated to teach ESL, English as a Second Language, classes. [IR, p.196.]

9. On December 7, 2005, James Bower (Caucasian, white, 62, no prior EEO activity), the Assistant Superintendent of the Japan District, sent Dr. Ashby a "high" priority email, informing him that he needed to "excess" one teacher based upon the DoDEA staffing authorizations for SY2006-2007. [AJE25, Tab 28; HT138-139.] Accompanying the email was a Staffing Authorization Document (SAD) showing a staff cut of one full-time teaching position and outlining the number and type of positions available to Zama HS for SY 2006-2007. [HT139; HT141; AJE25, Tab 28; IR, pp.196-197.] The SAD for SY 2006-2007 shows that Zama HS lost a half (.5) position⁶ for Middle Teacher (grades 6-8) and a half (.5) position⁷ for Secondary Teacher (grades 9-12), from the prior school year. The authorization for Middle Grades and Secondary Grades PTS teachers remained the same at .5 and 3.0, respectively, for both school years. [IR, pp.106-107.] As principal and resource manager for Zama HS, Dr. Ashby was required to account for the staff cut, and did not have discretion or authority to disregard it. [HT276-277.]

10. On January 8, 2006, Dr. Ashby sent the Zama HS staff an email announcing imminent staff cuts for SY 2006-2007, notifying them that he did not know what departments would receive the staff cuts, but he requested that any volunteers complete an unidentified form by close of business Wednesday, January 11, 2006 so that he could make an immediate decision. [*Id.*; HT98-99; HT142-143; IR, p.178.] In response, Michael Fleetwood (white, non-Hispanic, 49) senior Army instructor for the Junior Reserve Officer Training Corps (JROTC), volunteered to be excessed, but

⁶ Middle Teacher reduced from 15.5 for SY 2005-2006 to 15.0 for SY 2006-2007. [IR, pp.106-107.]

⁷ Secondary Teacher reduced from 23.5 for SY 2005-2006 to 23.0 for SY 2006-2007. [IR, pp.106-107.]

Dr. Ashby testified that he could not account for the staff cut by excessing Mr. Fleetwood's position because the school was required to offer JROTC and to have 2 JROTC instructors. Dr. Ashby testified that there were no other staff members certified to teach it. [HT142-143; IR, pp,174, 182; IR, Tab B.] On January 12, 2006, Dr. Ashby sent an email to Mr. Fleetwood rejecting his voluntary offer for the stated reason that it would not be "in the best interest of programming" because Ashby claimed he "would have to recruit for exactly the same position" if he approved Fleetwood's request. [*Id.*, Tab B.] I do not credit Dr. Ashby's testimony that he needed two JROTC instructors since the documentation submitted by the Agency identifying all the teachers and their respective classes taught during both semesters of SY2005-2006 did not identify Michael Fleetwood as a teacher who taught any class during the SY. [AJE25, Tab 10.] In fact, the documentation referenced identified George Dale as the single teacher responsible for teaching JROTC during SY 2005-2006. [*Id.*] Further, other documentary evidence established that there were three qualified JROTC instructors on staff at Zama HS (Ross H. Ballou,⁸ George L. Dale,⁹ and Michael W. Fleetwood) in SY2005-2006 and there was no evidence that any of the three were projected to leave Zama HS as of mid-January 2006. [AJE24, Tab 1.] Further, no evidence established that Mr. Fleetwood was teaching in the JROTC program at the time. At the same time, four other teachers (Ms. Brack, Ms. Johnson, Mr. Woodward, and Ms. Woodward) chose to retire at the end of the school year, but Dr. Ashby testified that he could not rely on their doing so, until he actually saw their paperwork. [HT151; HT189-192.]

11. Dr. Ashby could not remember at the time he prepared his affidavit, nor at the hearing, why he did not account for Mr. Woodward (white, non-Hispanic, 39 – secondary classroom teacher) retiring at the end of the school year when he wrote his statement, nor why Woodward's retirement would not have accounted for the necessary reduction in secondary classroom teachers. [HT192.] Dr. Ashby did not deny that he could have accomplished the one FTE reduction by taking a half position directly from the Middle Teacher and Secondary Teacher positions where each lost a half a position, but instead, Dr. Ashby decided to apply it to the Secondary Grades PTS category which had not lost an authorized teacher position. He did not make this decision until January 13, 2006. [HT52; HT57; HT97; HT155-156; HT239-241; HT293-294.] In other words, even knowing a) that he had four teachers who had indicated their intention to retire at the end of the school year, b) that he had no reason to disbelieve them, and c) that there were others on staff qualified to backfill for them, Dr. Ashby claimed he would still have had to eliminate Complainant's program because he would still have had to backfill for the four retiring teachers, even though they worked in the department that lost an authorization for a teacher. I do not credit Ashby's testimony which lacks internal consistency and conflicts with other evidence and testimony. Indeed, Complainant's department did not lose an authorization. Finally, Dr. Ashby did not try to obtain any more formal commitment from the four teachers that they intended to retire before arbitrarily deciding to excess Complainant. In sum, rather than accept Mr. Fleetwood's offer to be excessed, and/or to lower his ceiling of FTE employees by abolishing the position held by one of the teachers who was already planning to retire, Dr. Ashby eliminated Complainant's PTS program of Cosmetology. [AJE25, Tab 10; HT148-149.]

⁸ White, non-Hispanic, 61. [AJE24, Tab 1.]

⁹ Black, non-Hispanic, 55. [AJE24, Tab 1.]

12. The relevant provisions of the Memorandum of Understanding (MOU) concerning "Excess Procedures for DODEA Pacific Area," are as follows:

1. The agreement applies to bargaining unit members (excluding NTE employees) in the DoDDS-Pacific Area who are affected by school drawdowns occurring during the 1996-97 school year and subsequent school years unless and until replaced by a new MOU or superseded by a RIF....
3. In determining "excess" of the school/complex level, the following factors should be considered:
 - a. Volunteers
 - b. Seniority as determined by SCD:¹⁰
 1. elementary classroom (K, 1-3, and 4-6),
 2. teaching fields/subject areas currently assigned,
 3. teaching fields/subject areas qualified.

Program determinations and subsequent placements will be made in accordance with the hiring categories as defined by DoDDS recruitment brochure.

4. All "excess" unit members desiring placement outside of their current district will be set aside during the district placement round. The Association will be afforded representation at all district-level placement meetings within DoDDS-Pacific. District Superintendents may consider positions encumbered by NTE teachers for placement of excess permanent teachers.

5. All "excess" unit members desiring placement within their district will be considered at the district level for placement. Excess unit members will be placed into vacancies within the district by SCD. Special circumstances affecting placement will be considered. Placement into district positions, through the district-level placement process, will only be to locations specified by applicants.

6. "Excess" unit members who are not placed through the District placement process will be forwarded to DoDEA for world-wide placement consideration through the transfer program.... [AJE24, Tab 17.]

13. During the SY 2005-2006, Complainant served as a CP Coordinator, she taught modeling and cosmetology, she was a cheerleading coach, a prep club coach, and she was a qualified AVID teacher who served as an AVID "site team member." [HT42-48; HT51.] In the first semester of SY 2005-2006, she taught 61 students, 46 students in CP by placing them and monitoring them in up to 21 different work areas and 15 students in cosmetology and modeling. [*Id.*; see also, AJE25, Tab 10.] Complainant testified that according to the DoDD's standard, she was not

¹⁰ SCD = service computation date. [HT206.]

supposed to teach more than 45 students in CP and Cosmetology combined throughout the school day (composed of 8 periods). [HT43-45.] Because Complainant was required to teach as many as 100 students in a single day prior to Dr. Ashby's arrival and she had a pending EEO complaint over class size and other things, she confronted Dr. Ashby about reducing the size of her second semester classes from a total of 61, which was the number of students in the first semester of SY2005/2006, and increasing the size of her teaching space after the Christmas holiday break in 2005. [HT33; HT52; HT94-95.] Dr. Ashby did decrease the size of her second semester class in CP class to 32, but her Cosmetology/modeling class increased by one to 16 for a total of 48 students. [AJE25, Tab 10; IR, p.53; HT42-48; HT51; HT94-95.] Between January 9 and 13, 2006, Dr. Ashby discussed his intention to "knock the walls out of [Complainant's] classroom...in order to give [her] more space because of the different subject matters [she] was teaching." [HT52; HT57; HT97; HT239-241.] Complainant distinctly remembers this conversation about expanding her work space occurring after the Christmas holiday break and a day or two before the January 13, 2006 Martin Luther King (MLK) school assembly, and before she read the Commission's decision granting summary judgment in favor of the Agency on Complainant's other, then-pending EEO complaint. [*Id.*; HT53-54; IR, pp.234-245.] Dr. Ashby denied having any role in providing Complainant with a copy of the Commission's ruling on her prior EEO complaint or any knowledge about how Complainant received a copy of the ruling, but he admitted that he knew about the complaint after a discussion with Assistant Principal (Jorgenson), who told him that he would have to evaluate Complainant as a teacher since she was involved in Complainant's pending EEO complaint. [HT159; HT171-172.]

14. The issues in Complainant's **prior** EEO complaint were identified as follows:

Whether Complainant was unlawfully discriminated against on the bases of her race (African-American), sex (female), age (DOB: 1937), and/or reprisal for prior EEO activity when: (1) in 2003 and 2004, Complainant's advance degree was not recognized for purposes of giving her a salary increase in her teaching position; (2) she was assigned an "excessive" number of students to teach; (3) she was notified that she would not be provided a classroom aid; and/or (4) she did not receive sufficient classroom supplies and equipment? [IR, pp.234-245.]

On January 5, 2006, the AJ who ruled on the summary judgment motion decided that there was no material evidence in genuine dispute or questions of credibility and ruled in the Agency's favor as a matter of law; the Agency quickly (within 13 days of the decision – January 18, 2006), issued a final order fully implementing the AJ's decision. [IR, pp.246-247.]

15. On January 13, 2006, there was a Zama high school assembly in recognition of Martin Luther King (MLK) Day. During the MLK Assembly Dr. Ashby told a story to all participants about an experience he had in 1964 when he was in the eighth grade in Gatesville, Texas. [HT178-179.] Dr. Ashby described that he remembered the first day of the consolidated school after the implementation of integration. He recalled sitting in the bleachers with the white students and as the black students came in, all the white students, including himself, moved over to one of the

bleachers. [*Id.*] He admitted that he shared the racist attitudes of the predominant, white student population because his school was being consolidated, *i.e.*, integrated ten years after the U.S. Supreme Court issued its ruling in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). [*Id.*] Both Complainant and Victor Ramirez credibly testified that Dr. Ashby failed to offer “closure” because he did not say that he disowned such racist attitudes and practices. [HT54; HT314.] When Dr. Ashby was questioned as to whether he offered any conclusion or closure to his story by disavowing racism that he experienced in the eighth grade, he testified as follows:

CR: You told the assembly that you had been raised in a segregated school. Is that right?

WIT: Until that point, yes.

CR: You told the assembly that you have been raised as a racist. In terms of keeping apart from other races.

WIT: I don’t recall being – telling them I was a racist. But I recalled telling them, “Yeah, I was part of that society that was segregated. There was racism.”

CR: You used that term repeatedly during your discussion.

WIT: I don’t know if I used it repeatedly. But I did use it. Yes.

CR: You recall you never disavowed or changed your viewpoint on racism.

AJ: Can you rephrase your question?

CR: That you never disavowed your previous stance on racism?

WIT: I think I recall saying, “it is great that we don’t have to be that way anymore.” I think I recall saying, “You know, I got out of that situation. I got out of that environment and I don’t want to go back.” Again, as I said yesterday, we still need to continue having these activities – these commemorative events so we don’t go back.

CR: So if a person is to testify that they heard you speak and they came away with the impression that you were admitting to being a racist, would they be mistaken?

WIT: I would hope they would be mistaken, yes. [HT179-180.]

I note that these are the facts that I find were established by a preponderance of the evidence after both parties examined Dr. Ashby concerning his comments he made during the MLK Assembly.

16. I find it also worthy to note that Dr. Ashby proffered two versions of what he said during the MLK Assembly. When Agency counsel first questioned Dr. Ashby on direct examination about his MLK Assembly comments, Dr. Ashby recanted a story (version one) involving him sitting in a college graduate class in Texas working on his terminal degree, talking to his colleagues and describing the perfect school where no racial tensions existed, how he referenced the DODDs educational system and how the Zama HS students are so lucky to be in such a perfect school where racial tensions do not exist. [HT158.] However, during cross-examination by Complainant’s counsel, Dr. Ashby described a second version of what he said at the MLK Assembly, *i.e.*, the story about his eighth grade class being integrated with black students and how the white students reacted negatively with their body language. Complainant and Mr. Ramirez corroborated the eighth grade story, but not the graduate school story; hence, I do not credit version one as elicited by Agency counsel during his direct examination of Dr. Ashby. [HT54-55; HT313-314.]

17. After the MLK Assembly, Dr. Ashby called Complainant into his office, and Complainant thought it was going to be an offer of congratulations on organizing a “great program,” but when she arrived and saw a union representative present, she realized the meeting was about something else. [HT55-56.] During this meeting, Dr. Ashby informed Complainant that she was being excessed. Complainant testified that:

...I just fell apart. I was shocked. I said, “excess! No, you are kidding! You just told me you are going to knock down walls and all of that to make room. What is wrong with you? What is wrong? What have I done?” I went on for about five minutes, I know. I never – I never had anything like that...happen to me. Never. Never. I wanted to know why. My work? You never visited my classroom. But you didn’t have to because I do my work. You never commented on the classwork or anything. How do you manage to do this? [HT57-58.]

18. On January 17, 2006, Complainant sent Dr. Ashby a letter requesting reconsideration of his decision to excess her. [HT58; AJE24, Tab23.] Dr. Ashby did not respond so Complainant visited Dr. Ashby to talk to him about her letter requesting reconsideration and why he had not responded. [HT58; HT61.] Complainant credibly testified that Dr. Ashby blamed Dr. Bruce Derr, Superintendent of DODEA, Japan District, for pressuring him to excess Complainant. [HT58-59.] Dr. Ashby denied that Dr. Derr pressured him to excess Complainant and testified that he made that decision himself. [HT147-148.] Nevertheless, I credit Complainant’s testimony that, during their conversation, Dr. Ashby falsely blamed Dr. Derr for his decision to excess Complainant, whether or not it was true. Complainant also credibly testified that she pleaded with Dr. Ashby not to take away programs like her Cosmetology program because it was a “dynamite program...for students that were not college-bound.” [HT59.]

COMPLAINANT:...I said, “Look at our school, Dr. Ashby. Look at our school. We had kids [who are] dropping through the holes, crack, gaps. We have the gap right? In DODDs, we have the gap. I am trying to close the gap with our kids.” I said, “We have No Child Left Behind. We have kids being left behind every day – every day. Look at it. Look at the Terranova Test. The black kids are not doing what they need to be doing. What has DODDs done about that?” I said, “You guys please now, I have been in this program for a long time... We had the best program...I trained and worked with the CP coordinators. I was asked to conduct a DODDs Summer Conference at the New Sanno because of my skills in CP. How can you excess someone who is doing – working with the students?...How can that be?...[I also pointed out that] I have been a site member of AVID...” [HT59-62.]

Dr. Ashby neither admitted nor denied that he knew about the Agency’s final order implementing summary judgment in Complainant’s prior EEO case when he later denied Complainant’s appeal for reconsideration, but he admitted he knew other teachers were retiring or had informed him they planned to retire at the time he denied Complainant’s appeal for reconsideration. [HT61; HT101; HT151; HT168-169; HT189-192; HT243.]

19. Dr. Ashby testified that part of his rationale for excessing Complainant was that many of the “PTS classes were small, [and] the one that stood out was Cosmetology,” which is why he targeted Complainant as the person to be excessed. [HT181-182; IR, pp.193-195.] Dr. Ashby further testified that he consulted with the union representative and was advised that he did not have to follow the Union and Agency MOU concerning “Excess Procedures.” but he proffered no credible corroboration of this advice. [AJE24, Tab 17; HT147-155; HT206-209; HT230-231; HT250-255.]

20. Dr. Ashby’s decision to excess Complainant did not comply with paragraph 3.b.3. (*see*, facts #12 & #13 above), *i.e.*, “seniority as determinate by SCD, teaching fields/subject areas qualified.” [*Id.*] In conflict with his statement that the union told him that he did not have to follow the MOU, Dr. Ashby testified that when he later attempted to excess another older black female PTS teacher (Daisy Fulford), the Union required him to reconsider following the MOU or face a grievance. In spite of the union’s apparently conflicting position on this issue, Dr. Ashby testified, without support of corroboration, that he believed that paragraph 3.b.3. “was not [an] operative” provision that he was required to follow when reconsidering excessing Ms. Fulford. In fact, the agency failed to proffer credible evidence why Dr. Ashby did not apply it to Ms. Fulford when he tried to excess her or to Complainant when he made his decision to excess her. [HT166-168; HT220-221; HT230-231.] On the other hand, Dr. Ashby testified, he did not excess Ms. Rolén (aka Duan Anthony; black female, more than 18 years younger than Complainant; no prior EEO activity) and chose to excess Complainant because Ms. Rolén was certified in special education even though he did not use her to reach special education. Dr. Ashby had at least five other teachers on staff qualified to teach special education, and they were not all teaching special education (as evidenced by a loss of 1.5 FTE positions in special education for SY2006-2007) because there were not enough special education students enrolled in September 2005.¹¹ [AJE24, Tab 4; HT196-201; HT209; HT246; HT261-265; HT325-327; HT337; IR, pp.63-64.] During SY 2005-2006, Ms. Rolén was assigned to teach only AVID, a subject area in which Complainant was certified to teach, and it is undisputed that Complainant had more seniority (SCD) than Ms. Rolén pursuant to MOU paragraph 3.b.3. [HT153; AJE24, Tab 17.] Accordingly, Dr. Ashby’s testimony that he did not excess Ms. Rolén because she was qualified to teach special education classes lacked credibility, and did not provide a legitimate non-discriminatory explanation for excessing Complainant. [AJE24, Tab 4.]

21. After Dr. Ashby excessed Complainant, Ms. Christine Giest (white female; more than 20 years younger than Complainant) was the only qualified teacher to teach CP. Victor Rivera (Hispanic male, 54) did not become certified to teach CP until midway into the first semester of SY 2006-2007 and then, only after Dr. Ashby expedited the CP certification process. [HT74; HT80-81; AJE24, Tab 1.] Mr. Rivera testified that he had to become certified to teach computer science before he could become certified in CP, and Dr. Ashby was aware that Rivera was not certified in either area when he excessed Complainant. [*Id.*] When the first semester of SY 2006-

¹¹ Special education was allotted 3.5 FTE teachers for SY 2005-2006 and authorized 2.0 FTE teachers for SY 2006-2007. [IR, p.64.]

2007 started, Mr. Rivera had only one student in his CP class and had none in the second semester. [HT83.] Ms. Giest (culinary arts teacher) had only four CP students. Neither Mr. Rivera nor Ms. Giest had seniority over Complainant concerning qualification and certification in CP. [HT76-78.] Mr. Rivera further testified that he did not understand how Complainant could manage so many CP students because it was a very involved assignment. [HT85.] Mr. Rivera testified that after Ms. Giest received a compassionate transfer in the summer after SY 2006-2007, he remained as the only CP teacher and did not feel qualified to place and monitor students in subject matter areas of which he had no knowledge; with 10 students, he felt overwhelmed. [HT85.] He exclaimed that he did not know how Complainant could teach 45 CP students, “do luncheons” prepare a “newsletter,” and teach Cosmetology and Modeling, claiming that “she worked miracles” in order to be able to accomplish so much. [*Id.*]

22. In comparison to the large number of students in the CP program when Complainant was the CP Coordinator, the numbers of students enrolled in CP at Zama High School (Zama) dropped substantially after Dr. Ashby excessed Complainant. [HT82-83.] Dr. Ashby stated he expected the decrease, in fact he wanted it to decrease, but inexplicably, he doubled the number of CP teachers to cover the significantly reduced number of students.

23. Once Dr. Ashby notified Complainant that she was to be excessed, she was required to identify whether she would seek to separate, retire, or continue employment with the DoDEA. [HT99-100; AJE25, Tabs 25 and 26.] On January 17, 2006, Complainant notified Dr. Ashby that she wished to continue employment with the DoDEA within the Japan District, specifically at Zama HS, Arnn Elementary School, or Lanham Elementary School in an area in which she was qualified to teach. [*Id.* at Tabs 26 and 27.] In response, Dr. Ashby articulated that the Japan District could not reassign the Complainant to a vacancy at another school in the Japan District because there were no vacancies in Cosmetology or any other area in which Complainant was qualified. [HT288-289; AJE25, Tabs 6 & 26.] James Bower (white male, 62, no prior EEO activity), Assistant Superintendent of the Japan District, testified that he had only a five to ten minute conversation with Dr. Ashby about his decision to excess Complainant, which conversation occurred either in the second or third week of January 2006. [HT293-294.] Mr. Bower further testified that they did not discuss how Dr. Ashby applied the provision of the MOU on Excess Procedures, but he recognized that one of the criteria to be applied when determining which teacher to excess was the requirement to consider the service computation date of the teacher in regard to teaching fields/subject area qualified; however, he testified, he did not think that meant that Dr. Ashby had to consider bumping another teacher who had less seniority even if Complainant was qualified in that subject matter area, but he could not identify any such exception or qualification in the MOU. [HT284; HT293-294.] In sum, neither Mr. Bower nor Dr. Ashby could credibly explain why paragraph 3.b.3 was not meant to be interpreted as a bumping procedure, nor why Dr. Ashby’s decision to retain Ms. Rolan as a sixth back-up teacher for an unidentified special education need was better for the program than keeping Complainant, who was a highly productive teacher with large CP classes and the qualifications to teach AVID, with seniority (SCD) over Ms. Rolan.

24. After Complainant was excused from Zama HS, DoDEA Headquarters reassigned her to Lakenheath HS, England to teach Cosmetology, without any loss of salary or benefits. [HT106-108.]

VI. PRINCIPLES OF LAW

In any proceeding involving a charge of discrimination, either judicial or administrative, it is the burden of the Complainant to initially establish that there is some substance to the allegation of discrimination.

In order to accomplish this burden, the Complainant must establish a *prima facie* case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). This means that the Complainant must present a body of evidence such that were it not rebutted, the trier of fact could conclude that unlawful discrimination did occur.

The *McDonnell Douglas* standards are flexible and must be adapted to the facts of each case. *Id.* at 802, n.13. *Hagens v. Andrus*, 651 F.2d 622, 624-626 (9th Cir. 1981). Thus, the evidence required to establish a *prima facie* case varies from one case to the next. Direct evidence of discrimination is not necessary to prevail in a Title VII suit because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental process." *U.S. Postal Service v. Aikens*, 469 U.S. 711, 716 (1983). Thus, a complainant may prove his/her case by using either direct or circumstantial evidence.

Circumstantial Evidence

When a complainant must rely on indirect, or circumstantial, evidence of discrimination, the shifting burdens of *McDonnell Douglas* must be employed. The *McDonnell Douglas* burdens are designed so that the "plaintiff has [her] day in court despite the unavailability of direct evidence." *Trans World Airlines v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 622 (1985).

Once the complainant establishes a *prima facie* case, the burden of production shifts to the agency to articulate a legitimate, nondiscriminatory reason for its employment decision. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). That is, it "... must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254-255, n.8 (1981).

Should the Agency carry its burden and respond to complainant's *prima facie* showing by offering evidence of the reason(s) for the Agency's actions, the trier of fact proceeds to decide the ultimate question: whether complainant has proven that the Agency intentionally discriminated against her because of unlawful discrimination and/or reprisal. *Id.* In order to convince the trier of fact that

the Agency intentionally discriminated against her, a complainant must prove by a preponderance of the evidence that the legitimate reasons offered by the Agency were not its true reasons, but were a pretext for discrimination. *Burdine*, at 253. In order to show pretext, a complainant must present evidence that the agency's asserted reasons for its actions are not worthy of credence, and that the real reason for the agency's actions are discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); *DesVergnes v. United States Postal Service*, 01A00806 (2000). A reason cannot be proved to be pretext for discrimination "unless it is shown both that the reason was false and that discrimination was the real reason". *Hicks, supra*. "Proving the agency's reason false becomes part of the greater enterprise of proving that the real reason was intentional discrimination. *Id.* In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is "dissembling to cover up a discriminatory purpose." See, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

The agency generally has broad discretion to set policies and carry out personnel decisions, and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. *Vanek v. Department of the Treasury*, EEOC Request No. 05940906 (January 16, 1997); *Kohlmeyer v. Department of the Air Force*, EEOC Request No. 05960038 (August 8, 1996); *Burdine*, 450 U.S. at 259.

These general analytical principles are applicable to cases arising out of Title VII of the Civil Rights Act of 1964, as amended *Burdine, supra*; and the Age Discrimination in Employment Act, *Loeb v. Textron*, 600 F.2d 1003 (1st Cir. 1979); *Cova v. Coca Cola Bottling Co.*, 574 F.2d 958 (8th Cir. 1978).

It should be recognized that each complainant's allegation of discrimination is premised upon a particular set of facts and, therefore, the evidence required to establish a *prima facie* case must of necessity vary from one case to the next. Thus, a formula based on *McDonnell Douglas* must be adapted to the facts of each case. *Douglas v. Anderson*, 656 F.2d 528, 532 (9th Cir. 1981), citing *Hagans v. Andrus*, 651 F.2d 622, 624-625 (9th Cir. 1981).

Prima Facie Case - Disparate Treatment

In order to establish a *prima facie* case of disparate treatment concerning the issue of terms and conditions of employment, a complainant must establish that: (1) she is in a protected class; and (2) she was treated differently from similarly situated employees not in her protected class(es). See, *Potter v. Goodwill Industries of Cleveland*, 518 F.2d 864, 865 (6th Cir. 1975); *Scott v. Secretary of Defense*, EEOC Appeal No. 01902727 (September 24, 1990).

Prima Facie Case – Failure to Reassign

A *prima facie* case of disparate treatment concerning the issue of failure to reassign is similar to the issue of non-selection and may be shown by the following elements: (1) Complainant is a

member of a protected group; (2) Complainant was qualified for and requested reassignment to an available position; (3) despite her qualifications, Complainant was not reassigned to an available position; and (4) the employer continued to seek or actually reassigned a similarly qualified person not a member of the Complainant's protected group to the available position. *U.S. Postal Service v. Aikens*, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); *Burdine*, 450 U.S. at 254.

Showing of pretext

Pretext can be demonstrated by "showing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the [agency's] proffered legitimate reasons for its action that a reasonable fact-finder could rationally find them unworthy of credence." See *Dalesandro v. U.S. Postal Service*, EEOC Appeal No. 01A50250 (January 30, 2006) (citing *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997)).

Prima Facie Case - ADEA

The Age Discrimination in Employment Act of 1967 as amended, 29 U.S.C. Section 623, *et seq.* ("ADEA"), prohibits discrimination in federal employment based upon age with respect to individuals who are at least forty years old. With a few minor exceptions the prohibitions of [the ADEA] are identical to those of Title VII, except that "age has been substituted for race, color", etc. *Laugesen v. Anaconda Co.*, 510 F.2d 307, 311 (6th Cir. 1975)

The discrimination prohibited by the ADEA is discrimination "because of [an] individual's age," 29 U.S.C. Section 623(a)(1), but the element of replacement by someone under 40 does not necessarily satisfy this requirement. See, *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307, 1310 (1996) (The language of the ADEA does not ban discrimination against employees who are 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*.¹² In the age discrimination context, an inference that an employment decision was based on an illegal discriminatory criterion cannot be drawn from the replacement of one worker with another worker insignificantly younger. Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is *substantially younger*¹³ than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.). *Id.*; see also, *Gross v. FBL Financial Services, Inc.*, No. 08-441, 557 U.S. ____ (2009) (held that a mixed-motives jury instruction is never proper under the ADEA; instead, plaintiffs must show that age was the "but for" cause of discrimination in all circumstances).

¹² Emphasis original.

¹³ Emphasis provided.

Age and Race "Plus" Discrimination

The Commission has long held that discrimination can occur against a member of the same protected class when the facts and circumstances establish that a member of one protected class plus another protected class motivated the unlawful discrimination. *See, Morgan v. United States Postal Service*, EEOC Appeal No. 01883540 (January 27, 1989) (evidence showed agency preselected young, black female and nonselected older, black male with significantly better qualifications – finding age plus race and sex discrimination even though selectee was the same race); *see also, Campbell v. United States Postal Service*, EEOC Appeal No. 01830444 (November 16, 1983) (evidence showed that agency selected fourteen males ranging in age from 25 to 38 with no better qualifications than complainant who was a 45 year old male – finding age plus gender discrimination even though selectees were the same gender).

Prima Facie Case - Reprisal

As set forth in *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792 (1973) and *Hochstadt v. Worcester Foundation for Experimental Biology*, 425 F. Supp. 318, 324 (D. Mass.), *aff'd*, 545 F.2d 222 (1st Cir. 1976), a complainant may establish a *prima facie* case of reprisal by showing that: (1) she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the agency; and, (4) a nexus exists between the protected activity and the adverse treatment. *See Whitmire v. Department of the Air Force*, EEOC Appeal No. 01A00340 (September 25, 2000).

The Commission has held that this nexus may be shown by evidence that the adverse action followed the protected activity within such a period of time and in such a manner that a reprisal motive is inferred. *See Lee v. Department of Interior*, EEOC Appeal No. 01A62376 (August 25, 2006) (citing *Simens v. Department of Justice*, EEOC Request No. 05950113 (March 28, 1996)).

The Commission and the U.S. Supreme Court have stated that adverse employment actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. *See* EEOC Compliance Manual, Section 8: Retaliation (May 20, 1998); *Burlington Northern and Santa Fe Railway Company v. White*, 548 U.S.53, 126 S.Ct. 2405 (2006) (finding that the anti-retaliation provision protects individuals from a retaliatory action that a reasonable person would have found "materially adverse," which in the retaliation context means that the action might have deterred a reasonable person from opposing discrimination or participating in the EEOC charge process); *see also Lindsey v. U.S. Postal Service*, EEOC Request No. 05980410 (November 4, 1999). Instead, the statutory retaliation clauses prohibit any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. *Id.*

VII. ANALYSIS

Issue 1 – Excess of Complainant Race, Color, and Age Discrimination Prima Facie Case

Complainant established *prima facie* cases of race, color and age discrimination in that she was the oldest black female teacher at Zama HS, and Dr. Ashby excessed her on January 13, 2006. Since there were 50.5 FTE teachers authorized at Zama HS, and 84% of them were white, non-Hispanic, 90% were not in two of Complainant's protected classes (race – African-American; color – black), and 98% of them were significantly younger than Complainant, I find that she established a *prima facie* case of race, color, and age discrimination when Dr. Ashby decided to excess Complainant instead of teachers from the departments (Middle Teacher and Secondary Teacher) that lost the authorizations. [See, facts #8, 9, 10, and 11 *supra*.] Further, neither the Middle PTS nor the Secondary Grades PTS departments, in which Complainant was assigned, lost any authorizations. [*Id.*]

Issue 1 – Excess of Complainant Reprisal Prima Facie Case

Complainant established a *prima facie* case of reprisal when Dr. Ashby excessed Complainant on January 13, 2006. From the beginning of his tour of duty as the principal at Zama HS, Dr. Ashby was aware of Complainant's pending EEO case and the issues involved in it, for they were explained to him by his Assistant Principal (Jorgenson). Though Dr. Ashby denied knowing whether Complainant actually received a copy of the Commission's ruling in favor of the agency without a hearing in her prior EEO complaint, he did not specifically deny knowing about the decision or that he had been advised of the ruling after DoDEA Headquarters received the decision on January 11, 2006, two days before he advised Complainant she was being excessed on January 13, 2006. I find it noteworthy that immediately before the Commission's ruling on the issue of "expansion of Complainant's classroom," *i.e.*, sometime between January 9 and January 13, 2006, Dr. Ashby informed Complainant that he intended on knocking down a wall and expanding her classroom because of her large CP class. Further, I do not find that he would have had that discussion with Complainant if he had intended to excess her on January 13, 2006. Since Dr. Ashby's decision to excess Complainant was so close in time to Complainant's protected activity, I find that she established a causal connection between her prior protected EEO activity and the decision to excess her, creating an inference of reprisal.

Issue 1 – Articulated Reason

Dr. Ashby testified that he identified Cosmetology as the program to eliminate because it was a small PTS program, there were too many PTS teachers (7), and there were only 3.5 authorizations. Dr. Ashby further testified that he did not allow Complainant to remain at Zama HS to teach CP

because there were not enough CP students to justify Complainant remaining on staff.

Dr. Ashby also testified that he rejected Mr. Fleetwood's offer to be voluntarily excessed because he needed two JROTC instructors, and if he accepted his offer, that would have placed Zama HS below the mandatory requirement for 2 FTE JROTC instructors. Finally, Dr. Ashby testified that he did not excess Ms. Rolen, even though Complainant had more seniority, the MOU required him to apply seniority, and Complainant was qualified to teach AVID. Dr. Ashby testified that (1) he did not have to follow the MOU, (2) he intentionally chose not to follow the MOU, (3) he needed Ms. Rolen because she was currently teaching AVID, (4) Complainant was not teaching AVID, and (5) Ms. Rolen was certified to teach special education which he might eventually need.

Pretext

Dr. Ashby was unable to articulate a credible explanation for the complete reversal of his position concerning Complainant's value and worth to the Zama HS PTS program. In late December he told Complainant she could have a reduced number of students to meet DoDDs policy, and he honored this promise by reducing her total students from 61 to 48. Then, he promised Complainant he would have a wall knocked down to increase the size of her classroom. Dr. Ashby then appeared to completely reverse his position with respect to Complainant and eliminated her position. Dr. Ashby's stated explanations were not credible and were pretext for race, color, age and reprisal discrimination for the following reasons:

(1) Even though Dr. Ashby stated that he targeted Cosmetology as the PTS program to be excessed because it had a limited number of students, he admitted that all of the PTS programs were small; further, he did not establish that Cosmetology was smaller than any other PTS program, he just claimed it was. On the other hand, the documentary evidence does not establish that Cosmetology was the smallest of the PTS programs. Accordingly, this testimony did not provide a credible reason for the excess decision.

(2) I do not credit Dr. Ashby's testimony that he targeted Complainant's position because she was the only teacher teaching Cosmetology and she did not have enough CP students to warrant keeping her on staff. Complainant had a reputation for handling large numbers of CP students (as many as 100 at a time) during the course of her tenure with Zama HS. Further, during the first semester of SY 2005-2006, Complainant's CP class was still sizeable with 46 students (fewer than prior years) and 32 during her second semester, but the only reason for the reduced number of CP students, especially in the second semester, was because Complainant registered further complaints with Dr. Ashby concerning having too many students without help in violation of the DoDDs standards and not having a large enough classroom with sufficient supplies. Dr. Ashby admitted being briefed by the Assistant Principal about Complainant's pending EEO complaint over these issues upon his arrival and he admitted attempting to placate Complainant by reducing the number of CP students during her second semester to comply with the DoDDs standards. I find it compelling evidence that before Complainant could fully appreciate the impact of the

reduction, Dr. Ashby decided to excess Complainant's position and ultimately her. Accordingly, I discredit Dr. Ashby's claim that there were not enough CP students to warrant keeping Complainant on staff, especially since he assigned two teachers (Giest and Rivera) to replace Complainant as teachers of CP when the actual number of CP students was significantly reduced (no more than 10 students) after Complainant was excessed.

(3) I do not credit Dr. Ashby's testimony that he did not accept Mr. Fleetwood's offer to be excessed because he needed two JROTC instructors. The documentary evidence established that there were already three JROTC instructors, *i.e.*, Ross H. Ballou, George L. Dale, and Michael W. Fleetwood, on staff during SY 2005-2006, and if Ashby had accepted Mr. Fleetwood's offer to be excessed, he would have still met his 2 FTE JROTC instructor compliment. Further, Dr. Ashby did not use Mr. Fleetwood to teach JROTC during SY 2005-2006; he used only George Dale for JROTC instructor training during that period, therefore, undercutting his claim that he needed two JROTC instructors during any given SY or semester.

(4A) The agency provided no support for Dr. Ashby's surprising assertion that he did not have to follow the MOU which governed the subject of excessing teachers. The applicable MOU paragraphs (3.a. and 3.b.3) would have prevented him from not accepting a qualified volunteer and then excessing Complainant instead of Ms. Rolan who had less seniority than Complainant when Complainant was qualified to teach AVID. The plain language of paragraph 3.b.3 required Dr. Ashby to apply excess procedures based on seniority, *i.e.*, service computation date, and there was no credible evidence that the Agency was not required to apply this provision to excess procedures involving Complainant or anybody at Zama HS or in the Japan District. Further, Dr. Ashby knew Complainant was qualified to teach AVID, but he did not offer her the opportunity to stay and teach AVID. Rather, he chose to keep a less qualified, significantly younger black employee who had not engaged in prior EEO activity.

(4B) I do not credit Dr. Ashby's testimony that he needed to keep Ms. Rolan on staff because she was qualified to teach special education. Dr. Ashby clearly did not need another teacher with such qualifications, and thus, this explanation lacks credence. The documentary evidence established that Zama HS was cut 1.5 special education positions for SY 2006-2007 because of no projected needs and Zama HS already had five special education teachers on staff, not counting Ms. Rolan. Union representative Debra DeGalis' statement during the investigation, (prepared closer in time to the incident at issue), that Dr. Ashby informed her that Ms. Rolan was needed on staff for SY 2006-2007 because she was "needed for the special education" position, is contradicted by the preponderance of other evidence, and thus does not change my conclusion. Ms. Rolan was only an AVID teacher and DoDEA, Headquarters had determined to cut 1.5 special education positions at Zama HS for SY 2006-2007, reducing the authorization for special education teachers to two. I cannot speculate if this is why the union did not grieve Dr. Ashby's decision not to apply paragraph 3.b.3 of the MOU to the excess procedures when excessing Complainant.

However, I find his explanation to be unbelievable and therefore, I do not credit his articulated reason for intentionally failing to follow paragraph 3.b.3 of the MOU as applied to Complainant, nor can I credit Ms. DeGalis' statement that Ms. Rolen was needed as a special education teacher.

(4C) For the reasons stated in subparagraphs 4A and 4B immediately above, I find that age was the "but for" factor in his decision to keep Ms. Rolen and excess Complainant, and additionally, for the totality of the reason discussed herein, that race, color, and reprisal were additional ("age plus") motivating factors. *See, Morgan v. United States Postal Service, and Campbell v. United States Postal Service, supra.*

(5) The short time between the Commission's ruling granting SJ in favor of the Agency on the issues of Complainant's previous EEO complaint (too many students, insufficient supplies, not enough equipment, not enough space) and Dr. Ashby's complete reversal of position between first, pledging to assist complainant and then, excessing was highly suspect. The preponderance of the evidence established that sometime between January 9 and January 13, 2006, Dr. Ashby discussed his intention of assisting Complainant by expanding her classroom, etc. Complainant established, without refutation, that this occurred during the week of January 9.¹⁴ On January 11, 2006, the agency received the Commission's Decision without Hearing (issued January 5). On January 13, 2006, Dr. Ashby called Complainant into his office and informed her that her position was to be excessed. Thus, although Dr. Ashby's testimony made it appear as if he had been thinking about his decision for several weeks, this was clearly not the case. I find it noteworthy that Mr. Bowers admitted that Dr. Ashby did not discuss excessing Complainant with him until the second or third week of January 2006, even though Bowers had notified Dr. Ashby in early December 2005 about the need to excess one teaching position. Mr. Bowers' testimony further established that Dr. Ashby did not discuss excessing any other teacher, nor disclose that there was a volunteer, during the brief conversations (five to ten minutes) he had with Dr. Ashby concerning who he was going to excess. [HT291-295.] Thus, I find and conclude that Dr. Ashby targeted Complainant because of her prior EEO complaint, her age, race, and color. In order to accomplish his goal, he had to ignore the procedures required by paragraph 3.a and 3.b.3 of the MOU on Excess Procedures, justify not accepting Mr. Fleetwood's offer to voluntarily be excessed when he was one of three JROTC instructors, rationalize for shifting the decrease in FTE authorizations from the programs which actually lost the authorizations to the PTS program which did not lose any authorizations, and vindicate his decision to keep Ms. Rolen based upon an untrue and pretextual claim that she was needed as a back-up teacher for special education needs that did not exist. The credible evidence established that Dr. Ashby did not have a problem with the PTS department and that Complainant was not viewed as a viable candidate to be excessed before January 13, 2006.

¹⁴ Dr. Ashby could not remember when the discussions occurred; Complainant was credibly certain.

Summary of Pretext Analysis

After examining the totality of the circumstances discussed herein (paragraphs 1-5 immediately above), I find Complainant presented additional evidence of age plus race discrimination. In addition to the facts that 84% of the teachers at Zama HS were white and non-Hispanic, 90% were not in two of Complainant's protected classes, 98% were younger than Complainant and 77% were substantially younger (10 years or greater), Dr. Ashby could not articulate a legitimate, nondiscriminatory reason for selecting a new teacher, Mr. Woodward (Caucasian, white, 37), who had no prior department head experience instead of long-time PTS department head Daisy Fulford, also (African-American, black, and 61 years old), Dr. Ashby could not articulate a legitimate, nondiscriminatory reason for not considering that Mr. Woodward's retirement at the end of SY2005-2006 would meet his goal of excessing one FTE teacher, and Dr. Ashby refused to excess a teacher from either of the departments (Middle Teacher and Secondary Teacher) that lost the authorizations.

Further, I do not credit Dr. Ashby's claim that there were no other vacant positions for available in Zama HS to which he could reassign Complainant. Complainant remained qualified as a CP Coordinator, as well as qualified to teach AVID. However, Dr. Ashby chose not to reassign the Complainant to another position at Zama HS in either of these areas because he claimed that no other vacancies were available, which I do not find to be true. The preponderance of the evidence established that there were 21 career clusters in the CP program, including Cosmetology, and Complainant placed students in a majority of those areas. As discussed above, I find that Dr. Ashby failed to articulate a legitimate nondiscriminatory reason why eliminating Cosmetology precluded Complainant from continuing as the CP Coordinator, clearly a position that was needed, for that position did not go away as evidenced by Dr. Ashby's intentions to replace Complainant with two teachers in CP, one of which was not certified as a CP teacher (Rivera) at the time he excessed Complainant. Additionally, I find that the evidence does not establish that Dr. Ashby truly considered Complainant's qualification to teach AVID, for the document he admitted he used to review the qualifications of teachers who had been excessed for other positions in the Japan District did not list her as being qualified to teach AVID; instead it only listed Complainant as being qualified to teach Cosmetology and CP. [AJE25, Tab 6.]

Issue 2 – Failure to Reassign Complainant in the Japan District Race, Color, Age, and Reprisal Discrimination Prima Facie Case

Complainant failed to establish a *prima facie* case of race, color, age, or reprisal discrimination because she did not carry her burden of showing that either of the two schools within the Japan District for which she wanted to be considered for reassignment had a position available for her to be reassigned to, and it was filled with somebody else of lesser or similar qualifications with less seniority and in different protected classes or the position was left open while the Agency continued to search for someone to place into it. Notwithstanding the absence of a *prima facie* case, the Agency articulated a reason for not reassigning Complainant to another position in the

Japan District, *i.e.*, one simply did not exist, causing Complainant's name to be placed on the world-wide list for transfer, and she was ultimately transferred to Lakenheath HS, England. Even though there is sufficient evidence¹⁵ in the record to discredit Dr. Ashby's claim that he evaluated Complainant's qualifications to teach AVID when looking for another position for her in the Japan District, *e.g.*, a position at Perry HS, it becomes a moot issue since Complainant did not carry her burden to show that such a position existed. Accordingly, I find and conclude that the Agency did not unlawfully discriminate against the Complainant when she was not reassigned within the Japan District.

VIII. CONCLUSIONS OF LAW

Concerning issue one, I conclude that the preponderance of evidence established that Complainant was discriminated against on the bases of her race (African-American), color (black), age (DOB: 5/22/37), and reprisal for prior EEO activity when, on January 13, 2006, when Zama High School Principal Dr. Jerry Ashby declared Complainant's teaching position excessed and he did not reassign her to another position within Zama HS.

Concerning issue two, I conclude that Complainant was not discriminated against on the bases of her race (African-American), color (black), age (DOB: 5/22/37), and/or reprisal for prior EEO activity when she was not reassigned from her position at Zama High School to another position in Career Practicum (CP) or Advancement *via* Individual Determination (AVID) at another school within the Japan District.

Based upon the finding of liability, Complainant is entitled to compensatory damages, attorney's fees and costs, as discussed below.

IX. COMPENSATORY DAMAGES/ATTORNEY'S FEES & COSTS

Legal Standards for an Award of Compensatory Damages

Section 102(a) of the 1991 Civil Rights Act (CRA) authorizes an award of compensatory damages for all post-Act pecuniary losses, *i.e.*, past pecuniary losses (out of pocket loss)¹⁶, future pecuniary losses, and non-pecuniary losses, such as, but not limited to, emotional pain, suffering,

¹⁵ Dr. Ashby was unwilling to consider Complainant's qualifications to teach AVID when considering other positions available within Zama HS (shown by his refusal to apply paragraph 3.b.3 of the MOU on Excess Procedures). Therefore, I cannot his statement that he applied paragraph 3.b.3 of the MOU and considered all of Complainant's skills and qualifications when recommending Complainant for other available positions in the Japan District. [See, facts #11 and 14 *supra.*; AJE25, Tab 6; HT287-289.] Therefore, I am not persuaded that Dr. Ashby or anybody else in the Japan District actively looked for a position in another school in which Complainant wanted to be reassigned, and I would otherwise discredit such claim if Complainant provided evidence that a position existed.

¹⁶ Past pecuniary losses are also not included in the caps and are fully compensable where actual out-of-pocket losses can be shown. Section 1981A(b)(3) limits only claims that typically do not lend themselves precise quantification, *i.e.*, future pecuniary losses and non-pecuniary losses.

inconvenience, mental anguish, loss of enjoyment of life, injury to character and reputation, and loss of health. In *West v. Gibson*, 527 U.S. 2121 (1999), the United States Supreme Court found that Congress afforded the Commission the authority to award such damages in the administrative process. The CRA authorizes an award of compensatory damages as part of make-whole relief for discrimination. Section 1981a(b)(3) limits the total amount of compensatory damages that may be awarded each complaining party for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, according to the number of individuals employed by the respondent. The limit for a respondent who has more than 500 employees is \$300,000. Under 42 U.S.C. § 1981A, compensatory damages do not include the traditional relief authorized by Title VII, *i.e.*, make-whole remedies, including backpay, interest on backpay, front pay and injunctive relief.

To receive an award of compensatory damages, Complainant must demonstrate that she has been harmed as a result of the Agency's discriminatory action; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. *Rivera v. Department of the Navy*, EEOC Appeal No. 01934157 (July 22, 1994), request for reconsideration denied, EEOC Request No. 05940927 (December 11, 1995); *Lawrence v. United States Postal Service*, EEOC Appeal No. 01952288 (April 18, 1996). *Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991*, EEOC Notice No. 915.002 at 11-12, 14 (July 14, 1992).

Complainant must support her claim for compensatory damages with objective evidence, which may include her own statements, statements from family members and friends, or statements and documents from health care providers which identify and describe physical or behavioral manifestations of mental or emotional distress. *Goodwin v. USAF*, EEOC Appeal No. 01991301 (October 18, 2000); *Carle v. Navy*, EEOC Appeal No. 01922369 (January 5, 1993).

Compensatory damages are awarded to compensate a complaining party for losses or suffering inflicted due to discriminatory acts or conduct. *Carey v. Phipus*, 435 U.S. 247, 254 (1978). Compensatory damages "may be had for any proximate consequences which can be established with requisite certainty." 22 Am. Jur. 2d, *Damages*, Section 45 (1965). Thus, speculative damages will not be awarded, *i.e.*, there must be sufficient evidence to support the award. *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1121 (3d Cir. 1988), citing *Erebia v. Chrysler Plastics Products Corp.*, 772 F.2d 1250, 1259 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986).

The Commission recognizes that for a proper award of non-pecuniary damages, the amount of the award should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. *See, Ward-Jenkins v. Interior*, EEOC Appeal No. 01961483 (March 4, 1999) (citing, *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989)). The particulars of what relief may be awarded, and what proof is necessary to obtain that relief, are set forth in detail in the *EEOC's Enforcement Guidance, Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991* (July 14, 1992) ("Guidance"). Briefly stated, the Complainant must submit evidence to show that the Agency's discriminatory conduct directly or proximately caused the losses for which damages are sought. *Id.* at 11-12, 14; *Rivera v. Navy*,

EEOC Appeal No. 01934157 (July 22, 1994). The amount awarded should reflect the extent to which the Agency's discriminatory action directly or proximately caused harm to the Complainant and the extent to which other factors may have played a part. *See, Guidance*, at 11-12. The amount of non-pecuniary damages should also reflect the nature and severity of the harm to the Complainant, and the duration or expected duration of the harm. *Id.* at 14. Thus, the critical question is whether the complaining party incurred the losses as a result of the employer's discriminatory action or conduct.

Objective evidence of non-pecuniary damages could include a statement by the Complainant explaining how she was affected by the discrimination. *See, Carle v. Navy*, EEOC Appeal No. 01922369 (January 5, 1993). Statements from others, including family members, friends, and health care providers could address the outward manifestations of the impact of the discrimination on the Complainant. *Id.* The Complainant could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. *Id.* However, evidence from a health care provider is not a mandatory prerequisite to establishing entitlement to non-pecuniary damages. *Sinnott v. Defense*, EEOC Appeal No. 01952872 (September 19, 1996). The more inherently degrading or humiliating the Agency's actions are, the more reasonable it is to infer that a person would suffer humiliation or distress from that action, and the less it is necessary to rely on evidence from a health care provider to justify a damages award. *See, Lawrence v. USPS*, EEOC Appeal No. 01952288 (April 18, 1996). Nevertheless, the absence of such supporting evidence could potentially affect the amount of damages that could be awarded in specific cases. *Id.*

Complainant's Evidence

Non-Pecuniary Damages

Complainant requested non-pecuniary damages in the amount of \$300,000. Complainant's evidence of injury and causation consisted of testimony from herself and her spouse. [HT63-92; HT114-123.]

Complainant testified that the series of actions and treatments she received from Agency management, notably Dr. Ashby and Mr. Bower, over the course of time referenced in her complaint caused her to feel deep humiliation and she became so emotionally distraught that she began having "anxiety attacks," waking up throughout the night, endlessly questioning what she had done to warrant being excessed. [HT64.] Complainant sought treatment from Richard B. Smith, M.S., L.M.F.T.,¹⁷ Supervisor, Counseling and Advocacy Program, U.S. Naval Air Facility, Atsugi, Japan, on February 27, March 6, 13, 21, 31, April 14, May 15, 25, June 1 and 14, 2006 before transferring to Lakenheath, England. [AJE24, Tab 29; HT65-67.] Complainant testified that prior to 2006, she had been taking the anti-depressant "Effexor," but because of the tremendous anxiety she felt after being notified that she was being excessed, her prescription of 75 mg twice per day was doubled, requiring her to take 150 mg twice per day. [HT66.]

¹⁷ LMFT = licensed marriage and family therapist.

Complainant testified that without the anti-depressant at the dosage level she was prescribed she would be severely depressed and unable to function. Complainant testified about her emotional distress in the form of what she lost that meant so much to her, specifically, being unable to take her students to Seoul, Korea, Vietnam, and Hong Kong to have student designs sewn into final products for modeling shows; she testified about the hurt in her students' eyes when they learned that she was being excessed and how she could not explain to them why and how that was exceedingly traumatic for her.

Complainant's spouse testified that she was so dedicated to teaching that she invested her own money and had developed significant networks in Asian communities (Japan, Korea, Vietnam, and Hong Kong) that benefited the students, causing her to believe that she would never be targeted to be excessed. He testified that her commitment to the PTS program and Zama HS drove her into further "denial" because she could not understand how she could be excessed after she gave so much of herself to her profession, to her students, and to Zama HS, and she began deluding herself into believing that somebody was going to rescue her and tell her, "Okay, you can remain here." [HT115.] He credibly testified that she suffered from constant "crying spells," "sleeplessness," and that it got to the point that she did not want to communicate with him on the issue of leaving Zama HS. [HT117.] He testified that Complainant was so private that he had to make special arrangements with Counselor Smith at Atsugi to see her after hours so she would not be embarrassed because she was seeking mental health treatment, especially at her advanced age. [HT116-119.] Complainant's husband testified that even after they transferred to England, Complainant's severe emotional distress continued because she could not believe that after all of her dedication and commitment to the development of the program and students at Camp Zama that she would be excessed; he said that it hurt her beyond repair. He further explained that Complainant began taking anti-depressants in 1993 after she transferred to Naval Station Yokosuka. Complainant's husband stated that Complainant felt the principal did not want her at Yokosuka even though the Superintendent of the Japan District, Dr. Bloom, had invited her there to revitalize the Cosmetology program. [HT122.] He testified that Complainant continued to seek mental health treatment from professionals when they later transferred to Germany.

A number of Commission decisions have awarded non-pecuniary compensatory damages in cases which are comparable to the Complainant's. *See, Looney v. Department of Homeland Security*, EEOC Appeal No. 07A40124 & 01A53252 (May 19, 2005) - EEOC awarded \$195,000 in non-pecuniary damages and \$1,941.03 in pecuniary damages based on evidence that complainant experienced substantially long-term effects, including depression which was confirmed by her psychologist, humiliation, weight problems, rashes, anxiety, nightmares, difficulty sleeping, and marital problems; her husband testified that she experienced stress and mood swings, became sick more often, and was exhausted and extremely self-conscious; complainant's friends noted a change in appearance and withdrawal; *Goodridge v. Social Security Administration*, EEOC Appeal No. 0720050026 (November 15, 2006), request for reconsideration denied, EEOC Request No. 0520070216 (February 27, 2007) - EEOC awarded \$150,000 in non-pecuniary damages based on evidence that Complainant suffered from anxiety, depression, humiliation, sleep deprivation, and crying spells as a result of the agency's discriminatory actions; testimony of family and friends

indicated that she had withdrawn socially, had difficulty maintaining relationships, lost enjoyment of life, had diminished quality of life, and displaced physical symptoms due to the work situation; medical evidence submitted; *Furch v. Department of Agriculture*, EEOC Appeal No. 07A40094 (August 5, 2005) - EEOC awarded \$150,000 in non-pecuniary damages based on evidence that Complainant was off work for three months, suffered months of anxiety, insomnia, lack of appetite, and was prescribed various medications; she saw a psychologist for 6 to 8 months and, at the time of the hearing, continued to see a social worker and suffer weekly crying spells; her daughter and co-workers testified that she experienced stomach problems, and was no longer outgoing, but withdrew socially; complainant submitted medical evidence showing a diagnosis of generalized anxiety disorder.

I find the preponderance of the evidence established that the Complainant suffered emotional and psychological injuries which resulted from the Agency's unlawful discrimination and reprisal. Complainant was an exceptional teacher in that she was devoted to her students and developed teaching programs in PTS and CP that were very popular and well received at Zama HS, as evidenced by her large CP classes. She invested her own money for equipment and supplies, took students on trips to Korea, Vietnam, and Hong Kong in further pursuit of their education and training. She was the cheerleading coach, prep club coach, she wrote a newsletter, and she served as an AVID site team member. She had been performing at this level for years and she truly loved teaching and giving to the students. Unquestionably, she loved her students at Zama HS where she had been since 1997 and had remained until 2006 when a new principle, Dr. Ashby, decided to excess her, and not the younger, less qualified teachers or even someone who volunteered to be excessed. Complainant had been a teacher for many, many years and had never lost the desire, but Dr. Ashby's unlawful discriminatory and retaliatory actions crushed her to the point of causing her immense depression, forcing her to delude herself into thinking that it was all a bad dream and that somebody would rescue her from the trauma of having to leave the environment she so loved. She suffered severe depression and anxiety as evidenced by her refusal to accept the reality of Dr. Ashby's decision up until the day she had to relinquish her position and transfer to Europe. Her depression, anxiety, and loss of self-esteem followed her across the world when she transferred to Europe. As attested to by her spouse, things were never the same for Complainant after they left Camp Zama. She suffered countless sleepless nights, continued with increased dosages of anti-depressants, continued with psychological treatment, but things were never the same. At the time of the hearing, Complainant was 70 years young, and when she testified, her passion for teaching at Zama HS came through; she began to cry on at least two occasions during the hearing because she was still so upset about what she felt was unlawfully taken away from her.

Complainant did not proffer any additional medical documentation to further corroborate her depression and anxiety, but the Agency did not provide any evidence that her claims were less than described. I find that the Agency's illegal actions have had a long term, very negative impact on Complainant for more than 2-1/2 years (January 2006 through the hearing date in June 2008 and beyond). Complainant had remained employed by the Agency, but it's clear from the evidence that Dr. Ashby and his decision-making robbed Complainant of an integral part of her emotional well-being when he unlawfully discriminated and retaliated against her. Accordingly,

based on the foregoing evidence, I find that Complainant is entitled to non-pecuniary damages in the amount of \$175,000.00, which I will reduce by 20% (-\$35,000) to take into account the fact that Complainant was already suffering from some type of depressive condition/illness which required her to take anti-depressants since at least 1993 when she was posted in Yokosuka. Indeed at the time of her being noticed that she was being excessed, she was taking Effexor, a prescription antidepressant drug, indicated for major depressive disorder, generalized anxiety disorder, panic disorder, and social anxiety disorder. *See*, <http://www.effexor.com>. This amount takes into account the severity and duration of the harm sustained by Complainant as a result of the Agency's actions and after giving due consideration of damage awards reached in comparable cases. I further note that this amount meets the goals of not being motivated by passion or prejudice, not being "monstrously excessive" standing alone, and being consistent with the amounts awarded in similar cases. *See, Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989).

Pecuniary Damages

Complainant did not carry her burden of establishing a claim for pecuniary damages. Complainant testified that she paid to transport one vehicle from Japan to England because the Agency would only pay to transport one vehicle, but she did not support her claim with documentary evidence of the costs she incurred and therefore, none are awarded. The evidence established that, otherwise, Complainant was relocated at the cost of the Agency. Additionally, Complainant sought treatment from a Navy Counselor, thus, she did not appear to have any pecuniary damages for her mental health treatment. Though Complainant identified her medical prescription for an antidepressant increased, she did not provide any evidence of out-of-pocket costs for co-pays, prescriptions, transportation to and from the doctor, or any other quantifiable out-of-pocket expenses, nor did she provide documentation to support any other pecuniary damage. Accordingly, I find that Complainant failed to present sufficient evidence of pecuniary damages, and therefore, none are awarded..

Attorney's Fees and Costs

By regulation, a Federal Agency must award attorney's fees and costs, in accordance with existing law, for the successful processing of an EEO complaint. 29 C.F.R. Section 1614.501(e). The fee award is ordinarily determined by multiplying a reasonable number of hours expended on the case by a reasonable hourly rate, also known as a "lodestar." *See, Blum v. Stenson*, 465 U.S. 886 (1984); 29 C.F.R. Section 1614.501(e)(2)(ii)(B). In determining the number of hours expended, the Commission recognizes that the attorney "is not required to record in great detail the manner in which each minute of his time was expended." *See, Benard v. Department of Veterans Affairs*, EEOC Appeal No. 01966861 (July 17, 1998). However, the attorney does have the burden of identifying the subject matters in which he/she spent his/her time, which can be documented by submitting sufficiently detailed contemporaneous time records to ensure that the time spent was accurately recorded. *Id.* Further, in order to obtain an award of attorney's fees and costs, the Complainant must be considered a prevailing party. *See, Texas State Teachers Ass'n v. Garland*,

I.S.D., 489 U.S. 782 (1989).

Complainant is a prevailing party entitled to recovery of reasonable attorney's fees and costs pursuant to 29 C.F.R. Section 1614.501(e) and the Commission's Management Directive 110 (MD-110). During a telephonic conference call on August 19, 2008, I informed the parties that I intended to issue a decision in favor of Complainant on the issues¹⁸ and bases before the Commission in the above-captioned case; I also ordered Complainant to submit her motion for attorneys' fees and costs and for the Agency to submit its response. On August 28, 2008, the Commission received Complainant's fee petition and on September 10, 2008, the Commission received the Agency's response arguing that Complainant's fees should be reduced by 25%. [PHS3 and PHS4, respectively.] The bases for the Agency's request for a reduction are: (1) Complainant is not entitled to recover fees and costs accrued between January 9 and May 16, 2006 because she is not entitled to fees prior to the filing of her formal complaint; (2) Complainant is not entitled to excessive, redundant, or unnecessary costs; and (3) Complainant is not entitled to recovery for costs associated with multiple inaccurate documentation.

Reasonable Hourly Rate

For the purpose of determining the prevailing market rate, the relevant community is the area where the agency facility and complaint are located. *Black v. Secretary of the Army*, EEOC Appeal No. 01921158 (1993). Here, the facility and complaint are located in Camp Zama, Japan, but there is no comparable prevailing market rate for a similar labor practice in Japan. However, since Complainant could not find counsel readily available in that locality with the degree of skill reasonably required, I shall apply the standard for the prevailing market rate for the closest comparable state and locale, that in which Complainant's attorney resides and practices, *i.e.*, Honolulu, Hawaii. *See, Hatfield v. Navy*, EEOC Appeal No. 01892909 (December 12, 1989) (If a party does not find counsel readily available in the relevant locality with whatever degree of skill may reasonably be required, it is reasonable for a party go elsewhere to find an attorney); *see also, Southerland v. United States Postal Service*, EEOC Appeal No. 01A05403 (October 16, 2002). The burden is on the agency to show that complainant's decision to retain out-of-town counsel was unreasonable. *Id.* In *Southerland*, the agency met this burden by presenting documentation showing the availability of local counsel with federal sector experience and, thus, established that retaining out-of-town counsel was not reasonable. Here, the agency has not met this burden. Complainant case arose in Camp Zama, Japan and there was no evidence that there

¹⁸ Despite informing the parties that I intended on issuing a liability decision on both issues and all bases I realized that the reassignment issue (issue two) was improperly phrased and I, accordingly, rewrote the decision. [See, discussion *supra* under the heading, Issues] Complainant's entire case was focused on being excessed and not being reassigned to a position for which she had seniority at Zama HS. Complainant did not put on any evidence to show that there was a position available at any of the two schools in the Japan District that Complainant would be willing to accept reassignment to. Therefore, I find that Complainant's prosecution of her entire case was focused on what should have technically been considered as issue one only. Accordingly, I do not find that the hours Complainant's attorney spent in developing and prosecuting Complainant's case were spent on the rephrased issue two, necessitating a reduction in fees or costs on that basis.

were any English speaking attorneys familiar with Title VII and proceedings before the Commission practicing law in or around Camp Zama, Japan. Accordingly, I shall make an award on the basis of the chosen attorney's billing rate.

Mr. Clayton C. Ikei is a Hawaii attorney who has been practicing labor law in Honolulu, Hawaii for more than 33 years. He requested reimbursement at his customary rate of \$225.00 per hour for out of court legal representation and \$275.00 per hour for in-court and deposition representation. [PHS3.] Mr. Ikei also requested reimbursement for worked performed by his associate attorney, Jerry P.S. Chang, a Hawaii attorney, practicing labor law for more than 10 years, at his customary rate of \$200.00 per hour, and for worked performed by his paralegal Eric C. Schmidt at his customary rate of \$100.00 per hour.

Complainant presented declarations from Hawaii attorneys Elbridge W. Smith and Michael F. Nauyokas, whose practices concentrate on employment and labor law. Both Mr. Smith and Mr. Nauyokas stated that the hourly rates of Complainant's counsel and staff are fair and reasonable, and that they are below the prevailing market rate for professionals of similar experience and background. Mr. Smith has been a labor lawyer in Honolulu, Hawaii for approximately 26 years and his hourly rate in 2006 was \$310.00 per hour and \$125.00 per hour for his paralegal staff, not including the mandatory general excise tax and Oahu surcharge. [*Id.*] Mr. Nauyokas has been a labor lawyer in Honolulu, Hawaii for more than 17 years and his hourly rate in 2006 was \$325.00 per hour and \$135.00 per hour for his paralegal staff, not including the mandatory general excise tax and Oahu surcharge. [*Id.*] Accordingly, I find that Mr. Ikei's rate of \$275.00 per hour for in-court and deposition legal representation, \$225.00 per hour for out of court legal representation, and \$200.00 per hour for his associate are reasonable and within the prevailing market rate for attorneys with their level of experience in employment discrimination law in Honolulu, Hawaii and by comparison.

Reduction - Reasonable Hours Expended

Mr. Ikei claimed 239.9 hours @ \$225.00 per hour and 21.0 hours @ \$275.00 per hour working on Complainant's EEO case for a total of \$53,977.50. I note that Complainant did not file her formal written complaint concerning the above-captioned case until on or about May 18, 2006. [IR, Tab A.] 29 C.F.R. §1614.501(e)(1)(iv) provides as follows:

Attorney's fees shall be paid for services performed by an attorney after the filing of a written complaint, provided that the attorney provides reasonable notice of representation to the agency, administrative judge or Commission, except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. Agencies are not required to pay attorney's fees for services performed during the pre-complaint process, except that fees are allowable when the Commission affirms on appeal an administrative judge's decision finding discrimination after an agency takes final action by not implementing an administrative judge's decision. Written submissions to the agency that

are signed by the representative shall be deemed to constitute notice or representation.”

The Commission has long held that “one hour or two at the outside” would be a reasonable amount of time to reach a determination as to whether to represent complainant prior to the filing of a formal complaint. [See, *Stauner v. Agriculture*, EEOC Appeal No. 01890678 (April 13, 1989); *Rice v. Department of Energy*, EEOC Appeal No. 01950397 (June 19, 1997).] Since Complainant did not file her written formal complaint until May 18, 2006, I disapprove any hours in excess of 2 hours @ \$225.00 per hour incurred during the period of pre-complaint counseling. I understand that Complainant’s counsel represented Complainant in her prior EEO case and she continued employing him in the above-captioned case, but Commission law on this issue is clear. Accordingly, I approve 2 hours @ \$225.00 per hour for a total of \$450.00 for Mr. Ikei’s representation during the period of January through May 18, 2006. I approve all of the remaining hours charged by Mr. Ikei post-May 18, 2006, except for the following: his May 23, 2006 charge of \$5.00 for a returned check for insufficient funds; the duplicate charge for him and his associate counsel (Mr. Chang) to attend a telephonic pre-hearing conference on July 2, 2007, (i.e., .3 hours @ \$200.00 per hour); and .7 hours @ \$225.00 per hour billing charge for transmitting exhibits and outline to Complainant on August 20, 2007. Mr. Ikei has administrative staff working for him and the Agency should not be required to pay legal fees of \$225.00 per hour for the administrative task of transmitting a fax to a client. Accordingly, these charges are being disallowed.

Agency counsel objected to .1 hour billing charge @ \$200.00 per hour on November 14, 2006 for a call Mr. Chang left on Complainant’s voice mail when he could not reach her, but I find it reasonable for attorneys to charge in one-tenth of an hour increments for telephone calls, and I hereby approve the \$20.00 charge. Agency counsel also objected to Mr. Ikei’s charge of 8 hours @ \$200.00 per hour for Mr. Chang to review the EEO investigator’s report, devise a preliminary discovery plan, and draw an overall assessment of the case in December 2006, even though Mr. Ikei then billed 6 hours @ \$225.00 per hour in March 2007 for a discovery review. Agency provided no evidence that these charges are redundant, unnecessary, or unreasonable, so I hereby deny the Agency’s objections and approve the charges. Agency counsel also objected to Mr. Ikei’s charge of 1.1 hours @ \$100.00 per hour for his paralegal to print Agency’s document production response without any indication that it would be unreasonable to take 1.1 hours to download and print the number of documents submitted; therefore, I disagree with Agency’s objection and I hereby approve the charge. Agency counsel further objected to Mr. Ikei’s billing charges on May 14 and 15, 2007 of 2.6 hours @ \$200.00 per hour for Mr. Chang reviewing an email from Agency counsel concerning its motion to extend motion to compel deadline, drafting a supplement to motion, reviewing Agency’s discovery response, and reviewing the DoDEA website for annual reports and budgets for the Japan District, in addition to Mr. Ikei’s charges on May 16 and 17, 2006 for reviewing Agency’s responses to Complainant’s discovery requests in the amount of 4.1 hours @ \$225.00 per hour; I do not find evidence that these charges are duplicative or unreasonable; therefore, I approve them. Agency objected to Mr. Ikei’s charge on August 13, 2007 of .5 hours @ \$100.00 per hour for his paralegal to move databases and spreadsheets to a share drive and compress the database for emailing, which is higher skilled work

than that which a secretary performs. Therefore, I do not find this charge is for work that is unnecessary or unreasonable, and I hereby approve the charge. Agency counsel objected to Mr. Ikei's charges on September 21, 2007 for his spending .7 hours @ \$225.00 per hour and Mr. Chang spending 1.3 hours @ \$200.00 per hour reviewing the Agency's motion for summary judgment; I do not find a total 2.0 hour charge for reviewing a summary judgment motion to be unreasonable. Finally, Agency counsel objected to Mr. Ikei's charge of 17.9 hours @ \$225.00 per hour for reviewing 390 pages of transcript and preparing a written closing argument consisting of 22 pages with citations to the record; I do not find 17.9 hours to be unreasonable concerning the complexity of the case, and I hereby approve the charge.

Agency counsel requested a reduction of the hourly rate Mr. Ikei charged while in travel status by fifty percent. I concur with Agency counsel that Commission law supports a reduced rate (50%) for charges associated with travel, and I hereby reduce the charges for travel on May 25 and May 31, 2008 from 15 hours @ \$225.00 per hour each way to 15 hours @ \$112.50 per hour each way. Concerning Agency counsel's request for an "across the board reduction in fees" of 25% based on the allegation that Complainant's counsel engaged in "duplicative or excessive work," I find the Agency did not carry its burden of establishing that Complainant engaged in duplicative or excessive work; therefore, I hereby deny its request.

For the reasons stated herein, I award Complainant reasonable attorney's fees for work completed by Mr. Ikei for 204.8 hours @ \$225.00 per hour, 30 hours @ \$112.50 per hour, and 21 hours @ \$275.00 per hour for a total of \$55,230.00.¹⁹

Legal Assistant Hourly Rate

Under 29 C.F.R. 1614.501 (e)(1) (iii), attorney fees are "allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the bar . . ."

Here, Mr. Jerry P.S. Chang, is a licensed attorney in the State of Hawaii, and he had been practicing labor law for over 10 years at the time he began assisting Mr. Ikei with the representation of Complainant. As discussed above, I award Complainant reasonable attorney's fees for work completed by Mr. Chang for 79.9 hours @ \$200.00 per hour for a total of \$15,980.00.

Concerning the claim of fees for work accomplished by Mr. Ikei's paralegal, Eric C. Schmidt, I find that it was for work accomplished under the supervision of Mr. Ikei and Mr. Chang. Accordingly, I award Complainant fees for the services of Mr. Schmidt for 59.8 hours @ \$100.00 per hour for a total of \$5,980.00.

¹⁹ See, footnote 18 *supra*.

Preparation of Fee Petition

Concerning Complainant's claim that she should be reimbursed for fees incurred in connection with her attorney's preparation of the fee petition, the Commission has held that time spent in the preparation of a fee petition is compensable. *See, Curry v. Army*, EEOC Appeal No. 01984576 (January 12, 2001) (attorney work in preparation of a fee petition should be evaluated utilizing a reasonableness standard; using this standard we find it reasonable to compensate complainant's attorney at his full hourly rate for the preparation and defense of the fee petition); *see also, Black v. Army*, EEOC Request No. 05960390 (December 9, 1998). Complainant's attorney requested reimbursement for 14.4 hours at his full hourly rate for the preparation and defense of the fee petition: .7 hours @ \$225.00 per hour for Mr. Ikei's services and 10.5 hours @ \$200.00 per hour for Mr. Chang's services in the preparation of the initial fee petition, and 3.2 hours @ \$200.00 per hour for Mr. Chang's role in preparing a reply memorandum to the Agency's response to the fee petition. [PHS6.] The fee petition included a ten-page motion, four declarations consisting of thirteen pages, and seven tabs consisting of details and justifications for the various fees, charges, and costs. The reply memorandum consisted of 8 pages and was merely a recitation of the law and why the AJ should grant the requests in the initial fee petition. In that Complainant's counsel did not request permission from the AJ to submit a reply memorandum and it mostly contains arguments about the law with little if any new facts, I am disapproving the requested 3.2 hours @ \$200.00 per hour. However, I find it reasonable to compensate Complainant's attorney at his full hourly rate for the preparation and defense of the initial fee petition, and I hereby award 10.5 hours @ \$200.00 per hour (Chang) and .7 hours @ \$225.00 per hour (Ikei) for a total of \$2,257.50.

Costs

Although the only recoverable costs cited in the regulations are for reporting fees, expert witnesses, and copying, the Commission has held that recoverable costs may include reasonable out-of-pocket expenses incurred during the normal course of representation and normally charged to a fee-paying private client in the normal course of providing representation. *See, Hatfield v. Navy*, EEOC Appeal No. 01892902 (December 12, 1989). Recoverable expenditures include costs associated with clerical work, postage, and telephone calls, as well as travel expenses, including air fare, hotel accommodations, meals, and car rental. To be reimbursed for these expenditures, the fee applicant must submit adequate documentation in support of the expenses incurred, e.g., copies of the telephone bills or receipts. *See, Canady v. Army*, EEOC Request No. 05890226 (December 27, 1989).

Because the State of Hawaii requires the services industry to pay a fixed general excise (GE) tax and a Oahu surcharge and this is customarily charged to the client in the normal course of providing representation, I find that it is a recoverable cost. For 2006, the GE tax and Oahu surcharge amounted to 4.167% and for 2007 and 2008 it was 4.712%.

I hereby award Complainant GE tax and Oahu surcharges for 2006 in the amount of 3 hours (Ikei)

@ \$225.00 x .04167 = \$28.13; 7.3 hours (Chang) @ \$200.00 x .04167 = \$60.84; and .6 hours (Schmidt) @ \$100.00 x .04167 = \$2.50; for a total of \$91.47 for 2006.

I hereby award Complainant GE tax and Oahu surcharges for 2007 and 2008 in the amount of \$54,555 x .04712 = \$2,570.83 for Mr. Ikei's representation; \$14,520 x .04712 = \$684.18 for Mr. Chang's representation; \$5,920 x .04712 = \$278.95 for Mr. Schmidt's paralegal work; for a total of \$3,533.96 for 2007-2008.

I hereby award Complainant GE tax and Oahu surcharges for 2008 in the amount of \$106.37 (\$2,257.50 x .04167), for costs associated with preparation of the fee petition.

Accordingly, the total GE tax and Oahu surcharges awarded for 2006, 2007, and 2008 are \$3,731.80.

Concerning the other costs requested, the only cost that Agency counsel objected to was for a returned check in the amount of \$5.00, which I sustained. No objections were registered concerning the remaining charges for copying costs, postage, facsimiles, Federal Express mail, Lexis-Nexis research, court reporter costs for depositions, parking, telephone costs, airline expenses, lodging expenses, ground transportation costs enumerated in the initial fee petition, which amounted to total costs of \$4,522.86. Concerning the costs associated with the preparation of the initial fee petition, including postage (\$11.37), Federal Express Charges (\$34.97) and copying costs (\$55.20), I find that that they are recoverable costs, reasonable, and supported by the documentary evidence, therefore, I hereby award total costs in the amount of \$4,624.40.

X. CORRECTIVE ACTION

The Agency shall provide the following make-whole relief and compensatory damages to the Complainant:

1. The Agency shall offer Complainant a substantially similar position to that which she left at Zama HS, including teaching in CP, Cosmetology, and even AVID. Because I find that Dr. Ashby's decision to eliminate Cosmetology from his list of PTS programs available to the students was motivated by his desire to unlawfully discriminate and retaliate against Complainant, I do not accept the Agency's argument that the elimination of the program was necessary and therefore that the program is no longer available to be taught to be a legitimate, nondiscriminatory reason for its elimination.
2. The Agency shall restore to Complainant any annual leave, sick leave, and any other equitable remedy to which Complainant would otherwise be entitled had she not been subjected to unlawful discrimination and reprisal, including payment for any unreimbursed relocation costs associated with Complainant's move to Europe and any subsequent move back to Japan.
3. Upon Complainant's return to Zama HS, she shall be entitled to the same seniority as though

she never left, up to and including the date of her return.

4. The Agency shall ensure that the relevant management officials (Dr. Ashby and Mr. Bowers) who participated in the unlawful discrimination and retaliation referenced herein do not do so again by training and/or disciplinary action. Such training shall include, but is not limited to, EEO awareness training, especially focusing on Title VII with particular emphasis on race, color, age, and reprisal issues. To the extent that the Agency still has functional control over these employees, especially Dr. Ashby who was the primary discriminator, the Agency shall require these employees to attend a minimum of forty (40) hours of EEO awareness training annually for the next three years.

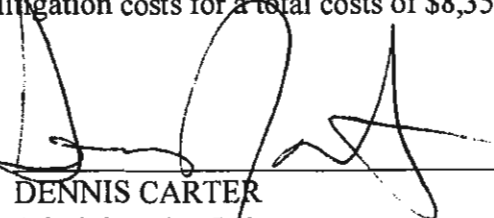
5. The Agency shall prominently post at the Zama HS and the Japan District Headquarters, a notice of the finding of discrimination in conformity with Appendix A of 29 C.F.R. Part 1614. The notice shall indicate that it is being posted pursuant to this Decision, and shall be readily visible and accessible by all employees of the Japan District Headquarters and Zama HS.

6. The Agency shall compensate the Complainant for non-pecuniary damages in the amount of \$140,000.00.²⁰

7. The Agency shall award Complainant reasonable attorneys' fees in the amount of \$77,190.00 for legal work performed by Mr. Ikei, his associate, Mr. Chang, and his paralegal, Mr. Schmidt, and \$2,257.50 for fees associated with the preparation of the fee petition for a total of \$79,447.50.

8. The Agency shall award Complainant costs associated with Complainant's successful prosecution of her EEO case as described herein, *i.e.*, \$3,731.80 for GE tax and Oahu surcharges and \$4,624.40 for other miscellaneous recoverable litigation costs for a total costs of \$8,356.20.

For the Commission:


DENNIS CARTER
Administrative Judge

²⁰ \$175,000 minus \$35,000 (20% reduction for pre-existing mental condition).