IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cynthia Artis, et al., **Plaintiffs,** **v.** **Alan Greenspan, Chairman of The Board of Governors of The Federal Reserve System,** **Defendant**	)))))))	**CASE NO. 01-0400 (EGS)**

PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSES TO COURT ORDERED DOCUMENT PRODUCTION AND RESPONSE TO DEFENDANT'S MOTION TO DISMISS

I. Defendant Failed to Respond in Good Faith to the Court's Order Compelling Document Production

Defendant's responses to the Court's Order requiring production of documents is noteworthy in three aspects: (1) the failure to produce any documents whatsoever; (2) the failure to address the issue of documents that were destroyed or lost, notwithstanding their required retention and; (3) the acknowledgment that in 1997, the Board failed to give grievants notice of their mandatory rights and responsibilities pursuant to the pre-complaint counseling process. According to the Board, the failure to notify was its "practice" at that time.

1. Defendant's Failure to Produce any Records Pursuant to the Court's Order

The Board was required to produce records in seven distinct categories, items 1, 2, 3, 4, 5, 6 and 8. However, not a single document was provided to plaintiffs. In light of the disclosure that defendant had destroyed or lost records which were required to be kept, a question arises. Were any of the documents which the Court ordered produced, likewise lost or missing? We are not informed. (Plaintiffs discussed the lost or destroyed records in their corrected reply to defendant's opposition to plaintiffs' motion to compel, March 22, 2005, at pages 5 through 11).

2. Defendant Fails to Discuss the Destruction or Loss of Records In Either the Documents Responses or in the Motion to Dismiss.

Defendant should reveal who ordered, if anybody, the destruction of records and how and why were other documents lost. In view of this revelation, it is incumbent upon defendant to disclose the exact circumstances of the destruction and loss of documents. And whether any material could not be produced because it was a "practice" to destroy or lose documents such as

"underlying counselors' notes and materials" referenced to in item 2 of the Court's Order to produce records. Plaintiffs have repeatedly stated that they did all that was asked of them in counseling in good faith. Plaintiffs contend that the counselors notes would prove this fact without any doubt. Defendant has conveniently lost or destroyed all evidence of this fact. It was defendant's lawful duty to retain all records in any case being litigated. Defendant has admitted that they have breached this vital statutory requirement. Was it a "practice " to treat Title VII records (in litigation) in a manner which would make any grievants hard-pressed to pursue their claims? Without credible answers, one must assume that the Board is concealing information adverse to its interests.

3. Defendant's Violation of Title VII, and Rules and Regulations Thereunder By It's (The Board's) Failure To Notify Complainants of their Rights.

By way of their document responses of September 8th, 2005, in item 1, defendant was compelled to admit that in 1997, the Board did not advise grievants of their rights under Title VII (and rules and regulations thereunder), as a matter of "practice". In view of this revelation, this material failure by itself renders the entire counseling process for plaintiffs a futile exercise. Consequently, how could the plaintiffs be expected to conform to substantive requirements, if they were never told the content of those requirements at the initial counseling session as the rules require?

II. Plaintiffs Satisfied Their Administrative Counseling Requirements Within and Despite the Bad Faith Conditions Created by Defendant.

1. The Board Failed to Notify Complainants of their Statutory Rights and Duties

Board Regulation No.12 CFR § 268.204 (b)[1] specifies that both individual complainants (§268.204(b)) as well as complainants seeking to file a class complaint (§ 268.305(a))[2] must be notified in writing of their rights and duties at the ***initial session*** of counseling. This was not

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[1] This is the section number of the Board's 1997 regulation (effective Apr. 6, 1994, as amended at 61 FR 252. Jan. 4, 1996) (Attachment 1). The regulation number changed to 12 CFR § 268.104(b) in the 2005 version.

[2] As to class complaints, the 1997 Board's regulations, conforming to mandatory EEOC regulations, require the Board to notify class complainants of their rights and duties and counsel complainants on their class claims. (Subpart C, § 268.305,as amended effective April 6, 1996) (Attachment 2).

done. Plaintiffs were ***never*** given their rights and duties by any counselor, orally or in writing as to either their individual or class claims. Moreover, the evidence shows that an active attempt was made by the Board's EEO department to discourage delay and mislead plaintiffs as to their class rights and duties. Certainly, no document exists with respect to conveying this vital information to plaintiffs. Belatedly, defendant admits that it was not the Board's "practice" in 1997, to provide written notice to a complainant. Those statutory rights and duties are part of the Board's regulations which include among other things the following:

> ***12 CFR Ch. 11 (1-1-97 Edition)***
>
> § 268.204 (b)
>
> At the ***initial counseling session***, EEO ***Counselors must advise individuals in writing of their rights and responsibilities***, including ***the right to request a hearing*** after the investigation by the Board, the right to file a notice of intent to sue pursuant to § 268.301(a) *****the duty to mitigate damages, administrative and court time frames, and that only the material(s) raised in pre-complaint counseling (or issues like or related to issues raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the Board. ***** ***The notice required shall include a notice of the right to file a class complaint. If the aggrieved person informs an EEO Counselor that he or she wishes to file a class complaint, the EEO Counselor shall explain the class complaint procedures and the responsibilities of the agent of the class.*** [3] ***[emphasis supplied].***

Defendant's oblique admission that it could not produce notice records is found in it's (Board's) response to item 1 of the Court's Order to produce specified documents. Defendant's failure to provide complainants with written notices of their rights and responsibilities was a breach of basic principles of fairness as codified in Title VII and rules and regulations thereunder. And by not complying with it's own regulation, the Board subverted the counseling process, which it asserts complainants did not fulfill. An audacious posture, given defendant's repeated failure to comply with Title VII and their own regulations, as will be further delineated.

2. The Board Refused to Discuss Class or Group Issues During Counseling:

As noted by the Court in it's Memorandum Opinion and Order dated September 25, 2002

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[3] These initial rights and responsibilities to be conveyed by the Counselor, are also contained in the current (2005) Board regulations at Title 12, Chapter 11 § 268.104 (b)(1) (Attachment 3).

(beginning at the bottom of page 12 and at page 13), Board counselor Rosemarie Nelson related how she was instructed not to engage in counseling as to plaintiffs' allegations of a pattern and practice of racial discrimination. But rather she was directed by superiors to deal with only individual grievances. Ms. Nelson's two affidavits explain how this posture of refusing to discuss group claims was part of the Board's illicit strategy to prevent claimants from seeking class redress. In fact, in affidavits and during her deposition in April 2004, Nelson implicated outside counsel, William L. Bransford and Board officials Barry Taylor and Sheila Clark in the scheme to deprive plaintiffs of their class claims. This was to be done by forcing group grievants to file individual claims only, so that they could be dismissed as being "untimely". Ms. Nelson also describes in detail numerous Board practices and policies intended to frustrate complainants from pursuing EEO grievances (also noted by the Court in its Order of September 22, 2002, at page 13).[4]

Ms. Nelson's affidavit and later deposition testimony as to her refusal to counsel on class issues, is supported by the complainants. They, their representative and agent, were present during a group counseling session on January 15th, 1997, when Nelson refused to counsel on class claims and stated that counseling would only be provided for individual grievances [5].

The Board's refusal to hear or counsel group complainants relating to a pattern of racial discrimination was contrary to the Board's own regulation, which clearly provides for counseling of class complaints. The applicable regulation at the time of the 1997 counseling sessions was 12 CFR Ch. 11, § 268.305- Class Complaints. The text of that regulation is attached as plaintiffs' Attachment No.2.

Defendant asserts in its memorandum that the Board never prevented plaintiffs from "raising issues in counseling" (defendant's memo at bottom of pp 5 and all of 6 and elsewhere). This is a non-issue and a "red herring" defense. On January 17, 1997, as requested by the counselors on January 15, 1997, each plaintiff delivered to the counselors a signed copy of

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[4] See Nelson Deposition Exhibit # 8, Affidavit of January 25, 1998, at pages 13-16, numbered paragraphs 42-58 (Attachment 4 hereto); see also attachment 5 hereto, at pages 14-16, Nelson Affidavit #2, dated February 8, 1999. These two sworn statements, substantively identical, were further verified as correct in substance and detail in Nelson's deposition on April 14th , 2004. (Nelson Deposition Pages 133-148, Attachment 6 hereto).

[5] Nine plaintiffs, undersigned counsel, as well as William Bransford, Esq., counsel to the EEO director, were present during that January 15th, 1997 counseling session (Attachment 7) when Nelson stated that she was prevented from discussing across-the-board or class issues by instructions of the EEO Department.

"Resubmission of Class-Action Complaint" (Attachment 9). That specification is a written list of class allegations by minority secretaries of a across-the-board continuing pattern and practice claims of racial discrimination. Once it received such notice, defendant was obligated to counsel on class issues, according to it's own regulations (§ 268.204(b) and § 268.305(a), (Attachments 1 and 2). The list of class claims was included in each counseling report as an attachment dated January 17, 1997.[6] The Board nevertheless refused to counsel on those class claims. It instructed counselors not to counsel plaintiffs in a group, or to discuss class claims. It then claimed that the Plaintiffs failed to counsel[7]. Ms. Nelson in her affidavit and deposition, explained how Board management sought to defeat the class claims by restricting the process to individual grievances. Ms Nelson also stated to the entire first group session, that she was prevented from discussing class claims by instructions from the EEO office[8].

3. Destruction and Loss of Notes and Other Materials Underlying Counseling Reports

Plaintiffs, in their Motion to Compel Discovery, dated December 14, 2004, reveal how defendant destroyed or lost notes and possibly other material, underlying the counseling reports that were prepared by the Board EEO personnel (Motion at Pgs. 2, 3, 4, 6, 7, and at Points and Authorities Pgs, 1, 2, 4, 5, including footnotes 6, 9 and 13).

Defendant was required to maintain these EEO records in accordance with rules promulgated by the EEOC in Management Directive MD 110, Chapter 2, VIII B page 10 (see also Attachments 7A pp 10 0f 11 of Motion to Compel). This is the same directive that supervisor of counselors, Barry Taylor, surprisingly disclosed in his deposition that the Board

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[6] The Counselor's Reports, recounting counseling events and each plaintiffs averments were supplied by EEO Director Ms. Clark. Those Reports contain all attachments thereto and are filed in Bulk Filings room of the Court. (See Taylor Deposition Ex # 3,) See for example, Attachment "A" to the counselor's report for Kathleen Matthews, appearing in Taylor Exhibit 3 at Bates Numbers Artis-BD-DR3- 029 through 033), listing of plaintiffs class claims.

[7] Two counseling sessions for the specific purpose of counseling on class claims were set up as requested by plaintiffs through counsel. One occurred on January 15, 1997 and the second on February 13, 1997. At each the group counseling sessions counselors attending refused to conduct counseling, except, plaintiff Kim Hardy was actually counseled on January 15, 1997, in full view of the entire assembled group. Not surprisingly, the counseling reports omit discussion of either group session, or the fact that at the first one, one plaintiff (Kim Hardy) was actually counseled at the January 15th, 1997 session.

[8] See plaintiffs' deposition excerpts Attachments; Artis, 8A, pg 266, 267; Logan, 8B pg 131, L 10-17, Hill, 8E pg 243; Hardy, 8F 247 L6-11, pg 254 L11-14; Matthews, 8H Pg 204 L 14-20.

supposedly follows EEOC rules and regulations[9]. Amazingly, Mr. Taylor also disclosed in his deposition[10] that he was not aware that there was a rule or regulation that stated records were to be retained, even though he noted EEOC Management Directive MD 110 as a major source for guidance on the EEO process.[11] Since defendant failed to produce these required records, "without good cause shown" the Court may and should draw an adverse inference that the materials requested "would favor the position of the opposition".[12] In that regard, plaintiffs maintain that the destroyed records would have shown that complainants engaged in and completed their counseling in good faith. ***Webb v. District of Columbia***, 189 F.R.D. 180, 181-183 (USDC DC 1999, LEXIS 14342)(upon remand of a Title VII case from the District of Columbia Circuit, default judgment re-entered for the party's and counsel's misconduct including destruction of critical documents).

4. Defendant Concedes That Counseling Occurred

Barry Taylor, supervisor of Board Counselors, recounts how counseling occurred in late 1996 and during the relevant period of 1997. This recitation of facts is found in a five page internal Board computerized document provided by defendant during discovery at Taylor's deposition (Taylor Exhibit 5, appearing here as Attachment 10).

As set forth by Taylor in that Exhibit, final summation page, (Artis-BD- DR 4-0005)

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"Counseling did occur one on one with most of the class complainants after January 17th, and before Feb. 13th, [1997]." (Attachment 10, pg 5)

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Mr. Taylor acknowledged this crucial fact in his deposition without any caveats or reservation. If there had been a problem with counseling, Taylor had an opportunity to report such difficulty during the times Attachment 10 was prepared. But this was not the case, because

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[9] See, Taylor Deposition excerpts, Attachment 11: pg 26 L-21-pag 27 L 7; pg 47 L 6-10;pg 66 L 19-pg 67 L-5.

[10] See, Taylor Deposition excerpts, pp. 82- 85.

[11] See, Taylor Deposition excerpts, pp 47 L6-10; pg 66, 67.

[12] These are excerpts from the Board's own regulations that are discussed at page 3, footnotes 3and 4 of Plaintiffs' Motion to compel.

Supervisor Taylor knew that plaintiffs had done all they could to fulfill their counseling obligations.

In his deposition on May 4, 2004, Mr. Taylor further verified the fact that plaintiffs correctly and successfully completed each required element of counseling. Taylor's deposition testimony is clear and striking.

Taylor testified that he was "aware of the complaint that was initiated" (Attachment 11, pg 56 L 9,10); "that the individuals in this matter did participate in counseling" (Taylor deposition pg 55 L 1,2); and counseling "did occur one-on one with most of the class complainants after January 17, and before February 13th" [1997].[13] Thus, plaintiffs counseled fully and completely to the extent allowed by the Board.

Summary of Plaintiffs' Position as to Counseling:

Plaintiffs have provided a substantial fact pattern which discloses that defendant deliberately ignored significant provisions of Title VII and its regulations thereunder. The purpose of these actions was to defeat the class complainants at the counseling stage. Plaintiffs, on the other hand, engaged in counseling as noted by Board official Barry Taylor. As the supervisor of all counselors, Taylor had first hand knowledge of the counseling process and controlled all documents during that procedure. Moreover, Taylor personally attended at least one of the group counseling sessions held specifically at the demand of plaintiffs in order to document their obligation to counsel (Pl Ex 7). While plaintiffs acted at all times in good faith, the Board's version of counseling–indeed became a futile exercise.

III. DEFENDANT'S MOTION TO DISMISS IS WITHOUT MERIT

Overview of the Board's Motion.

Defendant's Motion to Dismiss is noteworthy in several aspects: (1) Its' heavy reliance on plaintiffs' first case against the Board (Artis I) as if it is *stare decisis* and thus controlling here; (2) the Board's failure to address new issues and facts which have surfaced since Artis I and (3) the attempt to dismantle and diffuse the impact of the Rosemarie Nelson affidavit and

[13] See, Attachment 10, pg 5 Bates # DR 4-005)

deposition.

Flawed Board Assertions and Material Omissions:

1. The Honorable Judge Norma Holloway Johnson in **Artis v. Greenspan**, 158 F. 3d 1301 (DC Cir. 1998) did not deal with a number of critical facts or issues, which are now before this Court. Thus, Judge Johnson did not consider the Board's destruction of records, it's failure to notify complainants of their rights and duties under the Board's and the EEOC regulations, the full circumstances and facts relating to the Board's refusal to counsel on group-class issues, the Barry Taylor exhibit and the Nelson affidavit and deposition. Despite these significant omissions in the 1998 decision, defendant desperately seeks to infuse the notion that Artis I is controlling and no different from the instant action (Defendant's Motion and Memo at pages 2, 5 and 10). As discussed above, there are, of course, major distinctions between the two cases, apart from the seven year lapse of time.

2. Defendant's Motion To Dismiss is bereft of any discussion regarding: the Board's destruction of records which were required to be maintained; the failure to notify complainants of their rights and responsibilities during counseling, in writing, pursuant to their (the Board's) own regulations; the existence of the Barry Taylor Exhibit # 5 (Attachment 10), disclosing that counseling had occurred and had been completed (Taylor Memo at pg 5.), and Supervisor Taylor's deposition testimony (Attachment 11, pp 124, 125) leaving intact his contemporaneous memorandum (Attachment 10 pg. 5) stating that plaintiffs had in fact counseled one-on- one thereby completing their counseling requirements. These are significant factors which favor plaintiffs' position, yet are ignored by defendant in its Motion and Memorandum.

3. The Board's attempt to discredit Rosemarie Nelson (her affidavit and deposition) is exemplified by defendant's flurry of isolated quotes from her deposition testimony which consisted of 301 pages (defendant's Memorandum, bottom of 6 through top of page 9).[14] At the time Ms. Nelson signed her affidavit she was a Board employee with first-hand knowledge of

[14] The full text of Nelson deposition is part of the bulk filing of documents with the Court).

this case, as well as of Board practices in the EEO area.[15] Plaintiffs maintain that the Nelson affidavit, dated January 1998 and later deposition testimony should be given full credence, for reasons discussed below.

The Nelson revelations explain how Board policies and practices were intended to discourage and defeat grievants from pursuing EEO class complaints. Also, how directives and actions from and by superiors violated agency regulations governing the counseling process. And specifically how Nelson was directed not to counsel on group issues.

These observations of Board wrongdoing are indeed supported by defendant's failure to notify complainants of their rights and responsibilities pursuant to the Board's own rules. (12 CFR § 268.204(b) (Attachment 1, page 745). The Board also violated federal regulations when it breached mandatory adherence to MD 110, chapter 2, VIII B, page 10 (Attachment 12) when it (defendant) destroyed and lost the counselor's original contemporaneous notes and materials from which the counselor's reports were prepared.

Thus, when Ms. Nelson asserts in her affidavit and deposition testimony[16] that she was directed to not counsel the plaintiffs as a group, nor discuss class issues, but rather require plaintiffs to file individual complaints, this statement should likewise be credited. Especially since claimants and counsel for both sides heard Ms. Nelson make the aforementioned statement. (See previous cites to plaintiffs depositions of those persons present when the statement was made (See F/N 8, pg 5).

As noted by Ms. Nelson, this exclusion of group grievance counseling was for a pernicious purpose. And in fact it was the centerpiece of a plot to defeat plaintiffs' class claim. This is certainly contradictory to the assertion by defendant in it's current Memorandum at page 9, footnote 8, that the "refusal to counsel on class issues" --even had that occurred– was

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[15] Ms. Nelson had her own EEO issues with the Board at the time she signed her affidavit. And those issues have been resolved in her favor. She remains a full time Board employee no longer connected with the EEO department. See Attachment 6, Nelson Deposition pp 9, 10, 11.

[16] At Ms. Nelson's deposition, taken by plaintiffs on April 14, 2004, she was questioned about each of the material substantive paragraphs of her January 1998 affidavit disclosing misconduct by the Board pertaining to plaintiffs' counseling process and claims. She verified in all material respects the statements in her affidavit (Attachment 6, pp 133-148). Later, however, in that deposition, under cross examination by defendant's counsel, Nelson stated she was unable to remember the details of happenings previously verified that same day.

"immaterial". Indeed, defendant's conduct in this regard was violative of Title VII and the Board's own regulations which provided for class claims[17].

The Nelson affidavit and deposition should be viewed for what they are, an admission that she willingly participated in a scheme to deprive plaintiffs of their right to pursue a class complaint. The scheme included the refusal to counsel on group issues, the failure to notify plaintiffs of their extended rights and the destruction of Board records. Thus, when Ms. Nelson acknowledged that a scheme existed and her part in it, such is admissible as an inculpatory statement against her employer, the Board. ***Melvin Wilner, d/b/a Wilner Construction Company, v. The United States*** 994 F. 2d 783, 788 (Fed Cir 1993)(a government contracting officer's report favoring the contractor as evidence of government liability) and an out-of-court affidavit containing a "Statement Against Interest" pursuant to Federal Rule of Evidence 804(b)(3) allowed as evidence for an unavailable witness, ***Ciccarelli v. Gichner Systems Group, Inc, et al*** 862 F. Supp 1293, 1297-1298 (MD Pa 1994) or allowing the Nelson affidavit and her concurring deposition testimony as evidence by application of Federal Rules of Evidence 804 (a)(later lack of memory by witness of details of the contemporaneous affidavit).

CONCLUSION

Based upon the totality of the record, applicable statutes and case citations, plaintiffs maintain that they have fulfilled their administrative requirements to counsel. It was, however, a pointless exercise inasmuch as defendant acted in bad faith throughout the counseling process. Defendant's motion to dismiss should therefore be denied. Accordingly, final summary judgment pursuant to Federal Rule of Civil Procedure 59 (b) should be entered as to administrative exhaustion and the overall effect of the scheme to deny plaintiffs of their rights to assert continuing class violations under Title VII and 29 USC chapter 11, part 1614.

A draft Order is respectfully submitted for consideration by the Court.

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[17] The process for counseling a group grievance is specifically provided for within the Board's own version of the mandatory EEOC regulations, under "class complaints" (12 CFR, Chapter 11 § 268.305). In turn this provision directs the parties to § 268.204, which requires the Board to advise complainant(s) of their rights and responsibilities in writing at the initial counseling session. This however, the Board failed to do.

Respectfully submitted,

[s] Charltonw 2428

Walter T. Charlton
Counsel for the Plaintiffs and the Putative Class
1156 15th, Street N.W. , Suite LL10
Washington, D.C. 20004-1704
Phone 410 571 8764
Fax 410 897 0471
email charltonwt@comcast.net

Certificate of Service

I hereby certify that I mailed, first class postage prepaid, a copy of the foregoing Plaintiffs' Reply to Defendant's Responses To Court Ordered Document Production And Response to Defendant's Motion to Dismiss; on the 11th, day of October, 2005, to:

Kenneth M. Willner, D.C. Bar No. 415906
Paul Hastings Janofsky & Walker LLP
875 15th, Street, N.W.
Washington, D.C. 20005

John L. Kuray, Senior Counsel
Board of Governors of the Federal Reserve System
20th, & Constitution Avenue, N.W.
Washington, D.C. 20551

[s] CharltonW 2428

INDEX OF EVIDENTIARY ATTACHMENTS

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**Counselor's Reports, with Attachments, Voluminous, (Taylor Exhibit # 3)
as Filed in Bulk Filings Room, Incorporated by this Reference.** **Previously Filed**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cynthia Artis, et al.,	)	
Plaintiffs,	)	
v.	)	**CASE NO. 01-0400 (EGS)**
Alan Greenspan, Chairman of	)	
The Board of Governors of	)	
The Federal Reserve System,	)	
Defendant	)	

ORDER

Upon consideration of the submissions by the parties the Court finds that the Defendant did not carry their burden of persuasion that the Plaintiffs failed to exhaust their administrative remedies. The Court finds that:

1. Plaintiffs have submitted credible evidence showing that the majority of the plaintiffs (who allege that defendant engaged in a continuing pattern and practice of discrimination against minorities) had initiated counseling, participated in counseling to the extent permitted by the Board, and sought to comply with all directives of the equal employment department of the defendant Board of Governors of the Federal Reserve System.

2. The evidence supporting this finding is amply weighted in favor of Plaintiffs. Completed counselor's reports are of record containing, in addition to counselor's summaries indicating cooperation by the majority of plaintiffs, submission of details of their across-the-board complaints of a pattern and practice of racial discrimination against minorities in most, if not all of the important attributes of their federal employment. Included in those counselor's reports, as an attachment to each report are detailed listings, signed by each plaintiff, attesting to the continuing pattern complained about.

3. The supervisor of counselors, Mr. Barry Taylor has admitted in writing in a memorandum that

plaintiffs did complete the counseling process. His deposition testimony supports the conclusion that plaintiffs had engaged in counseling.

4. No credible evidence has been presented by defendant which contradicts the affidavit of a former Board counselor Rosemarie Nelson in which she described a scheme to prevent and obstruct the presentation of plaintiffs class claims.

5. The Court finds that the Board had failed to follow its own regulations as to the counseling process. Specifically, the Board has admitted that it failed to notify each of the plaintiffs in writing, or otherwise, of their rights and responsibilities to counsel and the mechanism of counseling in a class setting.

6. The Board has failed to preserve relevant documents which must be maintained to demonstrate that the defendant followed its own regulatory responsibilities. These responsibilities in the federal workplace as elsewhere are mandatory. Defendant lost or destroyed underlying counseling information without giving any explanation.

7. In sum, the evidence of record in this case demonstrates that the entire process in which plaintiffs were forced to endure was an entirely a fruitless exercise, designed by Board officials in bad faith to intentionally frustrate the complainants in this case from pursuing their class grievances.

8. The Court finds that the administrative process, specifically the counseling requirement has been completed in good faith by the plaintiffs.

9. The Court finds that the procedure to which the plaintiffs were subjected was a futile exercise which was contrary to the interests of justice, especially since defendant is a federal entity, which is to be held to a higher standard.

10. Adverse inferences are hereby drawn against the defendant for improper destruction of documents during the litigation process, and argument to the Court based upon unsupportable factual premises.

Accordingly, it is **HEREBY ORDERED THAT**:

1. Defendant's Motion to Dismiss is denied.

2. Defendant's arguments and pleadings in opposing Plaintiffs' attempts to complete the administrative processing of this case are without merit and lack foundation both in factual substance and in law.

3. Partial summary judgment is entered in favor of Plaintiffs as to exhaustion of administrative remedies.

So Ordered.

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Emmet G. Sullivan, United States District Judge