JD(ATL)–7–07
Jackson, KY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

JACKSON HOSPITAL CORPORATION, D/B/A KENTUCKY RIVER MEDICAL CENTER	
and	**CASES 9–CA–37734**
	9–CA–37795–1, –2
UNITED STEELWORKERS[1]	**9–CA–37796**
	9–CA–37875
and	**9–CA–38084–1, –2**
	9–CA–38237
ANITA TURNER, An Individual	**9–CA–38468**

Julius U. Emetu, II, Esq., for the General Counsel.
Randy Pidcock, District Organizing Coordinator, for the Charging Party.
Don T. Carmody, Esq., ***Bryan T. Carmody, Esq.,*** and ***Sam Braunstein, Esq***. for Respondent.

SUPPLEMENTAL DECISION AND ORDER

Statement of the Case

MARGARET G. BRAKEBUSCH, **Administrative Law Judge**. A Decision and Order of the National Labor Relations Board issued on September 30, 2003, finding, among other things, that Jackson Hospital Corporation, D/B/A Kentucky River Medical Center, herein Respondent, discriminatorily discharged eight employees in violation of Section 8(a)(3) of the National Labor Relations Act. The Decision and Order further provided that the unlawfully terminated employees be reinstated and made whole for any loss of earnings or

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[1] Upon the Charging Party Union's unopposed motion at hearing, the name of the Union was changed for the record from United Steelworkers of America to "United Steelworkers."

other benefits, computed on a quarterly basis, from the date of their discharges until the dates of the Respondent's offers of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). On June 3, 2005, the United States Court of Appeals for the District of Columbia Circuit, herein the Court, entered its Judgment enforcing the Board's Order.

A controversy having arisen over backpay due, the Regional Director for Region 9 of the National Labor Relations Board, herein the Board, issued a compliance specification and notice of hearing on August 18, 2006. While the Board's Order, as enforced by the Court, required reinstatement and a make whole remedy for all eight discriminatees, the compliance specification dealt only with backpay for Eileene Jewell, herein Jewell; Debra Miller, herein Miller; Lois Noble; herein Noble, and Maxine Ritchie, herein Ritchie.[2] Because Respondent has failed to reinstate the remaining three discriminatees, the appropriate backpay amount cannot be fully litigated. The Regional Director has reserved the right to issue a compliance specification to determine the correct amount owed to the remaining discriminatees once the issues regarding their reinstatement have been resolved and the backpay is tolled.

A hearing was held before me on multiple dates commencing October 18, 2006 and concluding on November 28, 2006.[3] The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Upon the entire record, including my observation of the demeanor of the witnesses, I find the following:

I. Preliminary and Procedural Matters

A. General Counsel's Motion for Partial Summary Judgment

Section 102.56(b) of the Board's Rules and Regulations state in relevant part:

> (b) *Contents of answer to specification*. The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to, the various factors entering into

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[2] The compliance specification did not include any backpay owed for discriminatee Laotta Sizemore because her interim earnings exceed her gross backpay.

[3] The hearing began on October 18, 2006 and continued through the next day. On October 19, 2006, the case was continued to allow Respondent additional time to subpoena necessary witnesses. The hearing resumed and concluded on November 28, 2006.

> the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

At the opening of the hearing, Counsel for the General Counsel moved for partial summary judgment with respect to paragraphs one through four of the compliance specification. Counsel for the General Counsel asserted that in its answer, Respondent had not complied with the Board's Casehandling Manual Part III[4] that requires a respondent to specifically state the basis for a denial and to furnish alternative figures and amounts.

Section 10652.2 of the Board's Casehandling Manual, Part III, herein Compliance Manual, provides in pertinent part:

> Section 102.56(b) of the Board's Rules and Regulations provides that if the respondent disputes the accuracy of the backpay amount or the premises on which it is based as alleged in the compliance specification, its answer to the compliance specification shall specifically state the basis of the disagreement, setting forth in detail the respondent's position as to applicable premises and furnishing appropriate alternative figures and amounts. General denials by the respondent to allegations regarding the calculation of backpay are not sufficient and do not comply with the requirements of Section 102.56(b) and (c) of the Rules and Regulations. Pursuant to a motion for summary judgment, the administrative law judge or the Board may deem these allegations to be admitted as true.

Accordingly, General Counsel moved that Respondent be precluded from offering any evidence to attack the gross backpay computation for "Appendix A," sections one through four. General Counsel further clarified that while Respondent could offer evidence on interim earnings, Respondent should be precluded from offering evidence concerning gross backpay.

Section 1 of the compliance specification alleges that the backpay period for each discriminatee begins on the date of the discriminatee's discharge as set forth in the Board's Order and in Appendix A of the compliance specification and ends on August 5, 2005, the response date for Respondent's valid offer of reinstatement. In its answer, Respondent denies the allegations set forth in Paragraph 1 of the specification relative to the definition of the "backpay period" and avers that the "backpay" period for each discriminatee ends on July 19, 2005, the date of Respondent's offer of reinstatement to each respective discriminatee.

Section 2 of the compliance specification alleges that gross backpay, interim earnings

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4 Section 10652.2.

and net backpay are computed on a quarterly basis with 13 weeks in a full calendar year. The specification further alleges that partial calendar quarters are based on the date of the discriminatee's discharge or the date the discriminatee's backpay tolled as set forth in Appendix A. In the answer to section 2, Respondent admits the allegations relative to the specification's definitions of "gross backpay, interim earnings, and net backpay" being "computed on a quarterly basis," and relative to "13 weeks in a full calendar quarter" and relative to "partial calendar quarters [being] based on the date of the discriminatee's discharge or the date of the discriminatee's backpay [being] tolled." Respondent thereafter adds: "except denies the allegations that the foregoing are 'as set forth in Appendix A.'"

Section 3 of the Specification alleges that gross backpay are wages that discriminatees would have earned during the backpay period but for Respondent's unlawful discrimination against them. The specification further avers that quarterly gross backpay is based upon the weekly average of the wages earned by each discriminatee while employed by Respondent during calendar year 2000, plus subsequent wage increases, as set forth in Appendix A. In the answer, Respondent admits the allegations of the specification relative to the definition of "gross backpay" and relative to "quarterly gross backpay [being] based upon the weekly average of the wages earned by each discriminatee while employed by [Kentucky River] during the calendar year 2000, plus subsequent wage increases." Respondent thereafter adds: "except denies the allegations that the foregoing are 'as set forth in Appendix A'."

Section 4 of the specification alleges that wage increases for each discriminatee during the backpay period are a percentage increase in the quarterly gross backpay based on the increases in hourly wages granted by Respondent during the backpay period, as set forth in Appendix A. The Respondent admits the allegations of the specification with respect to the definition of wage increases; however, Respondent adds a denial that the allegations are as set forth in Appendix A.

Analysis and Conclusions

In order to avoid summary judgment, a respondent's answer to the compliance specification must be "sufficiently specific to raise a litigable issue of fact." *Aneco, Inc*., 330 NLRB 969, 971 (2000). It is also well settled, however, that a respondent may properly cure defects in its answer before a hearing either by an amended answer or a response to a notice to show cause. *Mining Specialists, Inc*., 330 NLRB 99, 101, fn. 12 (1999); *Ellis Electric,* 321 NLRB 1205, 1206 (1996*); Vibra-Screw, Inc*. 308 NLRB 151, 152 (1992).

Section 10652.2 of the Compliance Manual provides that in the event the answer is defective, the Region should file a motion at the compliance hearing that the administrative law judge deem allegations not properly answered be admitted without taking evidence in support of the allegations and precluding the respondent from offering evidence to controvert them. The section also provides:

> Before filing either a motion with the Board or with the administrative law

> judge, the trial attorney should advise the respondent in writing that the answer is deficient and, following the procedures in Section 10652.1, allow the respondent a period of time, typically not to exceed 1 week, to file an amended answer.

There is no dispute that prior to Counsel for the General Counsel's motion for partial summary judgment, there was no notice to Respondent that its answer was deficient and there was no notice to Respondent that the Region intended to seek a motion for summary judgment because of any perceived deficiency. At the beginning of the hearing, Counsel for the General Counsel also amended paragraphs 5 and 6 of the compliance specification to conform to the Compliance Manual and to conform to the definitions in Respondent's answer.

By the admissions contained in paragraphs 2 through 4 of the answer, Respondent does not dispute General Counsel's process for computing gross backpay, including the provision for wage increases. In paragraph 1 of the answer, however, Respondent denies the backpay period and asserts that backpay for the discriminatees is tolled on July 19, 2005 rather than August 5, 2005 as alleged in the compliance specification. Thus, Respondent's answer appears to admit all the pertinent allegations contained in paragraphs 1 through 4 of the complaint, with the exception of the specific date for the tolling of backpay. Despite the admissions as described, Respondent inserts a conclusionary phrase: "except denies the allegations that the foregoing are 'as set forth in appendix A' "at the end of paragraphs 1 through 4.

The Respondent's answer to the compliance specification, considered in isolation, is arguably deficient because of Respondent's insertion of the blanket denial following the admission of all other terms in paragraphs 2 through 4. Thus, Respondent has generally failed, as required by the Board's rules, to reveal with sufficient specificity, the basis on which the Respondent disagrees with the specification's allegations. The inserted denial phrase provides no specificity and appears to be conclusionary only. In determining whether a respondent has satisfied the Board's requirements, the Board will construe the pleadings "in the light most favorable" to the non-moving party. *Eldeco, Inc*., 336 NLRB 899, 900 (2001). Accordingly, in light of the Board's tendency to construe pleadings in this manner and inasmuch as Respondent was not given notice of the deficiency of the answer, I denied General Counsel's motion for partial summary judgment. I further note that while an answer may be insufficient as to matters within a respondent's knowledge and control, it is sufficient as to issues of interim earnings. *Everman Electric Co., Inc*., 334 NLRB No. 6, slip op at 3, (2001); *Dews Construction Corp*., 246 NLRB 945, 946-947 (1979). While the denials in Respondent's answer in paragraph 2 through 4 may unclearly fail to refer to interim earnings, it is apparent that it is interim earnings and net backpay rather than the gross backpay that are in dispute with respect to these three paragraphs. With respect to paragraph one of the answer, Respondent specifically denies the date of the tolling of the backpay period and submits the alternative date. Such specificity is sufficient to raise a litigable issue of fact regarding the closing date of the backpay period and thus defeat a motion for summary judgment. See *Aneco, Inc*., 330 NLRB 969, 971 (2000).

Finally, I note that even though I denied Counsel for the General Counsel's motion for partial summary judgment, Respondent did not present or attempt to present evidence to rebut the computation of the gross backpay as defined in paragraphs two and three of the compliance specification or the computation of wage increases as outlined in paragraph four of the compliance specification. Respondent's only evidence concerning the correct date for the tolling of the backpay period as alleged in paragraph one of the compliance specification and paragraph one of the answer was the submission of Respondent's written offers of reinstatement to the discriminatees. These documents were submitted into evidence as a joint exhibit by General Counsel and Respondent. Accordingly, the record as a whole supports the denial of Counsel for the General Counsel's motion for partial summary judgment.

B. Respondent's Motions to Amend the Answer

Following Counsel for the General Counsel's motion for partial summary judgment and my ruling thereon, and following the testimony of Eileene Jewell, Respondent moved to amend the answer[5] to allege a "lack of knowledge" with respect to compliance specification paragraphs one, two, three, five, and six. Respondent argues that by asserting "lack of knowledge" with respect to the allegations in the enumerated paragraphs, Respondent has satisfied the obligation of Section 102.56(b) of the Board's Rules and Regulations. Additionally, having heard Jewell's testimony, Respondent further moved to amend its answer to conform to her testimony and to amend the answer to allege that there is no net backpay for Jewell and that Jewel's backpay period ended upon her initial termination.

Section 102.56(e) of the Board's Rules and Regulations provides: "Following the amendment of the specification by the Regional Director, any respondent affected by the amendment may amend its answer thereto." Counsel for the General Counsel opposed Respondent's motion to amend, asserting that there had been no amendment to the compliance specification requiring a corresponding amendment to the answer. The only amendment to the compliance specification simply revised the specification definitions to conform to those definitions included in Respondent's answer. I agreed, finding that General Counsel's amendment added nothing that required a corresponding amendment to the Respondent's answer.

It is well-settled that a respondent in a compliance proceeding may properly cure defects in its answer before a hearing either by an amended answer or a response to a notice to show cause. *MFP Fire Protection Inc*., 337 NLRB 984, 985 (2002); *Ellis Electric*, 321

[5] In denying Counsel for the General Counsel's motion for partial summary judgment, I offered both Respondent and General Counsel the opportunity to further brief the issue if they desired to do so. Respondent asserted that the motion to amend its answer was offered to protect its interest in the event that Counsel for the General Counsel offered additional and persuasive argument that might lead to a reversal of my earlier ruling denying the motion for partial summary judgment. Counsel for the General Counsel, however, explained that while the Region did not concur with the basis for my ruling, the Region did not plan to brief the matter.

NLRB 1205, 106 (1996). In this instance, however, Respondent did not seek to amend its answer prior to the hearing. Respondent sought to do so only after my denying General Counsel's motion for partial summary judgment and after hearing Jewell's testimony. Accordingly, inasmuch as there was no amendment to the compliance specification that included any additional allegations, and in light of the fact that the motion to amend the answer was made after Jewell's testimony, there was no basis to grant Respondent's initial motion to amend the answer.

On November 20, 2006, and during a hiatus in the hearing proceeding, Respondent filed a Second Amended Answer to Amended Compliance Specification. In the amended answer, Respondent adds a new paragraph asserting that the Board is without statutory jurisdiction to issue the relief sought in the specification for the benefit of discriminatee Ritchie. Respondent asserts that at all times material, Ritchie was a "supervisor" within the meaning of Section 2(11) of the Act, within the standard adopted by the Board in *Oakwood Healthcare, Inc*., 348 NLRB No. 37 (September 29, 2006).

In brief, Respondent argues that in its September 29, 2006 decision, the Board adopted definitions for the terms "assign," "responsibility to direct," and "independent judgment" as those terms are used in Section 2(11) of the Act. Respondent asserts that while Ritchie's supervisory status could not have been argued in the underlying unfair labor practice proceeding, Ritchie's responsibilities could now arguably meet the Board's new standard for determining supervisory status.

Certainly, the Board's usual practice is to apply new policies and standards retroactively "to all pending cases in whatever stage." *SNE Enterprises, Inc*., 344 NLRB No. 81, slip op. at 1, (May 17, 2005); *Aramark School Services*, 337 NLRB 1063, fn. 1 (2002*)*. The Board has also found, however, that it will apply an arguably new rule retroactively to the parties in the case in which the new rule is announced and to parties in other cases pending at the time, so long as this does not work as a "manifest injustice." *SNE Enterprises, Inc*., above at 2. In determining whether retroactive application will produce manifest injustice, the Board looks to: (1) the reliance of the parties on pre-existing law,[6] (2) the effect of retroactivity on accomplishment of the purposes of the underlying law which the decision refines; and (3) any particular injustice to the losing party under retroactive application of the change of law. *Pattern Makers (Michigan Model Mfgrs*.), 310 NLRB 929, 931 (1993). See also *NLRB v. Bufco Corp*., 899 F.2d 608 (7th Cir. 1990).

The courts have also applied a balancing of interests in analyzing the retroactivity of a policy, standard, or rule. "In considering the equities, courts generally balance the interests of the parties, taking into account such factors as the degree of hardship they will experience, their justifiable reliance on past practices, and the statutory interest in a retroactive application of the new rule." *Consolidated Freightways v. NLRB,* 892 F.2d 1052, 1058 (D.C. Cir. 1989).

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[6] In *Loehmann's Plaza*, 305 NLRB 663, 672 (1991), supplemented by 316 NLRB 109 (1995), the Board considered whether the parties had "settled expectations" as to the consequences of the conduct in issue.

In an even earlier case, the D.C. Circuit Court of Appeals identified factors for consideration as: (1) whether the particular case is one of first impression; (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law; (3) the extent to which the party against whom the new rule is applied relied on the former rule; (4) the degree of the burden which a retroactive order imposes on a party; and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard. *Retail, Wholesale and Dept. Store Union*, 466 F.2d 380, 390, (D.C. Cir. 1972).

On September 30, 2003, the Board issued its decision in the underlying unfair labor practice matter, requiring full reinstatement and a make whole remedy for Ritchie. It is undisputed that Ritchie's supervisory status was not in issue prior to the Board's decision. The original charge, the resulting complaint, and the government's proof presented to the administrative law judge were premised upon Ritchie's status as a non-supervisory employee. The extent to which the charging parties and the government relied upon her non-supervisory status is readily apparent. Accordingly, in light of the factors considered by the Board and the courts, it is apparent that in this instance the inequity of applying the Board's new analysis for determining supervisory status far outweighs the interests of its application in this case. Therefore, even if Respondent's late-filed amendment to add an additional affirmative defense were permissible, there is no equitable basis to entertain such retroactive application of the Board's new standard for determining supervisory status.

Despite the inequity of retroactive applicability as discussed above, Respondent's amendment is otherwise untimely. As discussed above, Section 102.56(e) of the Board's Rules and Regulations provides for a respondent's amendment to its answer when the respondent is affected by the Regional Director's amendment to the compliance specification. The Rules, however, do not provide for an amendment to insert an additional affirmative defense. It is well settled that issues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding. *IMAC Energy, Inc*., 322 NLRB 892, 894 (1997); *Transport Service Co*., 314 NLRB 458, 459 (1994). Furthermore, matters litigated in an unfair labor practice case cannot be relitigated under the guise of avoiding backpay. *EDP Medical Computer Systems*, 293 NLRB 857, 858 (1989).

Respondent argues that because a question concerning Board statutory authority may be raised at any time, its amendment is timely. Respondent requests the reopening of the record to receive "evidence of Ritchie's 'supervisory' status at all times to the Compliance Specification." The Board, however, has not found that a respondent has carte blanche to assert supervisory status at any juncture in the proceedings. In its decision in *Yesterday's Children, Inc*. 321 NLRB 766, fn. 1(1996),[7] the Board found that the judge properly denied the respondent's motion to amend its answer and to supplement the record and its brief to

[7] While the Board's Order was vacated in part, the First Circuit Court of Appeals did not find that the Board had abused its discretion in denying the respondent's motion to amend the pleadings in light of the recent Supreme Court decision. *Yesterday Children's, Inc., v. NLRB* 115 F.3d 36, (1st. Cir. 1997).

allege that a charge nurse was a supervisor or manager rather than an employee. It is significant that the judge's decision issued on June 30, 1994. The respondent, however, based its motion upon the Supreme Court's May 23, 1994 decision[8] that specifically involved the standard for determining the supervisory status for nurses.

Based upon the above, I find no basis for Respondent's motion to amend its answer as asserted or to reopen the record to receive evidence of Ritchie's supervisory status. In its recent decision in *T. Steele Construction Inc*., 348 NLRB No. 79, slip op at 1, fn 1 (November 30, 2006) the Board denied the respondent's motion to amend its answer in light of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706, (2001), and the Board's decision in *Oakwood Healthcare, Inc*., 348 NLRB No. 37 (2006).

C. Respondent's Subpoenas Duces Tecum

On August 18, 2006, the Regional Director for Region 9 issued the Compliance Specification and Notice of Hearing in this matter and set the hearing for October 18, 2006. On Friday, October 13, 2006, Respondent served a subpoena duces tecum on Miller at 4:29 p.m. On Saturday, October 14, 2006, Respondent served subpoenas on Jewell, Noble, and Ritchie.[9] The subpoenas requested the production of a number of documents including: (1) Federal, state, and local income tax documents; (2) documents reflecting efforts to obtain interim employment; (3) documents relating to self-employment; (4) documents relating to retirement or termination from interim employment; (5) documents relating to medical or other disability for which the discriminatees were unavailable for interim employment; (6) correspondence with the Union, the Board, the state unemployment office, and/or the Respondent; and (7) documents showing education received during the backpay period. Additionally, each subpoena duces tecum requested the production of (1) bank and other financial institution documents showing deposits and withdrawals from checking and savings accounts during the backpay period; (2) documents reflecting indebtedness and liabilities , including, but not limited to mortgage and lease commitments during the backpay period; and (3) any and all documents relating to any financial commitments, including formal agreements and/or court orders, with respect to any dependents.

On the first day of trial and only four to five days following the weekend receipt of the respective subpoenas, the Charging Party Union, on behalf of each discriminatee, moved to quash the subpoenas. The Charging Party Union asserted that the subpoenas were overly broad in their scope and the production of the requested documents was also overly burdensome to the discriminatees. The Charging Party Union further asserted that the documents sought by the subpoenas were especially irrelevant in view of the fact that all of the discriminatees were present and willing to testify under oath regarding the compliance issue to be litigated in the proceeding. Counsel for the General Counsel concurred with the

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8 *NLRB v. Health Care & Retirement Corp*., 511 U.S. 71, 114 S. Ct. 1778 (1994).

9 Because Respondent served the subpoenas over the weekend before the hearing, it is likely that neither Board nor Union personnel were readily available to the discriminatees for assistance or clarification.

Charging Party's argument in support of its motion and further asserted that the Respondent's request for such documents relating to the discriminatees' mortgage and child support obligations was purely harassment. The Charging Party Union also asserted that certain of the subpoenaed documents related to joint checking accounts and by their very nature did not relate to the discriminatees' interim earnings. Respondent, however, asserted that the documents were relevant because production of the requested information might lead to the need to subpoena additional documents to test the accuracy of the reported interim earnings.

I denied the petition to quash with respect to the request for the production of all documents relating to interim earnings, search for work, supplemental education, and the requested correspondence as described above. Certainly, the majority of these documents related to information that the discriminatees provided to the Region to prepare the compliance specification. I granted the petition to quash the subpoena with respect Respondent's request for the production of documents pertaining to the discriminatees' financial obligations, liabilities, and net worth.

Respondent asserts that it is "not only entitled to request and produce evidence of a discriminatee's 'off the record' interim earnings, it is also entitled to inquire into a discriminatee's living expenses during the back pay period, in order to determine whether the individual's expenses and standard of living are beyond the amount of gross interim earnings disclosed." In support of this argument, Respondent cites *NLRB v. Overseas Motors, Inc*., 818 F.2d 517 (6th Cir. 1987). In *Overseas Motors, Inc*., the Court found that the administrative law judge erred in prohibiting the respondent from cross-examining the discriminatee regarding the discriminatee's expenditures and the source of almost $100,000 spent on living expenses and oversea trips. While the discriminatee asserted that he had interim earnings from only part-time work at an auto repair shop and from auto repair work at his home, he kept no records of his self-employment income. Although the discriminatee alleged that he had no income from a wine-importing business, he admitted that he was registered as a salesman for the company with the State of Michigan and that he had taken four trips to Yugoslavia. Under those circumstances, the Court found that the administrative law judge erred in precluding inquiry into the discriminatees' expenses. The circumstances in the *Overseas Motors, Inc*. case are certainly distinguishable from those in the instant case. All of the discriminatees provided releases for full disclosure from the Social Security Administration for information on all interim earnings. The Respondent has demonstrated no evidence that any of the discriminatees had unreported[10] income or had fraudulently concealed interim earnings during the relevant backpay period. Respondent's desire to probe into the discriminatees' net worth in hopes of unearthing relevant information is "pure conjecture" and clearly only a "fishing expedition" that would not justify its subpoena. *U.S. ex rel. Vuitton Et Fils S.A. v. Karen Bags, Inc.*, 600 F. Supp. 667 (1985).

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[10] As discussed further in this decision, Respondent asserts that Miller's income from her trucking company should be counted as interim earnings. Although the Region takes the position that funds received from the trucking company are not interim earnings, these funds were not hidden and were reported to the Internal Revenue Service as required.

As the Board recently observed in its decision in *Parts Depot, Inc*., 348 NLRB No. 9, slip op. at fn. 6 (2006), the Board's Rules[11] provide, in pertinent part, that a judge should "regulate the course of the hearing" and "take any other action necessary." In that case, the respondent filed exceptions to the administrative law judge's failure to allow it to subpoena certain records from the backpay claimants and from the Immigration and Naturalization Service. The Board found that the administrative law judge acted within his broad discretion in balancing burdensome against probity and by imposing a reasonable limitation on the respondent's ability to cross-examine claimants. While noting that the respondent was free to question the backpay claimants about their searches for work, the actual employment obtained, and their interim earnings, the Board also determined that the respondent was properly precluded from burdening the record with cumulative and superfluous questions and inquiry that amounted to nothing more than a fishing expedition.

Clearly, the information sought in paragraphs five, six, and seven of the respective subpoenas sought documents which dealt with the discriminatees' net worth and personal liabilities. Respondent maintains that such documents are relevant because they reflect the financial demands and burdens imposed upon the discriminatees during the relevant time period. The subpoena is properly quashed in part, however, as there is an absence of either claimed or apparent relevancy. Respondent's a mere hope of possibly finding a "smoking gun" is nothing more than a fishing expedition, rather than a request for the valid production of reasonably anticipated probative evidence.

D. **Lack of Discovery**

During the course of the hearing, Respondent argued that because of the unavailability of pre-trial discovery, Respondent was denied due process. The record also reflects, however, that the hearing was adjourned for 39 days to allow the Respondent the opportunity to subpoena witnesses and documents necessary for the presentation of its case.

Additionally, it is well settled that parties to judicial or quasi-judicial proceedings are not entitled to discovery as a matter of a constitutional right. *Starr v. Commissioner of Internal Revenue*, 226 F.2d 721, 722 (7th Cir. 1955), cert. denied 350 U.S. 993 (1956). Furthermore, the Administrative Procedure Act does not confer a right to discovery in federal administrative proceedings. *Frilette v. Kimberlin*, 508 F.2d 205, 208 (3d Cir. en banc 1974), cert. denied 421 U.S. 980 (1975). Moreover, the National Labor Relations Act does not specifically authorize or require the Board to adopt discovery procedures. *NLRB v. Interboro Contractors, Inc*., 432 F.2d 854, 858 (2d Cir. 1970), cert. denied 402 U.S. 915 (1971); *NLRB v. Globe Wireless, Ltd*., 193 F.2d 748, 751 (9th Cir. 1951). Accordingly, there is no basis in fact or law to support a finding that Respondent was denied due process.

[11] Section 102.35.

E. The Correct Date for Tolling Respondent's Backpay Obligation

The compliance specification designates August 5, 2005 as the date when backpay tolls for Miller and Ritchie. Backpay is tolled earlier for Jewell and Noble, inasmuch as Jewell retired in March 2003 and Noble became unavailable for work in December 2004. In its answer, Respondent asserts, however, that backpay is tolled for Miller and Ritchie on July 19, 2005; the date of Respondent's unconditional offer of reinstatement. There is no dispute that the offer of reinstatement letters sent to Jewell, Noble, Miller and Ritchie are dated July 19, 2005.[12] Each letter gives the discriminatee a deadline of August 5, 2005 to accept the offer.

Generally, the Board finds that backpay is tolled on the date of actual reinstatement, on the date of rejection, or in the case of discriminatees who do not reply, on the date of the last opportunity for the discriminatee to accept the offer of reinstatement. *Cliffstar Transportation Co*., 311 NLRB 152, 154-155 (1993); *American Mfg. Co. of Texas*, 167 NLRB 520, 521 (1967). In this instance, it is appropriate that backpay is tolled for Miller and Ritchie on August 5, 2005,[13] as set forth in the compliance specification.

II. Applicable Legal Principles and Authority

It is settled law that a finding by the Board that an unfair labor practice was committed is presumptive proof that some backpay is owed. *Minette Mills, Inc*., 316 NLRB 1009, 1010-1011 (1995); *Arlington Hotel Co*., 287 NLRB 851, 855 (1987), enfd. 876 F.2d 678 (8th Cir. 1989); *NLRB v. Mastro Plastics Corp*., 354 F.2d 170, 178 (2nd Cir. 1965), cert. denied 384 U.S. 972 (1966). The General Counsel's burden in a backpay proceeding is limited to showing the gross backpay due each discriminatee. *J. H. Rutter Rex Mfg. Co. v. NLRB,* 473 F.2d 223, 230-231 (5th Cir. 1973), cert. denied 414 U.S. 822 (1973). The General Counsel has discretion in selecting a formula that will closely approximate backpay. The Region has the burden of establishing only that the gross backpay amounts contained in a backpay specification are reasonable and not an arbitrary approximation. *Performance Friction Corp*., 335 NLRB 1117 (2001); *Mastell Trailer Corp.*, 273 NLRB 1190, 1190 (1984). In its decision in *Alaska Pulp Corp*., 326 NLRB 522, 523 (1998), the Board stated: "If, due to the variables involved, it is impossible to reconstruct with certainty what would have happened in the absence of a respondent's unfair labor practices, we will resolve the uncertainty against the respondent whose wrongdoing created the uncertainty." It should be noted that with the exception of the disputed date for the tolling of backpay, Respondent does not challenge the formula or the calculations used to arrive at the gross backpay as set forth in the compliance

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12 Although Noble received an unconditional officer of reinstatement dated July 19, 2005, Respondent also argues in brief that Noble was offered reinstatement in or about February 2002. As discussed more fully below, the 2002 offer was not a valid and unconditional offer of reinstatement and did not toll Noble's backpay.

13 Miller's personal tax record for 2005, submitted by Respondent, reflects earnings at Respondent's facility during the 2005 calendar year. There is no evidence, however, to establish that Miller returned to work or accepted the offer of reinstatement prior to August 5, 2005.

specification. Accordingly, I find General Counsel's gross backpay formula appropriate and sufficient for recommendation to the Board.

Once the General Counsel has established gross backpay, the burden is on the Respondent to establish facts that reduce the amount due for gross backpay. *Atlantic Limousine, 328 NLRB 257, 258 (1999); Florida Tile Co*., 310 NLRB 609 (1993); *Hacienda Hotel & Casino*, 279 NLRB 601, 603 (1986). This burden cannot be satisfied, however, by conclusionary or self-serving statements. *W. C. Nabors,* 134 NLRB 1078, 1088 (1961), enfd. as modified on other grounds 323 F.2d 686 (5th Cir. 1963), cert. denied 376 U.S. 911 (1964).

A discriminatee is entitled to backpay if he makes a "reasonably diligent effort to obtain substantially equivalent employment." *Moran Printing*, 330 NLRB 376 (1999). In seeking to mitigate loss of income, a backpay claimant is held only to reasonable exertions, not the highest standard for diligence. The principle of mitigation does not require success; it only requires an honest, good faith effort. *Fabi Fashions*, 291 NLRB 586, 587 (1988*); NLRB v. Arduni Mfg. Co.,* 394 F.2d 420, 422-423 (1st Cir. 1968); *NLRB v. Madison*, 472 F.2d 1307, 1319 (D.C. Cir. 1972).

It is well-established that any doubt or uncertainty in the evidence must be resolved in favor of the innocent employee claimant and not the respondent wrongdoer. *NLRB v. NHE/Freeway*, *Inc.*, 545 F.2d 592, 594 (7th Cir. 1976); *NLRB v. Miami Coca-Cola Bottling Co*., 360 F.2d 569, 572-573 (5th Cir. 1966).

III. Findings and Conclusions Concerning Individual Discriminatees

Based on the entire record, including the Board's Decision and Order, as affirmed; the testimony of witnesses and my observation of their demeanor, and record documents, I make the following findings of fact and conclusions of law.

A. Eileene Jewell

At the time of her discharge from Respondent's facility on August 17, 2000, Eileene Jewell was 60 years old and worked as a surgical technician. Her duties included sterilizing surgical instruments, working with the laundry to insure that a sufficient number of scrubs were available, and keeping the surgical area and instruments clean. Prior to working as a surgical technician, Jewell worked on the hospital floor as an aide. Her work as an aide involved such duties as assisting patients, serving lunch trays, and changing bed linens.

She recalled that following her discharge, both the Region's compliance officer and the Union's representative told her that she would be expected to look for and to find employment. She applied for state unemployment insurance shortly after her discharge in August 2000 and received unemployment benefits until March 2001. She recalled that during the time that she received unemployment benefits, she visited the unemployment office in Jackson, Kentucky and she periodically telephoned the agency. Following her discharge,

Jewell primarily searched for work in her hometown community of Beattyville and Lee County, Kentucky. While she did not keep a log of her contacts, she applied for work at the Lee County Library, the Save-a-lot grocery store, and the local Dollar General Store. She recalled that she contacted individuals who worked as sitters for the elderly and sick to explore possible job openings. She read the newspaper and searched the want ads for possible employment. Jewell testified that there was not work available in her community that was comparable to the work that she performed at Respondent's facility. She explained that there were no hospitals in Lee County and the nearest hospital was approximately 30 miles away in Irving, Kentucky. That facility, however, did not have a surgical unit. She acknowledged that she did not check with any of the local physicians' offices to inquire about possible employment. She explained that there were only three physicians in practice in Beattyville and she was familiar with the staff working for each doctor. The staffing for the three doctors had remained essentially unchanged for a substantial period of time. Jewell testified that while she also contacted the Presbyterian Missionary Group in Owsley County concerning possible employment, she conceded that she did not search much farther than the Beattyville area. Jewell's husband died during the final days of the underlying unfair labor practice hearing. She remembered that she had been really frightened during her job search because she was alone with no income. Jewell explained that because of her age and her inexperience, work opportunities were limited in her hometown. In early 2001, Jewell began working part-time at Rite-Aid in Beattyville, Kentucky, as a pharmacy technician. She continued that employment throughout 2002. Jewell also reported $856 income in 2001 and $664 income in 2002 for selling herbal medications as self-employment. Jewell explained that her employment with Rite-Aid ended when two employees were transferred from the Jackson, Kentucky store into the Beattyville store. Jewell was then asked to transfer to the West Liberty, Kentucky store; which was approximately 70 miles from her home. Although Jewell asked to work at a closer store in McKee, Kentucky, she was only given the option to transfer to the West Liberty store. She explained that as she was only making $7 an hour, it did not seem feasible to drive the requisite 70 miles each way to work only a half shift for part-time employment. Jewell recalled that she had also asked if she could transfer from the pharmacy department to any other position in the store. Her request was denied. After her work ended with Rite-Aid, she no longer had sufficient contacts to continue her self-employment in selling the herbal medications.

In December 2000, Jewell cashed her 401K termination distribution check. The resulting distribution of $4,702.03 was deposited into her bank account. During the backpay period, she used funds from this distribution to meet monthly expenses when necessary.

Compliance Supervisor John Grove testified that Jewell's backpay period runs from her date of discharge until March 23, 2003, when she retired and ceased to seek active employment. Following her husband's death in 2001 and prior to March, 2003, she received Social Security widow's benefits. In March 2003, Jewell filed for, and began receiving retirement benefits based upon her own Social Security contributions.

1. Respondent's Proof Concerning Interim Earnings

When this matter resumed on November 28, 2006, Respondent presented the testimony of Rite Aid Regional Human Resource Manager Roy Terry, herein Terry. Through Terry's testimony, Respondent introduced a document from Jewell's personnel file identified as a "termination form." The document references a termination date of November 8, 2002 and the termination code is designated as "PERSNL." Terry testified that the form is an electronic e-form that Rite Aid uses to identify the basis for an employee's termination. Terry admitted that he was not familiar with the circumstances of Jewell's leaving the company. He asserted, however, that generally a "personal" code indicates a voluntary resignation by the employee. Terry also identified a second electronic e-form containing handwritten portions that had been contained in Jewell's personnel file. The form contains a section categorized as "Availability Information," with the typewritten instruction: "Please list this employee's daily availability." The form further contains a section showing the number of hours that the employee can work weekly with the notation: "We recommend that you set the minimum hours for all part-time employees to zero." There is a handwritten note setting Jewell's minimum hours at "0" and maximum hours at "24." Despite the notation of maximum availability for 24 hours, the form also contains the specific hours and days of availability for Jewell. These hours are shown to be a total of 31. Terry testified that he had no knowledge as to who completed the handwritten portion of this form. Terry acknowledged that he had not hired Jewell and he had no personal knowledge of her employment situation. He admitted that the form did not reflect whether Jewell was a full-time or part-time employee. He further admitted that he was unaware of any "personal" reason for Jewell's leaving Rite Aid's employment.

2. Conclusions Concerning Jewell's Backpay

Jewell's backpay period covers the time between her unlawful discharge on August 17, 2000 and March 2003 when she retired. During this total backpay period, there are two separate periods when Jewell was unemployed. The personnel document from Rite Aid reflects that she was employed at Rite Aid from May 30, 2001 until November 8, 2002. Thus, an analysis of her search for work is geared primarily to the period of time between August 17, 2000 and May 30, 2001 and the period of time from November 8, 2002 until the end of March 2003.

In assessing a discriminatee's search for interim employment, a respondent must affirmatively establish that a discriminatee failed to make a reasonably diligent search for equivalent interim employment. In assessing the search for work, the Board has found that a discriminatee's efforts need not comport with the highest standards of diligence, but merely demonstrate a good faith effort. See *Lundy Packing Co*., 286 NLRB 141 (1987). In *NLRB v. Arduni Manufacturing Corp*., 394 F.2d 420 (1st Cir. 1968), the employer was able to establish that a discriminatee could not show that he had looked for jobs where he could use his specific skills and he was unable to explain gaps in his job-search chronology. Additionally, the discriminatee only went to the employment security office to check on his unemployment

benefits. The Court even commented on the fact that the discriminatee's records were sketchy and his testimony was at times implausible and inconsistent. Despite indications that the discriminatee failed to do all that he could have done to mitigate his loss of pay, the Court nevertheless held that the NLRB could find that a reasonable search was conducted. Although Jewell did not have an extensive recollection of where she searched for work and did not keep records of her search for work, I find no evidence that she neglected to make an honest good faith effort. *N.L.R.B v. Cashman Auto Company and Red Cab Company*, 223 F.2d 832, 836 (1st Cir. 1955).

Additionally, in determining the reasonableness of Jewell's effort, I have also considered her skills and qualifications, her age, and the labor conditions in her area. *Mastro Plastics Corp*., 136 NLRB 1342, 1359, (1962). At the time of her discharge from Respondent's facility, Jewell was 60 years old and worked as a surgical technician. Respondent's CEO Okey David Bevins, herein Bevins, identified a map showing the hospitals and other health care providers within an eight county regional area. Bevins explained that the map depicted the health care facilities where there was a concentration of physicians rendering primary care. He identified these facilities as primary care certified clinics or rural health clinics. Bevins acknowledged that while the hospitals would have surgical technicians on staff, the clinics would not.[14] In his testimony, Bevins did not discuss any hospital facilities that were in the surrounding area of Respondent's facility. Respondent's map, however, reflects no other hospitals included in the areas designated as a primary service area or a secondary service area for Respondent's facility. Appalachian Regional Healthcare, herein ARH, in Hazard, Kentucky, is the only hospital shown to be in a tertiary service area. All the remaining hospitals on the map are in geographic locations outside the primary, secondary, and tertiary service areas for Respondent's facility. Additionally, there is no record evidence that contradicts Jewell's testimony concerning the distance between her home and any other area hospitals. It is apparent therefore that Jewell's opportunity to find interim employment was affected by not only her age, but also the availability of comparable work as a surgical technician in her geographic area.

Jewell acknowledged that she did not keep a written record of where she searched for work prior to finding employment with Rite Aid or following her employment with Rite Aid. The fact that she could not recall the names and dates of all the establishments she had contacted during her search for work does not invalidate the conclusion that she made a reasonable exertion to find employment. *Airport Park Hotel*, 306 NLRB 857, 861 (1992), enfd. 13 F.3d 1347 (9th Cir. 1994); *Ben Susan Restaurant Corp*., *d/b/a The Blue Note*, 296 NLRB 997, 999 (1989). Additionally, I note that the Board has held that employees are not automatically disqualified from backpay because of their poor recordkeeping or uncertainty as to memory. *Pat Izzi Trucking Co*., 162 NLRB 242, 245 (1966), enfd. 395 F.2d 241 (1st Cir. 1968).

[14] Although Bevins testified that possibly orthopedic clinics might need surgical technicians, he identified none by name and demonstrated no specific knowledge of such job opportunities.

Respondent argues that because Jewell quit her employment with Rite Aid, she is not entitled to any backpay following her employment with Rite Aid. In support of this argument, Respondent relies upon Terry's testimony. While Terry identified a form from Jewell's personnel file that reflected that there was a personal reason for her termination from Rite Aid, he had no personal knowledge of the circumstances of Jewell's employment. While he also identified a document that purported to show that Jewell was available for 31 hours each week, he also admitted that he did not know whether she had been hired as a full-time or part-time employee and he did not know who had completed the information on the personnel documents. He acknowledged, however, that the hours shown on the document would normally be considered part-time employment with Rite Aid. Thus, neither the personnel file documents nor Terry's testimony rebuts Jewell's testimony that she was only hired as a part-time employee for Rite-Aid. Additionally, the document purporting to show that Jewell voluntarily left her employment with Rite Aid does not rebut Jewell's testimony. Jewell acknowledged that she left employment with Rite Aid and she credibly explained her basis for doing so.

Certainly, under established Board policy, a claimant is deemed to have willfully incurred loss of income by voluntarily relinquishing interim employment "without compelling or justifying means." *Knickerbocker Plastic Co., Inc.,* 132 NLRB 1209, 1212 (1961). A claimant, however, is under no obligation to retain nonequivalent employment, once secured, regardless of the conditions under which the employee is required to work. *Churchill's Supermarkets*, 301 NLRB 722, 725 (1991). In fact, the Board has found that a skilled employee was justified in quitting an unskilled job that was paying less than half his former weekly wages. *Lozano Enterprises*, 152 NLRB 258 (1965). While the Board expects an employee to retain an interim job, exceptions have been found when the interim employment was unprestigious, annoying, or certain to create unacceptable disruption to the discriminatee's private life. *Shell Oil Co*., 218 NLRB 87, 89 (1975). In *Tualatin Electric Inc*., 331 NLRB 36, 40 (2000), a discriminatee's backpay was not reduced when he voluntarily quit an interim job that required him to drive an additional 40 miles without the opportunity for overtime pay that had been available when he worked for the respondent employer. Because the interim employment was not found to be substantially equivalent to the position from which he had been unlawfully discharged, his resignation was not found to be willful loss of interim earnings. In the instant case, Jewell had only been able to find interim employment in a part-time position with considerably less pay[15] than she had received in her job at Respondent's facility. While Terry testified that a Rite Aid document reflects that Jewell left her interim employment because of a "personal" reason, he does not dispute her testimony that if she had continued her employment with Rite Aid, she would have been required to transfer to another store, requiring her to drive 70 miles from her home for part-time employment. Accordingly, inasmuch as Jewell's job with Rite Aid was not substantially equivalent to the position from which she was unlawfully terminated, her backpay should not

[15] At the time that she left her employment with Rite Aid, her quarterly interim earnings were $1,778 as compared to $5,427 that she would have received for the same period had she continued her employed with Respondent.

be reduced because she was forced to cease her employment with Rite Aid. Additionally, Terry did not rebut Jewell's testimony that she asked to work at the McKee Kentucky store or to work in other positions within the Beattyville store when her position was eliminated as a pharmacy technician in the Beattyville store.

Additionally, I do not find that Jewell's backpay should be reduced because she initially accepted a part-time position. There is no evidence that Jewell rejected full-time employment in lieu of part-time employment. Moreover, Jewell should not be penalized because she accepted part-time employment rather than waiting for a full-time employment offer. See *United Supermarkets, Inc*., 287 NLRB 394, 398 (1987); *Lundy Packing Co.,* 286 NLRB 141, 144 (1987). Respondent also argues that during her employment with Rite Aid, Jewell did not make any effort to locate another part-time job. Although Respondent presented Rite Aid's Regional Human Resource Manager, there was no evidence that Rite Aid offered Jewell any work other than part-time work. Additionally, Respondent presented no evidence to show that any other part-time jobs were available to Jewell or even known to Jewell. Accordingly, inasmuch as there was no record evidence that Jewell was offered or refused to accept additional part-time employment, there is no evidence that Jewell failed to make a reasonable effort to mitigate her losses. *Be-Lo Stores*, 336 NLRB 950, 950 fn. 1 (2001); *United States Can Company*, 328 NLRB 334, 338 (1999); enfd. 254 F.3d 626 (7th Cir. 2001). Furthermore, even though Jewell accepted interim employment earning less than she had made at Respondent's facility, she was under no duty to continue to search for a more lucrative job or to search for the most lucrative interim employment. *F.E. Hazard, Ltd*., 303 NLRB 839 (1991); *Fugazy Continental Corp*., 276 NLRB 1334, 1338 (1985), enfd. 817 F.2d 979 (2d Cir. 1987).

Appendix A of the compliance specification establishes Jewell's gross backpay at $54,621. With interim earnings of $13,029, the resulting net backpay for Jewell is $41,592. For the reasons explained above and based upon the entire record,[16] I find that Jewell is entitled to backpay in the amount of $41,592.

B. Lois Noble

Prior to her termination from Respondent's facility on August 28, 2000, Noble worked as a phlebotomist. This work entailed drawing blood from patients in the emergency room as well as in the hospital. A license or certification was not required for her work. Prior to working at Respondent's facility, she was employed as a phlebotomist at the University of Kentucky Clinic in Lexington, Kentucky. Noble testified that following her termination from Respondent's facility, it was her understanding that she was required to look for work and to find work. Noble also explained that because she had a child and responsibilities, she needed

[16] I found Jewell to be a totally credible witness. She did not appear to embellish her search for work or to minimize any apparent weaknesses in her attempts to find interim employment. As discussed above, her explanation for leaving Rite Aid was uncontradicted. Overall, there is no credible record evidence that disputes or contradicts Jewell's testimony.

to find work. She began her search for work in September 2000. Noble applied with the state unemployment office in Hazard, Kentucky and in Jackson, Kentucky. She checked all the state agency's openings for phlebotomists. Noble testified that from the time that she was discharged until she found employment in 2002, she checked the job listings at one of the state unemployment offices at least once a week. She recalled that she contacted the hospital in Hazard as well as several of the medical clinics, including the Central Kentucky Blood Bank in Hazard, Kentucky and the University of Kentucky. She additionally contacted the hospital in Winchester, Kentucky; which is located approximately 90 minutes away from her home. She also contacted friends who worked in her same medical field. In addition to her applications for work as a phlebotomist, Noble additionally applied for work at all the Dollar General Stores, Big Lots Stores, grocery stores, and fast food restaurants in her area. She also recalled that while she submitted an application to the Hazard Hotel to work as a maid, she was not offered work.

In May 2002, Noble became certified as a certified nurse's aid. In order to receive her certification, she attended weekly training classes on Saturdays for approximately three months. Noble began working at the Hazard Nursing Home, Inc. in June 2002 and continued her employment until December 2004. While working at the nursing home, Noble worked 30 to 40 hours or more each week. In January, 2005, Nobel became a full-time student in a Licensed Practical Nursing program and has remained in that program.

1. Conclusions Concerning Noble's Backpay

Bevin testified that primary care clinics, home health agencies, and some physician's offices would need the services of a phlebotomist. While Bevin estimated that there might be 35 or 40 facilities that would be able to use the services of a phlebotomist, he did not identify specific facilities or their proximity to Noble's residence. Although he recalled that one of the clinic physicians was looking for a nurse[17] approximately a year prior to the hearing, he did not demonstrate any knowledge of whether there were specific openings for phlebotomists or whether phlebotomists were hired at any of the clinics at the time that Noble was looking for employment. He opined that "phlebotomists are constantly in demand in hospitals in the area." He did not, however, identify the specific hospitals nor indicate their proximity[18] to Noble.

Noble's testimony regarding her search for interim employment was not contradicted. She credibly testified concerning her attempts to secure interim employment. Her lack of success in obtaining interim employment after her unlawful termination and prior to her full-time employment in 2002 does not impeach her testimony nor relieve Respondent of its

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17 He also recalled that one of the clinics hired three of Respondent's nurses during the two years prior to the 2006 hearing.

18 As discussed above, Respondent's map of the area surrounding Respondent's facility indicates no hospitals in Respondent's primary or secondary service area and only one hospital in Respondent's tertiary service area. Respondent Exhibit No. 13.

burden of proving facts to mitigate liability. Respondent has the burden of establishing the amount of any interim earnings that are to be deducted from the backpay amount due, and has the burden of establishing any claim of willful loss of earnings. *NLRB v. Mooney Aircraft*, 366 F.2d 809, 812-813, (5th Cir. 1966). With respect to a discriminatee's search for interim employment, a respondent must affirmatively establish that the discriminatee failed to make a reasonably diligent search for equivalent interim employment. In evaluating the search for interim employment, the Board has found that a discriminatee's efforts need not comport with the highest standards of diligence but merely demonstrate a good faith effort. *Basin Frozen Foods, Inc*., 320 NLRB 1072, 1074 (1996); *Canova v. NLRB,* 708 F.2d 1498, 1506 (9th Cir. 1983). In post-hearing brief, Respondent cites the Board's decision in *American Bottling Co*., 116 NLRB 1303, 1307 (1956), for the principle that a discriminatee's registering with the state unemployment agency should not be given conclusive weight in determining the adequacy of a discriminatee's search for work. In keeping with its earlier decision in *Southern Silk Mills*, 116 NLRB 769 (1956), the Board in *American Bottling Co*. went on to point out, however, that registering with the state agency is a factor to be given such weight as it may be entitled under all the circumstances of the case. In the instant case, Noble credibly testified that she not only searched for work with the state agency, she looked for work, even outside her field of training. Noble's regular inquiry with the unemployment agency is not indicative of a lack of motivation for seeking work elsewhere and does not establish that she used it as a substitute for a diligent search for work otherwise.

It is not enough for a respondent to present evidence of low or no interim earnings; rather a respondent must affirmatively demonstrate that the discriminatee neglected to make reasonable efforts to find interim employment. *Westin Hotel*, 267 NLRB 244, (1983), enfd. 758 F.2d 1126 (6th Cir. 1985); *Smyth Mfg. Co*., 277 NLRB 680 (1985). Respondent asserts that Noble should have been able to find interim employment during the period between her discharge on August 28, 2000 and when she began her employment with the Hazard Nursing Home, Inc. Suspicion and surmise, however, have not been found to be any more of a valid basis in a backpay hearing than in an unfair labor practice hearing. See *Laidlaw Corp*., 207 NLRB 591, 594 (1973); enfd. 507 F.2d 1381 (7th Cir. 1974), cert. denied 422 U.S. 1042 (1975). Additionally, the Board has long held that when there are uncertainties or ambiguities, doubt should be resolved in favor of the wronged party rather than the wrongdoer. *United Aircraft Corp*., 204 NLRB 1068 (1973). To conclude otherwise would effectively penalize Noble for Respondent's unlawful termination.

Noble had no interim earnings from August 28, 2000 until June 2002. Based upon her total record testimony, there is no basis to find that her lack of success is indicative of a willful loss of earnings or an unreasonable search for work. In determining whether an individual claimant made a reasonable search, the Board looks to whether the record as a whole establishes that the employee has diligently sought other employment during the entire backpay period. *Black Magic Resources*, *Inc*., 317 NLRB 721 (1995); *Saginaw Aggregates*, 198 NLRB 598 (1972). The Board has found that the "sufficiency of a discriminatee's efforts to mitigate backpay are determined with respect to the backpay period as a whole and not based on isolated portions of the backpay period*."* *Wright Electric, Inc*., 334 NLRB 1031,

1031 (2001); *Electrical Workers IBEW Local 3 (Fischbach & Moore*) 315 NLRB 1266, 1266 (1995); *I.T.O. Corp. of Baltimore*, 265 NLRB 1322 (1982). Noble credibly testified that prior to obtaining employment with Hazard Nursing Home, Inc., she not only tried to find work as a phlebotomist, but she also tried to find work in unrelated fields. She credibly testified that she tried to find a job as a maid and also applied at retail and fast food establishments. It is apparent that after finding no success in her chosen field or in any other jobs, she entered a training program to become a certified nursing assistant. Because she took the initiative to train herself and to learn new skills, she was able to secure interim employment. Thus, looking at Noble's backpay period as a whole and not simply at the isolated period prior to May 2002, the record supports a finding that Noble engaged in a diligent search and effort to secure interim employment. *Kawasaki Motors Mfg. Corp*., 850 F.2d 524, 528 (9th Cir. 1988); *Colorado Forge*, 285 NLRB 530, 538 (1987).

2. Respondent's 2002 Offer of Reinstatement

On February 19, 2002, Respondent's CEO Bevins sent a letter to Noble, offering interim or temporary reinstatement. Bevins explained in the letter that Respondent was offering temporary reinstatement during the time that Respondent appealed the judge's finding that Noble had been unlawfully terminated. Bevins further explained that if she returned to work and Respondent prevailed in its appeal, Respondent would again terminate her employment. Bevins also explained that by declining his offer of temporary reinstatement, Noble did not forfeit her right to "fight" her termination through the legal process. Noble testified that she declined the job because she needed a job that was more stable and not temporary.

Respondent argues that Noble's rejection of Respondent's February 2002 offer released Respondent from any backpay obligation from the date the offer was rejected. Respondent cites *Ford Motor Co. v. E.E.O.C.,* 458 U.S. 219, 238-239 (1982) in support of its argument that an employee's rejection of an employer's "valid offer of reinstatement" tolls the employer's backpay obligation. Respondent acknowledges, however, that research revealed no cases in which an employee's rejection of an offer of interim employment made pursuant to a Section 10(j) injunction is considered within the context of tolling an employer's backpay obligations.

Certainly, Respondent's 2002 letter to Noble does not constitute a valid offer of reinstatement. It is well settled that an offer of employment must be specific, unequivocal, and unconditional to toll backpay and satisfy a respondent's remedial obligation. *Midwestern Personnel Services Inc*., 346 NLRB No. 58, slip op. at 1, (2006*); L.A. Water Treatment*, 263 NLRB 244, 246-247 (1982); *Standard Aggregate Corp*., 213 NLRB 154 (1974). Even the very wording of Respondent's letter reflects that Noble was free to reject the offer of temporary employment and that such rejection would not prejudice her later reinstatement upon Court order. Thus, despite Respondent's assurances to Noble that she was free to reject the offer of interim employment, Respondent now seeks to rely upon that rejection as a basis for tolling its backpay obligation. Contrary to Respondent's argument, I do not find that

Respondent tolled its backpay obligation by offering temporary reinstatement to Noble in February 2002.

Appendix A of the compliance specification includes a total of $77,242 for Noble's gross backpay. During the course of the hearing, it became apparent that the Region had erroneously included $934 in her interim earnings. When Noble clarified in her testimony that this income was received in 2000 prior to her employment with Respondent, Counsel for the General Counsel moved to amend the compliance specification to correct the error. With the amendment to the specification, Noble's total interim earnings were corrected to $36,974. For the reasons that I have stated above, I do not find a basis to further reduce the backpay beyond the interim earnings described above. Accordingly, I find that the appropriate backpay owed to Noble is $40,268.

C. Debra Miller

Prior to her discharge from Respondent's facility on August 21, 2000, Debra Miller worked as a phlebotomist. In this position, she collected blood samples from hospital patients and prepared the accompanying paperwork. Miller testified that she began looking for interim employment within days of her discharge. She asserted that she looked for laboratory and medical positions by reviewing newspapers and the internet. She testified that she also applied for work at the surrounding hospitals. In approximately January 2001, she obtained interim employment with the Central Kentucky Blood Center, herein CKBC. The compliance specification documents that no backpay is owed from February 15, 2002 until April 15, 2002 because Miller was unavailable for work during that time. Miller testified that during this time she resigned from her job with CKBC in order to enter nursing school.[19] Miller testified that even though she had planned to attend nursing school, her daughter underwent surgery and she remained at home to care for her daughter during the recuperative period. After her daughter's condition improved, it was too late to enter the nursing program and she began a new search for work. Miller testified that the two months that she spent caring for her daughter were the only two months that she was unavailable for work during the backpay period.

For approximately three months in 2003, Miller worked as a laboratory assistant for the Appalachian Regional Healthcare (ARH) facility in Hazard, Kentucky. She explained that while her duties at ARH were similar to those performed at Respondent's facility, the duties were broader in scope. After working for three months for ARH, Miller returned to employment with the CKBC. She explained that she did so in order to increase her earnings. Miller continued to work for CKBC until 2004, when the facility closed.

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[19] Respondent submitted into evidence a letter purporting to be Miller's typewritten letter of resignation. Miller acknowledged that while she did not recall preparing the letter, her name was included at the bottom of the document. The letter does not reference her intention to enter nursing school and confirms that February 15, 2002 would be her last day of employment.

Miller testified that following her loss of employment with CKBC, she continued to search for work by researching the internet and the weekly newspapers. She talked with friends about job openings and applied at fast-food restaurants. She explained that she did not resubmit an application to the ARH in Hazard because the facility did not have openings in the laboratory at that time. She asserted that she went to the hospital and spoke with individuals who worked in the laboratory and determined that there were no jobs open. When she initially applied for work with ARH, she had submitted an application to work as a nurse's aid as well as to work in the laboratory. She testified that she had not submitted a new application because she assumed her applications were still on file with ARH. She acknowledged that while she had spoken with individuals in the laboratory, she had not contacted anyone in ARH's Human Resources office.

1. Miller's Trucking Company

Miller also owned and operated a trucking company from 1997 until approximately December 2004. Miller testified that prior to 1997 her mother-in-law had owned three trucks and had an arrangement with Pine Branch Coal to haul coal. When her mother-in-law became disabled, Miller took possession of the three trucks and signed an agreement with Pine Branch Coal to continue the coal deliveries. Prior to 2004, the trucking company employed three drivers for the three trucks. Miller testified that she discontinued the trucking operation in 2004 because it was no longer profitable. She maintains that although she was president and sole owner of Debbie Miller Trucking Inc., she did no "actual" or "physical" work. She asserted that her certified public accountant handled all the bookkeeping and her mechanics maintained the trucks. She contends that writing payroll checks once every two weeks was her only job. There was no record evidence that rebutted Miller's testimony that she did the very same work for the trucking company both before and after her discharge from Respondent's facility.

2. Conclusions Concerning Miller's Backpay

a. Whether Miller's Income from the Trucking Company Reduces her Gross Backpay

There is no dispute that during a portion of the backpay period, Miller received money from the trucking company that was designated as salary. In 2000, she received both a salary and a $32,000 dividend[20] from the trucking company. During the remainder of the backpay period, she continued to pay personal expenses from the trucking company's funds and the expenses were counted for tax purposes as loans to Miller as a corporate officer. As of September 30, 2003, Miller owed a total of $56,390.57 for loans from the trucking company. In preparing the compliance specification, the Region did not include either the salary or the loans that Miller received from the trucking company as interim earnings based upon the fact

[20] Miller does not deny that she took money from the corporation to pay personal expenses during the 2000 tax year. On the advice of her accountant, Miller counted the payment of these expenses as a dividend from the company.

that Miller's duties and hours of work did not increase, decrease, or change after she was unlawfully terminated from Respondent's facility. Counsel for the General Counsel asserts that Miller's salary and loans from the trucking company were based upon her personal needs and tax considerations, rather than based upon work that she performed for the trucking company. Respondent, however, asserts that any salary or loans paid out to Miller from the trucking company during the backpay period are interim earnings and should be applied to offset Respondent's backpay liability.

b. Miller's Corporate and Personal Tax Records

Respondent subpoenaed and subsequently submitted into evidence Miller's personal tax records as well as the corporate tax records for Debbie Miller Trucking, Inc during the backpay period. It should be noted that Miller's personal tax records are based upon the calendar year and the corporate tax records for Debbie Miller Trucking, Inc. are based upon the fiscal year. Accordingly, because the records are based upon two separate periods of time, there is some disparity in computations and amounts. Overall, the records appear to be essentially consistent.

To analyze the records in light of Respondent's arguments, it is essential to first look at the records for the fiscal and calendar year 2001. The corporate tax records for the fiscal year ending in September 2001 reflect an outstanding loan amount of $27,321.13 to Miller as the sole corporate officer. During the same tax year, Miller received a salary from the trucking company in the amount of $19,000. During the tax year ending in September 2002, Miller received no salary from the trucking company. She did, however, receive additional loans from the company in the amount of $21, 010.61. For the tax year ending September 2003, Miller received no salary from the trucking company. She received additional loans from the company totaling $8, 058.83. Thus, as of September 2003, Miller's unreimbursed loans from the trucking company amounted to a total of $56, 390.57. Respondent argues that the salary and loans to Miller during the backpay period were the equivalent of interim earnings that should offset Respondent's backpay liability.

Miller does not dispute that she pulled money from the trucking company to pay personal expenses during the entire backpay period. The tax records for the fiscal year ending in September 2000 demonstrate, however, that she had this same practice prior to her August 2000 discharge. The corporate tax records for the trucking company for the fiscal year ending in September 2000 reflect that Miller was paid $28, 800 in salary. It is significant that the tax year ended 40 days after Miller's discharge from Respondent's facility. Thus, the majority of the fiscal tax year ending on September 30, 2000 covered the time period prior to Miller's termination and prior to the beginning of her backpay period. The records reflect that from October 1, 1999 through September 30, 2000, Miller received a designated salary amount every two weeks. During approximately one-half of the pay periods reported in the 2000 fiscal tax year, Miller received $1049.62 per pay period. During other pay periods, Miller received lesser amounts averaging $764.12. Miller does not dispute that during this same fiscal tax year, she additionally took $32,000 from the trucking company to pay personal

expenses. The $32,000 was considered to be a dividend and declared as income on Miller's personal income taxes for the calendar year 2000. In reviewing the cash disbursements throughout the 2000 fiscal tax year, it is apparent that Miller had a practice of using the trucking company funds for her personal use long before her discharge and certainly as early as October, 1999. A review of the cash disbursement for the corporation reflect payments to clothing stores, doctors, food stores, and pharmacies throughout the fiscal year.[21] Thus, whether the money received from the trucking company was salary or loans; she also received this money prior to her discharge and supplemented her earnings from Respondent. Additionally, Miller testified, without contradiction, that following her discharge from Respondent's facility, the work that she performed with the trucking company did not increase and she remained available to look for other employment.

c. Respondent's Argument Concerning Taxable Income

In an effort to reduce its backpay liability owed to Miller, Respondent devoted a good deal of time and attention in the hearing as well as in its brief to the money that Miller received from the trucking company. Respondent, in fact, devoted a large portion of its brief to its discussion of the Internal Revenue Code and how the Code defines taxable income. Respondent asserts "Inasmuch as tax returns filed for federal income tax purposes is a reasonable basis for establishing the compensation of an individual, whether in the form of wages, net earnings from self-employment or otherwise, an understanding of certain federal income tax principals" as set forth in the Internal Revenue Code "is essential." Thereafter in its brief, Respondent provides an extensive discussion of "taxable income" under the Internal Revenue Code and as analyzed by the Internal Revenue Service and reviewing courts. In summary, Respondent maintains that because Miller's salary and dividends from the trucking company constitute taxable income, they are interim earnings that reduce gross backpay.

The Board, however, does not treat "taxable income" as synonymous with interim earnings. An early example of the Board's view is found in *Florence Printing Co*., 158 NLRB 775, 781-782 (1966), enfd. 376 F.2d 216 (4th Cir. 1967), cert. denied 389 U.S. 840, 88 S. Ct. 68 (1967). In that case, the respondent employer argued that because a discriminatee's strike benefits are taxable as "gross income" under the Internal Revenue Code, such benefits should therefore be regarded as earned income equivalent to interim wages and deductible from gross backpay. In rejecting the employer's argument, the judge (whose decision was affirmed by the Board) explained that the respondent's argument ignored the well-known fact

[21] As examples of corporate cash disbursements for apparent personal expenses, Respondent's Exhibit No. 10 reflects that cash disbursements were made to Food City on the following dates: 10-8-99, 10-19-99, 10-30-99, 11-10-99, 11-17-99, 11-29-99, 12-31-99, 1-3-00, 1-30-00, 2-18-00, 2-26-00, 3-2-00, 3-11-00, 3-28-00, 4-8-00, 4-19-00, 4-23-00, 5-16-00, 8-5-00, 9-2-00, 9-9-00, 9-18-00, 9-27-00, and 9-23-00. Cash disbursements were made to Rite Aid on the following dates: 11-3-99, 11-24-99, 12-3-99, 12-31-99, 3-1-00, 3-10-00, 3-17-00, 4-4-00, 4-19-00, 6-1-00, 7-2-00, 7-9-00, 9-9-00, and 9-11-00. Cash disbursements were also made to J.C. Penny on 10-11-99, 11-2-99, 12-6-99, 2-1-00, 3-3-00, 4-4-00, 5-15-00, 6-14-00 and 8-5-00. Respondent's Exhibit No. 10 also reflects cash disbursements to three doctors, Fashion Bug, Wal-Mart, and numerous other entities that appear to be personal expenses.

that "gross income" for Federal income tax purposes is a purely statutory invention designed solely for the purpose of raising revenue and has no relationship to the definition of "gross income" under statutes that are wholly unrelated to Federal tax law; i.e. the National Labor Relations Act. The judge noted that the question was not whether the strike benefits were gross income for Federal income tax purposes, but whether they constituted earnings under the "backpay" provisions of the National Labor Relations Act, and thus would be used as a setoff against gross backpay.

In the *Florence Printing Co*. decision, the judge looked to the Board's earlier decision in *National Motor Bearing Co*., 5 NLRB 409, 438 (1938), enfd. as modified 105 F.2d 652 (9th Cir. 1939) where the Board explained: "In all cases in which back pay is awarded, we will, in accordance with our usual practice, order the deduction of all sums *earned* since the discharges, which would not have been earned if the employee had been working for the respondent." [Emphasis added]. In finding that the strike benefits did not constitute earnings, the judge also considered Black's Law Dictionary and its definition of "earnings" as: "the reward for personal services, whether in money or chattels, the fruit or reward of labor; the gains of a person derived from his services or labor without the aid of capital; money or property gained or merited by labor, service, or the performance of something; that which is gained or merited by labor, services, or performance." Ibid at 782. Accordingly, while Miller's salary, loans, or dividend from the trucking company may constitute taxable income, such tax status is not sufficient to transform the income into interim earnings for backpay purposes.

d. Respondent's Argument that Miller was Self-Employed

Respondent asserts that as an officer of Debbie Miller Trucking, Inc., Miller took funds from the company in the form of salary and dividends and used those funds for her personal expenses. Respondent maintains that because Miller treated the company as her own "pocket book," the company should be treated as a self-employment business that generated interim earnings during the backpay period.

I do not, however, find significance in how Miller utilized the assets of the trucking company. Primarily, there is no dispute that Debbie Miller Trucking, Inc. existed prior to Miller's unlawful discharge. She testified, without dispute, that her duties as president of that company did not change after her discharge. What changed, however, was the fact that because she no longer had income from Respondent, she used more trucking company assets and income to pay her own personal debts and obligations.

Additionally, the law is well settled that earnings or profits during the period of discrimination from a business or job which a discriminatee held during his or her employment with the respondent are not deductible from gross backpay as interim earnings. *Rice Lake Creamery Co*., 151 NLRB 1113, fn. 4 (1965). Furthermore, I note that while Miller's backpay period ran from her August 21, 2000 discharge until August 5, 2005, there were only five quarters in which she is deemed to have no interim earnings. Thus, any

income derived from Debbie Miller Trucking, Inc. was supplemental to her interim employment with Central Kentucky Blood Center, Inc., and Appalachian Regional Healthcare (ARH). The Board and Courts have consistently held that second job earnings normally are not considered as interim earnings to be deducted from gross backpay, particularly when the claimant held the second job prior to discharge. *NLRB v. Ferguson Electric Co., Inc*., 242 F.3d 426, 433 (2nd Cir. 2001); U.S. *Telefactors Corp*., 300 NLRB 720, 722 (1990); *Calson Tower Geriatric Center*, 281 NLRB 399, 402 (1986).

Any income that Miller derived from Debbie Miller Trucking, Inc. was clearly supplemental earnings. It is well established that supplemental earnings from "moonlighting" jobs constitute an exception to the general rule regarding interim deductions and such supplemental earnings are not properly deducted if the employee had the moonlighting job prior to his or her unlawful discharge. *Birch Run Welding and Fabricating, Inc*., 286 NLRB 1316, 1318 (1987), enfd. 860 F.2d 1080 (6th Cir. 1988*); Miami Coca-Cola Bottling Co*., 151 NLRB 1701, 1710 (1965), enfd. 360 F. 2d 569, 573 (5th Cir. 1966). The burden is on Respondent to prove that Miller would not have been able to work at her supplemental job prior to her illegal termination. *Daniel Construction Co.*, 276 NLRB 1093, 1100 (1985). Miller's testimony that she performed the same duties for the trucking company before and after her unlawful discharge is unrebutted. Respondent has not shown that Miller did not receive supplemental earnings from the trucking company prior to her discharge. Respondent's own exhibits, in fact, establish that Miller received supplemental earnings from the trucking company prior to her discharge from Respondent's facility. Accordingly, whether or not Miller received money from the trucking company as either salary or loans after her termination does not change the undisputed evidence that this income was supplemental and existed prior to her discharge. Had Miller "earned" a larger income from the trucking company because of her non-employment with Respondent, such an increase would be counted as part of her interim earnings. See *Rice Lake Creamery Co*., 151 NLRB 1113, fn. 4 (1965). As discussed above, however, any income from the trucking company during the backpay period was either supplemental income comparable to the income that she had received prior to her discharge or a loan from the trucking business that had no correlation to earnings. Just as the Board recognized in the *Florence Printing Co.* decision, the resources taken from the trucking company were not "earnings." While Miller's unlawful termination may have prompted her to deplete more of the trucking company's assets, the income was clearly not interim earnings that would reduce Respondent's backpay liability.

e. Respondent's Argument that Miller Concealed Records

In response to Respondent's subpoena, Miller produced her corporate tax records for the tax years ending in 2000, 2001, 2002, and 2003. She testified that the tax return for the tax year ending in 2004 had not been filed as yet. In its brief, Respondent argues that because Debbie Miller Trucking, Inc. was operational during 2004, it follows logically that Miller "likewise received some income from that source during 2004." Respondent further argues that because Miller has failed to produce financial records concerning the trucking company's income during 2004, she is intentionally concealing her 2004 earnings. As discussed in detail

above, I do not find that Miller derived income from the trucking company that constituted interim earnings during any portion of the backpay period. Whatever income that Miller may have received from the trucking company in 2004 would no doubt be consistent with what she received in 2000, 2001, 2002, and 2003. Furthermore, inasmuch as Miller produced all of the income records for the other four years in the backpay period, there is no basis to conclude that she is intentionally concealing this information or that she failed to file the corporate tax return in order to conceal interim earnings. Accordingly, I find no merit to Respondent's argument.

f. Miller's Voluntary Resignation from an Interim Employer

Respondent asserts that Miller forfeited her right to backpay when she voluntarily resigned from Central Kentucky Blood Center (CKBC) during the first quarter of 2002. Miller testified that she resigned from the CKBC in February 2002 because she intended to attend nursing school. She asserted that before she could begin classes, her daughter became ill and it was necessary for her to remain at home to care for her daughter. She maintained that when her daughter's condition improved, it was too late for her to apply for nursing school. Miller denied that she left her position for any reason other than to attend nursing school.

Respondent submitted into evidence a typewritten letter directed to CKBC containing the following:

> I am officially resigning from the company. I feel at this time that it is just to[o] stressful for me. I am resigning of my own free will. This is a decision i feel i have to make at this time. I [I] have really given my decision a lot of thought so i regret to inform you that February 15 2002 will be my last day of employment.

While not signed, the letter ends "sincerely Debra A. Miller." When shown the letter, Miller testified: "I don't remember writing it. I could have, but I don't remember writing it." Respondent also submitted into evidence the handwritten employment application that Miller completed on February 18, 2003 for CKBC. In listing her prior employers, Miller included her earlier employment period with CKBC. Miller includes "stress" as the reason for leaving her prior employment with CKBC.

As documented in Miller's February 18, 2003 application to CKBC and as reflected in her testimony, it appears that Miller's next employment was with ARH in Hazard, Kentucky. She held this position for three months before returning to work with CKBC. Her earnings when she returned to CKBC as well as with ARH were less than what she earned during her initial period of interim employment with CKBC.

Based upon the record evidence, it appears that Miller quit her employment with CKBC in February 2002 for personal reasons. While Miller does not remember writing the

alleged letter of resignation, she does not deny writing the letter. Additionally, Miller does not deny that when she reapplied to CKBC in February 2003, she identifies "stress" as her reason for her prior resignation. When a discriminatee quits interim employment, the burden shifts to the General Counsel to show that the decision to quit was reasonable. *Taylor Machine Products, Inc., 338 NLRB 831, 835 (2003).* Inasmuch as Miller maintained that she resigned her employment with CKBC to enter nursing school, there was no record evidence concerning the cause of any stress for Miller or to justify the need for her to resign because of the stress. Additionally, there was no evidence to corroborate her plans to attend school or to dispute the purported letter to CKBC or her 2003 employment application to CKBC. Overall, the record evidence does not demonstrate that Miller's quitting her interim employment in February 2002 was reasonable.

Using the offset formula set out in *Knickerbocker Plastic Co.,* 132 NLRB 1209, 1212-1215 (1961), it is appropriate to use the earnings that she would have earned at CKBC from the time of her quitting through the remainder of her backpay period as interim earning deductions from her gross backpay. The Board has also set out a formula for determining the appropriate deduction when a backpay claimant has additional reduced interim earnings following a voluntary resignation from interim employment. Using the Board's analysis in *Sorenson Lighted Controls*, 297 NLRB 282, 283, (1989), the earnings that Miller received at the time that she resigned from CKBC should be used as the correct amount of interim earnings for the remainder of the backpay period. Accordingly, for each quarter beginning with the first quarter of 2002, a quarterly deduction of $4561 should be used to offset Miller's gross backpay.

For the reasons stated above, I compute the net backpay due Debra Miller, excluding interest, as follows:

Quarter	Gross Backpay	Interim Earnings	Net Backpay
3/2000	$2,234		$2,234
4/2000	$4,915		$4,915
1/2001	$4,915	$4,561	$ 355
2/2001	$4,980	$4,561	$ 419
3/2001	$5,008	$4,561	$ 448
4/2001	$5,083	$4,561	$ 522
1/2002	$2,737	$4,561	$ -
2/2002	$4,379	$4,561	$ 182
3/2002	$5,195	$4,561	$ 634
4/2002	$5,289	$4,561	$ 728
1/2003	$5,289	$4,561	$ 728
2/2003	$5,362	$4,561	$ 801
3/2003	$5,469	$4,561	$ 908
4/2003	$5,569	$4,561	$1,098
1/2004	$5,569	$4,561	$1,098

2/2004	$5,569	$4,561	$1,098
3/2004	$5,862	$4,561	$1,301
4/2004	$5,862	$4,561	$1,301
1/2005	$5,862	$4,561	$1,301
2/2005	$5,963	$4,561	$1,402
3/2005	$2,293	$4,561	$ -

Accordingly, the total net backpay for Miller, excluding interest, is $21,473.

D. Maxine Ritchie

Prior to her termination from Respondent's facility, Maxine Ritchie worked as a registered nurse in the Intensive Care Unit of the hospital. Her duties involved total care for the hospital patients. Ritchie testified that following her termination in August 28, 2000, she looked for employment anywhere that she thought there might be a job opening. She searched the newspapers and the internet. She also visited hospitals and clinics in her area and reviewed employment bulletin boards. Other than employment in the medical field, Ritchie applied to work as a substitute teacher. Ritchie estimated that within a week to two weeks following her termination on August 28, 2002, she submitted an application for employment with ARH in Hazard, Kentucky. In April 2001, Ritchie was hired by ARH. She initially worked for ARH as a home health nurse. During the time that she worked as a home health nurse, Ritchie was permitted to drive a company vehicle to visit her patients in their homes. After approximately seven months of employment with ARH, she changed to a position as a psychiatric nurse. From April 2001, Ritchie worked continuously as a full-time employee at ARH until May 2003. Ritchie testified that in May 2003, ARH closed its psychiatric unit and ARH changed her position to home health nurse. The company vehicle that she had driven when she was first employed with ARH was no longer available to her. Ritchie testified that in order to fulfill her duties as a home health nurse, she would have needed a four-wheel drive vehicle for her work. While neither counsel inquired further about this requirement, I take judicial notice that Hazard, Kentucky is located in the midst of the Appalachian Mountains. It is reasonable that a four-wheel drive vehicle would be required for mountain driving in certain weather conditions. Ritchie did not own such a vehicle. To use her own vehicle in her work would have also required her to purchase additional insurance to cover her for approximately $300,000. Ritchie explained that her husband had been injured in a mining accident and she could not afford to purchase the vehicle or the increased insurance coverage for the vehicle.

Following her loss of work with ARH, Ritchie found employment with the Kentucky River District Health Department on May 17, 2003. Her initial position was Asthma Coordinator. She has continued this interim employment with this same employer and currently holds the position of Tobacco Coordinator. Ritchie recalled that in approximately 2004, she was also employed by ARH for PRN[22] work on evenings and weekends during a

[22] While the term "PRN" was not defined for the record, Ritchie's additional work for ARH appeared to

Continued

period of seven to eight months. During 2004 and while working at the Kentucky River District Health Department, Ritchie was also employed by Hazard Community College as a part-time evening instructor.

1. Conclusions Concerning Ritchie's Backpay

Following Ritchie's unlawful discharge on August 28, 2000, Ritchie found interim employment in April 2001. Thereafter, she continued to work without significant interruption for the remainder of the backpay period. During at least two quarters of the backpay period, Ritchie's interim employment earnings exceeded her gross backpay amount and no net backpay accrued for these periods. Additionally, because of the amount of her interim earnings for two other quarters, her net backpay amounted to only $118 for the entire quarter. Therefore, throughout 2002, Ritchie's interim earnings were substantial enough to virtually extinguish Respondent's backpay liability for that period of time.

Ritchie testified, without dispute, that when ARH eliminated her job in the psychiatric unit and moved her to home health, she was unable to accept the job. She explained that she did not have the vehicle and could not afford the required car insurance that would have been necessary for her to perform the work in home health. The Board has long held that a claimant is not required to accept or retain interim employment that is substantially more onerous, is unsuitable, or threatens to become so. See *Parts Depot, Inc*., 348 NLRB No. 9, slip op. at 14 (2006). Thus, her resignation from ARH did not constitute a willful loss of employment, as the acceptance of the job in home health would have created a substantially onerous condition of employment. *Sorenson Lighted Controls*, 297 NLRB 282, 282 (1989). A claimant is certainly entitled to quit interim employment to search for work in a less onerous job. *Ryder System, Inc*., 302 NLRB 608, fn. 11 at 621 (1991). Additionally, it should be noted that even though she had to resign from ARH, she almost immediately found employment with the Kentucky River District Health Department. While she received less pay for her work with Kentucky River District Health Department over the next two years, the Board has also found that a claimant who accepts a job at a lower rate of pay than the job from which he was illegally discharged is under no duty to continue to search for work. *Champa Linen Service Co.*, 222 NLRB 940, 942 (1976). I also note that despite the fact that her earnings were less with Kentucky River District Health Department, she also tried to supplement her income by working part-time with ARH and by part-time teaching with Hazard Community College.

Accordingly, the total record evidence demonstrates that Ritchie not only made a diligent search for work throughout the entire backpay period, she may have even exceeded expectations for diminishing Respondent's backpay liability. Accordingly, Respondent has failed to meet its burden of showing that Ritchie did not properly mitigate damages. The compliance specification includes $232,247 as Ritchie's total gross backpay. Her interim earnings are shown to be $143,723. Therefore, the correct amount of net backpay for Ritchie,

be part-time work as needed at the hospital.

excluding interest, is $88,876.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[23]

ORDER

IT IS HEREBY ORDERED that the Respondent Jackson Hospital Corporation, D/B/A Kentucky River Medical Center, Jackson, Kentucky, its officers, agents, successors, and assigns, shall pay the individuals named below the indicated amounts of total gross backpay and other applicable reimbursable sums, with interest thereon accrued to the date of payment computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax and withholdings required by Federal and State laws.

Eileene Jewell	$41,592
Debra Miller	$21,473
Lois Noble	$40,268
Maxine Ritchie	$88,876

Dated, Washington, D.C., February 22, 2007.

Margaret G. Brakebusch
Administrative Law Judge

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.