

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

**THE LORGE SCHOOL,**

**and**

**Case 2—CA—37967**

**LINDA COOPERMAN, an Individual.**

*Joane Wong, Esq. and Rita Lisko, Esq.,*  
for the General Counsel

*Daniel Silverman, Esq. and Michael Silverman, Esq.,*  
(*Silverman & Silverman, LLP*) for the Respondent

*Antonio Cavallaro, Esq.,*  
(New York State United Teachers) for the Charging Party

**SUPPLEMENTAL DECISION**

**JOEL P. BIBLOWITZ, ADMINISTRATIVE LAW JUDGE:** This case was heard by me on April 14, 2009, in New York, New York. In its Decision and Order in the underlying case which issued on February 19, 2008, the Board found that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging Linda Cooperman on August 1, 2006, and ordered the traditional reinstatement and backpay remedy.<sup>1</sup> The United States Court of Appeals for the Second Circuit issued its Judgment on January 9, 2009, enforcing the Board's Order in full.<sup>2</sup>

The compliance specification, which issued on February 13, 2009, alleges that the backpay period was from August 1, 2006, the date of Cooperman's discharge, to March 31, 2008, when Respondent made an unconditional offer of reinstatement to Cooperman. The compliance specification alleges net backpay is owed of \$129,003.34, plus interest.

In its answer to the compliance specification, Respondent admits "that the backpay period is correctly set forth in the Compliance Specification" and "admits that the gross backpay is correctly set forth in the Compliance Specification."<sup>3</sup>

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<sup>1</sup> *The Lorge School*, 352 NLRB 119 (2008).

<sup>2</sup> 305 Fed. Appx. 811 (2d Cir. 2009).

<sup>3</sup> These admissions provide a sufficient and dispositive basis on which to reject the claim in Respondent's brief (R. Br. at 1 fn. 1) that it was wrongly barred at trial from adducing evidence showing that "the backpay period should be cut short because [subsequent to her unlawful discharge] Cooperman would have quit or have been terminated due to pedagogic differences and/or racial comments."

Sec. 102.56(b) of the Board's Rules and Regulations sets forth what must be included in an answer to a compliance specification. It states, in pertinent part:

Continued

Respondent denies the balance of the allegations contained in the specification, alleging that Cooperman did not satisfy her obligation to search for comparable employment and should therefore be disqualified from receiving any backpay. In this regard, Respondent contends that Cooperman did not maintain an adequate record of her search for interim employment and, more specifically, did not satisfy the requirement to mitigate damages by not applying for any teaching positions or tutoring positions. Further, Respondent contends that Cooperman’s efforts at self-employment did not constitute a legitimate mitigation effort.

#### Factual Findings

As set forth in more detail in the underlying decision in this matter, on August 1, 2006, Cooperman was unlawfully terminated from The Lorge School, a private school in New York City for children with developmental disabilities.

Cooperman had begun work at the school just three weeks earlier after being hired as the school’s instructional supervisor. During most of the three weeks, Cooperman worked with the outgoing instructional supervisor to learn the responsibilities of her new job. The instructional supervisor was responsible for all aspects of curriculum and instruction, and for mentoring, evaluating, and hiring teachers and teachers’ assistants. As instructional supervisor, Cooperman was responsible for scheduling classes, assigning teachers and generally overseeing instruction and assessment of students. Prior to working at The Lorge School, Cooperman worked as a teacher of mathematics, English, and science and, most recently, as an assistant to a principal at an elementary school. In that last position, she functioned as principal within the school, but did not hold that title. Cooperman has the educational background and has obtained the necessary certifications and licenses required by New York State to apply for any position in a school district, including school administrator positions such as assistant principal or principal, and districtwide positions such as assistant superintendant or superintendent.

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As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into 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.

Sec. 102.56(c) of the Board’s Rules and Regulations explains that

If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing evidence controverting the allegation.

As referenced, Respondent’s answer does not raise the issue that the backpay period would have been “cut short” or claim that, as a result of cutting the backpay period, the alleged gross backpay calculations are inaccurate. To the contrary, Respondent’s answer affirmatively and unequivocally admits the correctness of the backpay period and gross backpay pled by the Government. The answer, which Respondent never sought to amend before, during, or after trial, is binding on Respondent.

Cooperman testified that after her termination she began looking for new work immediately. Indeed, as early as August 1, the day of her termination, Cooperman's daughter began e-mailing potential job leads to Cooperman. Primarily, Cooperman looked for work by filling out an online job application for the New York City public schools and applied for certificates of eligibility for the type of jobs she was seeking, which included placement eligibility as a principal or an assistant principal at elementary, intermediate, and junior and senior high schools. In addition, she obtained a certificate of eligibility to be a principal supervisor of mathematics. These certificates were mailed to her in August and enabled her to access the New York City (NYC) online application process for positions falling within her certification, and allowed reviewers of her applications to access her resume and other qualifications materials. A separate application process placed her in an assistant principal pool, and if a school was looking for an assistant principal it could review the pool and their qualifications and invite pool members to an interview process called a "C-30 process." Cooperman went to many C-30 interviews through this process.

In total, Cooperman estimated that through the online pool process, she applied for at least 640 positions during the backpay period, a figure she derived from her application to an average of 40 jobs, twice a month, during the course of the 8 months after her discharge. Cooperman described how on the 1st and 15th of each month, she would log into the New York education department web site and review jobs for which she was eligible to apply. Initially, Cooperman applied for assistant principal and principal positions in the Bronx and Manhattan and tried to limit her commute to 1-1/2 hours, but within that radius she applied for all principal and assistant principal openings. She would send the school her application and essays and she did this "over and over again." Within a few months, after having no success, Cooperman expanded her search to include applying for jobs in Queens and Brooklyn as well.

In addition, Cooperman applied to between 5 and 10 positions that were listed on a job posting service called BOCES (Board of Cooperative Educational Services) that listed positions in suburban areas of New York City. Cooperman also applied for jobs she found in the New York Times want ads. Cooperman testified that every Sunday she would search the section where health and education jobs were posted. These jobs did not involve prequalification in order to apply. She would mail a form letter (conforming the letter to the details of the principal or assistant principal job listed in the BOCES or NYT ad) along with her administrator's certificate or license, and a resume, to the prospective employer.

As a result of her online applications, Cooperman testified, and submitted to the Region, a list of 18 positions for which she interviewed. In addition, there were additional interviews that Cooperman recalled that were not on the list given to the Region. In some instances, Cooperman was called for second interviews, but in no case was she selected for the position.

Cooperman also applied for substitute teacher positions in several school districts and a position as a permanent substitute in one district, jobs that would pay a daily rate. She was not successful in this job search either.

Frustrated with her lack of success in finding a position in education, in early 2007 Cooperman looking into business opportunities that culminated in her and her husband's establishment of a gourmet natural food store and catering business in Scarsdale. This enterprise, "Church Avenue Poultry Market," was incorporated in June 2007, space was leased in September 2007, and the store opened in April 2008. In addition to selling take out food and offering catering, the venture offered cooking classes, and education in healthy lifestyles.

Beginning in the spring of 2007, Cooperman devoted her time to creating this business. She undertook responsibility for investigating the prospects for and preparing to open this business. Cooperman developed a business plan, looked for property, investigated architects, interviewed architects, applied for licenses and permits, began working with a store designer, met with culinary schools, interviewed employees, contractors, and purchased equipment. Cooperman supervised the construction and renovation of the facility. Cooperman developed brochures for the store offerings and advertisements, and placed ads.

## Analysis

### 1. Principles

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. in part 876 F.2d 678 (8th Cir. 1989); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d 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.) cert. denied 414 U.S. 822 (1973). The General Counsel has discretion in selecting a formula that will closely approximate backpay. He has the burden of establishing only that the gross backpay amounts contained in a compliance specification are reasonable and not an arbitrary approximation. *Performance Friction Corp.*, 335 NLRB 1117 (2001); *Mastell Trailer Corp.*, 273 NLRB 1190 (1984). Any formula which approximates what the discriminatees would have earned had they not been discriminated against is acceptable if not unreasonable or arbitrary in the circumstances. *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), enfd. mem. 48 F.3d 1232 (10th Cir. 1995). Any uncertainty about how much backpay should be awarded to a discriminatee is resolved in his or her favor and against the respondent whose violation caused the uncertainty. *Alaska Pulp Corp.*, 326 NLRB 522, 523 and cases cited at fn. 8 (1998), enfd. in part, 231 F.3d 1156 (9th Cir. 2000); *Intermountain Rural Electric Ass'n*, 317 NLRB 588, 590–591 (1995), enfd. mem. 83 F.3d 432 (10th Cir. 1996).<sup>4</sup>

In this case, as noted, supra, the Respondent has admitted that the General Counsel's gross backpay allegations are accurate. I find that the General Counsel has met his initial burden of establishing the reasonableness of the gross backpay amounts contained in the compliance specification. Based on the evidence, these amounts are the most accurate estimate of gross backpay that would have been paid to Cooperman had there been no unlawful action to remove her. They are based on a backpay period (also admitted to be accurate by the Respondent) covering the time of discharge to the time an offer of reinstatement was made by The Lorge School to Cooperman. The lost wages are based on the Cooperman's wages at the time of discharge, supplemented by the increase provided to all administrators at the school during this period. All of this is undisputed.

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<sup>4</sup> "This does not mean, however, that the Board will always approve the General Counsel's backpay formula even if it is reasonably designed to arrive at the approximate amount of backpay due." *Alaska Pulp Corp.*, 326 NLRB at 523. The objective is to reconstruct as accurately as possible what employment and earnings the discriminatee would have had during the backpay period had there been no unlawful action. *American Mfg. Co. of Texas*, 167 NLRB 520 (1967). The Board may borrow elements from the suggested formula of each party to account for conditions described in the evidence and thereby meet its objective of accurately reconstructing backpay amounts. *Hill Transportation Co.*, 102 NLRB 1015 (1953).

Respondent's challenge to Cooperman's backpay centers on her efforts to mitigate her losses. A discriminatee is entitled to backpay if he makes a "reasonably diligent effort to obtain substantially equivalent employment." *Moran Printing Inc.*, 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. *Kentucky River Medical Center*, 352 NLRB 194, 200 (2008), enfd. 557 F.3d 301 (6th Cir. 2009). The Board has repeatedly adopted the statement, set forth in *1849 Sedgwick Realty LLC*, 337 NLRB 245, 254 (2001), and other cases, that:

A good faith effort requires conduct consistent with an inclination to work and to be self-supporting and that such inclination is best evidenced not by a purely mechanical examination of the number or kind of applications for work which have been made, but rather by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment.

Consistent with this, it is well settled that "the test for mitigation is not measured by an individual's success in gaining employment, but rather by the efforts made to seek work." *Essex Valley Visiting Nurses Ass'n*, 352 NLRB 427, 429 (2008); *Fabi Fashions*, 291 NLRB 586, 587 (1988). Whether a claimant's search for employment has been reasonable is evaluated in light of all of the circumstances. See *Pope Concrete Products*, 312 NLRB 1171 (1993), enf. mem. 67 F.3d 300 (6th Cir. 1995); *Cornwell Co.*, 171 NLRB 342, 343 (1968). It is measured over the backpay period as a whole, not isolated portions thereof. *First Transit Inc.*, 350 NLRB 825 fn. 8 (2007); *Wright Electric*, 334 NLRB 1031 (2001), enfd. 39 Fed. Appx. 476 (8th Cir. 2002). Any doubt or uncertainty in the evidence must be resolved in favor of the innocent employee claimant and not the respondent wrongdoer. *Kentucky River Medical Center*, 352 NLRB at 200; *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). The employer does not meet its burden of showing an inadequate job search by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings. *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991).

## 2. Respondent's Challenge to Cooperman's Mitigation Efforts

### a. Cooperman's Search for a new job

Respondent challenges Cooperman's mitigation efforts and contends that gross backpay should be reduced because of unsatisfactory mitigation efforts. I reject Respondent's arguments. Cooperman's testimony, and the record as a whole, establish that her job search efforts were more than adequate to satisfy her duty to attempt to mitigate her losses.<sup>5</sup>

First, much of Respondent's attack on Cooperman's mitigation efforts is, at bottom, an attack on the credibility of Cooperman's testimony, an attack which I find entirely unpersuasive, and at times, far fetched. Cooperman impressed me as an honest witness, who honestly

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<sup>5</sup> I note that this is not a case, such as in *St. George Warehouse*, 351 NLRB 961 (2007), where the General Counsel failed to advance evidence of the discriminatee's job search. In other words, in this case the General Counsel does not merely rely upon the Respondent's failure to affirmatively meet its burden of proving the inadequacy of the discriminatee's job search efforts. Here, the General Counsel, through Cooperman, produced substantial and uncontradicted evidence of Cooperman's job search.

recounted an extensive and sincere effort to look for work after her discharge. Her testimony was uncontradicted, and I credit it.

Respondent declares Cooperman’s testimony that she was not counseled by the General Counsel after her discharge about “obligations to look for work” and “document” her job search to be “incredible,” but it is not. Respondent’s professed shock reflects misunderstanding of Board practice and realities. Indeed, Cooperman did not file her charge until November 2006, and so her testimony that “I didn’t have any communication with the Labor Board until maybe around the December time frame” is entirely plausible. In any event, the record reflects that in March 2008, the Region’s compliance officer wrote asking for information about her job search, which Cooperman provided. Her letter to the compliance officer was consistent with her testimony at trial. As Cooperman testified, she did not need to be told to look for work. In the wake of her discharge, she had an immediate financial incentive to look for work.

Nor am I impressed by Respondent’s attack on Cooperman and the General Counsel, for not providing more “documentary” evidence of her job search. Cooperman plausibly and credibly explained that her job search was primarily conducted online, that she did not make a habit of printing out copies of letters she wrote and online applications that composed the gist of her search. In fact, she did provide some documentary support for her testimony, but it is important to point out that there is no requirement that a discriminatee keep original source documentation of her job search efforts.<sup>6</sup> It is not required that a discriminatee corroborate her testimony. *Heinrich Motors v. NLRB*, 403 F.2d 145, 149 (2d Cir. 1968). Corroboration can be of assistance if there is a dispute, but here, Cooperman’s testimony is not only creditable but uncontradicted.

Respondent also takes issue with the quality of Cooperman’s job search. But I doubt that any discriminatee could satisfy the exacting test articulated by Respondent.

Cooperman’s duty was to make a reasonable and honest, good-faith effort to find work. Respondent ignores all that she did to look for work, and complains about what she did not do. For instance, Respondent asserts that it was unreasonable and “arbitrary” for Cooperman to limit her job search, in the first few months of her unemployment, to Manhattan, the Bronx, and suburban counties north of New York City. After failing to land a new job, Cooperman broadened her search to Brooklyn and Queens in a few months. This seems like a perfectly reasonable effort from Cooperman. There were jobs available in the geographic area in which she looked, and she applied to them. The geographic area is not unduly limited: it encompasses millions of people, and scores of jobs. And when she was not successful in the first months of her job search she broadened the search. It is not Cooperman’s job search that is arbitrary. Rather, it would be arbitrary and unreasonable to permit a respondent to limit backpay because, in hindsight, a perfectly reasonable job search was not fruitful. After all, *in hindsight*, one can always surmise that an unsuccessful job search should have encompassed a

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<sup>6</sup> Employees are not disqualified from backpay “because of their poor record-keeping.” *Allegheny Graphics*, 320 NLRB 1141, 1145 (1996), *enfd.* 113 F.3d 845 (8th Cir. 1997). The Board has ruled a discriminatee’s inability to recall the names of places they searched for work or to maintain records of such after a long period of time does not establish a failure to mitigate damages. *Midwestern Personnel Services, Inc.*, 346 NLRB 624, 627–628 (2006) (citing *U.S. Can Co.*, 328 NLRB 334, 356 (1999)), *enfd.* 508 F.3d 418 (7th Cir. 2007); *Cassis Management Corp.*, 336 NLRB 961, 965 (2001), and cases cited therein.

broader geographic area. But Manhattan, the Bronx, and the northern suburban counties of New York City is not an unduly circumscribed job search.<sup>7</sup>

Respondent takes issue with Cooperman’s failure to apply for teaching or tutoring positions. With the exception of applying for some substitute teaching work, Cooperman focused her job search on principal and assistant principal positions. Board precedent is clear that “the discriminatee is equally not required to accept employment which is not at least the same or better than the work from which he had been discriminatorily discharged.” *Fugazy Continental Corp.*, 276 NLRB 1334, 1336 (1985), enf. 817 F.2d 979 (2d Cir. 1987). In other words, “it is well established that a discriminatee’s obligation to mitigate an employer’s backpay liability requires only that the discriminatee accept substantially equivalent employment.” *Minette Mills, Inc.*, 316 NLRB 1009, 1010 (1995). Clearly, teaching and tutoring, were not “substantially equivalent” in terms of pay<sup>8</sup> or duties to the administrative and supervisory responsibilities involved in the instructional supervisor position from which Cooperman was unlawfully terminated. While a discriminatee, generally speaking, is not obligated to seek the same type of interim employment as that from which she was discharged, and while “instructional supervisor” does not appear to be a widely-used job title or position, it is notable that Respondent suggests nothing *more* equivalent to the instructional supervisor—which involved responsibility for scheduling classes, assigning teachers, and generally overseeing instruction and assessment of students—than an assistant principal or a principal position.<sup>9</sup> Cooperman met the threshold requirements for those administrative positions, was qualified and certified for them, and her applications were accepted based on her experience and credentials. In many cases, she was called for interviews. Until April 2007, when Cooperman stopped seeking interim positions and focused on developing her own business, she was continually finding many assistant principal and principal openings to apply for. Although unsuccessful, this was not an unreasonable search for her to make. Based on the record, these positions appear “substantially” equivalent to the position she was fired from—which is not something Cooperman must prove, but the fact of which further undermines Respondent’s complaint about Cooperman’s job search.<sup>10</sup>

<sup>7</sup> Notably, and contrary to Respondent’s claims, Cooperman’s failure to obtain interim employment, despite her efforts, does not provide evidence of the inadequacy of her job search. *NLRB v. Cashman Auto Co. and Red Cab Co.*, 223 F.2d 832, 836 (1st Cir. 1955) (“‘Success’ is not the measure of the sufficiency of [the discriminatee’s] search for interim employment; the law ‘only requires an honest good faith effort’”); *Midwestern Personnel Services, Inc.*, 346 NLRB at 627 (2006); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575–576 (5th Cir. 1966) (respondent cannot meet its burden of proof merely by presenting evidence of lack of employee success in obtaining interim employment or of so-called “incredibly low earnings”).

<sup>8</sup> Cooperman testified that she contacted the New York City public schools and was told that with her level of experience she would earn around \$55–\$65,000 annually as a teacher. This was less than the \$75,000 per year she was earning at the time of her discharge. I have no doubt that had Cooperman sought and obtained interim employment as a teacher, at wages substantially less than she earned as an instructional supervisor at Lorge, that Respondent would have argued that she had failed to seek substantially equivalent work and that this should be held against her.

<sup>9</sup> *Avon Convalescent Center*, 219 NLRB 1210, 1215 (1975), enf. in relevant part 549 F.2d 1080 (6th Cir. 1977); *EL Plastics Corp.*, 314 NLRB 1056, 1058 (1994); *De Jana Industries*, 305 NLRB 845, 846 fn. 6 (1991).

<sup>10</sup> Respondent is wrong to claim that Cooperman’s application for substitute teaching positions establishes that teaching jobs are “substantially equivalent” to her position at The Lorge School. To satisfy her duty to mitigate, an employee is required to accept only substantially equivalent employment, but may look for and accept work more broadly. *Fugazy*

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b. Cooperman's self-employment

5 It is well settled under Board precedent that self-employment is an adequate and proper way for a discriminatee to attempt to mitigate loss of wages. *Cassis Management Corp.*, 336 NLRB 961, 968–969 (2001); *Black Magic Resources, Inc.*, 317 NLRB 721, 722 (1995); *Fugazy Continental Corp.*, 276 NLRB at 1334 (citing *Heinrich Motors*, 166 NLRB 783 (1967), enfd. 403 F.2d 145 (2d Cir. 1968)). There is no requirement that the self-employment be a financial success. “The fact that a self-employed discriminatee is not successful in his business does not demonstrate that he was not engaged in full-time self-employment because ‘the principle of mitigation of damages does not require success; it only requires an honest good faith effort.’” *Aircraft & Helicopter Leasing*, 227 NLRB at 646, 646–647 (1976), enfd. 570 F.2d 351 (9th Cir. 1978), quoting *Heinrich Motors, Inc.*, 166 NLRB at 784.

15 After April 30, 2007, Cooperman stopped actively looking for work (although she continued to go on a few interviews generated from her previous job search) and began actively working towards the opening of a gourmet food store and catering business. This business was incorporated in June 2007, and a lease signed in September 2007. The store opened in May 2008, but never earned any income for Cooperman.

20 Respondent objects to this effort by Cooperman. Respondent complains that Cooperman's effort to open a business in something she had no prior experience in should invalidate the enterprise as a legitimate effort at mitigation. But I am unaware (and Respondent points to none) of any obligation that a discriminatee remain in the same field or limit self-employment to a retail business with which the discriminatee has prior experience. The principle of mitigation requires an honest and good-faith effort consistent with an inclination to work and be self-sufficient. Based on Cooperman's testimony about the efforts and time she put into the creation and establishment of this business, it certainly appears to be a legitimate effort at self-employment, even if ultimately unsuccessful.

30 Respondent also complains about the length of time it took Cooperman to establish her business. Essentially, from May 2007 until her retail business opened its doors, in May 2008, Cooperman devoted herself to establishing her business from scratch; she was not actively searching for other paid employment during this time. A year is a long time, and Respondent objects to having to pay backpay for Cooperman during this period. But Respondent's indignation is not buttressed with any evidence that the year it took to launch the food store and catering business was longer than Cooperman reasonably needed. It is not buttressed with any evidence that Cooperman did not devote herself fulltime to the task of conceiving, developing, and establishing the new business. Without such evidence, Respondent's contention cannot prevail.

40 Cooperman described a comprehensive effort to develop a business plan, search for a suitable commercial location, rent space, interview and hire architects, and design the business. Once a building was found and space rented, Cooperman was intimately involved in every aspect of hiring, and designing menus and readying the business for opening. Cooperman is under no obligation to further corroborate this credited testimony. The burden is on Respondent to contradict it. *Heinrich Motors v. NLRB*, 403 F.2d 145, 149 (2d Cir. 1968). Based on the

50 *Continental Corp.*, 276 NLRB at 1336. Seeking a position, such as a substitute teaching position, does not show, or even suggest, that it is substantially equivalent to the instructional supervisors job or that there was a duty to broadly seek teaching positions instead of the administrative positions on which Cooperman focused her efforts.

evidence, I am in no position to conclude that a year is an inordinate amount of time for Cooperman to spend planning and developing the business before its doors actually opened. Respondent offers no evidence to support the claim that it is an inordinate amount of time. It certainly is not self-evident that Cooperman took too long to start her business or was not, as her testimony suggests, actively engaged in the development of the business for that year. Given this, and given that it is Respondent's burden to establish the unreasonableness of Cooperman's efforts, and given the maxim that any doubts must be resolved in favor of the discriminatee and against the wrongdoer, there is no grounds to limit Cooperman's backpay based on the length of time she spent conceiving and establishing her business.

After all, the touchstone, for measuring mitigation efforts is "[a] good faith effort" demonstrated by "conduct consistent with an inclination to work and to be self supporting." This is "best evidenced not by a purely mechanical examination of the number or kind of applications for work which have been made, but rather by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment." *Henrich Motors*, supra. Under this standard, it is difficult to say, and in this case entirely unproven, that Cooperman's launching of her food store was anything other than a sincere and reasonable effort to relieve unemployment. It is consistent with an inclination to work and to be self supporting. That fact that, in the end, it made no money for Cooperman, does not undermine the reasonableness or sincerity of the effort, and does not warrant reduction in backpay—either for the period spent putting the business together or the time spent operating the business. *Sioux Falls Stock Yards Co.*, 236 NLRB 543, 564 (1978) ("it is not a defense to Robinson's continuing efforts to build his own business during the backpay period that he did not make more money in his business or that some of his time was spent in acquiring additional skills and equipment. It therefore is found that Robinson should be made whole in accordance with the specification"); *Heinrich Motors, Inc.*, 166 NLRB at 784 ("The time spent by an entrepreneur in seeking business opportunities is in these circumstances necessarily related to his self-employment.") and fn. 10, citing *Cornell v. T.V. Development Corp.*, 215 N.E. 2d 349, 352 (NY 1966) ("where at the time of trial the plaintiff's self-employment had amounted principally—if not solely—to his efforts to become self-employed: ' . . . the proof shows that the plaintiff was borrowing funds to form a corporation for the purpose of going into the electronic business. At the time of trial, the corporation had no bank account; it owned no assets; and the plaintiff received no employment income after his discharge, but did receive \$600 in unemployment insurance payments"), pet. for review denied 403 F.2d 145 (2d Cir. 1968).

### 3. Respondent's Challenge To The Underlying Board Order

In its answer to the compliance specification, but not at the trial, and not in its post-trial brief, Respondent contended, as an affirmative defense, that "[t]he specification was issued prior to a valid Board Order since the two Board Members do not constitute a quorum under Section 3(b) of the Act."

I reject this defense, for several reasons. And, in doing so, I do not reach the issue of whether an affirmative defense, raised in an answer, is waived by the failure to ever mention the defense again. As referenced, the defense was not mentioned by Respondent at trial, it is not mentioned in Respondent's post-trial brief. Under these circumstances, a strong argument that Respondent has abandoned this defense may be made.

But the waiver problems are more profound than that. Respondent's defense is an attack on the jurisdiction of the Board to issue its underlying decision and order in this matter. That order was a final Board order requiring Respondent to offer reinstatement to Cooperman and make her whole for losses resulting from her discharge. Respondent could have, but did

not, present this jurisdictional issue to the Board during the litigation that resulted in the Board's order. Respondent could have, but did not, attempt to raise this issue to the Court of Appeals during the litigation that resulted in the Court's enforcement of the Board's order. Accordingly, with the Board's order judicially-enforced, the issue of the Board's authority to issue that order is settled by the doctrine of res judicata.

Respondent contends in its answer that "[b]ecause this is a matter of the authority of the Board, Respondent is not precluded from raising the issue at this stage of the proceeding." This contention is without force under the circumstances. Whether raised or not, the Board's authority to issue its order was, at least implicitly, before the Second Circuit Court of Appeals when it ordered enforcement of the Board's order in this case. *Stoll v. Gottlieb*, 305 U.S. 165, 171–172 (1938) ("Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter"). The Board's order is judicially enforced and these supplementary proceedings to determine what is owed under the Board's judicially-enforced order are not a forum for attacks on the validity of the underlying order. That the question is one of the Board's authority to act—in other words, of jurisdiction—makes no difference. "It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal." *INS Corp. of Ireland, Ltd. V. Compagnie des Bauxites de Guinee*, 456 U.S. 694 fn. 9 (1982). "A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment." *Id.*; see *United States v. Bigford*, 365 F.3d 859, 865 (10th Cir. 2004) ("as long as a party had an opportunity to litigate the jurisdictional issue, it is not subject to collateral attack."); *Weininger v. Castro*, 462 F.Supp. 457, 472 (S.D.N.Y. 2006) ("The same preclusive effect occurs where a party had an opportunity to litigate jurisdiction but chose not to do so: "A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment"); *Corbett v. MacDonald Moving Servs., Inc.*, 124 F.3d 82, 88–89 (2d Cir. 1997); *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986) ("Even if a court does not expressly rule on matters relating to its exercise of jurisdiction, if the parties *could* have challenged the court's power to hear a case, then res judicata principles serve to bar them from later challenging it collaterally") (court's emphasis). The issue is settled as to this party in this matter.

Finally, even if I were to reach the merits of Respondent's jurisdictional contention, I would not accept it. The Board has clearly and repeatedly taken the view, since December 31, 2007, when the expiration of Board members' terms left only two sitting members of the Board, that it has the authority to issue decisions and orders in unfair labor practice and representation cases. See, e.g., *Regency Grande Nursing & Rehabilitation Center*, 354 NLRB No. 93, slip op. at 1 fn. 1 (2009), and many other recent decisions. I am, of course, bound by Board precedent. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("It is for the Board, not the judge, to determine whether that precedent should be varied"). *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), *enfd.* 640 F.2d 1017 (9th Cir. 1981) (administrative law judge bound to apply established Board precedent that neither the Board nor the United States Supreme Court has reversed). Board precedent clearly requires rejection of Respondent's contention.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>11</sup>

<sup>11</sup> 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.

SUPPLEMENTAL ORDER

5 IT IS HEREBY ORDERED that the Respondent, The Lorge School, New York, New  
York, its officers agents, successors, and assigns, shall

10 Satisfy the obligation to make discriminatee Linda Cooperman whole the  
following by paying her \$129,003.34, with interest thereon to be added, 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.

15 Dated, Washington, D.C., November 18, 2009.

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Joel P. Biblowitz  
Administrative Law Judge

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