

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

ATLANTIC VEAL & LAMB, INC.

and

Case Nos. 29-CA-24484  
29-CA-24619  
29-CA-24669

KNITGOODS WORKERS' UNION, LOCAL 155,  
UNION OF NEEDLETRADES, INDUSTRIAL  
AND TEXTILE EMPLOYEES, AFL-CIO

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF  
IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S  
SECOND SUPPLEMENTAL DECISION**

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## STATEMENT OF THE CASE

On June 30, 2004, the National Labor Relations Board (Board) issued its Decision and Order (342 NLRB 418), which directed Atlantic Veal & Lamb, Inc., (Respondent), its officers, agents, successors, and assigns to offer Jorge Ogando (Ogando) full reinstatement to his former position, or if that position no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other privileges previously enjoyed. The Board also ordered Respondent to make Ogando whole for any loss of earnings and other benefits suffered as a result of the Respondent's discrimination against him.<sup>1</sup>

On October 27, 2005, the United States Court of Appeals for the District of Columbia Circuit issued its Judgment (No. 04-1326) enforcing, in full, the Board's Order.

A controversy arose over the amount of monies due under the Board's Order. The Regional Director of Region 29, pursuant to authority conferred upon him by the Board and Sections 102.54 and 102.55 of the Board's Rules and Regulations, Series 8, as amended, issued a Compliance Specification and Notice of Hearing on May 31, 2006. On June 21, 2006, Respondent filed its Answer to the Compliance Specification.

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<sup>1</sup> The Board further ordered Respondent to make whole Modesto Lora for any loss of earnings and other benefits as a result of Respondent's discrimination against him. After the issuance of the Compliance Specification and opening of the hearing in this matter, Respondent agreed to pay the amount of backpay, with interest, due to Mr. Lora as set forth in the Compliance Specification. Transcript (Tr.) 43.

On July 18 and 19, 2006, and on November 13 and 14, 2006, a hearing was held before Administrative Law Judge Raymond P. Green, and on January 31, 2007, he issued his Supplemental Decision. In this Supplemental Decision, the administrative law judge found that the Respondent's reinstatement of Ogando did not terminate the backpay period since the rate at which Respondent paid Ogando upon his return to employment was less than what it would have been had he not been illegally discharged. He also found that the gross backpay formula used by the Region was reasonable.

The administrative law judge further found that the time period from August 28, 2001, through June 7, 2004, should be excluded from the backpay period, and calculated the backpay due from the point at which Ogando began his interim employment at Whole Foods, Inc. In this regard, the administrative law judge opined that he could not make any reasonable conclusions about Ogando's search for work or work history. The administrative law judge additionally found that Ogando was entitled to interim expenses for the expenses he incurred by commuting to his interim employer.

The administrative law judge ordered Respondent to pay Ogando \$18,514.00, plus interest, in backpay for the time period of June 7, 2004, and continuing to the time of the hearing. Finally, he found that the backpay period continues to run until such time as Respondent raises Ogando's pay rate to what it should be and until such time as it offers him an opportunity to participate in its health insurance plan and gives him the proper amount of vacation pay.

Counsel for the General Counsel filed exceptions to the administrative law judge's conclusions of law that: (1) Ogando's testimony should be discredited; (2) the time period from August 28, 2001, through June 7, 2004, should be excluded from the

backpay period; and (3) he could not make any reasonable conclusions about Ogando's search for work or work history. On May 28, 2010, the Board issued its Supplemental Decision and Order and Order Remanding Case. In this decision, the Board found that the Administrative Law Judge had erred in failing to make findings of fact concerning Ogando's work history from the date of his discharge in August 2001 until June 7, 2004—the date he obtained interim employment with Whole Foods, Inc. The Board severed this portion of the case and remanded it to the judge “so that he may reconsider the record evidence, make credibility determinations, and provide an analysis explaining the basis for his findings.” See Atlantic Veal & Lamb, Inc., 355 NLRB No. 55 (May 28, 2010).<sup>2</sup>

On July 16, 2010, the administrative law judge issued his second supplemental decision. In the second supplemental decision, the administrative law judge found that Ogando's was not entitled to backpay for the 3<sup>rd</sup> quarter of 2001 and for the first five weeks of the 4<sup>th</sup> quarter of 2001.<sup>3</sup> He found that Ogando was entitled to \$3,400 in backpay for the 4<sup>th</sup> quarter of 2001.<sup>4</sup> The administrative law judge further found that Ogando had interim earnings for each quarter of 2002, 2003 and the first and second quarters of 2004 which exceeded the gross backpay calculations made on his behalf for

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<sup>2</sup> The Board agreed with the administrative law judge's findings that Ogando is entitled to backpay from June 4, 2004, and continuing to such time as Respondent makes Ogando a valid offer of reinstatement. The Board also agreed with the administrative law judge's finding that the General Counsel used a proper formula to calculate the backpay due to Ogando.

<sup>3</sup> He based this finding on Ogando's testimony that he did not begin his search for work until November 2001.

<sup>4</sup> The administrative law judge computed the amount of backpay due for the 4<sup>th</sup> quarter of 2001 as \$3,440 but then found Ogando was entitled to \$3,400 for that time period.

those years. He also found that for this period of time, Ogando willfully concealed his interim earnings. He concluded that Ogando was not owed any backpay for 2002, 2003 and the 1<sup>st</sup> and 2<sup>nd</sup> quarters of 2004 and that he was entitled to \$3,400 in net backpay for the 4<sup>th</sup> quarter of 2001. He therefore amended his calculations and determined that Respondent owed Ogando backpay in the amount of \$21,914. Counsel for the General Counsel has filed exceptions to the administrative law judge's second supplemental findings and conclusions.

The questions presented for resolution are:

1. Whether the administrative law judge erred by failing to include overtime in his computation of the amount of backpay owed to Ogando for the 4<sup>th</sup> quarter of 2001, and concluding that he was entitled \$3,400.00 in backpay for that quarter?
2. Whether the administrative law judge erred in finding that Ogando's interim earnings for each quarter of 2002, 2003 and the first and second quarters of 2004 exceeded the gross backpay calculations made on his behalf for those years and for that period of time, Ogando willfully concealed his interim earnings?
3. Whether the administrative law judge erred in finding that Ogando and Diaz were not credible witnesses?
4. Whether the administrative law judge erred in finding that Ogando would have continued to work for Royal Quality General Construction until he obtained interim employment with Whole Foods, Inc.?

## FACTS

### Background

Atlantic Veal & Lamb, Inc. employed Jorge Ogando in August 2001. Tr. 25<sup>5</sup>. He worked in the production department processing meat orders and preparing inventory. Tr. 50. In August 2001, Respondent unlawfully discharged him from employment. Tr. 25. Ogando was an unskilled worker. Tr. 55. Ogando attended high school but did not graduate. Tr. 54. He received a General Equivalency Diploma in 2000 and took an English class for a semester at Long Island University. Tr. 55, 61. He has no other education or training. Tr. 56. His primary language is Spanish, although he can read and speak some English. Tr. 52, 61. Ogando did not have any specific training for his job at Respondent. Tr. 51. He previously packed produce and unloaded trucks for Respondent. Tr. 52.

### Ogando's Interim Employment

Starting in about the middle of 2002, Ogando began working for himself. Tr. 82-83. He started painting houses, making minor repairs to houses, and cleaning. Tr. 82. Ogando was self-employed from the middle of 2002 through 2003. Tr. 84. Between 2002 and 2003 he worked for about 25 customers. Tr. 86. For a period of time in 2002, Ogando moved to Pennsylvania to look for work. Tr. 159. He worked for several months painting houses and making repairs to houses. Tr. 159-160. Mr. Ogando reported his interim earnings from his self-employment to the Internal Revenue Service and to the Social Security Administration. In 2002, he reported that he had net earnings

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<sup>5</sup> As used in this brief, the abbreviation "GC.Ex." refers to exhibits introduced at the hearing by the General Counsel; the abbreviation "R. Ex." refers to exhibits introduced at the hearing by the Respondent; and the abbreviation "Tr." refers to pages of the official transcript of the hearing before the Administrative Law Judge.

of \$6,975 from self employment. R. Ex. 9; G.C. Ex. 8. In 2003, he reported net earnings of \$3,740 from self-employment.<sup>6</sup> R. Ex. 10.

#### Alleged Concealment of Interim Earnings

At the hearing, Respondent produced documents which appeared to be a Tax Form W-2 for Ogando for the year 2002 from a company named Royal Quality General Construction, and pay statements from Royal Quality General Construction dated October 17, 2003, and October 31, 2003. See R. Ex. 13, 14. Respondent obtained these documents from the bank where Ogando obtained a mortgage.<sup>7</sup>

Ogando testified that he purchased a house in 2003. Tr. 214. Ogando further testified that he knew false information had been provided so that he would qualify for a mortgage. Tr. 274-75. He testified that a document which purported to be a W-2 for his earnings for the year 2002 had his social security number on it and that this document indicated that he earned more than \$66,000 in 2002 from Royal Quality General Construction. Tr. 269, R. Ex. 13. Ogando testified that he did not work for Royal Quality General Construction in 2002, Tr. 270, and further, that he had never seen this

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<sup>6</sup> In January 2003, Ogando won 25,000.00 from the New York State Lottery. Tr. 98, 202, 204. On or about January 13, 2003, he received five checks in the amount of \$5,000.00 each from the lottery office. Tr. 204-05. Ogando cashed the checks from the state lottery and placed some of those earnings in either his checking or savings accounts. Ogando reported these earnings on his 2003 Federal and state income tax returns. R. Ex. 10.

<sup>7</sup> Respondent's counsel did not present a witness to authenticate these documents. However, Counsel for the General Counsel and Respondent's counsel entered into a stipulation that Respondent received the documents identified as R. Ex. 14 from Flagstar Bank and that Flagstar Bank received these pay statements from Mr. Ogando's broker as part of his 2003 application for a home loan. Tr. 345. Counsel further stipulated that the pay statements received from Flagstar were not original documents, and that Flagstar did not independently verify the information contained in the pay statements or 2002 W-2 form contained in its files. Tr. 345.

W-2 form. Tr. 280. Ogando testified that he was not aware that purported pay statements from Royal Quality General Construction had been turned over to the bank as part of his mortgage application. Tr. 279; R. Ex 14. Ogando stated that he also never worked for Royal Quality General Construction in 2003, and that he had not earned more than \$56,000 from this company as of October 31, 2003, as reflected in the pay statement of that date. Tr. 277. He testified that his friend Angel Diaz owned this company. Tr. 278.

Angel Diaz testified at the hearing. Tr. 351. Mr. Diaz testified that he owned a business, Quality General Construction, and that he had owned this business for about five years. Tr. 351. He testified that Quality General Construction is a sole proprietorship that is engaged in the construction industry. Tr. 351. It performs carpentry, roofing and siding services. Tr. 351. Mr. Diaz testified that his business operated under the name of Royal Quality General Construction about five or six years ago. Tr. 352. Mr. Diaz testified that he has known Ogando for about 10 years and that he is a good friend. Tr. 352. Mr. Diaz further testified that between August 2001 and May 2004, he neither employed Ogando nor did he have any other employees. Tr. 352. He testified that he rarely hired others to work for him and on the occasions when he hired other employees, he did not hire Ogando. Tr. 353. He has on rare occasions hired employees from off of the street. Tr. 376.

Mr. Diaz testified that for the years 2002 and 2003, his business earned a total of about fifty to sixty thousand dollars, and that neither he nor any employee has been paid \$66,000.00 in a year. Tr. 354, 374. He further testified that the Federal employer identification number listed on a W-2 purportedly showing that Ogando worked for

Royal Quality General Construction, Inc. in 2002 (R. Ex. 13) was not the business's number, and that the address was not the business's address. Tr. 387, 389-90. Additionally, he testified that he had never seen the document which purported to be a payroll statement from his company showing Ogando had earnings in 2003 (R. Ex. 14), and that his company never used a payroll service. Tr. 391.

#### The Administrative Law Judge's Supplemental Decision

In his first supplemental decision, the administrative law judge found that the General Counsel had established that its gross backpay formula was reasonable. In this regard, he found that the General Counsel had amended the Compliance Specification to include overtime hours that had been worked by three comparable employees, and he adopted the amount of overtime hours claimed by the General Counsel as set forth in Appendix C to the Amended Compliance Specification.

The administrative law judge also found the time period from August 28, 2001, through June 7, 2004, should be excluded from the backpay period, and calculated the backpay due from the point at which Ogando began his interim employment at Whole Foods, Inc. as of June 7, 2004. In this regard, the administrative law judge found that he could not make any reasonable conclusions about Ogando's search for work or work history, during the period of August 28, 2001 through June 7, 2004. He based this conclusion on his findings that: (1) Ogando had not told the truth about his work experience on an employment application; and (2) false documentation had been submitted to a bank, during the backpay period, to show Ogando had income sufficient to qualify for a mortgage.

### The Board's Supplemental Decision and Order

In its Supplemental Decision and Order, agreed with the judge that the General Counsel had used a proper formula to calculate the backpay owed to Ogando. However, the Board found that the under extant Board law, the mere existence of discrepancies in reported income, such as those found by the judge here, is insufficient to establish a willful concealment of earnings from the Board that would warrant the denial of backpay for the period of the concealment, citing Cibao Meat Products, 348 NLRB 47 (2006). The Board held that under Cibao, the judge erred in finding that discrepancies alone between the income and job experiences reported to the Board and those Ogando provided to third parties disqualified him from receiving backpay for the period in issue.

The Board further found that it was uncertain what to make of the judge's credibility finding with respect to Ogando's testimony regarding interim earnings. The Board pointed out that Ogando has specifically denied receiving any interim earnings from Royal Quality General Construction or any other entity operated by Angel Diaz. Citing Parts Depot, 348 NLRB 152 (2006), the Board found that if the judge actually determines that, despite Ogando's denial, he in fact had significant income in 2002 and 2003 which was not reported to the Board, then Ogando's backpay in those relevant quarters should be curtailed. Accordingly, the Board remanded the case to the administrative law judge and directed that he make explicit findings as to Ogando's income in 2002 and 2003 and whether or not Respondent met its burden to establish that Ogando willfully concealed income from the Board from the period of August 28, 2001, to June 7, 2004. The Board further directed that the judge should make findings as to the backpay owed to Ogando for the period in question based on those findings.

### The Second Supplemental Decision

On July 16, 2010, the administrative law judge issued his Second Supplemental Decision. In that decision, the administrative law judge found that Ogando was entitled \$3,400 in backpay for the 4<sup>th</sup> quarter of 2001. He further found that Ogando was not entitled to backpay for 2002, 2003 and the first and second quarter of 2004. In finding that Ogando was not entitled to backpay for that period of time, the administrative law judge concluded that Ogando's interim earnings for each quarter of 2002, 2003 and the first and second quarters of 2004 exceeded the gross backpay calculations made on his behalf for those years and for that period of time, Ogando willfully concealed his interim earnings.

In reaching his conclusion that Ogando's interim earnings for each quarter of 2002, 2003 and the first and second quarters of 2004 exceeded the gross backpay calculations, the administrative law judge relied on documentary evidence produced by Respondent, which consisted of a W-2 for 2002 and the two pay statements it obtained from the mortgage bank, which showed Ogando had substantially more interim earnings in 2002 and 2003, than he testified to. He concluded that Respondent had met its burden of showing that Ogando had more interim earnings than claimed by the General Counsel and that the burden or proof then shifted back to the General Counsel to rebut Respondent's showing of interim earnings. The judge assumed that the W-2 and pay statements were submitted to the mortgage bank with Ogando's consent, and therefore he did not credit Ogando's assertion that he did not earn the monies reflected in those documents. He further found that Angel Diaz' testimony was not credible. Finally, the administrative law judge concluded, based on the documents submitted by Respondent,

that Ogando would have continued to work for Royal Quality General Construction at a comparable rate of pay during the first five months of 2004 until he was hired by Whole Foods on June 7, 2004.

### **ARGUMENT**

#### **THE ADMINISTRATIVE LAW JUDGE ERRED BY FAILING TO INCLUDE OVERTIME IN HIS COMPUTATION OF THE AMOUNT OF BACKPAY OWED TO OGANDO FOR THE 4<sup>TH</sup> QUARTER OF 2001**

The administrative law judge computed the amount of backpay due for the 4<sup>th</sup> quarter of 2001 as \$3,440. He based this amount of finding that Ogando would have earned \$340.00 per week (\$10.50 per hour/40 hours per week) for eight weeks during the 4<sup>th</sup> quarter of 2001. However, he failed to include in this computation Ogando's weekly overtime that he previously found was appropriately included in the gross backpay formula.

In Appendix C to the Amended Compliance Specification, the General Counsel set forth two comparable employees who worked an average of 191 hours of overtime for the 4<sup>th</sup> quarter of 2001. The administrative law judge adopted this appendix to the Specification. Thus, Ogando was entitled to overtime at a rate of 14.69 hours per week during the 4<sup>th</sup> quarter of 2001. Based on the gross backpay of \$10.75 per hour plus the 14.69 hours of average overtime hours, Ogando is entitled to \$5,334.69 for the 4<sup>th</sup> Quarter of 2001. Thus, the administrative law judge erred in finding that Ogando was entitled to \$3,400 for the 4<sup>th</sup> Quarter of 2001.

**THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT  
OGANDO'S INTERIM EARNINGS FOR EACH QUARTER OF 2002, 2003 AND  
THE FIRST AND SECOND QUARTERS OF 2004 EXCEEDED THE GROSS  
BACKPAY CALCULATIONS MADE ON HIS BEHALF AND FOR THAT  
PERIOD OF TIME, OGANDO WILLFULLY CONCEALED HIS  
INTERIM EARNINGS**

The Respondent bears the burden of establishing affirmative defenses that would mitigate its backpay liability such as establishing interim earnings to be deducted from backpay and demonstrating that a discriminatee willfully concealed interim earnings. See Atlantic Limousine, Inc., 328 NLRB 257 (1999) enfd. 243 F. 3d 711 (3<sup>rd</sup> Cir. 2001), citing Paper Moon Milano, 318 NLRB 962, 963 (1995). Where a discriminatee has been found to have willfully concealed interim earnings, the Board will deny backpay for those quarters where the Board has found a willful concealment. See American Navigation Co., 268 NLRB 426, 428 (1983); Hagar Management Corp., 323 NLRB 1005 (1997).

Contrary to the administrative law judge's findings, Respondent has not established, by a preponderance of the evidence, that Ogando had substantial interim earnings that he concealed from the Board. In this regard, at the trial, Respondent only presented documents submitted to a bank in connection with a mortgage application which indicated Ogando had income in excess of what he reported to the Board in the years 2002 and 2003. Respondent presented no testimonial or other documentary evidence to support its claim of concealed interim earnings.

The Respondent, and not the General Counsel, has the burden to prove interim earnings. See Atlantic Limousine 328 NLRB 257 n. 4 (1999), citing Iron Workers Local 373 (Building Contractors), 295 NLRB 648, 655 (1989). Respondent has not met its burden of proof. These documents do not establish that Ogando worked for an interim

employer or had interim earnings beyond those set forth in the Compliance Specification. At best, these documents created uncertainty. When there are uncertainties or ambiguities, doubt should be resolved in favor of the wronged party rather than the wrongdoer. See Paper Moon Milano, 318 NLRB at 963, citing United Aircraft Corp., 204 NLRB 1068 (1973). Here, the administrative law judge resolved any doubt created against the wronged party and not the wrongdoer.

In its decision remanding this case to the administrative law judge, the Board found that the judge had failed to consider its decision in Cibao Meat Products, 348 NLRB 47, 48 (2006), and held that the judge erred in finding that the discrepancies alone between income and job experiences Ogando reported to the Board and those Ogando provided to third parties disqualified him from receiving backpay during the period at issue. Yet, despite the Board's direction, the judge again erred in finding that the discrepancies alone between income and job experiences Ogando reported to the Board and those Ogando provided to third parties disqualified him from receiving backpay during the period at issue.

In Cibao the Board addressed the question of whether a finding of willful concealment of interim earnings was warranted based on discrepancies between interim income figures the discriminatee provided to the Board and the interim income figures he allegedly provided to other parties. Specifically, the respondent argued that tax returns attached to a mortgage application indicated a higher income for the discriminatee than tax returns for the same years submitted to the Board. Respondent also pointed to a credit card application which stated annual income than reported on a tax return submitted to the Board. The Board acknowledged that there were discrepancies in the

documents but stated that “we do not believe that the mere existence of such discrepancies suggest willful concealment of earnings from the Board.” Id. at p. 2. The Board further stated that at worst the discriminatee exaggerated his earnings in order to enhance his application for a mortgage and a credit card. Id. More importantly, the Board found that even assuming that this was an effort to mislead third parties, it did not believe that this should operate to reduce respondent’s obligation to remedy its unfair labor practice. Id.

Ogando testified that a document which purported to be a W-2 for the year 2002 had his social security number on it and that this document indicated that he earned in excess of \$66,000 in 2002 from Royal Quality General Construction. However, Ogando credibly testified that he had not worked for Royal Quality General Construction. This testimony is corroborated by the testimony of Angel Diaz. He candidly stated that he knew false information had been provided so that he would qualify for a mortgage, but he never saw this W-2 form. The administrative law judge did not find that Ogando had in fact worked for Royal Quality General Construction during the backpay period. Rather, he erroneously concluded that since the W-2 and pay statements had to have been submitted by Ogando or submitted with his consent, he did not credit Ogando’s assertion that he did not earn any money from Royal Quality General Construction. This conclusion is in contravention to the Board’s direction in its remand order.

Like the Board’s finding in Cibao Meat Products, the discrepancy in documents produced to the Board and those produced to a third party does not establish that Ogando willfully concealed interim earnings from the Board. Here, the discriminatee produced his tax returns which show his earnings for the 2001 through 2004 tax years. Respondent

was credited with those actual interim earnings in the Region's backpay computation. There is no credible testimony or credible documentary evidence that supports a conclusion that Ogando had any other interim earnings, other than those from self-employment, before he was employed by Whole Foods, Inc.

**THE ADMINISTRATIVE LAW JUDGE ERRED IN CONCLUDING THAT  
OGANDO AND DIAZ WERE NOT CREDIBLE WITNESSES**

In his Second Supplemental Decision, the administrative law judge found that he could not credit Ogando's testimony that he had little or no interim earnings in 2002 and 2003. In this regard, he "assumed that the W-2 and pay statements were submitted with the assent of Ogando." He found that "given these documents that had to have been submitted by him or submitted with his consent, I do not credit, on this record Ogando's assertion that he had little or no interim earnings in 2002 and 2003." See Second Supplemental Decision at p. 3. Finally, he did not credit the testimony of Angel Diaz. The administrative law judge did not provide any reason for discrediting Diaz' testimony. The administrative law judge's credibility determinations are clearly erroneous.

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of the evidence convinces the Board that they are incorrect. See Standard Dry Wall Products, 91 NLRB 544 (1950) enfd. 188 F. 2d 362 (3<sup>rd</sup> Cir. 1951). In the instant case, a clear preponderance of the evidence shows that the administrative law judge's findings that Ogando and Diaz were not credible witnesses are erroneous.

In Double D Construction Group, Inc., 339 NLRB 303, 304 (2003), the Board found that the administrative law judge erred by solely relying on the fact that the

discriminatee had proffered to the respondent a false social security number to obtain employment as a basis to discredit the discriminatee's testimony regarding the alleged unfair labor practice committed by the respondent. In the Board's view, the administrative law judge's credibility determination actually amounted to a disqualification of the discriminatee, as a sanction for his conduct, and not a proper determination of his credibility, which required consideration of multiple factors. *Id.* at 303. The Board further found that that "the judge had effectively disqualified the witness rather than making a true credibility determination, which considers the witness's testimony, in context, including, among other things, his demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Id.* at 305, citing Daikichi Sushi, 335 NLRB 622, 623 (2001). The Board pointed out that in "assessing whether a witness is telling the truth in a Board proceeding, a judge must take into account all of the factors that bear on the credibility of the witness *at the time of his testimony*. It is not enough to say that because the witness was untruthful in the past, and regardless of any factors that may tend to support his testimony, he cannot be credited now." *Id.* at 306. (emphasis in original).

Like the judge in Double D Construction Group, the judge here did not base his credibility determination on Ogando's testimony at the hearing. Rather, his determination was based on his assumption that Ogando provided false information in support of a mortgage application. While the alleged submission of false documents may be a factor that is considered in assessing Ogando's testimony, it should not have been the only factor relied on to determine that he was not a credible witness. In this regard,

the judge did not assess Ogando's demeanor at the trial, inherent probabilities, reasonable inferences drawn from the record as a whole, nor the weight of the evidence, including the corroborative testimony of Angel Diaz.

In Parts Depot Inc., 348 NLRB 152, 153 (2006), the Board agreed with the administrative law judge's finding that the discriminatee had interim earnings as reported on an application for employment despite her testimony that she made up the job to increase her chances of obtaining employment and a mortgage. The judge had discredited the discriminatee's testimony that she had not worked as reported on the employment application. In discrediting her testimony, the judge found that at the trial, the discriminatee's testimony was evasive in that she testified that she listed this business as a fictional employment reference in order to qualify for a loan, but did not explain why the job was listed on an employment application. He further found that she was equivocal in answering who actually filled out the application—she or her daughter. Finally, he found that the information on the job application submitted by the discriminatee was detailed setting forth her position, duties, salary and supervisor. On these various factors, the judge did not credit her testimony that she had not worked at this interim employer. The judge in the instant case has not made a detailed or reasoned credibility determination as the judge did in Parts Depot.

The documents the administrative law judge relied on in finding that Ogando was not credible, the purported W-2 for 2002 and payroll statements for 2003, should be accorded, little, if any, evidentiary weight. The documents are hearsay and do not possess the inherent quality that entitles them to substantive probative weight. In this regard, neither the W-2 form nor the payroll statements were authenticated by Diaz, the

owner of Royal. Rather, Diaz gave un rebutted testimony that these were sham documents and that Royal never employed Ogando. Diaz pointed out in his testimony that the address listed on these documents was not correct, nor did the documents contain the business's federal tax payer identification number. Ogando testified that he had not seen either document. Respondent stipulated that the entity it received these documents from—Flagstar Bank—did not independently verify the information contained in these documents. Thus, these documents should be accorded little, if any evidentiary weight. Cf. PIE Nationwide, 297 NLRB 454, 455 (1989), *enfd.* in relevant part, 923 F. 2d 506 (7<sup>th</sup> Cir. 1991)(Board accorded little weight to letter of discharge from interim employer and found that letter alone not sufficient to satisfy respondent's burden to establish willful loss of earnings).

Further, the 2002 W-2 and the payroll statements provided by Flagstar Bank must be given minimal weight because they conflict with Ogando's 2001 through 2004 tax returns that were offered into evidence by Respondent and whose authenticity is not in dispute. See R. Ex. 8 – 11. All potential taxable income acknowledged by Ogando in his testimony is included on his tax returns: his unemployment compensation, his lottery winnings, and his income from self-employment. Moreover, it is implausible that Ogando would leave a \$66,000.00 per year job for another job at Whole Foods paying less than 30% of that amount. Thus, it is inherently probable and reasonable to infer from the record as a whole that Ogando truthfully advised the Board and truthfully testified that his interim earnings were limited to those admitted in the Board Specification to the exclusion of the false documents submitted to the mortgage bank.

Under these circumstances, the unauthenticated hearsay documents cannot overcome the preponderance of the live, sworn and corroborated testimony that Ogando did not work at Royal Quality General Construction during the backpay period. As the Board stated in Double D Construction Group, Inc.,... “filling out a ....form in the workplace—even one’s that recite the criminal penalties for false statements in the event the signer’s false statement is detected and leads to a conviction—is not the same as testifying under oath in a legal proceeding.” 339 NLRB at 305.

**THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT  
OGANDO WOULD HAVE CONTINUED TO WORK FOR ROYAL QUALITY  
GENERAL CONSTRUCTION UNTIL HE OBTAINED INTERIM  
EMPLOYMENT WITH WHOLE FOODS, INC.**

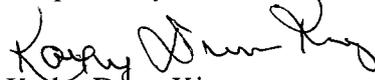
Even assuming (without conceding) that the evidence produced establishes that Ogando had interim earnings from Royal Quality General Construction, such evidence does not cover the entire time period that the administrative law judge found should be excluded from the backpay period. At best, the documents would establish additional interim employment for the year 2002 and up until October 31, 2003. There is no further evidence to support the conclusion that Ogando would have continued to work at a comparable rate of pay during the first five months of 2004 until he was employed by Whole Foods on June 7, 2004. Thus, even assuming that the judge correctly found that certain periods should be excluded from the backpay, his exclusion of the entire time between October 31, 2003 and June 7, 2004, is tantamount to a penalty and goes beyond the Board’s guidance in American Navigation Co. Under the Board’s decision in American Navigation Co., backpay is denied only in the quarters in which a discriminatee has concealed interim earnings. 268 NLRB at 428. As the Board stated in

American Navigation, “to deny backpay in an amount that exceeds that which is necessary to deter deception is to provide a respondent with an unjustified windfall and to permit it to avoid the consequences of its unlawful conduct for no useful purpose.” *Id.* Here, the judge has gone beyond the Board’s proscription. There is nothing in the record that supports a finding that Ogando had undisclosed earnings for the remainder of the 4<sup>th</sup> quarter of 2003 or for the 1<sup>st</sup> and 2<sup>nd</sup> quarters of 2004.

**CONCLUSION**

Counsel for the Acting General Counsel respectfully urges the Board to issue an appropriate remedial order requiring Respondent to make Jorge Ogando whole by paying him an additional \$75,795.02, for the period of August 28, 2001 through June 7, 2004, (for a total backpay amount of \$94,309.02) plus interest accrued to the date of payment, minus the tax withholdings required by Federal, State, and local laws.

Respectfully submitted,



Kathy Drew King  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Region 29

Dated at Brooklyn, NY this 13<sup>th</sup> day of September 2010.

**BACKPAY CALCULATION**

**CASE NAME:** Atlantic Veal & Lamb, Inc.  
**CASE NUMBER:** 29-CA-24484 **BACKPAY PERIOD:** 8/28/2001 - June 7, 2004  
**CLAIMANT:** George Ogando

Year	Qtr.	Gross Backpay	Interim Earnings	Interim Expenses	Net Interim Earnings	Net Backpay
2001	3rd	0.00	0.00		0.00	0.00
2001	4th	5,334.69	0.00		0.00	5,334.69
2002	1st	8,307.06	0.00		0.00	8,307.06
2002	2nd	7,795.11	930.00		930.00	6,865.11
2002	3rd	7,895.88	3,022.50		3,022.50	4,873.38
2002	4th	8,863.38	3,022.50		3,022.50	5,840.88
2003	1st	8,020.84	1,012.44		1,012.44	7,008.40
2003	2nd	8,198.22	1,012.44		1,012.44	7,185.78
2003	3rd	8,444.13	1,012.44		1,012.44	7,431.69
2003	4th	9,563.69	1,012.44		1,012.44	8,551.25
2004	1st	9,283.38	0.00		0.00	9,283.38
2004	2nd	5,113.42	0.00		0.00	5,113.42

Total: \$75,795.02

**Gross Backpay = \$10.75 per hour/40 hours per week, plus avg overtime.**  
 average o/t for 4th Q 2001 14.69 hours per week

Effective 10/1/03 \$11.50 per hour/40 hours per week, plus avg overtime.  
 Effective 10/1/05 \$12.25 per hour/40 hours per week, plus avg overtime.

**Interim earnings**

- 1 8/28/01 - 6/1/02 unemployed
- 2 6/1/02 - 6/1/2004 self employed
  - 2002 earnings Net earnings \$6,975
  - 2003 earnings Net earnings \$4,050
  - 2004 earnings none
- 3 Computation ends on 6/7/2004; balance of \$18,514 is set forth on p.6 of Board's Supplemental Decision and Order