

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ATLANTIC VEAL & LAMB, INC.

and

KNITGOODS WORKERS' UNION
LOCAL 155, UNION OF NEEDLETRADES,
INDUSTRIAL & TEXTILE EMPLOYEES, AFL-CIO
INTERNATIONAL UNION, AFL-CIO-CLC

:
:
: Cases 29-CA-24484
: 29-CA-24619
: 29-CA-24669
:
:
:
:
:
:

**RESPONDENT ATLANTIC VEAL & LAMB, INC.'S
ANSWERING BRIEF TO GENERAL COUNSEL'S EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE RAYMOND P. GREEN'S
SECOND SUPPLEMENTAL DECISION**

Steven B. Chesler
Attorney at Law
844 Bonito Road
Fripp Island, SC 29920
216-849-4513
Facsimile: 843-838-3373
Email: sches415@hotmail.com

INDEX

INTRODUCTION	4
STATEMENT OF THE CASE	4
FACTS	6
ARGUMENT	8
A. THE ADMINISTRATIVE LAW JUDGE DID NO ERR IN FINDING THAT OGANDO’S INTERIM EARNING FOR EACH QUARTER OF 2002, 2003 AND THE FIRST AND SECOND QUARTERS OF 2004 EXCEED THE GROSS BACKPAY CALCULATIONS MADE ON HIS BEHALF AND FOR THAT PERIOD OF TIME OGANDO WILLFULLY CONCEALED HIS INTERIM EARNINGS	8
B. THE JUDGE DID NOT ERR IN CONCLUDING THAT OGANDO AND DIAZ WERE NOT CREDIBLE WITNESSES	12
C. THE ADMINISTRATIVE LAW JUDGE DID NOT ERR IN FINDING THAT OGANGO CONTINUED TO WORK FOR ROYAL QUALITY GENERAL CONSTRUCTION UNTIL HE OBTAINED WORK AT WHOLE FOODS MARKET	13
CONCLUSION	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

CASELAW

<i>American Navigation Co.</i> , 268 NLRB 426 (1983)	8
<i>Atlantic Limousine, Inc.</i> 328 NLRB 257 (1999) <i>enfd.</i> 243 F2d 711 3 rd Cir., 2001)	8
<i>Cibao Meat Products</i> , 348 NLRB 47 (2006)	10
<i>Double D Construction Group, Inc.</i> , 339 NLRB 303 (2003)	12, 13
<i>Parts Depot, Inc.</i> , 348 NLRB 152 (2006)	10
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950)	12

STATUTES

8(a)(3) of the National Labor Relations Act, 29 U.S.C. Section 151, <i>et seq.</i>	4
--	---

INTRODUCTION

This matter is before the Board following the Second Supplemental of Administrative Law Judge Raymond P. Green. In this decision, the Judge found that discriminatee, Jorge Ogando, was not entitled to backpay for the entire third quarter of 2001 and portions of the fourth quarter of that same year because he failed to mitigate his damages. In addition, the Judge denied Ogando backpay for the years 2002 and 2003 and the first two quarters of 2004, finding that Ogando had intentionally concealed his actual earnings during that time period. The General Counsel filed exceptions to these rulings and Respondent now submits this Answering Brief contesting the General Counsel's position.

STATEMENT OF THE CASE

The compliance action now before the Board arose from a decision of the Board in 342 NLRB 418 (2004). In the underlying case, the Board found, *inter alia*, that Respondent, Atlantic Veal & Lamb, Inc. (hereinafter, "Atlantic Veal") terminated Ogando in violation of section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. Section 151, *et seq.* The Board ordered Atlantic Veal to reinstate Ogando and to make him whole for any loss of earnings and other benefits he incurred as a result of the improper termination.

Thereafter, Atlantic Veal pursued an appeal before the U.S. Court of Appeals for the District of Columbia. On October 27, 2005, the Court of Appeals enforced the Board's Order. *See*, 156 Fed Appx. 330 (D.C. Cir. 2005). As of March 27, 2006, in accordance with the Court of Appeals decision, Atlantic Veal reinstated Ogando to his former position.

Seven-months after the Court of Appeal's decision Region 29 issued a Compliance Specification. As to Mr. Ogando, the Specification defined the back pay period as August 28,

2001 to March 4, 2006. The Specification alleged that Ogando was totally unemployed from August 28, 2001, until June 1, 2002, when he began a period of self-employment as a handyman. Mr. Ogando continued to work as a self-employed handyman until June 7, 2004, when he began employment with Whole Foods Market. According to the Specification, Ogando was due \$102,000, in backpay and lost benefits.

In accordance with the Board's rules, in July and November of 2006, a four-day hearing took place on the issue of backpay due Ogando. On January 31, 2007, Administrative Law Judge Raymond P. Green, issued his Supplemental Decision finding that Ogando was not entitled to backpay from the time of his discharge on August 28, 2001 through June 7, 2004 when he began his employment at Whole Foods Market. In denying Ogando backpay from August 2001 until June 7, 2004, Judge Green stated that "Ogando's prevarications have so muddied the water regarding his work history or search for work from the date of his discharge until the time that he was hired at Whole Foods in 2004, that he has made it impossible for me to make any reasonable conclusions about this period of time." In some, Judge Green held that Ogando was entitled to \$18,514.00 in backpay, plus interest.

Counsel for the General Counsel filed exceptions to this conclusion and on May 28, 2010, the Board issued its decision. *See*, 355 NLRB No. 38 (2010). The Board remanded the matter to Judge Green with instructions to "reconsider the record evidence, make credibility determinations and provide an analysis explaining the basis for his findings."

On remand, Judge Green sent a letter to counsel for the respective parties requesting their input as to whether the record should be re-opened. *See*, Second Supplemental Decision (JD-26-10) page 1. Finding that it is "highly unlikely to me that the realtor could be located or that it would be possible, at this point in time, to ascertain how the loan documents were created,"

Judge Green rendered his decision based upon the record created at the four days of hearings in 2006. *Id.* at page 2. Based on this record, Judge Green found that Respondent met its burden of proving that Ogando had higher interim earnings in 2002 and 2003 than what was claimed by the General Counsel in the Specification. The Judge denied Ogando backpay for the third-quarter of 2001 and the first five-weeks of the fourth quarter of that year. In addition, he denied backpay for 2002, 2003 and the first two quarters of 2004 and ordered Atlantic Veal to pay Ogando \$21,914, plus interest. *Id.* at page 3.

Counsel for the General Counsel then filed exceptions to these finding by Judge Green.

FACTS

Ogando was employed by Atlantic Veal until August 28, 2001. T. 25¹. He held no production responsibilities but rather, ensured customers' orders were ready for delivery and prepared a daily inventory of Atlantic Veal's products. T 50-51, 185-86. At the time of his termination, Ogando testified that he was paid \$10.75 per hour and worked five, six or 10 hours of overtime. T. 25.

Following his termination, Ogando received unemployment benefits until August of 2002. By his own admission, Ogando did not begin to search for work until the middle of November of 2001. T. 72, 74. Ogando did not look for work before then because, "What happened is that after September 11, everything came down. For that reason, I start looking for a job at the end of 2001, and then I continue in 2002. So that means I am talking about the middle of November 2001." T. 72. Although Ogando claims to have started searching for work in mid-November 2001, he was not able to identify a single employer he applied to in 2001. T. 67 The only employers Ogando identified as having applied to were Home Depot and a Moroccan

¹ References are to the Transcript and page number from the hearing in 2006 and are designated as "T. ____"

nightclub, however, both of these applications were completed in 2002. T. 67. Although he said he applied to many other employers, he could not identify them and stated that it was not until June of 2002 that he started looking in newspapers and making phone calls to try and obtain a job. T. 73.

Unable to secure employment, Ogando testified that in 2002 he began to market his services as a handyman. T. 82 He got this idea from a friend and worked for himself. T. 82, 85. Ogando was allegedly paid in cash and checks but could not recall a single customer's name. T. 85. Ogando also testified that he was able to pay his basic expenses while self-employed. T. 97 In addition to doing this self-employed handyman work in the New York City vicinity, he also went to Pennsylvania for a two month period of time to work and supposedly look for a job. T. 159-60. While in Pennsylvania, Ogando stayed with a friend whose address Ogando had no trouble recalling. T. 160

In January of 2003, Ogando won \$25,000 in the New York lottery. He received five \$5,000 checks for his winnings. Also in 2003, Ogando purchased a home with two friends of his, Angel Diaz, and Diaz' "wife", Luz Rivera. T. 170-71, 224-25. In order to purchase this house, Ogando applied for a mortgage with Flagstar Bank. According to Ogando, as part of his application he knowingly submitted a false W-2 to Flagstar showing he earned \$66,123.46 from Royal Quality General Construction, Inc. in 2002. Respondent's Ex. 13. Ogando also submitted two paycheck stubs from this same company showing that as of October 31, 2003, he had earned \$56,269.18. Respondent's Ex. 14. At hearing Ogando denied ever having worked for Royal Quality General Construction although this company and Global Royal Roofing were owned by his good friend Angel Diaz. T. 278, 307.

In June of 2004, Ogando applied for employment at Whole Foods Market. On his application with Whole Foods, Ogando represented that he worked from 2000 to 2002 for Jerry's Grocery and from 2002 to 2004 for Global Royal Roofing. His application also detailed the compensation he earned with both employers. *See*, Respondent's Ex. 6. Though Ogando received at least one check from Jerry's Grocery in the amount of \$500 (Respondent's Ex. 15), Ogando denied ever working for the grocer. Rather, he claims to have made up this information to enhance his chances of being hired by Whole Foods. T. 100-01.

In March of 2006, Ogando accepted Atlantic Veal's offer of reinstatement and returned to its employ.

ARGUMENT²

A. THE ADMINISTRATIVE LAW JUDGE DID NO ERR IN FINDING THAT OGANDO'S INTERIM EARNING FOR EACH QUARTER OF 2002, 2003 AND THE FIRST AND SECOND QUARTERS OF 2004 EXCEED THE GROSS BACKPAY CALCULATIONS MADE ON HIS BEHALF AND FOR THAT PERIOD OF TIME OGANDO WILLFULLY CONCEALED HIS INTERIM EARNINGS

The General Counsel argues that Atlantic Veal bears the burden of proving that Ogando willfully concealed interim earnings from the Board. Respondent does not dispute that it bears this burden, however, the evidence adduced before Judge Green establishes that it has met the burden as set forth in *Atlantic Limousine, Inc.* 328 NLRB 257 (1999) *enfd.* 243 F2d 711 3rd Cir., 2001) and *American Navigation Co.*, 268 NLRB 426 (1983).

The General Counsel contends that the only evidence presented at trial to establish that Ogando was untruthful about his interim earnings are Respondent's Exhibits 13 and 14 - a 2002 W-2 from Global Quality General Construction and paystubs from October 2003 from this same entity. The General Counsel claims that no other testimonial or other documentary evidence was

² Respondent hereby incorporates all previous arguments and exceptions put forth in this matter.

presented that supported Atlantic Veal's contention that Ogando concealed his interim earnings. However, as will be explained below this is not the case³.

A key piece of evidence not discussed by the General Counsel in its Brief in Support of its Exceptions is Ogando's 2003 tax return (Respondent's Ex. 10). This is the year he claims to have won the lottery, although this is hardly significant to the issues before this Board. What this return does show, in addition to \$4050 in self-employment income, is that Ogando also deducted \$2,385 in "Unreimbursed Employee Expenses" See, page 6, line 20, of R. Ex. 10. One cannot have unreimbursed employee expenses unless one is an employee. According to the schedule in support of this deduction (page 4 of the Exhibit), Ogando expended funds on work clothes, boots, gloves and tools. Lest one think these are related to Ogando's self-employment, Ogando deducted another \$3,000 for "supplies" on his Schedule C (page 2 of the Exhibit). Thus, not only does the W-2 submitted to Flagstar support the assertion that Ogando was working during the backpay period, so does his tax return⁴.

There are also important facts that cannot be ignored. Ogando was able to qualify for a \$250,000 mortgage. This was not based solely on what Ogando now claims are false income statements. He also obtained the loan because he had good credit. T. 165 One does not have good credit unless one uses credit and pays it back. Ogando claims to have been out of work for two years at the time he made the loan application in 2003. If all he earned was a few thousand dollars as a handyman he would not have qualified for the loan⁵. It must also be acknowledged that Ogando never testified that he could not make the payments on the house. The only

³ Respondent would like to remind the Board that the Judge did not permit it to explore Ogando's expenses and lifestyle during the backpay period. T. 196-99. This would have been helpful in demonstrating that Ogando was understating his income. However, Ogando's 2003 tax return helps bolster the conclusion that Respondent's Exhibit 13 is accurate.

⁴ In addition, it is curious to note that Ogando also took a deduction for \$11,830 spent on the New York Lottery. His net winnings would therefore be \$13,170

⁵ In a footnote, the ALJ made reference to "liar loans." However, no inference should be drawn that such was the case with Ogando because the mortgage was never in default and the house was sold at a profit. T. 226.

conclusion that can be drawn is that Ogando was, in fact, working during this time and did not disclose his earnings.

The General Counsel contends that there was no testimonial evidence that Ogando concealed his earning. This ignores the fact, though, that the two witnesses that could have testified truthfully to the fact that Ogando worked for Royal Quality General Construction, Ogando and Diaz, both denied it. As will be discussed below, their testimony was properly discredited by the ALJ. It is this denial, however, that distinguishes the instant matter from cases such as *Cibao Meat Products*, 348 NLRB 47 (2006). In *Ciabo*, the discriminate, Mendez, disclosed all interim employment and even came forward with revised documentation showing higher earnings than he originally reported. While evidence was introduced that Mendez overstated his income on tax returns that were submitted to obtain a mortgage and credit card, the fact remains that he testified truthfully in the Board proceedings. That is not the case with Ogando where he repeatedly lied and gave vague and confusing testimony to the ALJ.

The case at bar does not represent a simple “discrepancy” in income as was at issue in *Cibao*. In *Cibao* there was a difference of a few thousand dollars between the employee’s actual income and the figures he reported to obtain a mortgage and a credit card. Here the difference is between \$110,000 and zero. If anything, the instant matter is more akin to *Parts Depot, Inc.*, 348 NLRB 152 (2006), also cited by the Board in its underlying decision herein. In *Parts Depot*, the ALJ discredited the employee’s testimony and found that the employee had concealed her income. It should not be forgotten that in addition to all the deceptive testimony Ogando provided regarding his employment and living arrangements between 2002 and 2004, he admitted that he failed to disclose to the Board’s representative that he worked in Pennsylvania for two months. *See*, Tr. at 162. Throughout the hearing in this matter, the one thing that was

abundantly clear was that Ogando was willing to lie about his earnings to benefit himself. He allegedly overstated his earnings to help obtain a mortgage and he understated his earning in this proceeding to bolster his back pay award.

Although Ogando clearly admitted knowing that Respondent's Exhibit 13 was false and that it was being submitted to mislead the mortgage company into believing his income was greater than he now claims it was (Tr. at 273-74), the General Counsel contends that Ogando never saw Exhibit 13 and it should be afforded little, if any, weight. Once again, the General Counsel is ignoring the testimony of Ogando. At page 268 of the transcript, Ogando was asked:

Q: So, did you in fact submit this document to the Flag Star Bank as a part of getting your home loan?

A: Yes

What could be clearer? While Ogando also denied having seen Exhibit 13 before, he clearly admitted that he had seen it as well. In addition, if Ogando did not assist in preparing Exhibit 13, how did it happen to have his correct social security number and address and an actual employer?

In sum, there is ample, credible evidence for the Judge to have concluded that Ogando was employed by Royal Quality General Construction during 2002-04 and that Ogando concealed this fact from the Board. As such the Judge's denial of backpay to Ogando for this time period was more than proper.

**B. THE JUDGE DID NOT ERR IN CONCLUDING THAT OGANDO AND DIAZ
WERE NOT CREDIBLE WITNESSES**

The General Counsel has also taken exception with the Judge's ruling that neither Ogando nor Diaz were credible witnesses and refers to this conclusion as "clearly erroneous." What would be clearly erroneous would be to consider either of these two witnesses credible. The record is replete with examples of Ogando's untruthfulness and what, at best, could be termed Diaz' evasiveness.

The General Counsel seems to imply that the Judge's credibility determinations are based solely on Ogando's attempted admission that he supplied false information with his mortgage application and not his testimony at hearing. GC's Brief in Support of its Exceptions, page 16. This is not a fair presumption on the General Counsel's part.

In *Standard Dry Wall Products*, 91 NLRB 544 (1950), the seminal case related to a judge's credibility resolutions, the Board stated that unless the clear preponderance of the evidence convinces the Board that the judge's conclusions are incorrect, they will be accepted. In *Double D Construction Group, Inc.*, 339 NLRB 303 (2003), cited by the General Counsel in its brief, the Board stated that 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." In the case at bar, there is no evidence that the Judge did not consider these factors.

The Judge's decision in his Second Supplemental decision cannot be divorced from his First Supplemental decision. In that decision, Judge Green stated, "Based on the evidence as a whole, including my observations of the demeanor of the witnesses . . ." He, therefore, did

consider the factors set forth in *Double D Construction Group* case. A review of the record and testimony of Ogando and Diaz provide ample reasons to disbelieve their testimony.

In regards to Ogando's testimony, there are an abundance of reasons to disbelieve anything he said. First there is the fact that Ogando attempted to convince the Judge that he lied on his mortgage application. Although the Judge did not accept this, it was Ogando's testimony that he knowingly supplied false documents to Flag Star Bank. There are clear false statements in Ogando's 2003 tax return and Ogando admittedly lied on his employment application to Whole Foods Market. He also did not disclose to the Board attorney originally assigned to his case that he had worked in Pennsylvania for two-months. One must also remember all the inconsistencies in Ogando's testimony: He had joint bank accounts with people he couldn't identify (T. 163); he shared a house with Diaz and his "wife" yet Diaz said Ogando never lived in the house with them (T. 394); one breath he says the house he bought with Diaz was taken by the bank and then turns around and says he sold it at a profit (T. 217, 220); the fact that even though he wasn't working he had enough money to loan a friend \$500 to buy Jerry's Grocery (T.282-83). In general, Ogando recalled exact details when it assisted his claim but could not recall the most basic information if might harm his claim. Clearly, just from reviewing the record in this manner, without observing the demeanor of this witness, there is sufficient reason to disbelieve Ogando.

With respect to Diaz, the Judge likewise found his testimony lacked credibility. As the Judge found, Diaz was a good friend of Ogando's (T. 352, 367) and allowed Ogando to falsely assert that he worked for Diaz on his Whole Foods Market application. Diaz also was not able to identify basic information about his business. For example he could not identify his accountant (T 379). In addition, Diaz gave a completely different account from Ogando's about their

buying a house together and their living arrangements during that time. Once again, there was ample reason not to believe Diaz' testimony.

C. THE ADMINISTRATIVE LAW JUDGE DID NOT ERR IN FINDING THAT OGANGO CONTINUED TO WORK FOR ROYAL QUALITY GENERAL CONSTRUCTION UNTIL HE OBTAINED WORK AT WHOLE FOODS MARKET

The General Counsel has argued that even if the Judge was correct in finding that Ogando was employed by Royal Quality General Construction, he erred in excluding the first and second quarters of 2004 from the backpay period. Respondent asserts that in a situation such as the instant one, where the discriminate has refused to testify truthfully and is evasive in providing accurate information about his true earnings, the Judge was within his authority to infer that Ogando continued to work for Royal until he became employed at Whole Foods. To find otherwise would require an employer in the shoes of Atlantic Veal to prove the impossible. If the persons or entities that could provide information about Ogando's interim employment refuse to turn that information over or conceal its whereabouts thereby making it impossible to discover, a Respondent should be entitled to have a negative inference drawn from that fact. To do otherwise would encourage the concealment of evidence.

The General Counsel contends that it is "implausible that Ogando would leave a \$66,000 per year job for another job at Whole Foods paying less than 30% of that amount." This is a giant leap in logic by the General Counsel. It could be that Royal's business dried up or ran into some kind of other difficulties. Perhaps this is when Diaz changed the name of his business (T. 381-82) and Ogando's leaving was related to that. Perhaps he wanted to be closer to home or wanted different hours or benefits. In reality, there is no way of knowing the answer to this

question because Ogando was never truthful about his interim employment. If he had been, this would have been a relatively simple backpay proceeding.

CONCLUSION

For the reasons set forth above, the General Counsel's Exceptions to the Administrative Law Judge's Second Supplemental Decision should be overruled.

Respectfully submitted,

Steven B. Chesler
844 Bontio Rd.
Fripp Island, SC 29920
(216) 849-4513
Facsimile: 843-838-3373
Email: sches415@hotmail.com

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Exceptions was served this
___ day of September, 2010, via facsimile and electronic mail upon:

Kathy Drew King
Counsel for the General Counsel, Region 29
Two Metro Tech Center, Fifth Floor
Brooklyn, NY 11201-4201
Kathy.Drew-King@NLRB.gov

And

Leila M. Maldonado, Esq.
111 Livingston Street, Suite 1110
Brooklyn, NY 11201

Steven B. Chesler