

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO**

**STEPHENS MEDIA, LLC, d/b/a
HAWAII TRIBUNE-HERALD**

and

Cases 37-CA-007043
37-CA-007045
37-CA-007046
37-CA-007047
37-CA-007048
37-CA-007084
37-CA-007085
37-CA-007086
37-CA-007087
37-CA-007112
37-CA-007114
37-CA-007115
37-CA-007186

**PACIFIC MEDIA WORKERS GUILD,
LOCAL 39521, THE NEWSPAPER GUILD--
COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO¹**

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for the General Counsel.

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(The Zinser Law Firm, PC),

for the Respondent Company.

Carl Hall,

for the Charging Party Union.

SUPPLEMENTAL DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. This is a compliance proceeding to determine the amounts of backpay due two reporters, Hunter Bishop and David Smith, who were unlawfully suspended without pay and discharged by the Hawaii Tribune-Herald in late 2005 and early 2006 for engaging in conduct protected by the National Labor Relations Act. See 356 NLRB No. 63 (Feb. 14, 2011), *enfd.* 677 F.3d 1241 (D.C. Cir. April 20, 2012), rehearing en banc denied June 15, 2012. In June 2012, after its appeals were exhausted, the Company offered reinstatement to Bishop and Smith as required by the Board's remedial order. Bishop accepted the offer and returned to work at the newspaper. Smith also initially

¹ The parties stipulated that the original Charging Party, Hawaii Newspaper Guild Local 39117, has merged with Pacific Media Workers Guild, Local 39521, TNG-CWA (Tr. 8).

accepted the offer, but approximately 2 weeks later changed his mind and decided to remain with his interim/current employer. Unfortunately, however, the parties have not since been able to agree on the precise amounts of net back wages, interim expenses, and unpaid pension fund contributions the Company owes over the interim 6–7 year period. The Regional Director issued an initial backpay specification alleging the amounts due on December 21, 2012, which the Company answered, denying or disputing many of the allegations in whole or in part, on January 10, 2013. Both sides subsequently amended or corrected their pleadings on numerous occasions, but continued to disagree on a number of issues.²

Following several prehearing conferences, a hearing to address the disputed backpay issues was held on March 12 and 13, and April 1.³ The parties thereafter filed posthearing briefs on May 6. After carefully considering the briefs and the entire record, for the reasons set forth below I find that the Company owes \$212,951 to Smith, \$17,950 to Bishop, and a total of \$32,752 to the union pension fund on behalf of both, plus interest and applicable penalties.⁴

² The final pleadings are set forth in GC Exh. 25, as amended by GC Exh. 26, and R. Exh. 50, as corrected at Tr. 387.

³ The March 12 and 13 sessions were held at the NLRB Regional Office in Honolulu. The Company's pretrial motion to change the hearing location to Hilo was denied by the Associate Chief Administrative Law Judge applying the relevant factors considered by the courts in evaluating similar motions under 28 U.S.C. Sec. 1404(a). See GC Exh. 1(m). However, by agreement of all parties, one of the Company's subpoenaed witnesses, Scott Bush, an assistant to the trustees of the Newspaper Guild International Pension Fund in Washington, D.C., testified by videoconference from the NLRB's D.C. Office. The final session on April 1 was held with counsel by teleconference and was limited to addressing any issues raised by the most recent amendments to the compliance specification and answer on March 20 and 27, respectively; no further witness testimony was offered or taken.

⁴ Since its March 4 amended answer, the Company has objected to the compliance proceeding on the ground that the NLRB's Acting General Counsel, Lafe Solomon, did not lawfully hold office when the underlying backpay specification and amendments thereto were issued. See R. Exhs. 1(t) and (u) (tenth defense) and 50 (eighth defense); and Br. 8–11. However, the Board recently considered and rejected the same or similar arguments in cases involving the Acting General Counsel's exercise of his unreviewable discretionary authority to issue complaints under Sec. 3(d) of the NLRA. See *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 fn.1 (March 13, 2013); and *Bloomingtondales*, 359 NLRB No. 113 (April 30, 2013). The Company offers no reason why a different conclusion should be reached in this case and none is apparent. Indeed, there seems even more reason to reject the Company's arguments here, as the compliance proceeding was initiated in the name of the Board pursuant to the Board's court-enforced order, not pursuant to the Acting General Counsel's unreviewable discretionary authority. See Sec. 101.16 of the Board's Statements of Procedure; Secs. 102.52–102.54 of the Board's Rules and Regulations; and *Ace Beverage*, 250 NLRB 646 (1980). Although a question has also been raised in the courts about whether the current Board is lawfully constituted—see *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. Jan. 25, 2013), petition for certiorari filed, 81 USLW 3629 (April 24, 2013)—the Company has not objected to the compliance proceeding on this ground. Rather, it has only narrowly objected in its answer to reliance on any Board order issued without a valid quorum in support of requiring the Company

I. David Smith

A. Backpay Period

5 This is the most significant issue in dispute between the parties. The specification alleges
 that Smith’s backpay period runs from his unlawful suspension on March 9, 2006, which was
 followed by his unlawful discharge on April 26, through July 10, 2012, when the Company’s
 reinstatement offer expired (GC Exh. 25, par. 1c). The Company admits that Smith’s backpay
 10 period commenced on March 9, 2006;⁵ however, it contends that the backpay period ended just
 18 months later, on September 1, 2007, when Smith began receiving pension benefits from the
 Newspaper Guild International Pension Fund (R. Exh. 50, par. 1c). The Company argues that,
 by applying for and receiving the pension benefits, Smith voluntarily and knowingly retired,
 separated from employment, and waived any right of reinstatement or further backpay. As
 support, the Company cites:

15 (1) the Pension Plan documents, which specifically state that, to receive pension benefits,
 a participant must meet the Plan’s definition of “retirement,” which means that the participant
 must have “separated from service” with any and all contributing employers “without a right of
 recall” (R. Exhs. 16, p. 24 and 17, p. 29);

20 (2) Smith’s July 27, 2007 application for “early retirement” benefits (R. Exh. 5) and
 September 10, 2007 “Retirement Declaration” (R. Exh. 7)

25 (3) Smith’s admitted failure thereafter to apply for work with any other covered
 employers who contribute to the Guild Pension Fund (Tr. 305); and

(4) Smith’s eventual refusal of the Company’s June 25, 2012 offer of reinstatement (R.
 Exh. 1).

30 I reject the Company’s argument. Contrary to the Company’s contention, nothing in the
 language of the pension plan documents supports a conclusion that Smith voluntarily
 relinquished any right to reinstatement and further backpay when he applied for pension benefits.
 Although the documents state that a participant must not have a “right of recall” to his/her former
 employer, Smith in fact had no such right at the time he applied for and received pension
 35 benefits; as indicated above, there is no dispute that he had been terminated over a year earlier.

to pay interest and penalties on its backpay obligation. See R. Exh. 50 (sixth defense). Further,
 it has not offered any argument in support of even this narrow objection in its brief. In any
 event, the Board has made clear in *Belgrove*, *Bloomington*, and numerous other post-*Noel*
Canning decisions that it intends to continue fulfilling its statutory responsibilities as long as the
 issue remains in litigation and has not been definitively decided.

⁵ In its posthearing brief, the Company asserts that it paid Smith through May 10, 2006,
 citing Smith’s reports to the pension fund to that effect (R. Exhs. 5, 15). However, as indicated
 above, the Company admitted in its answer that Smith’s backpay period begins on March 9,
 2006, when Smith was suspended without pay (356 NLRB No. 63, slip op. at 11, 22). And it
 never presented any company payroll or other records showing otherwise.

And he did not acquire a right to reinstatement until almost 5 years later when the court enforced the Board’s decision and order finding that the termination was unlawful.⁶ In short, at the time Smith applied for and received pension benefits, he did not have either a right of recall or a right of reinstatement to voluntarily waive.

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Further, it is well established that “retiring” to collect pension benefits after being unlawfully discharged does not alone terminate a discriminatee’s right to backpay; rather, all of circumstances must be examined to determine whether the discriminatee abandoned the labor market, i.e. whether the discriminatee failed to make a reasonably diligent effort to mitigate losses by obtaining substantially equivalent interim employment. See *1849 Sedgwick Realty LLC*, 337 NLRB 245, 255–256 (2001) (employee’s receipt of social security and union retirement benefits was insufficient to establish that he abandoned the work force); *Ramada Inn Newburgh*, 323 NLRB 630, 635 (1997), *enfd. sub nom. NLRB v. Thalbo*, 171 F.3d 102, 111–113 (2d Cir. 1999) (employee’s statement at deposition that she was “retired” did not disqualify her from receiving backpay during applicable period); *Hansen Bros. Enterprises*, 313 NLRB 599, 608 (1993) (employee who identified himself as “retired” on his tax return and received early retirement benefits from the union pension fund was still entitled to backpay); *Roman Iron Works*, 292 NLRB 1292 fn. 3 (1989) (employees’ receipt of pension benefits was insufficient to show that they abandoned the workforce or were incapable of working during the backpay period). See also *KSM Industries*, 682 F.3d 537, 545 (7th Cir. 2012); and *Sever v. NLRB*, 231 F.3d 1156, 1168-69 (9th Cir. 2000), and cases cited therein.⁷

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Here, it cannot reasonably be concluded that Smith abandoned the workforce when he began receiving pension benefits. There is no evidence that Smith had previously announced,

⁶ The plan documents contemplate that such situations may occur, stating that benefits shall be suspended where a participant subsequently returns to work full time for a covered employer (R. Exhs. 16, p. 16, and Exh. 17, pp. 27, 30). The plan documents also provide that participants may be considered retired even if they retain a right of recall if they have been laid off for an indefinite period and have not performed any active work for the employer for at least 6 months (R. Exh. 16, p. 24, and R. Exh. 17, p. 30).

⁷ Compare also *Solutia, Inc.*, 357 NLRB No. 15, JD. at fn. 20 (July 15, 2011), *enfd.* 699 F.3d 50 (1st Cir. 2012); and *Borden, Inc.*, 308 NLRB 113, 114 fn. 12 (1992), *enfd.* 19 F.3d 502 (10th Cir.), *cert. denied* 115 S.Ct. 316 (1994) (ordering the respondent employers to reinstate and make whole any employees who opted to retire as a result of the employers’ unlawful consolidations/work transfers, leaving to compliance the number and identity of such employees). As indicated by the Company, the Board applies a different, objective standard in election-eligibility cases. See *Columbia Steel Casting Co.*, 288 NLRB 306 (1988) (holding that striker’s actual retirement status on the date of election was determinative, “not [the striker’s] subjective intent to terminate his retirement and attempt to return to work for the employer at some later date.”), citing *Belt Supermarket*, 260 NLRB 118 (1982). However, this simply reflects the Board’s preference for bright-line rules in representation cases to avoid prolonged litigation and resulting delays in realizing the employees’ choice. See *Appalachian Shale Products*, 121 NLRB 1160, 1162–1164 (1958), upheld on point in *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 228 (D.C. Cir. 1996). See also *Monte Vista Disposal Co.*, 307 NLRB 531, 533 (1992).

prior to his unlawful discharge, that he intended to retire. Cf. *Continental Insurance Co.*, 289 NLRB 579, 580 (1988) (finding that employee who received social security and union retirement benefits after his discharge had abandoned the workforce because, inter alia, he had announced his intent to retire before his termination). Further, there is abundant evidence, which the Company does not dispute, that Smith continued to diligently search for work after he began receiving pension benefits. Indeed, he actually performed freelance writing work off and on for various media outlets and environmental companies during that period; worked full time for a company in charge of the Hilo natural disaster preparedness training center (Hawaiiya Technologies) from February 2011 until he was laid off 7 months later; and has been working full time as news editor for an online newspaper (Big Island Now.com) since mid-2012. (GC Exhs. 5, 11, 12; Tr. 277–287.) Although Smith acknowledged that he has not applied to any covered employers who contribute to the Newspaper Guild International Pension Fund, he testified that this was because there were no other such employers on the Big Island (Tr. 305). And the Company never presented any evidence to the contrary.

Finally, as indicated above, Smith initially *accepted* the Company’s June 18, 2012 reinstatement offer. See R. Exh. 1.3 (stating that he had given 2 weeks notice to his current employer and would be available to resume work on July 16). And while he changed his mind and informed the Company on July 13 that he had decided not to return, he stated that he had done so, not only because of the Company’s history of hostility to his protected activities, but also because of the Company’s failure, following the D.C. Circuit’s recent judgment, to specifically inform him that any reference to the discharge had been expunged from his record as required by the Board’s enforced order and requested in his initial acceptance (R. Exh. 1.5). See also Tr. 274 (adding that he decided to stay with Big Island Now.com). Thus, Smith’s response to the reinstatement offer actually undermines, rather than supports, the Company’s position. See also *Original Oyster House*, 281 NLRB 1153, 1154 (1986), *enfd. sub nom. NLRB v. Louton, Inc.*, 822 F.2d 412, 414–415 (3d Cir. 1987) (holding that backpay continued to run until the respondent company made a reinstatement offer, even though the discriminatee had previously testified that she would not accept such an offer).

Accordingly, I find that the appropriate backpay period for Smith is as stated in the specification.

B. *Gross Backpay*

The specification calculates the total amount of gross back wages Smith would have earned at the newspaper during the 6-year backpay period based on the weekly wage rates (\$842.91–\$851.34) and overtime rates (\$33.72 – \$34.05) that were in effect over that period, and a weekly auto allowance (\$39) that was effective through August 16, 2010. Aside from its meritless position regarding the appropriate backpay period, the Company does not dispute the weekly wage and overtime calculations. See R. Exh. 50; R. Br. 31; and Tr. 352. However, it argues that the auto allowance constituted an expense reimbursement, not wages, and therefore should be excluded in calculating gross backpay because Smith did not actually incur the expense.

The record supports the Company’s position. In arguing to the contrary, the General Counsel relies on the language of the collective-bargaining agreement in effect at the time Smith was discharged, which described the auto allowance as a “guarantee.” However, it is clear from both the context and the contract as a whole that the term “guarantee” meant a guaranteed minimum weekly expense reimbursement, not a guaranteed weekly payment or wage. Thus, only employees who were required to use their personal vehicles for business purposes received the allowance; the employees were also “guarantee[d]” reimbursement for their actual weekly expense (calculated at \$.275 per mile) if it exceeded \$39; and the employees did not receive the allowance when they were out on paid sick leave or vacation (when they received only their “regular rate” or “straight-time rate” of pay). See GC Exh. 3, pp. 11–16 (Secs. 12, 14–15); and Tr. 349–351.

Accordingly, I find that specification erroneously included the \$39 auto allowance in calculating Smith’s gross backpay. Compare *Boyer Ford*, 270 NLRB 1133, 1139 (1984) (car and gas allowances constituted expense reimbursements rather than regular wages), with *Garment Workers*, 300 NLRB 507 (1990) (distinguishing *Boyer Ford* and finding that auto allowance constituted regular wages where employees received it even when they were on vacation or not using their automobile).

C. *Interim Earnings*

The specification calculates Smith’s interim earnings based on the severance pay he received from the Company following his termination, his earnings from self-employment or freelance work, and his wages from other employment during the backpay period (GC Exh. 25, par. 4e–g). The Company admits these allegations (R. Exh. 50). Accordingly, I find that Smith’s interim earnings are as stated in the specification.

D. *Net Backpay*

The specification alleges that the Company owes Smith a total net backpay of \$186,153, which it calculates by subtracting his pre-tax interim earnings from his gross backpay on a segregated quarterly basis in accordance with *F. W. Woolworth*, 90 NLRB 289 (1950), upheld on point in *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344 (1953).⁸ However, as indicated

⁸ The original specification calculated Smith’s and Bishop’s net backpay by subtracting the after-tax amount of severance pay and interim wages they received, rather than the pre-tax amount, which resulted in more net backpay for both. The General Counsel initially argued (Tr. 17) that this was done because the remedial notice, which the Board ordered the Company to post at the facility, stated that Smith and Bishop would be made whole, less any “net interim earnings” (356 NLRB No. 63, slip op. at 6). However, the General Counsel later conceded (Tr. 320–321) that the term “net interim earnings” means earnings less expenses to find and perform interim work, not earnings less taxes, and that the calculation therefore should have been based on pre-tax interim earnings. See *F. W. Woolworth*, 90 NLRB at 289 fn. 8. See also *Phelps Dodge v. NLRB*, 313 U.S. 177, 198 fn. 7 (1941). Accordingly, the specification was thereafter amended.

above, I have found that the specification erroneously counted the \$39 auto allowance in calculating Smith’s gross back wages through August 16, 2010 (when the auto allowance ended). This reduces his total gross backpay by \$195 for the first 5 weeks of the backpay period; by \$507 in each of the 17 quarters thereafter through the second quarter of 2010; and by \$273 for the first 5
 5 7 weeks of the third quarter of 2010. Subtracting these amounts from the otherwise undisputed quarterly amounts of net backpay set forth in the specification (GC Exh. 26, attachment 2), I find that the Company therefore owes Smith a total net backpay of \$177, 261, plus interest.

E. *Interim Self-Employment Expenses*

10 The specification alleges that the Company also owes Smith for the interim self-employment expenses (e.g. purchases of computer and other office supplies) he incurred between May 2006 and August 2011 (GC Exh. 25, par. 5). Again, aside from its meritless position regarding the appropriate backpay period, the Company does not dispute these allegations (R.
 15 Exh. 50).⁹ Accordingly, I find that the Company owes Smith \$4430 in interim expenses, plus interest, as alleged in the specification.

F. *Medical Insurance Expenses*

20 The specification alleges that the Company also owes Smith for the increased cost of his medical insurance premiums, over and above what he would have paid at the newspaper, during the backpay period (GC Exh. 25, par. 9). As with Smith’s interim self-employment expenses, the Company does not dispute these allegations on any basis other than its previously rejected position regarding the appropriate backpay period (R. Exh. 50). Accordingly, I find that the
 25 Company owes Smith \$31,260 for medical insurance expenses, plus interest, as alleged in the specification.

G. *Pension Fund Contributions*

30 The specification alleges that the Company owes the Newspaper Guild International Pension Fund all unpaid contributions on behalf of Smith during the backpay period, plus any applicable interest and/or penalties. The Company again disputes these allegations on the ground that Smith retired and began collecting pension benefits as of September 1, 2007. To the extent
 35 the Company contends that Smith’s receipt of pension benefits terminated the backpay period, I reject the Company’s position for the reasons stated previously. To the extent the Company may also be contending that Smith’s receipt of pension benefits otherwise terminated the Company’s obligation to make whole the pension plan for unpaid contributions, I reject the Company’s position on the ground that it is unsupported by any cited legal authority or argument. See also

⁹ Notwithstanding the General Counsel’s concession regarding the meaning of “net interim earnings” (see fn. 8, above), the specification does not deduct Smith’s self-employment expenses from his gross interim earnings to determine net interim earnings before calculating quarterly net backpay. Instead, it adds Smith’s self-employment expenses to Smith’s net backpay in each quarter. Compare *California Gas Transport*, 355 NLRB No. 73, slip op. at 1 fn. 1, and 8 (2010), and cases cited there. However, the Company does not challenge this either (perhaps because it would not have significantly changed the result).

1849 Sedgwick Realty, above (ordering the employer to reimburse the pension fund on behalf of an employee who had collected pension benefits during the backpay period and continued to do so following his reinstatement).

5 The Company’s answer also summarily objects to paying any penalties to the Fund on the ground that “the Act restores the status quo ante” (R. Exh. 50, pp. 10, 14). However, as noted by the General Counsel, the propriety of this remedy is well settled, at least where, as here, the pension fund documents specify such penalties.¹⁰ See *Merryweather Optical Co.*, 240 NLRB 1213 fn. 7 (1979). See also *NLRB v. Carpenters Local 1913*, 531 F.2d 424 (9th Cir. 1976).
 10 Although it does not appear that the fund documents were expressly incorporated into the parties’ collective-bargaining agreements, the Company does not cite this as grounds for a different result or paying a lesser amount to the Fund; indeed, the Company does not even address the issue in its posthearing brief. See *Triple A Fire Protection*, 357 NLRB No. 68, slip op. at 2 (2011); *Avery Heights*, 349 NLRB 829 fn. 1, and 838 (2007); and *Ryan Iron Works, Inc.*, 345 NLRB 893 (2005), distinguishing *NLRB v. G & T Terminal Packaging*, 246 F.3d 103, 128 (2d Cir. 2001).

 Accordingly, I find that the Company owes the Pension Fund \$15,945 on behalf of Smith,¹¹ plus any applicable interest and/or penalties, as alleged in the specification.

20 II. Hunter Bishop

A. *Backpay Period*

25 Unlike with Smith, there is no dispute regarding Bishop’s backpay period. The specification alleges, the Company’s answer admits, and I find that the backpay period for Bishop began with his unlawful suspension on October 19, 2005, which was followed by his unlawful discharge 8 days later, and continued through July 9, 2012, when the Company reinstated him pursuant to the Board’s enforced remedial order. (GC Exh. 25, par. 1b; R. Exh. 30 50.) As discussed more fully below, however, the General Counsel concedes that Bishop’s interim earnings as of December 8, 2008, when he began working for the County of Hawaii as executive assistant to the Mayor, more than offset the gross wages he would have earned at the newspaper, and that he is therefore owed no net back wages as of that date.

35 B. *Gross Backpay*

 The specification calculates the total amount of gross wages Bishop would have earned at the newspaper based on the weekly regular wage rate (\$842.91), hourly overtime rate (\$33.72), and weekly minimum auto allowance (\$39) prior to December 8, 2008. The Company admits
 40 the allegations regarding the amount of weekly wages Bishop would have earned during that

¹⁰ See Section 11.01(b) of the Plan, GC Exh. 17, p. 76; R. Exh. 17, p. 55 (specifying that “liquidated damages” on delinquent contributions shall be equal to the greater of the amount of interest charged on the unpaid contributions, or 20 percent of the unpaid contributions).

¹¹ Consistent with the other calculations in the specification, this amount has been rounded to the nearest dollar.

period. However, it again argues, and I find for the reasons stated in section I.B above, that the auto allowance should not have been counted in calculating gross backpay.

5 The Company also disputes the overtime calculations for Bishop. The specification
 estimates that Bishop would have worked .508 hours (\$17.13) per week of overtime during the
 relevant backpay period based on the average weekly overtime hours he worked during the 6
 months preceding his October 2005 discharge (GC Exh. 25, pars. 2a,3a). The Company,
 however, argues that this formula is unreasonable; first, because overtime hours decreased after
 10 2005 due to the poor economy, and second, because a more accurate measure is the actual
 overtime worked by Bishop’s replacement on the business and education beat, Brett Yager.
 Based on this measure, the Company asserts that Bishop would have worked only .0432 hours
 (\$1.46) of overtime per week during the relevant period prior to December 8, 2008.¹²

15 I reject the Company’s argument. It is, of course, true that the more accurate of two
 alternative methods of calculating backpay should normally be adopted. See, e.g., *Atlantic Veal
 & Lamb, Inc.*, 355 NLRB No. 38, slip op. at 1 fn. 5 (2010). However, the predischarge formula
 used in the specification is a common and accepted method of estimating gross backpay,
 including overtime. See, e.g., *Allied Mechanical*, 352 NLRB 880 (2008); and *East Wind
 Enterprises*, 268 NLRB 655, 656 (1984).¹³ Further, while it is not the only method, the record
 20 does not support the Company’s position that its postdischarge formula is more accurate than the
 predischarge formula here.

The uncontroverted documentary evidence submitted by the Company (R. Exh. 23)
 confirms that the total amount of overtime hours worked in the newsroom declined from
 25 approximately 642 in 2005, to about 410 in 2006, 500 in 2006, and 368 in 2008. However, the
 evidence does not support the Company’s contention that Bishop’s overtime hours would have
 likewise declined. Indeed, the evidence indicates that several of the 14–16 listed newsroom
 employees worked about the same or even more overtime hours during that period. Thus,
 Reporter Jason Armstrong, who worked only about 33 hours of overtime in 2005, worked 57
 30 hours in 2006, 66 hours in 2007, and 59 hours in 2008. Reporter William O’Rear, who worked
 83 overtime hours in 2005, worked 69 hours in 2006, 107 hours in 2007, and 37 hours in 2008
 (for a 3-year average of 71 hours). Copy Editor Margaret Premo, who was apparently hired
 during 2005, worked only 16 overtime hours in 2006, but 54 hours in 2007, and 37 hours in
 35 hours in 2006, but 55 in 2007, and 48 in 2008.

Moreover, the evidence indicates that virtually all of the reduction in total overtime
 during that period was due to a sharp decline in the overtime hours worked by just three
 individuals: Copy Editor Leigh Critchlow, who went from 115 overtime hours in 2005, to just 19

¹² The Company’s March 27 amended answer asserts that Bishop would have worked “no more than .15 hours of weekly overtime” during the backpay period (R. Exh. 50, par. 3b). However, the Company’s subsequent, May 6 brief more precisely asserts that Bishop would have worked only .0432 hours of weekly overtime through December 8, 2008 (Br. 26).

¹³ Indeed, as discussed in Section I.B, above, the Company does not challenge the use of the same predischarge formula in calculating Smith’s overtime. See R. Exh. 50, at 6 fn. 4.

in 2006, 15 in 2007, and 5 in 2008; Photographer William Ing, who went from 74 in 2005, to 47 in 2006, 40 in 2007, and 9 in 2008; and Jakahi, who went from 84 in 2005, to 2 in 2006, and 0 in both 2007 and 2008.¹⁴

5 Finally, while Yager, who replaced Bishop on the business and education beat during that period, worked far less overtime than anyone else (only 3 hours of overtime in 2006, 0 in 2007, and 4 in 2008), the Company offered no persuasive evidence that this was due to the beat rather than Yager. Indeed, although total overtime declined even further to 229 hours in 2010, and 221 hours in 2011, Colin Stewart, who replaced Yager, worked 24 and 13 hours of overtime in those years, respectively—substantially similar to the number of overtime hours Bishop had worked in 10 2004 (19 hours) and 2005 (14 hours).¹⁵

 In sum, contrary to the Company’s contention, the record as a whole does not support a conclusion that an individual’s overtime is determined solely by the economy and/or the beat he/she is assigned to. Rather, a preponderance of the credible evidence indicates that the particular individual working the beat is also a substantial factor.¹⁶ In these circumstances, I cannot conclude that the Company’s postdischarge formula, which essentially ignores Bishop’s (and Stewart’s) overtime history, is more accurate than the specification’s predischarge formula. Accordingly, as uncertainties in calculating backpay are properly resolved against the wrongdoer, I find that the overtime wages Bishop would have earned during the backpay period are properly calculated based on the formula stated in the specification. See generally *United Aircraft Corp.*, 204 NLRB 1068 (1973); *Kawasaki Motors USA v. NLRB*, 850 F.2d 524, 527 (9th Cir. 1988); and *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1321 (D.C. Cir. 1972).

25 C. *Interim Earnings*

 The specification calculates Bishop’s interim earnings based on the severance pay he received from the Company following his termination and the wages he received from other employment during the backpay period (GC Exhs. 25, 26 (pars. 3(e)–(g))). With respect to the former, the specification alleges that Bishop received \$15,172 in severance pay and that this amount constitutes interim earnings during the first 18 weeks of the backpay period. With respect to the latter, the specification alleges that, from about November 7, 2005 through December 5, 2008, Bishop earned \$144,501 working for the Guild; and that from about December 8, 2008 until he was reinstated on July 9, 2012, he earned \$267,540 working for the County of Hawaii.

¹⁴ The full names of Armstrong, O’Rear, Premo, Critchlow, and Ing, as well as their newsroom positions, are set forth in the underlying decision, 356 NLRB No. 63, slip op. at 9 – 10, and 11 fn. 20. Gerhart and Jakahi are not otherwise identified in either that decision or the current record.

¹⁵ Although Bishop did not request or work any overtime in the second half of 2012, following his reinstatement, he was only given back the business portion of his old beat; Stewart retained the education portion (Tr. 357, 363).

¹⁶ In reaching this conclusion, I have fully considered the testimony of Editor David Bock, which both sides cite in support of their positions. However, I find Bock’s testimony with respect to overtime too vague and/or conclusory to warrant significant weight in favor of either.

The Company specifically admits the allegations regarding Bishop’s severance pay. Nor is there any real dispute regarding the alleged amounts Bishop earned working for the Guild and the county, which the Company acknowledges are based on W-2 forms and/or certified records.¹⁷ However, the Company contends that the specification understates Bishop’s interim earnings between the spring of 2006 and December 8, 2008 because it is undisputed that Bishop also earned some income during that period from selling advertising on his personal online blog, HunterBishop.com.

I reject the Company’s argument. There is no dispute that Bishop worked full time for the Guild during the same period. And while he had not previously operated the blog when he worked full time for the newspaper, there is no contention or evidence that he would not have been able to “moonlight” during that time as well.¹⁸ Thus, as indicated by the General Counsel, it is clear that Bishop’s income from his personal blog was supplemental or secondary earnings, which are not deducted in calculating net backpay. See *Birch Run Welding*, 286 NLRB 1316, 1318 (1987), enfd. 1988 WL 108178 (6th Cir. 1988) (unpub.); and *Miami Coca-Cola Bottling Co.*, 150 NLRB 1701, 1710 (1965), enfd. in relevant part 360 F.2d 569, 573–574 (5th Cir. 1966), and cases cited there. See also *NLRB v. Ferguson Electric*, 242 F.3d 426, 433 (2d Cir. 2001), enfg. 330 NLRB 514 (2000).

The Company also argues that Bishop should be disqualified from receiving backpay because he failed to disclose his blog income until cross-examined about it at the hearing based on his subpoenaed tax returns (Tr. 185–186, 215–216), citing *American Navigation Co.*, 268 NLRB 426 (1983) (discriminatees who willfully conceal interim earnings forfeit any backpay for all quarters in which they engaged in the concealed employment). I reject this argument as well. As found above, Bishop’s supplemental blog income clearly did not constitute countable interim earnings. Further, there is no evidence that he at any time falsely denied receiving the income. Accordingly, the Company has failed to establish that Bishop intentionally concealed interim earnings to increase his net backpay. See *Victor’s Café 52, Inc.*, 338 NLRB 753, 767 (2002).

¹⁷ In calculating Bishop’s total interim earnings at the Guild, the specification includes a \$39 weekly auto allowance that Bishop received in addition to his weekly straight time pay. See GC Br., Appx. A, fn. 5; R. Exh. 48; and Tr. 175–178. Unlike with the Company’s \$39 auto allowance, however, there is no dispute between the parties that the Guild’s auto allowance constituted regular wages, rather than an expense reimbursement, and is therefore properly counted in calculating his total interim earnings at the Guild.

¹⁸ Arguably, Bishop’s blog would have been prohibited by section 19 of the collective-bargaining agreement, which barred employees from activities “in competition with the Employer” (GC Exh. 3, p. 19). However, the Company has not made this argument or presented any evidence about the blog to support it. Moreover, subject to certain limitations, the same section expressly permitted employees to engage in other activities on their own time. See also sec. 21, regarding “re-use and syndication,” which stated that employees were “free to sell to their own advantage the products of their work appearing in the Employer’s enterprise.” The Company presented no evidence that Bishop did not take advantage of these provisions to likewise earn extra income prior to his unlawful discharge.

D. Net Backpay

5 The General Counsel concedes that the combination of Bishop’s severance pay and
interim earnings with the Guild completely offset his gross backpay for the two quarters
following his suspension and discharge, i.e. the fourth quarter of 2005 and the first quarter of
2006, and that Bishop is therefore due no back wages during that period. As mentioned earlier,
the General Counsel also concedes (Br. 18–19) that Bishop’s interim earnings as of December 8,
10 2008, when he began working for the county, exceeded what he would have earned in gross
wages at the newspaper, and thus Bishop is likewise due no net back wages as of that date.

Thus, the only period at issue is the 10 quarters and 10 weeks from the second quarter of
2006 until December 8, 2008. As discussed above, in agreement with the Company, I find that
the specification improperly counted the \$39 auto allowance in calculating Bishop’s weekly
15 gross backpay during this period. This reduces his total gross backpay during each of the 10
quarters by \$507, for a revised quarterly total of \$11,181 (\$842.91 regular straight-time pay +
\$17.13 average overtime pay x 13 weeks).¹⁹ It also reduces his total gross backpay during the 10
weeks of the last quarter by \$390, for a revised total of \$8600 during that period.

20 As discussed above, Bishop’s earnings at the Guild during the same period are
undisputed. He earned a total of \$11,489 during each of the first 3 quarters, \$11,416 during each
of the next 4 quarters, \$11,466 during each of the next 3 quarters, and \$8,820 during the 10
weeks of the last quarter. See GC Br., Appx. A. As each of these amounts exceeds the amounts
Bishop would have earned at the newspaper, in agreement with the Company I find that Bishop
25 is due no net back wages during this period as well.²⁰

E. Medical Insurance Expenses

30 It is undisputed that Bishop had to pay more for his Kaiser health insurance while
working for the county than he would have at the newspaper. However, the parties disagree
about how much the Company should reimburse Bishop. The specification alleges that the
Company owes Bishop the full amount of his additional expense (\$18,228). However, the
Company contends that this amount is inaccurate because it conflicts with the total amount
certified by the county (\$17,950). The Company further argues that the total amount is
35 improperly inflated because Bishop initially selected the more expensive, comprehensive Kaiser
plan, rather than the basic Kaiser plan, offered by the county. The Company argues that the
county’s less expensive, basic Kaiser plan was “more equivalent to” and “most closely matched”
the newspaper’s Kaiser plan, and that Bishop should therefore recover only the additional cost of
that plan throughout the time he worked for the county (\$15,109). Finally, the Company argues
40 that it should not have to reimburse Bishop at all for his additional medical insurance costs

¹⁹ The weekly wage rates Bishop would have earned at the newspaper did not vary during
this period. See GC Exh. 26, attachment 1.

²⁰ In light of this, it is unnecessary to address the Company’s remaining argument that the
General Counsel’s March 20 amendment to paragraph 3(i) of the specification (GC Exh. 26)
denied it due process.

because they were fully offset by the higher wages he earned with the county during the same period.

1. Bishop’s total medical insurance costs

The specification calculates the total amount of medical insurance premiums Bishop paid during the backpay period by adding the amount stated on Bishop’s county earnings summary for 2008 and the monthly contribution rates during the subsequent years through July 9, 2012 (GC Exhs. 9, 10). However, on the first day of hearing, the Company offered into evidence a process history report, which was prepared and certified by the county, showing the actual amounts deducted from Bishop’s pay for medical insurance during the same period (R. Exh. 25). As indicated by the Company, the relevant amounts on the certified report total about \$278 less than the calculated amount set forth in the specification.

At no time has the General Counsel disputed the certified report’s authenticity or accuracy. The General Counsel conceded the former at the hearing (Tr. 194–197), and has never addressed the latter. Nor is there any record evidence that Bishop at any time paid for the medical insurance directly rather than through payroll deductions. Accordingly, in agreement with the Company, I find that the specification is inaccurate, and that Bishop’s interim medical insurance costs totaled \$17,950.

2. Bishop’s selected interim insurance plan

The Company presented no evidence whatsoever that the county’s basic plan was more equivalent to the newspaper’s plan prior to 2012. Further, the evidence the Company presented with respect to the 2012 plans does not support its position. Although that evidence indicates that the county’s 2012 comprehensive Kaiser plan was more generous in many ways than the newspaper’s 2012 Kaiser plan, it also indicates that the county’s basic plan was less generous than the newspaper’s plan in several respects, including primary care office visits, outpatient lab and imaging charges, outpatient surgeries, inpatient hospital services (room & board), and mental health office visits and inpatient care. Compare R. Exhs 45, p. 1, and 46, p. 19.²¹ In short, as indicated by the General Counsel, it appears that the newspaper’s 2012 Kaiser plan fell somewhere between the county’s 2012 basic and comprehensive Kaiser plans.

Perhaps realizing this problem, the Company argues that the “the most significant evidence” that the county’s basic plan was more equivalent to the newspaper’s plan is not a direct side-by-side comparison between the plans, but the fact that Bishop himself eventually decided to switch to it effective February 1, 2011 (Br. 29). However, the Company fails to explain why Bishop’s choice in 2011 should be given more weight in this respect than his initial choice in 2008. There could be a number of reasons why Bishop decided to switch to the basic plan during his third year with the county. For example, his medical needs may have changed over time so that he did not believe he would need the services that were less generous in the

²¹ The summary chart set forth at p. 28 of the Company’s brief appears inaccurate in several respects based on the Company’s own cited exhibits.

basic plan. In any event, there is no evidence that Bishop decided to switch because the basic plan was more equivalent to the plan he had at the newspaper.

Accordingly, I find that the Company has failed to establish that the basic plan was more equivalent to the newspaper’s plan than the comprehensive plan. See generally *Local 418, Sheet Metal Workers*, 249 NLRB 898, 904–905 (1980); and *Madison Courier, Inc.*, 180 NLRB 781,789 (1970), *affd.* in relevant part 472 F.2d 1307, 1312 fn. 9 (D.C. Cir. 1972).

3. Bishop’s higher interim wages

Although the Company’s last argument has some surface appeal, it ignores the significant underlying differences between wages, which are normally based on qualifications, job performance, and/or other individual factors, and health insurance benefits, which are normally available to all employees on an equal basis. See *EEOC v. Boeing Services International*, 968 F.2d 549, 557 (5th Cir. 1992). In any event, as the Company concedes (Br. 30 fn. 16), its argument is contrary to extant law. See *Aroostook County*, 332 NLRB 1616, 1618 (2001) (granting motion to strike respondent’s answer to backpay specification “insofar as it calls . . . for excess interim earnings to offset medical insurance and medical expenses,” inasmuch as “the Board generally has offset benefits by like interim benefits”). See also *John T. Jones Construction*, 349 NLRB No. 119 (2007), vacated and modified on other grounds 352 NLRB 1063 (2008), *enfd.* 574 F.3d 857 (8th Cir. 2009), and cases cited therein.²² Accordingly, I reject this argument as well.

F. Pension Fund Contributions

The specification alleges, the Company’s answer admits, and I find that the Company owes the Newspaper Guild International Pension Fund \$16,807 in back contributions on behalf of Bishop. See GC Exh. 25, par. 6b; R. Exh. 50. Although the Company again summarily objects to paying any additional “penalties” to the Fund, I find that it is appropriate to order the Company to pay any applicable interest and/or penalties on the back contributions for the same reasons discussed in section I.G above.

Accordingly, based on the above findings and the record as a whole, I issue the following recommended supplemental

ORDER

The Respondent, Stephens Media, LLC d/b/a Hawaii Tribune-Herald, Hilo, Hawaii, its officers, agents, successors, and assigns, shall make whole discriminatees David Smith and Hunter Bishop as follows:

1. Pay to Smith and Bishop the following total amounts of net backpay and expenses set forth opposite their names, plus interest computed and compounded daily as prescribed in *New*

²² Based on this precedent, by order dated March 4, 2013, I granted the General Counsel’s motion to strike the Company’s similar defense here. See GC Exh. 1(s) at 4.

Horizons for the Retarded, 283 NLRB 1173 (1987) and *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), accrued to the date of payment, minus tax withholdings required by Federal and State law.²³

5 Smith: \$ 212,951
 Bishop: \$ 17,950

2. Pay the Newspaper Guild International Pension Fund the following contribution amounts on behalf of Smith and Bishop, plus any applicable interest and/or penalties:

10 Smith: \$ 15,945
 Bishop: \$ 16,807

15 Dated, Washington, D.C. June 6, 2013

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Jeffrey D. Wedekind
Administrative Law Judge

²³ Neither the Board's enforced order nor the specification includes a remedy for the adverse tax consequences of the multi-year lump-sum backpay awards to Smith and Bishop. See *Latino Express*, 359 NLRB No. 44 (Dec. 18, 2012), which issued after the Board and court orders in this case. Accordingly, although such a remedy would otherwise appear warranted (particularly for Smith), I have not included it in the recommended supplemental order. See *Life's Connections*, 359 NLRB No. 85, slip op. at 2 fn. 5 (2013).