

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

GEORGE J. MARTIN & SON, INC.

- and -

Case 03-CA-188649

MICHAEL DeORIO, an Individual.

**RESPONDENT'S OPPOSITION TO
GENERAL COUNSEL'S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

This Memorandum of Law is submitted on behalf of Respondent George J. Martin & Son, Inc., in opposition to Counsel for the General Counsel's Motion for Partial Summary Judgment.

By the instant motion, Counsel for the General Counsel seeks judgment as follows: (a) on Paragraph I of the Compliance Specification, General Counsel seeks a ruling that Respondent's backpay obligation began on September 26, 2016; (b) on Paragraphs II, IV, V and VI, General Counsel seeks a ruling that Respondent cannot contest its calculations of backpay and the amounts allegedly owed to the Health and Welfare, Pension, Annuity, and National Electrical Benefit funds, on grounds that Respondent did not provide alternative methods for "calculating gross back pay or fund contributions with supporting figures;" and (c) on Paragraph VII, General Counsel seeks a ruling that Respondent cannot contest its calculations as to excess tax liability incurred by DeOrio for any lump sum payment made.

For the reasons set forth herein, Counsel for the General Counsel's motion should be denied.

A. DeOrio's Backpay Period

Respondent does not contest that DeOrio's backpay period begins on September 26, 2016, as concluded by Administrative Law Judge Keltner W. Locke.

However, as acknowledged in the General Counsel's instant motion, and as detailed in the Amended Answer (see Exhibit G to General Counsel's motion), Respondent disputes that DeOrio's backpay period ends on October 30, 2017.

The Amended Answer illustrates that DeOrio continued to work with Respondent after his removal from the Rivers Casino project, at the Regeneron worksite, until November 18, 2016 (see Ex. G, at ¶¶4-7). The Amended Answer further details that DeOrio was employed by nrastructure, in Clifton Park, from December 27, 2016 through April 7, 2017, which is long after the conclusion of most of the work at the Rivers Casino site (see Ex. G, at ¶8). Thereafter, DeOrio worked for Schenectady Hardware & Electric Co., in Schenectady, as well as O'Connell Electric Company, in Schenectady (see Ex. G, at ¶¶9-10). DeOrio's consistent work history since his removal from Respondent's project at Rivers Casino demonstrates that his backpay period should be deemed to have ended as of his employment with nrastructure.

Because Respondent disputes the duration of the backpay period, this issue remains subject to determination after hearing. Thus, Respondent should be permitted to introduce evidence by testimony, documents and/or argument, concerning the date on which DeOrio's backpay period should be deemed to end.

B. General Counsel's Calculations of Backpay, and Health and Welfare, Pension, Annuity, and National Electrical Benefit Fund Amounts

Counsel for the General Counsel seeks judgment precluding Respondent from contesting its calculations of DeOrio's backpay, as well as the amounts allegedly owed to the Health and Welfare, Pension, Annuity and National Electrical Benefit funds – all of which are based on the

number of work hours allegedly lost by DeOrio after his removal from the Rivers Casino worksite. Counsel for the General Counsel argues that summary judgment against Respondent is proper on this issue (with respect to Paragraphs II, IV, V and VI) because Respondent “does not provide any alternative method for calculating gross backpay or fund contributions with supporting figures.”

However, the Amended Answer details the bases for Respondent’s denials of Paragraphs II, IV, V and VI, namely that the General Counsel’s straight mathematical computations are based on assumptions without factual support, and fail to take into consideration: (a) DeOrio’s obligations to mitigate his alleged losses, including making himself ready, willing and available to work; (b) DeOrio’s inability to drive to work opportunities within the Union’s established geographic region, due to the loss or suspension of his driver’s license; and (c) the realities of Respondent’s workforce, available projects, locations of available projects, and the significant reduction in its workforce during the relevant period (see Ex. G, at ¶¶ 29, 35, 38 and 41). Because these factors play a significant role in determining the number of work hours (if any) DeOrio is deemed to have “lost” due to Respondent’s actions, Respondent has no choice but to deny the computations contained within Paragraphs II, IV, V and VI. Respondent denies the underlying bases for the figures used in the General Counsel’s calculations.

Further, Respondent is not in a position to proffer alternative “supporting figures,” because the above factors are not within its knowledge or control. Respondent has served subpoenas duces tecum and subpoenas ad testificandum, in an effort to obtain evidence surrounding these issues, and proffer alternative calculations to the presiding Administrative Law Judge during the hearing.

Section 102.56(b) of the Board's Rules and Regulations provides: "The answer shall specifically admit, deny, or explain each and every allegation of the specification, *unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial.*" (Emphasis supplied.) The Amended Answer makes clear that, as of the time it was served, "Respondent does not possess knowledge regarding various factors used in the Compliance Specification for calculating DeOrio's alleged back pay award, because supporting evidence has not been produced regarding DeOrio's mitigation of his damages, employment, wages earned after his work with Respondent, and any offers of (or opportunities for) employment which were declined by DeOrio during the alleged backpay period." (Ex. G, at ¶30; see also ¶¶ 33, 36, 39 and 42.) The Amended Answer further states: "Because Respondent does not have knowledge, information and documentation pertaining to the factors and items detailed in the Specification, Respondent is not in a position to offer its own calculations at this time." (Ex. G, at ¶31; see also ¶¶ 34, 37, 40 and 43.) These responses to the Compliance Specifications are wholly proper and in accordance with Section 102.56(b) of the Board's Rules and Regulations.

As a result, the General Counsel's motion for summary judgment should be denied with respect to Paragraphs II, IV, V and VI; and Respondent should be permitted to proffer evidence at the hearing regarding the same.

C. DeOrio's Excess Tax Liability

Counsel for the General Counsel seeks judgment precluding Respondent from contesting excess tax liability which DeOrio may incur as a result of a lump sum payment. However, as provided in the Amended Answer, Respondent stated only its agreement with the specifications indicating that DeOrio's excess tax liability totaled "\$0" for both Federal and State taxes. As of

the date of the Amended Answer, there was no specific allegation pertaining to an estimated or alleged amount of excess tax incurred by DeOrio. Thus, Respondent was not in a position to admit or deny the same. As a result, the General Counsel's motion for partial summary judgment on this issue should be denied and reserved for determination after hearing.

CONCLUSION

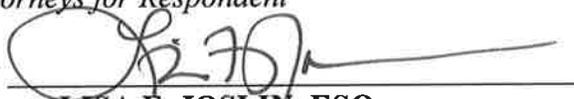
For the reasons set forth herein, Counsel for the General Counsel's motion for partial summary judgment should be denied, and all issues should be reserved for determination after evidentiary hearing.

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April 5, 2018

Respectfully submitted,

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By



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