

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

G4S REGULATED SECURITY SOLUTIONS  
a Division of G4S SECURE SOLUTIONS (USA) INC.  
f/k/a THE WACKENHUT CORPORATION

and

THOMAS FRAZIER, an Individual

Case 12-CA-026644

and

CECIL MACK, an Individual

Case 12-CA-026811

**BRIEF TO THE ADMINISTRATIVE LAW JUDGE  
ON BEHALF OF COUNSEL FOR THE GENERAL COUNSEL**

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## I. STATEMENT OF THE CASE<sup>1</sup>

Counsel for the General Counsel of the National Labor Relations Board submits this brief to the Honorable Robert Ringler, Administrative Law Judge in the above-captioned cases. These cases concern Respondent's obligation to fully remedy the unfair labor practice found by the Board and affirmed by the courts, by a) paying discriminatee Cecil Mack full backpay plus interest, which resulted from Respondent's unlawful discharge and b) paying Cecil Mack for the excess tax liability and incremental tax liability associated with his receipt of a lump sum backpay award for wages he would have earned, and paid taxes on, in prior years, had Respondent not unlawfully discharged him. Specifically, the issues are:

1) Did Cecil Mack fulfill his obligation to mitigate his losses during the backpay period by searching for and accepting offers for reasonably similar work?

2) Did the Region err in calculating Mack's backpay on a quarterly basis consistent with the Board's holding in *F.W. Woolworth*, 90 NLRB 289 (1950)?

3) Did the Region err in seeking compensation for Mack for the adverse tax consequences associated with the receipt of a lump sum payment for backpay owed for prior taxable years, including amounts for excess tax liability and incremental tax, consistent with the Board's holding in *Tortillas Don Chavas*, 361 NLRB 101 (2014).

The Charge in case 12-CA-026644 was filed by Thomas Frazier, an individual, on February 22, 2010, and the Charge in case 12-CA-026811 was filed by Cecil Mack, an individual, on July 29, 2010. On December 29, 2010, the Regional Director of

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<sup>1</sup> Throughout this brief T "page number line number" refers to the transcript page number and line number; GCX refers to General Counsel's Exhibits, and RX refers to Respondent's exhibits.

Region 12 issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (The Complaint). On June 25, 2015, the National Labor Relations Board (The Board) issued a Decision and Order in the above-referenced cases, reported at 362 NLRB No. 134 (The Board Order), which incorporated by reference the prior Decisions and Orders reported at 358 NLRB 160 and 359 NLRB 947. GCX-1(n), GCX-1(j), GCX-1(k). The Board found that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) and ordered Respondent to reinstate Frazier and Mack to their former positions, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges. The Order further required that Respondent make Frazier and Mack whole for loss of earnings and other benefits suffered as a result of their discharge, and to compensate them for the adverse tax consequences, if any, of receiving a lump sum backpay award, and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

On November 21, 2016, the United States Court of Appeals for the Eleventh Circuit (the Court) denied Respondent's request for review, and granted the Board's cross-petition for enforcement. GCX-10. On January 24, 2017, the Court denied Respondent's petition for panel rehearing. GCX-1(q). On February 1, 2017, the Court issued its mandate and entered its opinion as the judgment of the Court. GCX-1(p).

All issues regarding the reinstatement of and backpay owed to Frazier have been resolved. Respondent's offer of reinstatement was accepted by Mack on July 24, 2017. However, Respondent has failed and continues to fail to comply with the requirements set forth in paragraphs 2(b) and 2(c) of the Board's Order which obligate Respondent to

make Mack whole for his loss of earnings and benefits, and to compensate him for adverse tax consequences resulting from the lump sum payment of backpay. Rather, Respondent has maintained that it is unable to determine whether the amounts set forth in the Amended Compliance Specification and Notice of Hearing (Compliance Specification) accurately reflect the amounts that Mack is owed. GCX-1(r) at page 4, par. 6(g). Respondent avers that Mack is not entitled to any backpay due to his delayed and otherwise inadequate search for work. GCX-1(r) at page 4, par. 6(g). Respondent also challenges the validity of the Board's holding in *Don Chavas Tortillas*, 361 NLRB 101 (2014). GCX-1(r) at page 4-6, par. 7(a)-7(i).

Because of Respondent's failure to fully comply with the Board's Order, on April 17, 2018, the Regional Director issued the instant Compliance Specification. A hearing in this matter took place at the Miami Resident Office of Region 12 on May 23, 2018 before the Honorable Robert Ringler.

## **II. STATEMENT OF FACTS**

All parties were provided an opportunity to present evidence in support of their positions. Board Compliance Officer Jason Scherer and discriminatee Cecil Mack testified on behalf of the General Counsel. Claude Seltzer was called as an expert witness to testify on behalf of Respondent

### **A. The General Counsel's method of calculating backpay and adverse tax liability.**

The Compliance Specification alleges that the backpay period for Mack begins on February 2, 2010, when Mack was discharged by Respondent, and continues through July 24, 2017, the date he was reinstated. GCX-1(e). Respondent admits that

an appropriate measure of backpay due to Mack is based on the average annual earnings of lieutenants employed by Respondent at its Turkey point facility who worked at least 2080 hours in the respective calendar years of the backpay period, including holiday pay, wage increases, accrued sick leave pay for sick leave in excess of 40 hours, and accrued vacation leave. GCX-1(r) at page 2, par. 2. In appendices A through G of the Compliance Specification, the General Counsel listed the yearly earnings for each of the relevant lieutenants fitting the criteria set forth above, and provided the average earnings for each year. GCX-1(e) Appendix A through Appendix G. In paragraph 6(d) of the Compliance Specification, the General Counsel provides a chart reflecting the annual, quarterly and weekly gross back pay amounts for the relevant calendar years. GCX-1(e) at page 4, Appendix A through Appendix G. In its Answer, Respondent admits that the General Counsel's calculations with respect to gross back pay are correct, and at no time has Respondent provided any alternative calculations. GCX-1(r) at page 3, par. 6(d).

Respondent also admits that calendar quarter net interim earnings are the difference between calendar quarter interim earnings and calendar quarter interim expenses related to interim employment. GCX-1(r) at page 2, par 3. Respondent further admits that calendar quarter net backpay is the difference between calendar quarter gross backpay and calendar quarter net interim earnings. GCX-1(r) at page 2 par. 4. Although Respondent, as more fully discussed below, challenges Mack's efforts to mitigate his losses and asserts that Mack is not entitled to any backpay, Respondent

admits that the General Counsel's calculations of net backpay as set forth in Appendix H of the Compliance Specification are accurate. GCX-1(r) at pages 3-4, par. 6(f).<sup>2</sup>

With respect to the Region's calculation regarding adverse tax consequences for the receipt of a lump sum payment for backpay amounts owed for prior years, the General Counsel called Jason Scherer to explain the calculations and the rationale underlying those calculations.

Scherer began working for the Board as a Field Examiner in 2004. T-11:14. Approximately two years ago, Scherer became a Compliance Officer for the Board's Region 6 office in Pittsburgh, Pennsylvania. T-11:18-22. As Compliance Officer, Scherer is involved in the calculation of backpay and adverse tax liability, including calculations for excess tax and incremental tax, in unfair labor practice proceedings. T-12:5-11; 13-21. Scherer provided uncontroverted testimony regarding Board practices concerning awards for adverse tax liability incurred by discriminatees. Scherer explained that the concept of excess tax refers to the difference in taxes that a discriminatee would have to pay on a lump sum award, versus the amount of taxes he would have had to pay had he received those earnings in the years they would have been earned if Respondent had not unlawfully discharged him. T-12: 22-25; T-13:1-4. In other words, when a discriminatee receives a large lump sum backpay award, that income is taxed at a higher rate than the rate at which the income would have been taxed if the wages had been paid in the years in which they would have been earned.

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<sup>2</sup> The General Counsel and Respondent agree that the gross backpay for the first quarter of 2016 should be \$22,698.13 rather than \$22,688.13.

The increased tax burden is a result of the progressive income tax scheme in effect in the United States.

In addition to excess tax liability, discriminatees may also be subjected to adverse tax consequences in the form of incremental tax liability. As explained by Scherer, because excess tax in itself is taxable income, the Region takes into consideration that the amount of excess tax compensation actually received by a discriminatee will be further reduced as those amounts are subject to taxation. T-13:5-9.

Applying these principals to the backpay calculations set forth in the Compliance Specification, Scherer testified that he created GCX-2 to assist in the illustration of the calculation of excess tax as well as incremental tax owed to Mack. T-13:19-23 Using the backpay amounts for each calendar year from 2010 through 2017 as found in the Compliance Specification, Scherer calculated the amount of federal tax that would have been owed to the IRS had Mack earned those amounts in the respective calendar years.<sup>3</sup> GCX-2 at page 1. In order to calculate the federal tax for each year, Scherer broke down the exact amount of taxes owed for each tax bracket, given the amount of backpay owed in the respective years. Those calculations can be found on pages 2 through 9 of GCX-2. T-15-17. Additionally, Scherer provided a breakdown of the progressive tax rates and the associated dollar amount for each tax bracket for calendar year 2018 and applied those amounts to the lump sum backpay amount, in order to calculate Mack's tax liability for lump sum backpay received in 2018. GCX-2, page 10.

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<sup>3</sup> Mack testified that during the relevant period, he filed as a single filer.

The total amount of backpay Mack is owed for the backpay period including calendar years 2010 through 2017 is \$362,214. GCX-2, page 1. Had Mack earned the backpay amounts during the respective calendar years, he would have paid a total of \$60,427.90 in federal income tax. T-14:14-17. However, because Mack is presumably receiving the entire lump sum in 2018, he will owe \$102,464.40 in taxes on the lump sum amount under the current tax laws. T-14:11-13. The difference between what Mack would have paid in taxes had he earned the wages in the respective years and what he will now have to pay in taxes as a result of receiving a lump sum is \$42,036.50. T-14:2-25; T-15:1-2. This amount reflects the total excess tax owed to Mack as a result of the receipt of a lump sum payment for backpay.

With respect to incremental tax owed on the excess tax award, Scherer explained that the Region uses a formula established by the Division of Operations Management, the methodology of which is reflected in the chart on GCX-2 at page 11. T-18-19. Based on 2018 taxing regulations, taxable income between \$200,000 and \$500,000 will be taxed at 35%. Because Mack's gross backpay is well over \$200,000, his top tax bracket for 2018 is 35%. Accordingly, any amounts paid to him over \$200,000 will be taxed at 35%, including amounts paid to him compensating him for excess tax liability. T-18:13-19. As explained by Scherer, the formula considers the excess tax amount, and multiplies that amount by 35 percent in order to determine the tax on the excess tax. T-18:20-23. The tax liability for an excess tax award of \$42,036.50 in 2018 is \$14,712.78. T-18:20-22. If Mack is required to pay \$14,712.78 from his excess tax award, he is not being fully compensated for the excess tax liability. The General Counsel's formula presumes that Mack will be compensated for the

incremental tax of \$14,712.78. Because the additional payment of \$14,712.78 is taxed at 35% as described above, Mack will be required to pay \$5149.47 on that amount. If Mack is awarded the \$5149.47 to pay the incremental tax, he will have to pay taxes on that amount at a rate of 35%. Again, those taxes must be deducted from the incremental amount that Mack will be reimbursed. The formula continues to reimburse Mack for each incremental reduction in the amount paid to him due to the incremental tax liability. Based on the General Counsel's formulary as described on page 11 of GCX 2, the total amount of incremental tax liability is \$22,635.04. That amount reflects what Respondent would have to pay Mack in order to compensate him for the additional tax burden. T-19:11-16. In total, Respondent's total liability is \$362,214 in backpay, plus \$42,036.50 in excess tax liability, plus \$22,635.04 in incremental tax liability.<sup>4</sup>

B. Cecil Mack's mitigation of losses in earnings

1. Testimony of Cecil Mack.

Mack began working for Respondent around June 2002. T-25:20. Mack was unlawfully discharged around February 2, 2010, and reinstated on July 24, 2017. T-25:20-25; GCX-1(e) at page 3, par. 6(a). Mack credibly testified that after his discharge, he immediately applied for unemployment and began searching for work. T-26:9-11. Additionally Mack testified that during the backpay period, he provided the Region with documents reflecting his search for work. GCX-4; T-27:2-7. Those documents, which were entered into evidence as GCX 4, reflect that Mack immediately began his job search. Additionally, shortly after his discharge, Mack registered with an employment

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<sup>4</sup> These amounts do not include interest and will be adjusted when payment is made.

agency, Workforce, which assists unemployed individuals in finding suitable employment. Mack testified that he also registered for a job related course sponsored by the State of Florida<sup>5</sup>. The information in GCX-4 reflects that for the time period between February 15 and March 31, 2010, Mack submitted applications to at least three different potential employers. GCX-4 at page 1. Mack further testified that during that quarter, he applied for a position at the Krome Detention Center.

For the second quarter of 2010, Mack submitted applications to at least eight prospective employers as identified in GCX-4 at page 3. Mack further testified that in May of 2010, he submitted an application for employment with the State of Florida Department of Corrections. T-30:13-22.

In July 2010, which falls in the third quarter, Mack applied for a position with the Florida Highway Patrol. Mack secured employment in August 2010 with a company identified as Rent A Wheel where he began working as a collections specialist on a full-time basis. GCX-4 at page 5; T-33:4-13 He quickly rose up the ranks to the position of assistant manager and then store manager. T-33:15-22. As store manager, Mack worked 40 to 50 hours per week and earned a salary of about \$44,000 per year. T-35:5-9. Mack continued to work for Rent A Wheel until around June of 2011, when he was discharged. T-34:15-19. Mack was discharged for mishandling customer payments, although he testified that he was unaware that the conduct for which he was discharged was against company policy. T-35-37. As more fully discussed below, Mack's backpay should not be tolled in any way due to his discharge as he did not

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<sup>5</sup> Mack was not selected for the course.

engage in gross misconduct, or in any conduct which could be construed as a deliberate loss of income.

Subsequent to Mack's discharge from Rent A Wheel, he continued searching for work. Between June 9 and June 23, 2011, Mack submitted applications for four positions at Baptist Health Hospital. T-39-40. Additionally, he applied for a position with Miami-Dade Public schools on June 27<sup>th</sup>.

During the third quarter of 2011, in July, Mack applied for positions with five different employers. T-40-41. During the month of August 2011, Mack submitted applications for over 30 positions with various employers. T-41-43, GCX-5. For the month of September 2011, Mack submitted at least 11 applications. T-43-45. In total, for the entire third quarter of 2011, Mack submitted at least 46 applications for employment.

Mack continued his job search during the fourth quarter of 2011. In October 2011, he applied for more than 20 positions with various employers. T-45-49. In November 2011, he applied for at least six more positions. T-50-51. For the entire fourth quarter, Mack submitted at least 26 applications for employment.

In January 2012, Mack applied for positions with the City of Miami Police Department and Dyncorp. T-51:2-19. Through his diligent job search efforts, in February 2012, Mack secured employment with RAC Acceptance, an affiliate of Rent-A-Center. T-51:20-24. During his employment at RAC Acceptance, Mack worked full-time as a collection specialist, between 38 to 44 hours per week. T-52:8-9. Despite working a full-time job, Mack found the time to continue to search for better employment opportunities. For example, around August 23, 2012, Mack applied for a position as a

water treatment plant operator trainee in Hialeah, Florida. T-52:14-25. Additionally, Mack applied for a position with the Miramar Police Department in November 2012. T-53:9-13. Around February 2013, Mack applied for a position with the United States Postal Service in search of a more fulfilling career and higher wages. T-53:19-24. Mack's continued efforts yielded fruit, and Mack was hired by the Postal Service as a City Carrier Assistance while he was still employed by RAC acceptance; there was no lapse in his employment during the transition between employers. T-54:4-6. While employed by the Postal Service as a City Carrier Assistant, Mack worked about 60 hours per week. T-54:7-12. Nonetheless, Mack still sought better working conditions and continued to search for work by submitting an application to the City of Miami Police Department. T-54:18-25.

Mack continued to work for the Postal Service as a City Carrier Assistant until he was offered a full time position as a Letter Carrier in the middle of 2015. T-55:10-13. As a Letter Carrier, Mack worked between 40-48 hours per week. He continued to work for the Postal Service until Respondent reinstated him to his former position on July 24, 2017.<sup>6</sup>

## 2. Testimony of Claude Seltzer

Respondent called Claude Seltzer, a certified vocational rehabilitation counselor, as its only witness. Seltzer testified that the central part of a vocational rehabilitation counselor's position is to evaluate individuals who are not in the labor market, or who need to return to the labor market, and to evaluate the labor market itself. T-103:12-17.

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<sup>6</sup> While there was significant testimony on cross examination regarding certain entries including business names and amounts, on Respondent's Exhibit 1, the record evidence highly suggest that SOI-31 of AR Inc., is a payroll company, possibly used by Respondent, as well as other subsequent employers for whom Mack worked. T-92-95.

Over the General Counsel's objection, Seltzer was permitted to testify as an expert witness.

On direct examination, Seltzer testified that it was his opinion that for the time period from February 2010 through April 2013, specifically in the area of security guards, there were jobs open and available to Mack for which he was qualified. T-107:9-19. Seltzer also provided limited testimony regarding Respondent's Exhibit 3, which shows statistics that were purportedly published by the Bureau of Labor Statistics, reflecting the labor market with respect to security guard positions, in various geographical areas, including Miami. RX-3. The documents reflect, inter alia, that for the designated time period (which preceded May 2014), the hourly mean wage rate for security guards in Florida was \$11.04 and the annual mean wage was \$22,970. RX-3 at page 2. The documents further reflect that for the Miami Metropolitan area, the hourly mean wage was \$10.96 and the annual mean wage was \$22,790 for security guards. RX-3 also reflects much higher wages for security positions in areas outside the State of Florida, including Texas, New Jersey, Idaho, New Mexico and California. RX-3 at pages 7 and 8.

Seltzer testified that he developed a packet of job advertisements from the Miami Herald for the time period between February 2010 through April 2013. T-110:19-22. He further noted that the documents were not exhaustive, rather representative, based on samples drawn once or twice per month. T-110:18-24. RX-4. Seltzer testified that the jobs in RX-4 were not atypical of jobs in the Greater Miami market from February 2010 through April 2013. T-110-111. Based on his very limited and flawed research, Seltzer testified that during the period from February 2010 to April 2013, there were jobs that

were in the open, competitive labor market for security guards, and that these jobs were available on a continual basis. T-111:10-18. Seltzer acknowledged that the mean wage for security guard positions in Florida was around \$11 per hour. T-111-112. Without establishing any reliable basis for his conclusion, Seltzer testified that Mack would have been a valuable employee to a general security company, given his highly specialized training. He further testified that Mack could have earned above the average salary of almost \$23,000, and could have earned closer to \$30,000 as a supervisor in a high security operation. T-112-113. Seltzer testified that as a supervisor, Mack could have earned 25 to 50 percent above the average salary. T-113:18-25.

Seltzer testified that Mack should not have relied on online applications during his search for work, but rather should have applied in person. He further testified that it's always better to make an in-person effort than to solely rely on a telephone call or an internet job search. T-115:1-4. Although Seltzer testified that the employers identified in RX-4 had immediate openings, he also testified that he did not contact any of them to determine how many openings, if any, there were at the time of the advertisements. T-116-117.

On cross examination, Seltzer admitted that he had no idea how many applicants the employers received for those positions advertised in the postings found in RX-4. T-119:6-8. Although he testified that the unemployment rate during the 2010 and 2011 was about 6 to 7 percent, he later admitted that it could have been closer to 10 percent. T-119-120.<sup>7</sup> Seltzer also admitted that he had no idea how many licensed security

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<sup>7</sup> According to the US Department of Labor Bureau of Labor Statistics website at <https://data.bls.gov>, the unemployment rate in Florida in January 2010 was 11.3%, the highest unemployment rate on record

officers there are in the State of Florida, or how many of them were unemployed in 2011. T-120:12-17. He further testified that he did not know how many licensed security officers were unemployed and searching for work in 2011, 2012 or 2013. T-120-121. Seltzer acknowledged that Mack's pay rate was over \$50,000 per year and that his analysis of available jobs includes jobs for which 18-year old recent high school graduates would be eligible. T-122-123. Seltzer acknowledged that some employers might view Mack as overqualified for the positions that Seltzer claims were available to him. T-124:23-25.

With respect to Mack's qualifications, Seltzer admitted that the bulk of Mack's experience was in a nuclear plant. T-125:6-9. He further admitted that Respondent staffs *all* nuclear security officer jobs in the South Florida area as the facility where Mack worked is the only nuclear facility in South Florida. T-125:9-24. While Seltzer testified that he believed that a prospective employer is "more likely" to hire Mack due to his extensive qualifications, Seltzer offered no basis in fact for forming his conclusion. T-131-132.

### **III. ARGUMENT**

A. In a compliance proceeding, the General Counsel bears the initial burden of proof to show that backpay is owed and to establish backpay amounts. Respondent then bears the burden to establish facts that would negate or mitigate its liability.

As an initial matter, the General Counsel bears the burden of proof in a compliance specification. *Triple A Fire Protection, Inc.*, 353 NLRB 838 (2009). That burden includes the burden of establishing the gross backpay due to each

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since 1976. In January 2011 the unemployment rate was 10.7%. By comparison, the current unemployment rate is under 4%.

discriminatee. *J.H. Rutter Rex Manufacturing Company, Inc., v. NLRB*, 473 F.2d 223, 230-231(5<sup>th</sup> Cir.) cert. denied, 414 US 822 (1973). A finding by the Board that an unfair labor practice was committed is presumptive proof that backpay is owed. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2<sup>nd</sup> Cir. 1965), cert denied 384 U.S.972 (1966). Once the gross backpay amounts are established, the burden shifts to the employer to establish facts that would negate or mitigate its liability. *United States Can Co.*, 328 NLRB 334, 337 (1999), enfd. 254 F.3d 626 (7<sup>th</sup> Cir. 2001) In challenging the General Counsel's calculations, the employer who committed the unfair labor practices maintains the burden of setting forth facts which reduce the amount of backpay owed. *Atlantic Limousine*, 328 NLRB 257,258 (1999), enfd. 243 F.3d 711 (3d Cir. 2001); *Florida Tile Co.*, 310 NLRB 609 (1993), enfd. 19 F.3d 36 (11<sup>th</sup> Cir. 1994). Respondent has the burden of establishing such matters as availability of jobs, willful loss of earnings, and interim earnings to be deducted from the backpay award. *NLRB V. Mooney Aircraft, Inc.* 366 F.2d 809, 812-813 (5<sup>th</sup> Cir. 1966); *Neeley's Car Clinic*, 255 NLRB 1420 (1981). Any uncertainty regarding the amount of back pay that a discriminatee should be awarded should be resolved in favor of the discriminatee and against the Respondent. *Alaska Pulp Corp.*, 326 NLRB 522 (1988), enf. in part, 231 F.3d 1156 (9<sup>th</sup> Cir. 2000); *Intermountain Rural Electric Ass'n.*, 317 NLRB 588, 590-591 (1995), enfd. mem. 83 F.3d 432 (10<sup>th</sup> Cir. 1996). This obligation includes the burden of establishing a willful loss of earnings. *Atlantic Limousine* citing *Grand Mela Corp.* 318 NLRB No. 73 (1995).

Section 102.56 (b) and (c) of the Board's Rules and Regulations states:

(b) *Contents of answer to specification*—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. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as true and shall deny only the remainder. As to all matters within the knowledge of respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail respondent's position as to the applicable premises **and furnishing the appropriate supporting figures** (emphasis added).

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegation of specification.*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

To begin, Respondent's Answer is deficient to the extent Respondent challenges any of the Board's calculations. Respondent has failed to provide any alternative calculations with respect to the amounts listed in the backpay specification as the gross back pay owed for the relevant backpay time period, as required by Section 102.56(b). Notwithstanding Respondent's omissions, in its Answer, Respondent admits that the Region's calculations of gross backpay as set forth in paragraph 6(d) of the Compliance Specification are accurate. GCX-1(r) at page 3. Accordingly, it must be concluded that the General Counsel has satisfied its initial burden. The burden now shifts to Respondent to set forth facts which negate or mitigate its liability. Again, the burden of

establishing affirmative defenses to mitigate its liability, including a willful loss of interim earnings, lies with Respondent. *Millennium Maintenance & Electrical Contracting, Inc.* 344 NLRB 516, 517 (2005) citing *Chem Fab Corp.*, 275 NLRB 21,21 (1985). enfd. Mem. 774 F.2d 1169 (8<sup>th</sup> Cir. 1985). Respondent also bears the burden of proof when advancing an affirmative defense that a discriminatee failed to make reasonable efforts to find interim employment. *St. George Warehouse*, 351 NLRB 961, 961 (2007). Respondent has failed to meet its burden. As discussed below, the evidence reflects that Mack engaged in an extensive search for work and remained employed for the bulk of the backpay period.

B. Cecil Mack performed an adequate job search in an effort to mitigate his loss of earnings, and Respondent has not met its burden to establish that would negate or mitigate its liability.

It is well settled that “the test for mitigation is not measured by an individual's success in gaining employment, but rather by the efforts made to seek work.” *The Lorge School*, 355 NLRB 558, 560 (2010), quoting *Essex Valley Visiting Nurses Assn.*, 352 NLRB 427, 429 (2008). Whether a claimant's search for employment has been reasonable is evaluated in light of all of the circumstances. *The Lorge School*, 355 NLRB at 560, citing *Pope Concrete Products*, 312 NLRB 1171 (1993), enf. mem. 67 F.3d 300 (6th Cir. 1995); *Cornwell Co.*, 171 NLRB 342, 343 (1968). Furthermore, it is measured over the backpay period as a whole, not isolated portions thereof. *The Lorge School*, 355 NLRB at 560, citing *First Transit Inc.*, 350 NLRB 825, 825 fn. 8 (2007) and *Wright Electric*, 334 NLRB 1031 (2001), enfd. 39 Fed. Appx. 476 (8th Cir. 2002). Any doubt or uncertainty in the evidence is resolved in favor of the employee claimant and not the respondent. *International Brotherhood of Teamsters Local 25*, 366

NLRB No. 99 (2018) citing *United Aircraft Corp.*, 204 NLRB 1068,1068 (1973), See also *Midwestern Personnel Services*, 346 NLRB 624, 625 (2006) enfd. 508 F.3d 418(7<sup>th</sup> Cir. 2007); *Jackson Hospital Corp.*, 352 NLRB 194, 200 (2008).; see also *NLRB v. NHE/Freeway, Inc.*, 545 F.2d 592, 594 (7th Cir. 1976); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 572-573 (5th Cir. 1966). The Respondent does not meet its burden of showing an inadequate job search by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings. *Lorge School*, 355 NLRB at 560 citing *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991). Although a backpay claimant has a duty to mitigate her loss of income, she is held only to a good-faith effort, not the highest standard for diligence. *International Brotherhood of Teamsters Local 25*, 366 NLRB No. 99 (2018) citing *Lundy Packing Co.*, 286 NLRB 141, 142 (1987), enfd. 856 F.2d 627 (4th Cir. 1988).

Mack provided credible and uncontroverted testimony which reflects that he engaged in a thorough search for interim employment beginning shortly after he was unlawfully discharged by Respondent around February 2, 2010. Mack registered with a state unemployment agency, Workforce, which assists individuals in finding suitable employment. He also registered for job-related training, and submitted applications to at least three different employers during the first quarter of 2010. During the second quarter of 2010, he continued his job search and submitted at least 9 applications, including an application to the State of Florida Department of Corrections. During the third quarter of 2010, Mack secured interim employment with Rent A Wheel. During that same quarter, he applied for a position with the Florida Highway Patrol.

Mack continued to work for Rent A Wheel until around June 2011 when he was discharged. While Respondent may argue that Mack's discharge from Rent A Wheel constitutes a deliberate loss of employment, the Board has consistently held that discharge from interim employment, without more, is insufficient to constitute willful loss of employment warranting an earnings offset subsequent to the termination date. *PIE Nationwide* 297 NLRB 454 (1989), *enfd.* In pertinent part 923 F.2d 506(7<sup>th</sup> Cir. 1991). A respondent must show deliberate or gross misconduct on the part of the discharged employee in order to establish a willful loss of employment. *Ryder System, Inc.* 302 NLRB 608 (1991). This burden is not easily met. For example, in *Pepsi-Cola Bottling Co.* 330 NLRB No. 153 (2000), the Board found that an employee who was compelled to resign, or risk discharge, for having failed a drug test did not constitute a loss of earnings based on deliberate or gross misconduct.

In the instant matter, Mack was discharged for what appears to have been an unintentional failure to fully follow Rent A Wheel's policy regarding customer payments. Mack admitted that when a customer would pay more than the minimum payment on their account, or when the customer tendered a large enough payment to pay off the account, Mack would apply the minimum payment and wait for the account due date to pay off the remaining balance on the account. Mack's conduct, in this regard, did not adversely impact the customer, nor did it result in the loss of revenue for the Employer. Mack also realized no personal monetary gain through his actions. Mack testified that he believed that the conduct for which he was discharged was permissible, that he was trained to process transactions in the manner described, that he was unaware of any policies or procedures that prohibited the conduct, and that he did not become aware

that the conduct was a terminable offense until he was discharged. T-36-38 Under these circumstances, Respondent cannot show that Mack's discharge was based on deliberate or gross misconduct. To the contrary, Mack was unaware that he was engaging in any type of prohibited activity

Immediately following his June 2011 discharge, Mack resumed his job search. He applied for five positions during that same month. During the third and fourth quarters of 2011, Mack submitted at least 46 and 26 applications respectively. He continued his search for employment and secured employment with RAC Acceptance in February 2012. Mack was continuously employed for the time period beginning February 2012 though the date he was reinstated by Respondent. During that same time period, Mack, in fulfilling his obligations to search for reasonably equivalent employment, continued to apply for higher paying positions. It is these continued efforts that landed Mack a position with the United States Postal Service, where he began working in March 2013. Mack continued to work for the Postal Service until he was offered reinstatement by Respondent in July 2017, and at no time between February 2012 and July 2017 did he experience any lapse in employment.

Respondent's attempts to show that Mack did not do an adequate job search, or in any other way failed to make sufficient efforts to mitigate his losses, fall flat when viewed in light of all evidence. Respondent's expert testimony is not dispositive of any issues in this case. Curiously, Respondent appears to suggest, through the elicited expert testimony, that Mack, whose gross backpay as a highly specialized nuclear security officer exceeded, \$70,000 per year for each year during the backpay period, should have applied for entry level positions which pay an average of \$11 per hour or

around \$23,000 per year had Mack accepted a position as a security officer earning \$11 per hour, as Respondent's expert appears to suggest he should have, Respondent would have undoubtedly argued in these proceedings that Mack's acceptance of such a low paying position for which he clearly is overqualified constitutes a willful loss of employment. Furthermore, Respondent's apparent contention that Mack did not appropriately mitigate because he failed to secure an \$11.00 per hour security guard position is irrational. Mack's interim earnings exceeded what he would have earned had he found and accepted a job paying \$11.00 per hour and, had Mack followed Respondent's prescribed course of action, Respondent's backpay liability would be significantly greater. Although Respondent's expert testified that Mack likely would have been offered a supervisory position, thus possibly entitling him to a higher wage (albeit far less than he earned as nuclear security officer), such a contention is so speculative that it warrants almost no treatment here; for neither Respondent nor its witness can say with any certainty that any such opportunities for professional advance would have come to fruition for Mack.

Respondent suggests that Mack failed to fulfill his obligations by limiting his job search to online applications. While Respondent appears to challenge the efficacy of such an approach, the prevalence of electronic communications in all facets of business transactions in modern society belies any assertion that a face to face application is still the preferred means of applying for employment. To the contrary, many employers expect that employees will submit online applications rather than burdening the employer with unplanned walk-ins which can be disruptive to business operations. Additionally, Mack's testimony regarding his success in using online applications to

secure interim employment equally belies Respondent's suggestions that Mack's online search for interim employment was inadequate. Although the law does not require that interim search be exhaustive, Mack's search for work was nothing short of extensive. *Sioux Falls Stock Yard Company*, 236 NLRB 543 (1978). Thus, there exists no basis for concluding that Mack did not satisfy his obligation to engage in diligent efforts to mitigate his losses during the backpay period.

In evaluating whether a position is "substantially equivalent, the Board compares various criteria, such as pay, working conditions, job duties, commutes and work locations." *Teamsters Local 25*, 366 NLRB No. 99 (2018). Respondent's expert testimony failed to identify a single position that paid similar wages as those earned by Mack. There was no reliable testimony regarding commuting times for available positions. There was insufficient testimony or evidence regarding job duties and working conditions for available positions. In short, Respondent failed to establish the existence of substantially equivalent employment opportunities available to Mack during the relevant time periods.

Based on the facts set forth above, Respondent has offered insufficient evidence to show that Mack failed to meet his obligations. Respondent has failed to meet its burden in this regard, thus, there should be no reduction in Mack's backpay award due to any failure to mitigate losses during the backpay period.

C. Respondent's challenge to the use of the quarterly calculation method for backpay, first set forth in *FW Woolworth*, 90 NLRB 289(1950) (the *Woolworth* formula) should be rejected as Respondent did not raise its challenge before the Board or the Court of Appeal during the ULP phase of these proceedings

In its Answer, Respondent challenges the General Counsel's use of the *Woolworth* formula in calculating net backpay on a quarterly basis, and states that an annual formula is appropriate.

It is well-settled that Respondent is precluded from raising such an objection during the compliance phase, because it failed to do so before either the Board or the Court of Appeals. In *Aroostook County Regional Ophthalmology Center*, 332 NLRB 1616 (2001), the Board granted the General Counsel's Motion to strike the challenge of the *Woolworth* formula since the Board has generally applied the *Woolworth* formula for calculating backpay on a quarterly basis since 1950 with court approval, and that both the ALJ's decision and the Board's Order included specific reference to the *Woolworth* formula. *Id.* at 1617-1618. In that case, the Board cited its Rules and Regulations regarding the filing of exceptions to find that the respondent was thus foreclosed from belatedly challenging the use of the *Woolworth* formula in the compliance stage.<sup>8</sup>

In the instant matter, Respondent is attempting to challenge the same *Woolworth* formula, although it failed to raise such a challenge at any phase of the Board and Circuit Court proceedings, despite *Woolworth* being mentioned by the Board in both the vacated order and the later effective Order. Respondent has put forth no reasonably convincing argument that would support a departure from using a formula that has been applied to thousands of Board cases over the past seven decades. Therefore, Respondent's untimely challenge to the use of the *Woolworth* formula, to the extent

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<sup>8</sup> In *Aroostook*, the board cited Section 102.46(b)(2) of the Rules and Regulations, which has since been moved to Section 102.46(a)(1)(ii) but remains unchanged in substance.

Respondent continues to raise it in the compliance phase, should be summarily rejected.

D. The General Counsel's compensation of Cecil Mack for adverse tax consequences associated with the receipt of a lump sum backpay award is appropriate under the circumstances of this case and consistent with the Board's holding in *Tortillas Don Chavas* 361 NLRB 101 (2014).

Respondent, in its Answer, objects to the Board's award of excess tax liability pursuant to its holding in *Tortillas Don Chavas*. In that case, the Board explained its rationale for adopting the excess tax liability remedy already long in use by the courts and other administrative agencies to ensure make whole remedies were the best approximation of restoring discriminatees to their economic status quo ante. 361 NLRB No. 10, slip op. at 4-5. In the instant case, in applying *Tortillas Don Chavas* to the remedy, the Board therefore ruled that Respondent had failed to make a persuasive argument on due process or any other grounds articulated in its answering brief to the Counsel for the General Counsel's cross-exceptions. Respondent then effectively waived its objection to the inclusion of excess tax liability in the remedy in this case by declining to renew its arguments before the 11th Circuit, when it was before that court upon Respondent's own petition for review. (Neither did Respondent argue against an excess tax liability remedy in its answering brief to the Board's cross-petition for enforcement of the Board's Order.)

At the compliance hearing, therefore, the only issue related to excess tax liability which Respondent is entitled to litigate is the Region's methodology for calculating the remedy. It is improper for Respondent to argue now, for the first time, that *Tortillas Don Chavas* was incorrectly decided, when it failed to object when it had the appropriate opportunity to do so before the 11th Circuit.

The record evidence as described above contains a detailed showing of how the Region determined the excess tax owed to Mack based on the anticipated lump sum payment he will receive in a year other than the year in which he would have earned the wages but for Respondent's unlawful discharge of him. In order to fulfill the Board's interest in making an employee fully whole who has suffered losses due to an employer's unlawful discharge, the Board has ordered Employers to compensate employees for excess income tax liability. *Tortillas Don Chavas*. As previously discussed above, any amounts awarded to a discriminatee to compensate him for excess taxes will also be subjected to incremental federal income tax. Although the Board in *Tortillas Don Chavas* does not specifically discuss incremental tax, the policy considerations underlying the award of excess tax are the same for incremental tax. Notably, in the Board's recent *Teamsters Local 25* decision, issued on June 1, 2018, the Board adopted the ALJ's decision awarding incremental tax to a discriminatee resulting from compensation for excess taxes. Similarly, in order to fully compensate Mack for the losses he has suffered as a result of his discharge, Respondent should be ordered to pay Mack for the excess tax liability he will incur as a result of receiving a lump sum award, as well as the incremental tax liability he will incur as a result of receiving the excess tax liability award.

#### **IV. CONCLUSION**

The Board and Courts have held that Respondent violated the Act when it suspended and discharged Cecil Mack. An unfair labor practice finding by the Board that an employee was unlawfully terminated "is presumptive proof that some backpay is owed." *Teamsters Local 25* citing *St George Warehouse* 351 NLRB 961,963 (2007).

The General Counsel has established through the allegations in the Compliance Specification, and Respondent admits in its Answer, that the amounts listed in Appendices A through H accurately reflect the gross backpay amounts due to Mack as a result of his unlawful discharge. Respondent has failed to show that Mack did not make an adequate search for work or that he failed in any way to fulfill his obligation to mitigate his losses through interim employment. The evidence reflects that the interim earnings listed in the Compliance Specification are accurate and self-explanatory. Accordingly, the General Counsel submits that Respondent should be required to pay Mack the entire amount of backpay owed to him as identified in the Compliance Specification, and that Mack should be compensated for the adverse tax consequences associated with the receipt of a lump sum payment for wages that would have been earned in prior years, including excess tax and incremental tax. Respondent should be ordered to pay the aforementioned amounts, plus interest as calculated at the time of payment.

Respectfully submitted,

*/s/ John F. King*

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**CERTIFICATE OF SERVICE**

I hereby certify that the Counsel for the General Counsel's Brief to the Administrative Law Judge in the matter of G4S Regulated Security Solutions, a Division of G4S Secure Solutions(USA) Inc., f/k/a The Wackenhut Corporation, Case 12-CA-026644 and Case 12-CA-026811 was duly served upon the following individuals by electronic transmittal on July 9, 2018, by the following means:

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