UFT, 6 OCB2d 19 (BCB 2013)

(IP) (Docket No. BCB-2849-10)

Summary of Decision: Pursuant to the its orders in *UFT*, 4 OCB2d 4 (BCB 2011) and *UFT*, 5 OCB2d 26 (BCB 2012), the Board calculated the backpay awards due to employees affected by the unilateral enforcement of a 1,000 hour cap on hours of work per year. The Board found that under the unique circumstances of this situation, the employees did not have a duty to mitigate, and alternatively, if there were a duty to mitigate, that the City did not challenge the work search of 20 employees and another 7 employees satisfied any duty to mitigate. Further, the Board ruled on legal issues relating to unavailability to work, whether unemployment benefits should be considered interim earnings, and whether net or gross income from self-employment should be considered interim earnings. The Board found that certain outside income by employees in 2010 was interim earnings and calculated the amount of backpay due to each hearing officer. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

UNITED FEDERATION OF TEACHERS, LOCAL 2, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

On March 29, 2010, the United Federation of Teachers, Local 2, AFL-CIO ("Union" or "UFT") filed a verified improper practice petition against the City of New York ("City"). The Union alleged, among other things, that the City unilaterally imposed new limits on the number of hours worked by Hearing Officers (Per Session) ("Hearing

Officers") in violation § 12-306(a)(1), (4), and (5) of New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). By decision issued on January 5, 2011[1], *UFT*, 4 OCB2d 4 (BCB 2011), the Board found that by enforcing a 1,000-hour cap on the aggregate number of hours Hearing Officers could work per year, the City violated NYCCBL § 12-306(a)(1), (4), and (5) as alleged. Thereafter, in *UFT*, 5 OCB2d 26 (BCB 2012), the Board developed a gross backpay formula to determine a reasonable approximation of the number of hours a Hearing Officer would have worked.[2]

Pursuant to the Board's Order in *UFT*, 5 OCB2d 26 (BCB 2012), a hearing was held and the parties were given the opportunity to submit evidence and arguments concerning the calculation of net backpay due[3]. In this decision, the Board makes specific findings of fact with regard to each individual and calculates the amount of backpay due each Affected Hearing Officer. In so doing, we address the following legal issues raised by the parties: whether employees have a duty to mitigate back pay when

[1] We note that the dissent's argument concerning the Board's failure to take into account the reduction in hours available to hearing officers in 2010 was previously addressed. In *UFT*, 5 OCB 2d 26 at n.5 (BCB 2012) we stated our belief that the dissent's argument in this regard is based upon the faulty premise that hours were evenly distributed among hearing officers. The facts we have found in this proceeding demonstrate that hearing officers worked varying hours, leading to our disagreement with the dissent's argument in this regard.

[2] Hereinafter, a Hearing Officer who was found eligible for backpay is referred to as an "Affected Hearing Officer." The criteria necessary to be considered an Affected Hearing Officer is discussed in the Background section of this decision.

[3] We disagree with our dissenting colleagues' assertion that this award and the interim decisions that preceded it were not based on a full record. As noted, this is the third decision issued by this Board. Prior to each decision, all parties were afforded the opportunity to present any and all relevant evidence in support of their respective arguments. In this final decision in which we calculate the amount of back pay to be awarded, the affected hearing officers testified and were subject to examination by all parties.

their work hours are reduced in violation of the NYCCBL, whether an employee's gross backpay will be limited by the period of time which the employee was "unavailable" to work, whether back pay is reduced by unemployment insurance benefits are interim earnings, and whether gross or net income from self-employment is the appropriate amount by which gross backpay is reduced.

As set forth in detail below, we find that under the circumstances presented, the 36 Affected Hearing Officers did not have a duty to mitigate.[4] As a threshold matter, we note that the question of the existence of a duty to mitigate is only actually an issue for a handful of Affected Hearing Officers. The record reflects, and indeed, the City concedes, that 20 of the Affected Hearing Officers made what it deems to be reasonable efforts to mitigate. We find that the City did not carry its evidentiary burden of establishing that the efforts made by another seven Affected Hearing Officers to obtain comparable work were not reasonable under the unusual circumstances here. We find that even assuming we were to impose a duty to mitigate, the record evidence establishes that these seven hearing officers made sufficient efforts to look for comparable employment and therefore would satisfy a duty to mitigate. Thus, in effect, we are presented only with the question of whether the remaining seven Affected Hearing Officers who did not make any efforts to find comparable work had a duty to mitigate with which they failed to comply.

We further hold that employees who were unavailable to work during the backpay period will have their gross backpay reduced accordingly. In addition, we find that certain income received by Affected Hearing Officers in 2010 must offset the gross backpay. If an Affected Hearing Officer obtained new employment in 2010 as a result of

[4] As discussed fully below, we find two of the Affected Hearing Officers removed themselves from consideration for a backpay award, and therefore are not eligible.

the improper practice, gross backpay is reduced by the gross income from this employment. In addition, to the extent an Affected Hearing Officer had outside earnings prior to 2010, the gross amount of increase in their non-City income in 2010 is considered interim earnings and is deducted from their gross backpay. However, if the increased earnings in 2010 were generated from self-employment, the net amount of increased income is considered interim earnings. Further, gross backpay is reduced by the amount of unemployment insurance compensation they received. Finally, we determine the specific backpay award for each employee at issue.

BACKGROUND

In our first decision in this matter, *UFT*, 4 OCB2d 4, we found that the City violated NYCCBL § 12-306(a)(4) when it unilaterally changed a mandatory subject of bargaining by enforcing a 1,000 hour cap on the total number of hours of worked by Hearing Officers across several City agencies. Because the initial record was insufficient to determine remedial relief, we ordered "that the parties provide, at the Board's direction, information regarding damages as the Board will retain jurisdiction to determine any remedy at a later date." *Id.* at 25.

Thereafter, pursuant to the Board's request, the City submitted data concerning hours worked by all Affected Hearing Officers in all agencies during 2007, 2008, 2009, and 2010. The parties agreed upon the accuracy of the tabulated total hours worked by each individual Hearing Officer. After this data was compiled, and its accuracy confirmed by both parties, the parties were given an opportunity to submit briefs and argue their positions on remedy before the Board.

In our second decision in this matter, *UFT*, 5 OCB2d 26, we determined that the employees eligible for backpay are those who would have worked additional hours in 2010 if not for the City's improper practice and determined that the Affected Hearing Officers are those employed during 2010 who meet the following criteria:

> 1) worked over 1,000 hours at more than one agency in at least one of the preceding three years (*i.e.*, 2007-2009),
>
> **and**
>
> 2) whose average annual work hours during 2007 through 2009 (at more than one agency) were more than 1,000 hours per year. ["Average Number of Hours Worked"]

Additionally, we found that a Hearing Officer's Average Number of Hours Worked should be reduced by the greater of either:

> 1) the actual number of hours an Affected Hearing Officer worked in 2010 ("2010 Hours Worked")
>
> **or**
>
> 2) 1,000 hours (*i.e.*, the amount of hours that they could have worked but for the 1,000 hour cap).

We held that the resulting difference between the Average Number of Hours Worked and the greater of the Affected Hearing Officer's 2010 hours or 1,000 hours is a reasonable approximation of the number of hours that the Affected Hearing Officer was prevented from working in 2010 ("Estimated 2010 Hours"). This formula is set forth numerically below:

> (Average Number of Hours Worked during 2007 through 2009) – [the greater of (2010 Hours Worked or 1,000 Hours)] = Estimated 2010 Hours[5]

[5] As we stated in *UFT*, 5 OCB2d 26, at 14, "It has been recognized in the context of private sector labor law that a "backpay award is only an approximation of what is owed [and a] formula does not have to achieve perfection; it need only be non-arbitrary."

Pursuant to our order in *UFT*, 5 OCB2d 26, and in accordance with the Trial Examiner's direction, Affected Hearing Officers responded to compliance questionnaires regarding their work histories, 2010 income, availability to work during 2010, and efforts to search for work in 2010. Hearings were held on these same issues.

POSITIONS OF THE PARTIES

City's Position

The City asserts that the Board has no authority to waive the common law duty to mitigate. Further, it argues that it violates public policy to discard this obligation without specific statutory authority. The Board's authority to fashion a remedy under Civil Service Law § 205(5)(d), which addresses the power to impose remedies in improper practice proceedings, does not give the Board the discretion to fashion a windfall. In addition, finding no duty to mitigate would amount to a gift of public funds in violation of Article VIII, § 1 of the New York State Constitution.

The City also argues that a duty to mitigate exists for these employees because of the unique nature of their work and its extraordinary flexibility. Alternatively, it argues that Affected Hearing Officers who reached the 1,000 hour cap prior to the end of 2010 were effectively laid off or discharged for part of 2010, and therefore, they would be

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Intermountain Rural Elec. Assn. v. N.L.R.B., 83 F.3d 432, at *6 (10th Cir. 1996). Therefore, "[a] formula which closely approximates what the [employees] would have earned had they not been [injured] is acceptable if it is not unreasonable or arbitrary under the circumstances." *Center Construction Co., Inc*., 355 NLRB 198, at *3 (2010); *see also, e.g., Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35, at *36 (1991), *enfd*. 952 F.2d 1393 (3d Cir. 1991)."

subject to the duty to mitigate under National Labor Relations Board ("NLRB") precedent.

The City argues that all Affected Hearing Officers should have sought additional employment to mitigate their loss. Even if the Board should limit their duty to mitigate to only search for comparable employment, i.e. hearing officer or administrative law judge work, the record is clear that Affected Hearing Officers could have applied for and received such positions.[6] The City argues that Affected Hearing Officers who made little or no effort to mitigate should be denied a backpay remedy. While there may be no absolute standard for measuring the sufficiency of a job search, the City asserts that the efforts of Affected Hearing Officers who did not submit any job applications were wholly inadequate, as were the efforts of those who performed only minimal searches. In addition, the City challenges the work search of some employees that had pre-existing employment because they made no effort to secure additional employment to mitigate losses due to the 1,000 hour cap. It also contends that one Affected Hearing Officer who declined a job offer should not be eligible for a backpay award.

The evidence shows that some Affected Hearing Officers maintained outside legal practices. The City asserts that these Affected Hearing Officers had more time to devote to their outside practices in 2010 and, therefore, increases in their earnings in 2010 for pre-existing and new employment as compared to previous years should be deducted from gross backpay.

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[6] The City concedes, however, that in those instances in which hearing officers secured such similar or comparable work, employment did not actually commence until 2011.

To determine what portion of Affected Hearing Officers' 2010 income from pre-existing employment is attributable to the 1,000 hour cap, the City asks the Board to use a methodology that mirrors its approximation of the hours an Affected Hearing Officer would have worked for the City.[7] If the Board determines that outside income should be based on when it was earned, not when it was paid, then it must undertake this examination for all of the Affected Hearing Officers and not just those for whom the issue was raised.

The City also argues that three Affected Hearing Officers who were unavailable for certain periods during 2010 and therefore should have their gross backpay reduced accordingly. Additionally, for each Hearing Officer who collected unemployment compensation after reaching the 1,000 hour cap, any unemployment compensation received should offset gross backpay. The City argues that, by applying for unemployment insurance compensation, the Affected Hearing Officers effectively acknowledged that they were laid off or discharged, and, therefore, are now estopped from denying they were fully laid off or discharged in an effort to avoid the duty to mitigate.

The City notes that any increase in gross income from self-employment should be an offset to gross backpay. Net income from self-employment is not based on hours

[7] The City notes that many Affected Hearing Officers who worked increased hours for non-City employers in 2010 testified that they could have worked these increased hours regardless of the City's improper practice but the City posits that this testimony is implausible. Additionally, it underscores that the question before the Board should not be whether these employees could have taken on the outside employment had the cap not existed, but whether they performed this additional work to offset economic loss experienced because of the cap. According to the City, the Board should be determining whether Hearing Officers who testified that they tried to increase their income because of the 1,000 hour cap succeeded in their efforts.

worked, and, therefore, is of little value in determining whether a Hearing Officer worked more hours in self-employment in 2010.

Union's Position

Assuming there is a duty to mitigate, which the Union disputes, 27 employees have complied with such an obligation. With regard to the seven employees who did not look for work, the Union argues that under the unique circumstances presented here, when hours are reduced, requiring mitigation would contradict the principle that any uncertainty in creating a backpay remedy must fall upon the wrongdoer.

The Union argues it would be irrational to conclude that employees were effectively laid off when they reached the 1,000 hour cap is irrational. Most of the Affected Hearing Officers reached the cap or were told by the City that they were no longer permitted to work, even without reaching the cap, in November or December 2010. Further, employees reached the cap at different times in each agency; for example, one employee reached his cap in October at ECB, and in December at DOHMH.[8] Only three Affected Hearing Officers actually reached the cap relatively early in the year; one in June 2010, and two others in August. All three of these employees conducted vigorous searches for employment.

The Union argues that in cases involving a reduction in hours, the Board should not impose a duty to mitigate or reduce the gross backpay by interim earnings. Should the Board find otherwise, if an employee worked an increased number of hours for an

[8] The Union notes that not a single Affected Hearing Officer who conducted a search for new employment was able to secure equivalent employment during 2010. In 2010, there was a high unemployment rate, and many Hearing Officers have significant work experience, making them ineligible for entry level positions. While still employed by the City, Affected Hearing Officers were not able to search for full-time work, which further reduced the likelihood of finding a supplemental job.

outside employer than s/he would have worked for the City during the backpay period, any offset should be based only upon the established number of hours the employee lost from the City and not the increased income. If an employee was paid a higher rate of pay by an outside employer than by the City, the offset should be based upon hours and wages that the Hearing Officer would have earned working for the City had the hours not been reduced. The Union argues that this is so because many Hearing Officers' outside employment consists of private legal practices and other hearing officer appointments, which, by their nature, fluctuate from year to year.

The Union asserts that employees who received unemployment benefits should not be estopped from claiming that they were not laid off or discharged. Further, the Union notes that the NLRB has concluded that an employee's receipt of unemployment benefits is *prima facie* evidence of a reasonable work search because unemployment claimants are required to demonstrate a reasonable work search in order to qualify for benefits. If unemployment benefits were deducted from gross backpay, the employee would be required to defend the State's cause of action to recoup benefits, which would impose additional costs on the employee.

If the Board determines that interim earnings are to be deducted from gross backpay, the Union argues that net income derived from self-employment or work as an independent contractor, not gross income, should be considered interim earnings consistent with the NLRB.

DISCUSSION

As we stated in our prior decision in this matter, "[t]his Board is empowered to remedy violations of the NYCCBL, and NYCCBL § 12-309(a)(4) entrusts the Board with determining and issuing a proper remedial order for an improper practice." *UFT*, 5 OCB2d 26, at 10.[9] Further, "[i]t is well settled that the finding of an [improper] practice is presumptive proof that some backpay is owed." *Regional Import and Export Trucking Co., Inc*., 318 NLRB 816, at 818 (1995) (internal citations omitted). Once the gross backpay has been determined and any applicable duty to mitigate is satisfied, "the burden is upon the employer to establish the facts which would mitigate that liability." *Id.* Moreover, "any uncertainty about how much backpay should be awarded to [an employee] is resolved in his or her favor and against the respondent whose violation caused the uncertainty." Id. at 13 (citing *The Lorge School*, 355 NLRB 94, at *5 (2010)).

Here, we consider the parties' legal arguments with respect to availability, duty to mitigate, unemployment compensation, and income from self-employment. We recognize that calculating back pay under these circumstances is not an exact science. We believe, however, that the formula we have devised and the adoption of settled principles

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[9] NYCCBL § 12-309(a) states in pertinent part:

> The board of collective bargaining, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty: . . . .
>
> **(4)** to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 12-306 of this chapter. For such purposes, the board of collective bargaining is empowered to establish procedures, make final determinations, and issue appropriate remedial orders.

of law in this area of labor relations represents the best approximation of how to remedy the violation found. In doing so, we believe that we effectuate the policies of the NYCCBL and fulfill our duty to remedy the violation of rights it protects.

I. Availability

We find that it is appropriate to limit backpay awards to those periods when an employee was available to work.[10] Under NLRB precedent, gross backpay is generally tolled when an employee is unavailable to work due to illness or other withdrawal from the labor market. *J.J. Cassone Bakery, Inc*., 356 NLRB No. 122 (2011). Indeed, there is a "general rule that an employer is ordinarily not liable for backpay for periods when an employee is unavailable for work due to illness or a disability." *Id.* at *9. Likewise, where an employee declines to accept the employer's offer of employment, the employee may make himself unavailable. *See*, *e.g.*, *Grosvenor Resort*, 350 NLRB 1197 (2007) (employee was not justified in quitting an interim job and employer was entitled to an offset equaling the amount employee would have earned had she not quit). Accordingly, we find that Affected Hearing Officers will not be eligible for backpay for periods of time in 2010 during which they were unavailable for work.

II. Duty to Mitigate

This Board has not previously addressed whether an employer has a duty to mitigate losses suffered as a result of a violation of the NYCCBL. In the absence of established precedent at this Board, we look to decisions from the New York State Public

[10] As discussed below, the City asserts that three Affected Hearing Officers, Leonard Margolis, Igor Oberman, and Geanine Towers, were unavailable to work during a portion of 2010.

Employment Relations Board ("PERB"), the NLRB or the Federal Labor Relations Authority for persuasive authority. *See Local 376, DC 37*, 4 OCB2d 64, at 12 (BCB 2011); *DC 37*, 3 OCB2d 56, at 12 (BCB 2010); *NYSNA*, 3 OCB2d 36, at 13 (BCB 2010); *District Council 37, AFSCME, AFL*-CIO, 47 OCB 16 (1991). PERB generally presumes that terminated employees have a duty to mitigate, but our search has not uncovered relevant PERB or New York State court cases concerning mitigation of damages for employees who lost wages due to improper practices that resulted from a unilateral reduction in hours. *Gross v. Board of Educ. of Elmsford Union Free Sch. Dist.*, 24 PERB ¶ 7527 (1991); *see also Bd of Educ. of the New Paltz Cent. Sch. Dist.*, 40 PERB ¶ 7525 (2007).

In the private sector, employees who are laid off or terminated in violation of the NLRA also have a duty to mitigate. They are therefore required to make reasonable efforts to find new employment. *See F.W. Woolworth, Co.*, 90 NLRB 289 (1950); *Painters Local 419 (Spoon Tile Co.)*, 117 NLRB 1596 (1957); *Gimrock Construction*, 356 NLRB No. 83 (2011); *Tubari Ltd. v. NLRB*, 959 F.2d 451, 454 (3d Cir. 1992). This duty only requires employees to search for "substantially equivalent employment." *The Lorge School*, 355 NLRB No. 94 (2010) (citing *Minette Mills, Inc.*, 316 NLRB 1009, 1010 (1995)). We note that a failure to obtain interim employment does not establish an employee's a failure to mitigate. *See Lorge School*, 355 NLRB No. 94 (2010); *Midwest Motel Management Corp.*, 278 NLRB 421 (1986).

The duty to mitigate requires that an employee make a good faith and reasonable search for work. However, there is no categorical obligation that employees apply for

positions. *Fabi Fashions*, 291 NLRB 586, at 587 (1988). As the NLRB explained in *Fabi Fashions*:

> [An employee] is required to make a reasonable search for work in order to mitigate loss of income and the amount of backpay. *Lizdale Knitting Mills*, 232 NLRB 592, 599 (1977). The Board and the courts hold, however, that in seeking to mitigate loss of income a backpay claimant is "held ... only to reasonable exertions in this regard, not the highest standard of diligence ... The principle of mitigation of damages does not require success, it only requires an honest good faith effort...." *NLRB v. Arduini Mfg. Co*., 394 F.2d 420, 422-423 (1st Cir. 1968); *NLRB v. Madison Courier*, 472 F.2d 1307 (D.C. Cir. 1972). The Board and the courts also hold that the burden of proof is on the employer to show that the employee claimant failed to make such reasonable search. *NLRB v. Midwest Hanger Co*., 550 F.2d 1101 (8th Cir. 1977), or that he willfully incurred loses of income or was otherwise unavailable for work during the backpay period. *NLRB v. Pugh & Barr, Inc*., 231 F.2d 588 (4th Cir. 1956); *NLRB v. Miami Coca Cola Bottling Co*., 360 F.2d 569 (5th Cir. 1966). Moreover, in applying these standards, all doubts should be resolved in favor of the claimant rather than the respondent wrongdoer. *United Aircraft Corp*., 204 NLRB 1068 (1973).

(*Id*.). Moreover, as to a "good faith" search for work, the NLRB stated that:

> [I]n broad terms a good-faith effort requires conduct consistent with an inclination to work and to be self-supporting and that such inclination is best evidenced not by a purely mechanical examination of the number or kind of applications for work which have been made, but rather by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment. Circumstances include the economic climate in which the individual operates, his skill and qualifications, his age, and his personal limitations.

(*Id*.).

What "constitutes reasonable efforts depends upon the circumstances of each case, an examination of the entire backpay period." *J.J. Cassone Bakery, Inc*., 356

NLRB No. 122, at *8 (2011). Evaluating mitigation efforts must account for circumstances that could limit opportunities such as the labor conditions or an employee's specific skills. *Id*. An employer "must show that the job search efforts were unreasonable and there were suitable jobs available for someone with the claimant's qualifications that a person undertaking a reasonable search would have secured." *Essex Valley Visiting Nurses, Assoc*., 352 NLRB No. 61, at *429 (2008).

The NLRB has found, however, that in circumstances similar to this case in which an employee's hours were unlawfully reduced, no duty to mitigate such losses exists. This holding has also been applied to instances when wages are lost as a result of an employer's contract repudiation or a discriminatory schedule change. *See Cmty. Health Servs., Inc.*, 356 NLRB No. 103 (2011); *Ogle Protection Service, Inc*., 183 NLRB 682, at 683 (1970); *Wild Oats Markets, Inc*., 344 NLRB No. 86 (2005); *88 Transit Lines, Inc*., 55 F.3d 823 (3d Cir. 1995).

Recently, the United States Court of Appeals for the District of Columbia confirmed the NLRB's approach to mitigation in cases where an employee's hours are reduced because of an unfair labor practice. In *Deming Hosp. Corp. v. NLRB*, 665 F.3d 196 (D.C. Cir. 2011), the employer unilaterally reduced the hours of certain employees from 40 hours to between 32 and 36 hours. The NLRB ordered the employer to rescind the unilateral change and make the employees whole for any lost earnings and benefits but did not impose a duty to mitigate. In this regard, the reviewing Court stated that:

> Employees who have been unlawfully discharged or laid off from their jobs have a duty to mitigate. *See NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1323 (D.C. Cir. 1972) (noting that an employee who has been "improperly deprived" of his position must at least make reasonable efforts to find new employment which is substantially

> equivalent to the position he has lost). Victims of unfair labor practices who have not lost their jobs have no such duty. *See 88 Transit Lines, Inc.*, 314 NLRB 324, 325 (1994) (holding the duty to mitigate "makes sense only with respect to employees who have been unlawfully discharged"), *enfd*, 55 F.3d 823 (3d Cir. 1995).

Id. at 200.

We find these legal precedents arising under PERB and the NLRB's jurisdiction consistent with the purpose and policies of the NYCCBL, and they are reasonable means to effectuate the Board's statutory authority to fashion a make-whole remedy. We further find that based on the nature of this violation of the NYCCBL – a unilateral reduction in hours – the Affected Hearing Officers did not have a duty to mitigate. This finding is based upon the evidence discussed below as well as the concededly "unique" nature of the Hearing Officer position, the brief duration of the damages period, and the lack of any affirmative showing from the City other than that certain Affected Hearing Officers may have missed a potential means of finding comparable work.

We note that our conclusion that there is no duty to mitigate only affects a small number of those employees eligible to receive backpay. Although there are 34 Affected Hearing Officers, the City does not contest the sufficiency of 20 Affected Hearing Officers' efforts to secure additional employment. Therefore, even assuming the Board were to apply a duty to mitigate, we would conclude that these employees satisfied their duty. The City only challenges the remaining 14 Affected Hearing Officers arguing that their efforts to look for work were insufficient or that they failed to conduct a work search, which includes seven employees that the City alleges performed an insufficient search and seven employees that admittedly did not search for work.

In the individual backpay awards set forth herein, we consider the City's claim that seven of the Affected Hearing Officers' efforts to secure new employment were insufficient.[11] The City argues that these employees performed an inadequate work search because they should have applied to hearing officer jobs to which other Affected Hearing Officers applied, such as at the Department of Education's Hearing Officer positions. However, the fact that an employee does not apply for a particular position does not illustrate a failure to mitigate. *See Essex Valley Visiting Nurses, Assoc*., 352 NLRB No. 61 (2008). In addition, for the reasons set out in the specific discussion of each individual Hearing Officer's efforts to mitigate, we find that the evidence presented establishes that even if we were to impose a duty to mitigate, these employees satisfied this duty.

The seven Affected Hearing Officers who admittedly did not search for work are the only hearing officers whose backpay determinations are directly affected by our determination that they did not have a duty to mitigate. These seven Hearing Officers stopped working for the City or, at the earliest, on November 29, 2010, and as late as December 30, 2010, either because they reached the cap or were told by the City not to return to work because they were approaching the cap. Therefore, the longest period during which any of the Hearing Officers was unemployed was only 30 calendar days.[12] While these employees knew they would reach the 1,000 hour cap, they could not be

[11] The following Hearing Officers fall into this category: Beth Badner, Susan Barbour, Stephen Haken, Andrea Pfeiffer, Marion Posner, Joan Silverman, and Susan Valcic.

[12] It is notable that for the seven Affected Hearing Officers who the City asserts conducted insufficient work searches, similarly their hours of work for the City ended late in the year -- from October 29, 2010 to December 30, 2010.

certain when that would occur. Although their hours with the City ceased in 2010 due to the implementation of the cap, it is not disputed that they resumed City work assignments in January 2011.[13]

Due to the improbability of actually finding other comparable work, for a period ranging from one day to at most one month, we will not impose a requirement that these seven Affected Hearing Officers engage in a work search where the likelihood of finding work in 2010 would be remote, making such a requirement unreasonable, if not futile.[14] As the Court found in *Deming*, to impose an obligation upon an employee to look for a position that most likely did not exist would result in an unjustified windfall for the employer. This conclusion we find rooted in the policies underlying the NYCCBL and applicable to these circumstances. Therefore, we find no duty to mitigate.[15]

In reaching this conclusion, we note that although many Affected Hearing Officers searched for additional work as hearing officers, not a single person was able to find a new hearing officer position that started before 2011. In fact, only four employees

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[13] We note that the circumstances here are unique; generally, an employee receives 60 days notice of the effective date of their layoff and also does not know if or when they will ever return to work. Moreover, the process of grieving a layoff would take an indefinite and likely lengthy period of time. In contrast, generally, the employees here were not aware of their specific last date of employment in 2010 before it happened and knew that they could resume employment for the City beginning in 2011.

[14] We note that when an employer notifies employees that a layoff is temporary, employees are under a lessened burden to seek new employment. *See Hickman Garment Company*, 219 NLRB No. 178 (1975); *Western Union Telegraph Co*., 83 NLRB No. 30 (1949). Moreover, employees terminated from skilled employment may reasonably limit their job search to equivalent employment. *Associated Grocers*, 295 NLRB 806, at 811 (1989).

[15] This includes the following Hearing Officers: Laura Fieber, Deena Greenberg, Arthur Kegelman, Michelle Manzione, Leonard Margolis, Myra Michael, and Gary Sherbell.

were offered new employment of any sort. [16] We further note that, a number of the Affected Hearing Officers held outside employment before the City's improper practice, making the possibility of their finding additional outside employment that would fit within their existing employment schedules even less likely than after they stopped their City employment. To impose a duty to mitigate under these circumstances would put an unreasonable burden on employees to replace only a few hours per week. Therefore, we are not persuaded that a duty to mitigate exists during the period of time after the 1,000 hour cap was announced but while the Affected Hearing Officers continued to work for the City in 2010.

III. Interim Earnings

Persuaded by *Deming*, and the specific circumstances of this case, we find that that these employees had no duty to mitigate because they were not terminated but merely had their hours reduced; however, we will consider Affected Hearing Officers' outside income in 2010 to the extent that they had earnings. Our examination of their earnings is consistent with the concept of a make-whole remedy and the concept that an employee who finds other work, without a duty to mitigate, does not receive more backpay than the earnings they would have received had there been no improper practice. The *Deming* Court, concerned that employees subject to a make whole remedy would receive a windfall, directed the NLRB to consider recalculating backpay to account for interim earnings. The D.C. Circuit's concern about an employee receiving a windfall is reasonable, and we opt to follow it. Thus, we find that Affected Hearing Officers did not

[16] The following four employees were offered new employment: Beth Badner, Igor Oberman, Christopher Stephens, and Geanine Towers. Two other employees started their own businesses: Isabeth Gluck and Diane Rivers.

have a duty to mitigate, but we have reviewed individually whether any of their 2010 income from outside employment will be considered interim earnings and will offset their gross backpay.

To the extent that an Affected Hearing Officer obtained new employment and income in 2010 in order to compensate for the reduced work hours with the City, these earnings, as argued by the City, will be deducted from the gross backpay. However, not all income from outside employment in 2010 will be considered interim earnings and will offset gross backpay. Earnings from outside employment that employees held prior to an improper practice will not generally offset their backpay. *See U.S. Telefactors Corp*., 300 NLRB 720, 722 (1990); *Regional Import and Export Trucking Co., Inc*., 318 NLRB 816 (1995); *Golay & Co.*, 184 NLRB 241, 245 (1970). Indeed, the NLRB "has consistently held that second job earnings normally are not considered as interim earnings to be deducted from gross backpay, particularly where, as here, the claimant held the second job prior to discharge." *Id.*

However, as contended by the City, earnings from a second job may reduce an employer's backpay liability when they are inconsistent with the earnings the employee would have had if the improper practice had not occurred. *Golay & Co.*, 184 NLRB 241, 245 (1970). In *Golay & Co*., an employee began working in part-time outside employment one month before he was discharged in violation of the NLRA. After being discharged, the employee began working full-time for the outside employer. Believing that "an adjustment should be made to [the employee's] interim earnings to reflect this continued [outside employment]," the NLRB excluded "such part of [an employee's] earnings from the secondary employer which would normally be earned if he were still

employed at the Respondent." *Id*. Specifically, it determined that his interim earnings from the outside employer should be reduced by one-fourth to account for the amount of hours worked prior to being wrongfully discharged. Thus, we examine whether Affected Hearing Officers' outside earnings increased in 2010 over prior years, and whether this increase would have existed had the improper practice not occurred.[17] We will deduct from gross backpay any increased income in 2010 from outside employment that an Affected Hearing Officer held prior to 2010 where the increase was earned in order to supplement the loss of hours due to the City's improper practice.

In the section below concerning Backpay Awards, we set forth on a case-by-case analysis the interim earnings of each Affected Hearing Officer.

IV. Unemployment Insurance Compensation

We find that the gross backpay of Affected Hearing Officers shall be reduced by the amount of unemployment compensation each received. The law is clear that unemployment benefits paid by a public agency should be deducted from backpay. *Williams v. Secy. of Navy*, 853 F.Supp. 66, 72 (E.D.N.Y.1994). Where a private employer is ordered to pay backpay, the collateral source rule provides that unemployment benefits received by the employee not be deducted because "a tortfeasor should not benefit from the fact that a plaintiff has received funds from a third party as a result of her injury." *Stratton v. Dept for the Aging*, 922 F.Supp. 857, 866 (S.D.N.Y.1996). However, pursuant to Labor Law §§ 565.4 and 565.5, "the City of New

[17] To the extent that Affected Hearing Officers obtained new outside employment, we have not evaluated whether such employment was comparable. The inquiry into whether employment is comparable is solely related to the duty to mitigate. Where an Affected Hearing Officer had increased income in 2010 from outside employment that was not comparable to a hearing officer position, it is properly deducted as interim earnings.

York is the entity which effectively pays [the employee's] unemployment compensation," and, thus, the collateral source rule does not apply. Accordingly, we find that Affected Hearing Officers who applied for and received unemployment insurance compensation during 2010 as a result of the City's improper practice shall have such unemployment compensation deducted from their gross backpay.

V. Income from Self-Employment as Interim Earnings

Under NLRB precedent, "[i]t is well established that only net earnings from self-employment are considered to be interim earnings deductible from gross backpay." *California Gas Transport*, 355 NLRB No. 73, *1, fn. 1 (2010) citing *Regional Import & Export Trucking Co*., 318 NLRB 816, 818 (1995). As the NLRB explained, "[t]he use of gross wages in the backpay calculation reflects the fact that in the employment relationship most costs of doing business are borne by the employer. The use of net earnings for purposes of mitigation in the case of a self-employed [employee], by contrast, reflects the fact that the self-employed bear their own costs of doing business." *Id.*

We are persuaded by the NLRB's reasoning, and we likewise find that for Affected Hearing Officers engaged in self-employment in 2010, their net income is properly considered interim earnings, while for other outside employment, gross income will be considered earnings and are the proper offset to the gross backpay. *Id.*

INDIVIDUAL BACKPAY AWARDS

Of the 36 Hearing Officers who the Board initially determined were eligible for a remedy, 34 Hearing Officers testified at the hearings. Two Hearing Officers did not participate in this proceeding. Linda Agoston explicitly declined to participate, and Bernadette Taylor did not respond to communications by OCB or the Union. Therefore, we find these two employees ineligible for a remedy. Thus, there are 34 Affected Hearing Officers now eligible for a remedy.

Below, we discuss all issues relating to each individual employee's net backpay calculation. The employees are discussed in the following groups: (1) those whose work search is not contested; (2) those whose work search efforts are challenged; (3) those who undisputedly did not search for work. Each group is divided into those employees who have interim earnings and those who do not. In each category, we apply the legal conclusions reached above, and determine what, if any, interim earnings should be deducted from the employees' gross backpay. The hourly wage rate used to calculate the gross backpay is $39.47, as listed in the job specification and confirmed by the parties.

Each party bears a burden of proof in the context of this proceeding. At the outset of a backpay proceeding before the NLRB, the General Counsel, who generally is tasked with representing the injured party in NLRB proceedings, has a duty to investigate and establish that an employee looked for work. *G & T Terminal Packaging Co., Inc*., 356 NLRB No. 41 (2010). Here, the movant, the Union, bears the burden of establishing that a search for work took place. Thereafter, the employer bears the burden of proof to establish any element that could reduce its gross backpay liability, including the insufficiency of an employee's search for work or interim earnings. *Regency Grande*

Nursing & Rehabilitation Center, 354 NLRB 832, 837 (2009). Once it has been established that backpay is due, "the burden is upon the employer to establish facts which would . . . mitigate that liability." *RSN & Assocs., Inc. and UNITE HERE Local 49, UNITE HERE!, AFL-CIO*, 358 NLRB No. 107, at * 7 (2012) (quoting *NLRB v. Brown & Root, Inc*., 311 F.2d 447, 454 (8th Cir. 1963); *Mastro Plastics Corp*., 136 NLRB 1342, 1346 (1962)).[18] Under NLRB precedent, if the employer shows that comparable jobs were available, the burden then shifts to the Union to establish that the employee made reasonable efforts to seek such jobs. *See Iron Workers Local 373* (Building Contractors), 295 NLRB 648, 655 (1989); *Fluor Daniel, Inc*., 351 NLRB 103, 104–105 (2007); *St. George Warehouse*, 351 NLRB 961 (2007). As applicable, we apply these respective burdens below.[19]

Generally, we determine whether an employee had increased earnings from outside employment by comparing 2010 outside earnings to 2009 outside earnings. We reject the City's argument that an employee's prior three years of outside income should be averaged and compared to their 2010 outside income to determine whether there were interim earnings. The Board used an averaging of 2007-2009 work hours in its gross backpay formula because we concluded that this was a better predictor of the estimated number of hours hearing officers would have worked in 2010 had the 1,000 hour cap not

[18] The employer bears the burden of establishing all elements that could reduce its gross backpay liability. *Regency Grande Nursing & Rehabilitation Center*, 354 NLRB 832, 837 (2009).

[19] Generally, the Union argues that increases in an Affected Hearing Officer's outside employment was due to a natural fluctuation in their work and that the City did not meet its burden of proof to demonstrate otherwise or that there existed suitable employment that Affected Hearing Officers could have obtained had they applied.

been imposed. Here, the evaluation of whether an employee's outside income should be considered interim earnings does not require any estimation or averaging. Our reliance upon the Affected Hearing Officers' testimony concerning the outside work they in fact performed and their actual outside income in 2009 and 2010 is an accurate and reasonable method to determine what amount of outside income should be deducted as interim earnings. The record evidence does not demonstrate that the averaging methodology proposed by the City would be more accurate. We have created a record regarding the amount of outside employment that Affected Hearing Officers worked or the reasons that they were able to perform that work.

A. Affected Hearing Officers Whose Work Search is Not Contested

1. Affected Hearing Officers Who Had No Interim Earnings

Amy Jill Baranoff

We find that Baranoff received $3,318.75 in unemployment insurance compensation, which will reduce her gross backpay. We also find that she had increased outside income in 2010, but that these earnings do not reduce her backpay.

Baranoff's history of outside net income is as follows: in 2007, she worked as a *per diem* attorney and earned approximately $1,500; in 2008, she worked at Transit Adjudication Bureau and earned $4,342; in 2009, she worked at Small Claims Assessment Review ("SCAR") and earned $2,100; in 2010, she worked at SCAR and earned $3,492.

Baranoff testified that when SCAR would contact her with available opportunities to work as a Hearing Officer, she accepted the work that was offered. Usually, she would work at SCAR on days when she was not already scheduled to work for the City. On rare

occasions, she would leave City work one to one-and-one-half hours early in order to get to a SCAR hearing. She wrote up her SCAR cases on weekends and in the evenings.

Based on the record, we find that Baranoff's increased income in 2010 resulted from increased work offers from SCAR, which would have occurred regardless of the City's improper practice. We credit Baranoff's testimony that she performed this work, and it did not interfere with the hours she worked for the City prior to the cap. Further, there is no evidence that she sought or was given increased SCAR assignments as a result of the cap. The City has not demonstrated otherwise. Accordingly, we find her backpay should not be offset by her 2010 outside earnings.

Based upon our formula, we find that as a result of the improper practice, Baranoff lost 418.88 hours, which at the rate of $39.47, results in a loss of $16,533.19. Her gross backpay is reduced by $3,318.75 she received in unemployment insurance compensation. The backpay award is $13,214.44.

Susan Brand

We find that Brand's gross backpay shall not be reduced by any interim earnings. Brand had outside earnings in 2010 that were attributable to employment she held prior to 2010. In addition, this income did not increase in 2010 as compared to previous years. Therefore, nothing will be deducted from her gross backpay.

Based upon our formula, we find that as a result of the improper practice, Brand lost 166 hours, which at the rate of $39.47, results in a loss of $6,552.02. The backpay award is $6,552.02.

Laurie Cohen

We find that Cohen's gross backpay shall not be reduced by any interim earnings. Cohen had no income other than her income from the City in 2010. Therefore, nothing will be deducted from her gross backpay.

Based upon our formula, we find that as a result of the improper practice, Cohen lost 99.5 hours, which at the rate of $39.47, results in a loss of $3,927.27. The backpay award is $3,927.27.

Judith Cox

We find that Cox's increased 2010 outside earnings were due to more offers of teaching work, which, we find, she would have performed regardless of the City's reduction in hours. Therefore, we find she had no interim earnings to offset her gross backpay.

Prior to 2010, Cox had outside employment as an adjunct professor at CUNY. In 2010, her outside income increased as compared to previous years. Cox's history of outside earnings is as follows: in 2007, she earned $2,658; in 2008, she earned $9,761; in 2009, she earned $5,391; in 2010, she earned $11,472.

We credit Cox's testimony that in 2010, she received more teaching assignments and her pay rate increased from $72 per hour in 2009 to $74 in 2010. Cox's teaching assignments were for courses held in the evenings and occasionally on Saturdays.[20] She stated that she preferred teaching to hearing officer work and that she always accepted offers to teach.

[20] In previous years, she occasionally worked for the City on Saturday, but not in 2010. She testified that if there had been a conflict, she would have opted to teach at CUNY instead of working for the City.

The Union argues that Cox's increased 2010 outside income was due to a normal fluctuation in assignments, and that work was performed during evenings and weekends. Therefore, the Union argues that Cox did not have any 2010 income that should be deducted from her gross backpay. The City argues that the increase in her income from 2009 to 2010 cannot solely be the result of the small increase in pay rate. It also argues that, in 2010, when her income as Hearing Officer declined, she chose to accept additional teaching assignments.

We find that Cox's 2010 income was from work performed in the evenings and Saturdays, times when she would otherwise not be working for the City. Further, based on her testimony that she has always accepted offers to teach, we find that she would have accepted the increased number of teaching assignments regardless of the decrease in City hours. Therefore, we find that the increased income should not offset her backpay.

Based upon our formula, we find that as a result of the improper practice, Cox lost 393.80 hours, which at the rate of $39.47, results in a loss of $ 15543.29. The backpay award is $ 15543.29.

Daniel Curry

We find that Curry received $4,050 in unemployment insurance compensation in 2010. As we find that Curry had no interim earnings, his backpay will be offset by that amount.

Curry's history of outside employment is as follows: during 2007 through 2010, he had his own legal practice. He earned the following net income; in 2007, he earned $2,741; in 2008, he earned $12,063; in 2009, he earned $620; in 2010, he earned $835.

Curry testified that his earnings in 2010 were greater than 2009 because he worked five additional hours in his private practice. He noted that he may have also worked ten additional hours in 2010, paid at a rate of $ 200 per hour, that were not paid until 2011. He stated that his efforts to obtain business were the same in 2010 as during previous years and that his higher earnings were a result of normal fluctuations.

We find that Curry's increased earnings in 2010 were a result of a slight increase in the hours of work he performed in 2010, which was is normal in a private law practice. There is no evidence that he sought or took on any additional work as a result of the City's improper practice. Accordingly, we find his backpay award should not be offset by his 2010 outside earnings.

Based upon our formula, we find that as a result of the improper practice, Curry lost 521.06 hours, which at the rate of $39.47, results in a loss of $20,566.24. His gross backpay is reduced by $4,050 he received in unemployment insurance compensation. The backpay award is $16,516.24.

Dorothy Dolan

We find that Dolan's gross backpay shall not be reduced by any interim earnings. Dolan had no income other than her income from the City in 2010. Therefore, nothing will be deducted from her gross backpay.

Based upon our formula, we find that as a result of the improper practice, Dolan lost 617.64 hours, which at the rate of $39.47, results in a loss of $24,378.25. The backpay award is $24,378.25.

Michelle Jacobowitz Gallagher

We find that Gallagher's gross backpay shall not be reduced by any interim earnings. Gallagher had increased outside earnings in 2010 that were attributable to employment she held prior to 2010, however we do not find that these were interim earnings. Therefore, nothing will be deducted from her gross backpay.

Gallagher's history of outside earnings is as follows: from 2007 through 2010, she worked as an arbitrator for FINRA on a per case assignment basis, with the pay rate ranging from $ 200 to $ 475 per day. She had the following net income: in 2007, she earned $390; in 2008, she earned $1800; in 2009, she earned $1,343; in 2010, she earned $8,607.

Gallagher testified that her work for FINRA was generally performed on weekends and nights; largely it was work not requiring live hearings, such as deciding motions, writing decisions on the papers, holding telephone conferences. She stated that her increased income at FINRA stemmed from the fact that mortgage and financial crisis resulted in more individuals filing complaints with FINRA. She worked her FINRA schedule around her City work because the majority of her work and earnings came from the City. Thus, she would occasionally decline offers to work for FINRA when she was already scheduled to work for the City. In previous years, she accepted the majority of the work FINRA offered her, but in 2010, she was concerned about the 2010 reduction of hours at the City, and therefore accepted any work FINRA offered her that did not interfere with her work for the City.

We find that Gallagher's earnings increased because she was offered and accepted more work from FINRA. Generally, she performed her FINRA work when she was not

scheduled to work for the City and never refused work for the City. Therefore, we find that her backpay should not be offset by her 2010 earnings from outside employment.

Based upon our formula, we find that as a result of the improper practice, Gallagher lost 156.33 hours, which at the rate of $39.47, results in a loss of $6,170.35. The backpay award is $6,170.35.

Mark Goichman

We find that Goichman's backpay shall not be offset because prior to 2010; he had outside employment, and in 2010, his income from this employment did not increase as compared to previous years. We find no interim earnings will be deducted from his gross backpay as his outside earnings were attributable to previously held employment.

Based upon our formula, we find that as a result of the improper practice, Goichman lost 535.75 hours, which at the rate of $39.47, results in a loss of $21,146.05. The backpay award is $21,146.05.

Steven Jackson

We find that Jackson received $3,240 in unemployment compensation in 2010. As he had no interim earnings, his backpay will be offset by that amount.

Based upon our formula, we find that as a result of the improper practice, Jackson lost 399.03 hours, which at the rate of $39.47, results in a loss of $ 15749.71. His gross backpay is reduced by $3,240 her received in unemployment insurance compensation. The backpay award is $ 12509.71.

Patrick McAuliffe

We find that McAuliffe received $8,100 in unemployment compensation in 2010. As he had no interim earnings, his backpay will be offset by that amount.

Based upon our formula, we find that as a result of the improper practice, McAuliffe lost 470.25 hours, which at the rate of $39.47, results in a loss of $18,560.77. His gross backpay is reduced by $8,100 he received in unemployment insurance compensation. The backpay award is $10,460.77.

Anthony Mini

We find that Mini had no interim earnings that should reduce his gross backpay. Mini worked for ECB and TLC from 2008 through 2010. From 2007 through 2010, Mini was a partner in a law firm of which he was a fifty-percent shareholder. In this position, he received at various times both a salary and/or proceeds from profit sharing. Mini reported that in 2007, when he did not yet work for the City as a Hearing Officer, he earned a $50,000 salary from the law firm, with the net wages being approximately $35,000 to $40,000; he received no profit from the law firm that year. In 2008, he received no salary or profit from the law firm. In 2009, he earned $5,696 in profit as a shareholder in the firm. In 2010, he earned $5,425 in shareholder profit. Mini spent more time in his law office in 2010, but did not earn a salary from his practice that year.

The Union notes although Mini received shareholder profits, that he had no outside salary income from 2008 through 2010, and shareholder profits are not an appropriate offset to gross backpay because they are not earned wages. Moreover, the Union argues that the profits Mini received in 2010 were lower than in 2009, and, therefore, even if shareholder profits were considered earnings, Mini had no increased earnings in 2010. The City argues that Mini did not provide the Schedule C of his 2010 income tax return, which records income from self-employment as directed, and, as a

result, he should be excluded from consideration for a remedy. The City asserts that Mini has failed to provide his basis for determining his net income.

We find that the tax documentation that Mini provided demonstrates that, in 2010, he only received profits as a shareholder in his law firm, which we will not consider income appropriate to be interim earnings. *John T. Jones Construction, Co., Inc.*, 352 NLRB No. 126 (2008) ("unearned income . . . are not interim earnings"). Even if we were to consider his shareholder profits as interim earnings, it is clear that his shareholder income in 2010 were lower than his earnings in 2009. Therefore, we find that he had no increase in outside earnings in 2010. Thus, no offset will be taken from his backpay award.

Based upon our formula, we find that as a result of the improper practice, Mini lost 189.13 hours, which at the rate of $39.47, results in a loss of $7,464.76. The backpay award is $7,464.76.

Rachel Nash

Nash had no outside income in 2010. The City concedes and we find that her backpay shall not be offset.

Based upon our formula, we find that as a result of the improper practice, Nash lost 142.13 hours, which at the rate of $39.47, results in a loss of $5,609.67. The backpay award is $5,609.67.

Robert Nisely

We find that Nisely was continuously available for work in 2010 and did not have any interim earning that should reduce his gross backpay. Nisely's history of outside earnings is as follows: during 2007 through 2010, he worked as a hearing officer for

FINRA and held special education hearings for the State of New York Department of Education. He testified that he did not control the assignments he received from either source. In 2010, he held 15 days of special education hearings, whereas he held 30 days of hearing in 2009. As net income from both positions, he received $1,628 in 2007, $9,620 in 2008, $8,234 in 2009, and $72,089 in 2010. However, Nisely provided documentation, including invoices and records to demonstrate that a significant portion of the income he received in 2010 was earned from work performed in 2009.[21] Adjusting his earnings to reflect the year in which the money was earned, not paid, shows in 2010, he earned $42,417.86 in outside income; in 2009, he earned $38,458.25 in outside income. Therefore, Nisely's earnings increased from 2009 to 2010 by only $3,959.61. Nicely also testified that most of this outside work was performed at night or on weekends. He stated that he could have performed these outside work assignments and his usual hours as a Hearing Officer had the 1,000 hour cap not been imposed.

The Union argues that Nisely's outside work would not have interfered with any regular hours he would have received as a Hearing Officer had the City not imposed the 1,000 hour cap and therefore none of his outside income should be considered interim earnings. The City argues that Nisely should not be eligible for any backpay because he was not available for work during some periods of 2010.[22] Alternatively, it argues that

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[21] The City argues that to the extent that Nisely performed work in 2010 for which he was paid in 2011, such income should offset his backpay award. However, Nisely did not perform any work in 2010 for which he was paid in 2011.

[22] The City relies on Nisely's testimony at the initial improper practice hearing that he did not expect to reach the 1,000 hour cap that year because he took time off to "attend to other types of business." (October 1, 2010 Tr. at 190). This remark was made in the context of Nisely's description of how many hours he was working for the City in 2010 and was not explained. The City also raises Nisely's comment that his ability to reach

Nisely's interim earnings should be calculated based on the total income he received in 2010, which was significantly greater than his income in previous years.

We find that Nisely was continuously available for work for the City in 2010. We credit Nisely's testimony that he performed most of his outside employment at night or on weekends, the only days that would have posed a conflict with his City work were those in which he held hearings for outside entities. However, his credible testimony was that the number of hearing days he attended in 2010 was only 15 as compared to 30 days in 2009, when his hours for the City exceeded the 1,000 hour cap. Therefore, we cannot conclude that he was performing his outside employment in 2010 during hours that he would have been working for the City had the cap not been imposed. Further, although Nisely had increased earnings in 2010 compared to previous years, we find that these earnings were due to a natural fluctuation in his pre-existing business. We find that there is no evidence that Nisely took on additional hearings in 2010 that account for his increased earnings. In fact, he appears to have had fewer days of hearing in 2010 than in 2009. Accordingly, the City has not demonstrated that his increased 2010 earnings were the result of anything other than a natural fluctuation in his outside employment. Thus, the increased 2010 earnings are not interim earnings and will not offset his gross backpay.

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the 1,000 cap was also limited in 2010 because the City stopped assigning hearing officers default hearing work that was performed after regular work hours. There was no evidence presented to support the conclusion that Nicely did not reach the 1,000 hour cap as a result of the loss of the default hearing work. Therefore we cannot find that he was not eligible for a backpay remedy on this basis.

Based upon our formula, we find that as a result of the improper practice, Nisely lost 472.42 hours, which at the rate of $39.47, results in a loss of $18,646.42. The backpay award is $18,646.42.

Dianne Roberts

We find Roberts had no interim earnings in 2010 to be deducted from her gross backpay.

Roberts' history of outside earnings is as follows: during 2007 through 2010, she had her own practice working as a law guardian. As net income, in 2007, she earned $2,023; in 2008, she had a loss of $3,977; in 2009, she had a loss of $9,716; in 2010, she earned $36,442. [23]

Roberts testified that as a law guardian, she receives her assignments from the Court, and does not have the ability to solicit for additional law guardian work. She receives payment from the courts for law guardian work when a final order is issued. She testified that she performed work in 2010 and earlier for which she had still not yet been compensated at the time of the hearing, one dating back to 2007. Roberts was not able to apportion her income precisely to the corresponding year in which it was earned. She noted that she kept records of her work performed, but that the court might modify the rate of pay and reject some of her expenses. Generally, as in previous years, Roberts performed her private practice in evenings, on the weekends, and on Fridays when she did not work for the City. She testified that, because of the cap, she was able to devote more time to her work as a law guardian in 2010, mainly using the additional time to do administrative work.

[23] The Union established that only $14,957.70 was derived from work performed in 2010, with the majority of her 2010 income coming from work performed in 2008 and 2009.

According to the Union, Roberts performed substantially the same amount of outside work in 2010 as she did in previous years. She never refused work from the City or any other source. Therefore, her increased earnings should not result in an offset. The Union notes that as a court-appointed law guardian, the guardian is often paid at the end of the guardianship, which could be years after the initial assignment.

The City requested that Roberts attempt to determine the hours worked in her private practice during each year, but she did not maintain records on an hourly basis. Thus, she is unable to provide information that would allow the Board to credit her income to the year in which her work was performed. According to her 2010 Schedule C, her 2010 income greatly exceeded her averaged income from the prior years. Thus, any backpay award that she might receive should be reduced by her increased 2010 income.

Although we understand the City's concern that Roberts was unable to provide a clear accounting of her hours worked in particular years, we find that a specific determination of these earnings is not necessary. The relevant concern for us is whether Roberts 2010 outside income, regardless of the precise amount, increased as a result of the improper practice, and we find that it did not. The fact crucial to our determination is that Roberts had no control over the amount of law guardian work the court assigned to her, and she testified that payment for such work was determined by the court at the resolution of a matter. Therefore, we find that none of her increased earnings in 2010 constitute interim earnings.

Based upon our formula, we find that as a result of the improper practice, Roberts lost 239.25 hours, which at the rate of $39.47, results in a loss of $9,443.20. The backpay award is $9,443.20.

Michael Schwartz

We find that Schwartz received $9,461 in unemployment insurance compensation in 2010. Schwartz did not have increased outside earnings in 2010, and, therefore, he had no interim earnings. His backpay will be offset by that amount he received in 2010 from unemployment insurance.

Based upon our formula, we find that as a result of the improper practice, Schwartz lost 823.47 hours, which at the rate of $39.47, results in a loss of $32,502.36. His gross backpay is reduced by $9,461 he received in unemployment insurance compensation. The backpay award is $23,041.36.

2. **Affected Hearing Officers With Interim Earnings**

Isabeth Gluck

We find that Gluck's gross backpay will be offset by her gross earnings from her self-employment.

Gluck had increased income in 2010 as compared to previous years. Prior to 2010, Gluck did not have any outside employment. In 2010, she started a computer business from which she earned $940 in gross income. She testified that she did not declare this income on her 2010 taxes because her expenses exceeded her income. The City argues her gross income should be considered interim earnings rather than net because it asked Gluck to produce records regarding the business costs she claimed. She

did not do so; therefore, the City was deprived of the opportunity to question her about such expenses.

Although we held above that net earnings from self-employment should be used to offset gross backpay, Gluck did not provide a basis, such as her 2010 tax return, to confirm her assertion that her self-employment resulted in a net loss. The record contains no evidence from which to make a determination of the extent of her business expenses. Therefore, her backpay will be offset by the gross amount of $940.

Based upon our formula, we find that as a result of the improper practice, Gluck lost 85.08 hours, which at the rate of $39.47, results in a loss of $ 3,358.11. She had interim earnings of $940. The backpay award is $ 2,418.11.

Igor Oberman

We find that Oberman is not entitled to a backpay award due to his voluntarily unavailability and his decision to decline ECB's offer to work in the Appeals Unit.

Oberman was unavailable to work for the City from April 9, 2010 to June 25, 2010, while he explored the possibility of running for New York Senate. In June 2010, he informed the TLC and ECB that he desired to be restored to the schedule. He requested five days per week at TLC, but TLC scheduled him for only two or three days per week. ECB offered him work as a Hearing Officer in the Appeals Unit, where he worked prior to his two-month leave. Oberman testified, however, that he asked to conduct live hearings and thus refused ECB's offers to work in the Appeals Unit. Specifically, although prior to his leave, he previously worked in the Appeals Unit, he stated:

> I asked to be transferred. The appeals unit [is] considered to be . . . something that all the other ALJs desire to get into

> . . . because that's a unit where it's a higher position of opinion-making for the agency. When I asked ECB whether I could be put back to doing hearings because it was something that I wanted to just start doing hearings, they said no, that you have to go back to only doing appeals, which is very unusual since most people want to get into appeals. [B]y telling me to go back into appeals, it was very clear that they would not be able to put me back on the calendar that I wanted and give me the days that it wanted, it was clearly an indication that they don't want me back because at the same time [it's] an easy transfer which is allowed for anybody [but] wasn't done for me.

(Tr. at 323-24).

The Union argues that Oberman could have easily made the same number of hours that as in the past, if ECB scheduled him to perform live hearings instead of appeals work. ECB's failure to schedule him to do his preferred work should therefore not be held against him. The City argues that Oberman's work at ECB would have ended early in 2010 irrespective of the 1,000 hour cap. The City notes that most of the reduction in Oberman's 2010 hours resulted from his unavailability in April and May 2010 and his declining the work that ECB offered, and which he had in fact been performing before he voluntarily absented himself from ECB. In fact, for most of 2010, Oberman was not dually employed because he ceased accepting work from ECB at the end of March 2010. Accordingly, the record evidence establishes that Oberman's reduction in hours was not the result of the 1,000 hour cap.

It is undisputed that Oberman was unavailable for work from April 9, 2010 to June 25, 2010 in order to explore a run for New York State Senate. We also find that when Oberman declined ECB's offer to work as a Hearing Officer in the Appeals Unit, he voluntarily quit his position with ECB and failed to make reasonable efforts to mitigate. Therefore, we find that he was unavailable to work for TLC and ECB from

April 9 through June 25, 2010, for 11 weeks. We also find that, as to ECB, he was unavailable or voluntarily quit from June 25, 2010 through the end of the year, a total of 27 weeks. As discussed above, we find that Oberman is not entitled to a backpay award due to his voluntarily unavailability and his decision to decline ECB's offer to work in the Appeals Unit. Based upon these actions, we are unable to conclude that he would have reached the 1,000 hour cap, thus, there is no showing that he was injured by the improper practice.[24] Therefore, we find him ineligible for a backpay award.

Diane Rivers

We find that Rivers received $8,120 in unemployment insurance compensation in 2010. In addition, she had $1,334 in interim earnings, in gross income, from her self-employment, which reduces her gross backpay.

Rivers' history of outside earnings is as follows: in 2007, she earned $11,329 from her private practice. In 2008 and 2009, she gave up her private law practice and had no outside income. In 2010, as a self-employed life coach she earned gross income of $1,334 and had a $49 net loss. Her work as a life coach was performed over the telephone in the evenings.

The Union notes that Rivers' outside earnings in 2007 are not representative of her 2010 potential outside earnings because they stem from a full time private law practice that she subsequently closed. The City argues that Rivers' 2010 business costs should not be considered because she failed to provide an unredacted copy of Schedule C

[24] Oberman also had increased outside income in 2010 as compared to previous years. In 2010, he earned $1,500 by working as a Community Assistant for the Brooklyn Borough President. The income from this newly acquired employment is interim earnings. Were we to have found him eligible for backpay, these earnings would have reduced his award.

of her 2010 tax return, and thus, there is no basis for evaluating her alleged business expenses. The Board should thus reduce her gross backpay by all of her 2010 earnings.

Although we held above that net earnings from self-employment should be used to offset gross backpay, Rivers redacted her 2010 tax return to such a degree that we are unable to confirm the basis for her statement that her self-employment resulted in a net loss. We find that Rivers did not provide sufficient information from which to discern the basis for the deductions resulting in her net loss of $49. Therefore, we will consider her 2010 gross income her interim earnings and deduct that amount from her gross backpay.

Based upon our formula, we find that as a result of the improper practice, Rivers lost 865.83 hours, which at the rate of $39.47, results in a loss of $34,174.31. Her gross backpay is reduced by $8,120 she received in unemployment insurance compensation and $1,334 in interim earnings. The backpay award is $ 24,720.31.

Christopher Stephens

We find that Stephens' backpay will be offset by the $2,733.75 in unemployment insurance compensation he received in 2010. In addition, he had $750 in income from new employment in 2010 that will be deducted from his gross backpay.

Stephens's history of outside earnings is as follows: in 2010, he worked for the U.S. Census as an enumerator, from which he earned approximately $750, at a rate of $18.50 per hour. He testified that he obtained this work to make up for the loss of hours from the 1,000 hour cap. He performed the census work either in the evenings or on days when he was not scheduled to work as a Hearing Officer for the City.

We find that Stephens' 2010 income resulted from work he acquired after the cap was instituted, which he sought specifically because of the loss of hours resulting from the improper practice. Accordingly, his backpay shall be reduced by $750 and by the unemployment compensation that he received in 2010.

Based upon our formula, we find that as a result of the improper practice, Stephens lost 543.83 hours, which at the rate of $39.47, results in a loss of $21,464.97. His gross backpay is reduced by $2,733.75 he received in unemployment insurance compensation and $750 in interim earnings. The backpay award is $17,981.22.

Geanine Towers

We find that Towers' gross backpay will be reduced by $1,381.45, representing her five weeks of unavailability. In addition, she had $12,275 income from new employment and $5,366.25 in unemployment insurance compensation, which will reduce her gross backpay.

Towers took an unpaid maternity leave from the end of 2009 until the middle of February 2010. The City argues that the estimate of how many hours Towers would have worked during 2010 should be adjusted to reflect her five-week period of unavailability. The Union argues that Towers was still able to reach her 1,000 hours from February through September despite her maternity leave. Thus, she clearly could have worked additional hours that year regardless of her leave.

It is undisputed that Towers was unavailable from the beginning of the year until the middle of February, for a total of approximately five weeks. The Board determined that she would have worked 364.28 hours over 1,000 in 2010, or an average of seven

hours per week. Therefore, we find that her unavailability amounts to a reduction in 35 hours, and she is eligible for gross backpay for 329.28 hours.

Prior to 2010, Towers did not have outside employment. She earned $12,275 in 2010 from her various legal positions as a New York State law guardian and an appellate attorney.

In 2009, Towers first started seeking other work because she was pregnant with twins. She became more concerned about her income after hearing that the 1,000 hour cap was going to be implemented. When she returned to work for the City after her maternity leave, she worked five days a week, seven hours per day, which was more than she had worked previously. Her Hearing Officer assignments began to taper off in June 2010, and she reached the 1,000 hour cap completely in September 2010. She found outside employment writing appellate briefs for the Appellate Division, which began in August 2010 while she still worked as a Hearing Officer. During that time, she performed the appellate work at night and on the weekends. After reaching the cap, she spent her time writing briefs and began collecting unemployment insurance. She also worked as a New York State law guardian and assigned counsel as an 18(b) Panel appellate attorney. She testified that she could have worked 35 to 40 hours per week in outside employment at night or on the weekend, while still performing her work for the City.

The City argues that Towers performed appellate work when her hours as a Hearing Officer were tapering off or had been completed. Thus, according to the City, her outside work was acquired as a result of the 1,000 hour cap and effectively replaced

her work as a Hearing Officer. Therefore, the 2010 income from such work should offset her gross backpay.

We credit Towers testimony that she sought outside employment because the cap was being implemented. Aside from the work she performed at night and on weekends in August 2010, the great majority of her outside employment was performed after her City employment ceased. Therefore, we find that such income was earned as a result of the City's improper practice, and is, therefore, interim earnings that will be deducted from her gross backpay.

Based upon our formula, we find that as a result of the improper practice, Towers lost 329.25 hours, which at the rate of $39.47, results in a loss of $12,995.49. Her gross backpay is reduced by $5,366.25 in unemployment insurance compensation and $12,275 in interim earnings. Therefore, she receives no backpay award.

B. Affected Hearing Officers for Whom the City Challenges the Sufficiency of Work Search Efforts

Beth Badner

We find that Badner's work search was sufficient and that said search would have satisfied any applicable duty to mitigate.

Badner's last day of employment as a Hearing Officer in 2010 was December 14. Badner testified that she tried to find new employment by looking on various websites including Pslawnet, Simplicity, and other services. She looked only for part-time work that would not interfere with her work as a Hearing Officer for the City. She sent between 20 and 30 resumes and had 5 or 6 interviews. She was offered outside *per diem* legal work in October through December during hours that she was scheduled to work for the City. She testified that she declined to accept the offer because it would conflict with

her City hours and she did not like the work. Badner was hired by the New York State Liquor Authority, but her employment there did not begin until 2011.

The City argues that Badner's gross backpay should be reduced by the amount she would have received if she had not turned down any opportunities to work. We find that her refusal to aggravate her own loss is patently reasonable, and, thus, do not penalize her for rejecting this work opportunity. We find that Badner's backpay shall not be reduced due to her decision not to accept the outside employment offer that would have required that she relinquish her Hearing Officer work scheduled with the City. She had no interim earnings in 2010, and, therefore, her gross backpay will not be reduced.

Based upon our formula, we find that as a result of the improper practice, Badner lost 434.17 hours, which at the rate of $39.47, results in a loss of $17,136.69. The backpay award is $17,136.69.

Susan Barbour

We find that Barbour's work search was sufficient.

Barbour's last day of employment as a Hearing Officer in 2010 was November 12. Barbour applied to work as a hearing officer for the New York State Department of Education in 2009. She was offered a position there in the spring of 2010. She received training for the position in July 2010, and was told that she would have to do additional training in November 2010. However, her work for the DOE did not commence until 2011. She testified that initially she understood that she could start working for DOE after the July training and therefore did not engage in an active search for any other employment. She did not want to look for and commit herself to new employment when she had already committed herself to work for DOE commencing in 2011.

We find that Barbour would have satisfied any applicable duty to mitigate. She obtained outside employment during 2010 but, through no fault of her own, the job did not commence until 2011.

Based upon our formula, we find that as a result of the improper practice, Barbour lost 700.75 hours, which at the rate of $39.47, results in a loss of $27,658.60. The backpay award is $27,658.60.

Stephen Haken

We find that Haken conducted a sufficient search for work, and his backpay will not be reduced by his increased 2010 income from a law practice.

Haken's last day of employment as a Hearing Officer in 2010 was December 29. He testified that he looked for *per diem* administrative law judge positions that would allow him to continue working as a Hearing Officer for the City. He saw a posting for a position as a hearing officer for the DOE in 2010 for which he applied, but he was not offered work there until 2011. We find that Haken looked for and obtained comparable employment. Therefore, his search for work would have satisfied any applicable duty to mitigate backpay.

Haken's history of outside earnings is as follows: during 2007 through 2010, he had his own legal practice. As net income, in 2007, he had a loss of $8,910; in 2008, he had a loss of $3,158; in 2009, he had a loss of $4,042; in 2010, he earned $2,564. He testified that his increased earnings in 2010 were due to a matrimonial case, which began in 2009 and was paid in 2010. He stated that he never refused work from the City and that he performed his private practice work on days when he was not scheduled to work for the City.

The Union argues that Haken's increased income in 2010 was due entirely to a matrimonial case and is an anomaly representing steady working hours within the same range over the years. The City notes that the loss of those hours because of the 1,000 hour cap gave Haken significantly more time to devote to his legal practice. Using net earnings as a comparison results in an even greater improvement because in the prior years he incurred losses, while in 2010, he made a profit of $2,504.

We find that Haken's increased outside income in 2010 was the result of work he performed in the regular course of his private practice. Although the City argues that its improper practice allowed him to devote more hours to his private practice, there was no evidence that Haken's increased 2010 income was due to his working more hours. Instead, we credit Haken's testimony that the increase in earnings was a result of work he performed at least in part prior to 2010.

Based upon our formula, we find that as a result of the improper practice, Haken lost 320.33 hours, which at the rate of $39.47, results in a loss of $12,643.43. The backpay award is $12,643.43.

Andrea Pfeiffer

We find that Pfeiffer satisfied any applicable duty to mitigate and her gross backup will not be reduced by interim earnings.

Pfeiffer's last day of employment as a Hearing Officer in 2010 was December 30. Prior to December 30, 2010, Pfeiffer looked for new positions on websites including nyc.gov, Craigslist, CUNY, idealist.org, and abovethelaw.com. She largely looked for part-time and temporary work because she did not want to give up her position as a Hearing Officer for the City. She was particularly interested in administrative law judge

and hearing officer jobs. Pfeiffer was not offered and did not obtain any new employment. Nevertheless, we find that the evidence establishes that under the circumstances here presented, Pfeiffer made a good faith effort to look for comparable employment.

Pfeiffer did not have increased outside income in 2010, and therefore, her gross backpay is not reduced.

Based upon our formula, we find that as a result of the improper practice, Pfeiffer lost 29.50 hours, which at the rate of $39.47, results in a loss of $1,164.37. The backpay award is $1,164.37.

Marion Posner

We find that Posner satisfied any applicable duty to mitigate and her backpay will not be reduced by her increased 2010 earnings, which we find to have resulted from natural fluctuations in her legal practice.

Posner's last day of employment as a Hearing Officer in 2010 was December 30. Posner sought to increase her legal practice in 2010. She contacted former clients and associates to inquire about whether they knew of any work. She attended bar association events to network. None of these avenues resulted in any new clients or work. Nevertheless, the testimony establishes that she made a good faith effort to look for comparable employment. Therefore, we find that her search for work satisfied any duty to mitigate.

Posner's history of outside earnings is as follows: during 2007 through 2010, she worked as an adjunct professor at NYU and had her own real estate legal practice. In 2009 and 2010, she also worked for Nassau County as a SCAR Hearing Officer. In 2007,

she earned $6,046.50 from her NYU teaching and $329 in net earnings her law practice; in 2008, she earned $1,769 in gross income from NYU; in 2009, she had a net loss of $414; in 2010, she had gross earnings from NYU of $3,195 and net earnings of $1,838. She testified that her outside work was performed either during times that she was not scheduled to work for the City, either during evenings, weekends, or on Fridays.

Posner's income from outside employment in 2010 reflect an increase over 2009. However, she credibly testified that she did not obtain additional work in 2010 as a result of her attempts to get more work. Therefore, we conclude that her increased 2010 income was a result of the normal fluctuations in earnings from a law practice.

Based upon our formula, we find that as a result of the improper practice, Posner lost 318.17 hours, which at the rate of $39.47, results in a loss of $12,558.17. The backpay award is $12,558.17.

Joan Silverman

We find that Silverman satisfied any applicable duty to mitigate and her backpay will not be reduced by her increased 2010 earnings.

Silverman's last day of employment as a Hearing Officer in 2010 was December 28. Silverman initially stated that she did not look for work in 2010. However, at the hearing, she testified that in 2010 she applied for and was ultimately hired as a judge to adjudicate parking violations. She started this position in 2011. Based on her testimony, we find that Silverman made a good faith effort to look for work. Her search for work satisfies the duty to mitigate.

Silverman's history of outside earnings is as follows: during 2007 through 2010, she worked for Nassau County as a SCAR Hearing Officer. Her net outside earnings are

as follows: in 2007, she earned $1,535; in 2008, she earned $4,826; in 2009, she earned $3,608; in 2010, she earned $3,660.

Silverman testified that she generally worked about 15 to 18 days per year for SCAR. She testified that SCAR assigns work on a rotational basis and that she had no control over when SCAR would offer her work. She also stated that during all relevant times, she worked for both the City agencies and SCAR, and her work for SCAR never conflicted with her work for the City.

We find that Silverman's increased earnings in 2010 resulted from an increase in work offered by SCAR and was not a result of the 1,000 hour cap. Accordingly, we find that her 2010 increased income is not interim earnings and her gross backpay will not be reduced.

Based upon our formula, we find that as a result of the improper practice, Silverman lost 501.17 hours, which at the rate of $39.47, results in a loss of $19,781.18. The backpay award is $19,781.18.

Susan Valcic

We find that Valcic satisfied any applicable duty to mitigate and her gross backpay will be offset by the $2,835 in unemployment insurance compensation that she received. As she had no interim earnings, her backpay will not be reduced by any other amount.

Valcic's last day of employment as a Hearing Officer in 2010 was October 29. Valcic testified that she sent resumes and looked for jobs with the City of New York. Although she stated her job search was sporadic, she recalled applying to the Fire Department, the Police Department, and the legal departments of various agencies. She

received no interviews. Based on Valcic's testimony, she made a good faith effort to look for comparable employment. Therefore, we find that her search for work satisfies any applicable duty to mitigate.

Based upon our formula, we find that as a result of the improper practice, Valcic lost 239.96 hours, which at the rate of $39.47, results in a loss of $9,471.22. She received $2,835 in unemployment insurance compensation. The backpay award is $6,636.22.

C. **Affected Hearing Officers Who Did Not Search for Work**

As stated above, the following employees reached the cap or were told not to return to work on or after November 29, 2010. None of the employees discussed below searched for employment. As set forth in the Discussion above, we find that these employees were under no duty to seek employment, and that under the unique circumstances of this case, it would be unreasonable to require them to search for comparable employment. Below, we discuss their interim earnings or lack thereof.

Laura Fieber

We find that Fieber's gross backpay shall not be reduced as her 2010 outside earnings decreased, and she had no other offsets. The last date in 2010 on which she worked for the City was December 7, 2010.

Based upon our formula, we find that as a result of the improper practice, Fieber lost 193.75 hours, which at the rate of $39.47, results in a loss of $7,647.31. The backpay award is $7,647.31.

Deena Greenberg

We find that Greenberg's gross backpay shall not be reduced since she had no outside earnings or other offsets. The last date in 2010 on which she worked for the City was December 7, 2010.

Based upon our formula, we find that as a result of the improper practice, Greenberg lost 283.07 hours, which at the rate of $39.47, results in a loss of $11,172.77. The backpay award is $11,172.77.

Arthur Kegelman

We find that Kegelman's gross backpay shall not be reduced since he had no outside earnings or other offsets. The last date in 2010 on which he worked for the City was December 15, 2010.

Based upon our formula, we find that as a result of the improper practice, Kegelman lost 378.75 hours, which at the rate of $39.47, results in a loss of $14,949.26. The backpay award is $14,949.26.

Myra Michael

We find that Michael's gross backpay shall not be reduced since she had no outside earnings or other offsets. The last date upon which she worked for the City was December 30, 2010.

Based upon our formula, we find that as a result of the improper practice, Michael lost 5.94 hours, which at the rate of $39.47, results in a loss of $234.45. The backpay award is $234.45.

Gary Sherbell

We find that Sherbell's gross backpay shall not be reduced since we find that his increased 2010 outside earnings were the result of natural fluctuations in his arbitration practice. Sherbell had pre-existing outside employment but made no effort to secure additional outside employment. The last date in 2010 upon which he worked for the City was December 20, 2010. We do not find Sherbell had any interim earnings that will be deducted from his gross backpay.

Sherbell's history of outside earnings is as follows: during 2007 through 2010, he worked as an arbitrator for FINRA, where he was paid $200 for a half-day session and $475 for a full-day session. He reported gross income only: in 2007, he earned $800; in 2008, he earned $1,125; in 2009, he earned $2,900; in 2010, he earned $5,850.

Sherbell testified that he did not control the number of FINRA cases he was assigned. He also stated that the work he performed for FINRA did not affect his availability to work for the City. Largely, his FINRA work was performed at home and on weekends, or in the morning. He stated that most of his FINRA cases in 2010 settled with little hearing required, until December 2010, when he had more hearing dates. As a result of these December 2010 hearings, he earned $3,850.

We find no evidence that Sherbell's increased 2010 income was a result of efforts to seek or obtain additional work at FINRA. Instead, any increase is attributable to an increase in assignments unrelated to the City's improper practice. Accordingly, we do not find Sherbell had any interim earnings that will be deducted from his gross backpay.

Based upon our formula, we find that as a result of the improper practice, Sherbell lost 732.01 hours, which at the rate of $39.47, results in a loss of $28,892.30. The backpay award is $28,892.30.

Michelle Manzione

We find that Manzione received $1,113.75 in unemployment insurance compensation in 2010. Her gross backpay will be reduced by the amount of her unemployment insurance compensation.

Manzione had no new outside earnings. The last date in 2010 she worked for the City was November 29, 2010.

Based upon our formula, we find that as a result of the improper practice, Manzione lost 35.81 hours, which at the rate of $39.47, results in a loss of $1,413.42. Her gross backpay is reduced by $1,113.75 she received in unemployment insurance compensation. The backpay award is $299.67.

Leonard Margolis

We find that Margolis was unavailable for five weeks, and his gross backpay will be reduced to reflect this unavailability. The last date on which he worked for the City in 2010 was December 29, 2010. Margolis had no outside earnings.

Margolis was injured on February 10, 2010. As a result, he did not return to work until the end of March. He stated that two of the weeks when he was injured were intended to be used for his annual two to three week vacation, which he did not take that year. At the most, therefore, he was unavailable to work for four weeks more than any other year. He also testified that after he returned to the Hearing Officer work in March

2010, he never refused any work offered by the City and remained available to work four days per week. In 2010, Margolis worked 838.75 total hours.

The Union argues that Margolis never refused a day of work from the City beyond his absence and did not take his customary vacation. Therefore, his unavailability was not substantial, and he could have easily worked more hours than he was permitted upon his return. The City argues that Margolis' hours in 2010 should be reduced in proportion to the number of hours he was unavailable due to his injury, less the two weeks he would have been on his scheduled vacation.

We find that Margolis was unavailable for five weeks in 2010 due to his injury. Although he was unavailable from February 10 through March 31, a seven-week period, he normally took at least a two week vacation for which he would have generally made himself unavailable. Accordingly, his unavailability due to illness was five weeks. Since his gross backpay is based on 223 hours, his average hours per week is 4.46 hours per week (223 hours divided by 50 weeks), and his hours should be reduced by 22.3 hours. Thus, due to his unavailability, Margolis' gross backpay is based on 200.7 hours.

Based upon our formula, we find that as a result of the improper practice, Margolis lost 200.7 hours, which at the rate of $39.47, results in a loss of $7,921.63. The backpay award is $7,921.63.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that backpay be awarded in accordance with this decision.

Dated: July 10, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

I dissent (see attached opinion) M. DAVID ZURNDORFER
MEMBER

I dissent (see attached opinion) PAMELA S. SILVERBLATT
MEMBER

PETER B. PEPPER
MEMBER

GWYNNE A. WILCOX
MEMBER

DISSENT OF M. DAVID ZURNDORFER IN BCB 2849-10 IN WHICH PAMELA S. SILVERBLATT CONCURS

I dissent. The Majority's decision would award damages totaling more than $405,000 to thirty-two City employees working as part-time hearing officers for time in which they performed absolutely no work. The Majority justifies these awards as constituting pay for hours these employees would have worked were it not for the City's improper practice in limiting the number of hours they were permitted to work in 2010 to 1000 hours.

However, there is no evidence in the record that the damages being awarded by the Majority were *actual* damages that the employees sustained. Instead the Majority arrived at its dollar amounts through use of a make-shift formula founded more on conjecture than fact. This is impermissible because a backpay remedy must be sufficiently "tailored to expunge only the *actual*, and not merely *speculative* consequences" of an improper practice. Sure Tan Inc. v. NLRB, 467 US 883, 900 (1984).

Backpay damages are normally determined based on a factual record with the party seeking damages bearing the burden of proof.[1] In this case, the Union should have had the burden of making a record proving the amount of backpay due each claimant; and the Trial Examiner should have been responsible for assuring that the record was complete. No such record was made in this case. Instead, the Majority took it upon itself to preempt the compilation of such a record and announced a formula which purported to determine how many hours each individual would have worked during 2010 were it not for the cap based solely on the number of hours that each individual worked during the preceding three years. 5 OCB2d 26 (2012).* (referred to herein as "Remedy I").

Putting to one side the propriety of the Board's action in doing so, reliance on that formula is fatally ill-conceived given the unique nature of the hearing officer position. These are part-time jobs being performed by attorneys, many of whom also have private law practices or hold other employment. Furthermore, hearing officers do not have fixed schedules and have significant discretion to accept, reject, cancel or reschedule scheduled hours. The number of hours a hearing officer works can vary from year to year based on many factors such as his or her family situation, the availability of other employment, and changes in the agencies' needs.

This is illustrated by the wide variations in the number of hours that most hearing officers actually worked during 2007, 2008, 2009, and 2011 – years in which there was no cap. It is also illustrated by the fact that in 2010 when the hearing officers were permitted to work up to 1000 hours, fifteen of the thirty-two worked fewer that 950 hours and five worked fewer than 900 hours.[2]

In addition, the Board's formula fails to take into account the sharp reduction in the number of hours available for the hearing officers to work in 2010. The number of hearing officers

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1 Center Construction Co., 355 NLRB No. 198 at p 2 (2010) ("It is the General Counsel's burden to show the amount of gross backpay due each claimant. The burden then shifts to the respondent to negate or mitigate its liability").

2 A chart showing the number of hours worked by each of the 32 hearing officers in 2007, 2008, 2009, 2010 and 2011 is attached.

employed by the City increased from 306 in 2009 to 338 in 2010; while the total number of hours worked by all hearing officers combined fell from 233,543.23 in 2009 to 222,668.67 in 2010. The combined effect of the increase in hearing officers and the decrease in the number of hours to be worked resulted in a reduction in average hours worked per hearing officer from 763 in 2009 to 659 in 2010, a reduction of 13.7%. *Thus a hearing officer who was needed to work 1157 hours in 2009 would on average have been needed for only 999 hours in 2010.*[3]

The Board sought to defend its complete disregard of this sharp reduction in the number of available hours in 2010 by arguing that it could not be assumed that the reduction would be evenly distributed among the hearing officers because "the record shows that individual Hearing Officers worked varying hours." Remedy I at 16n5. But this response misses the point that under the circumstances applying here, a makeshift formula based solely on the number of hours each hearing officer worked during 2007, 2008, and 2009 which fails to take into account a 13.7% drop in available hours per hearing officer in 2010, yields results far too uncertain to be the basis for an award of damages. What this Board said in finding backpay damages speculative in Colella applies here as well: "Under the circumstances, no rational basis exists for making any such finding with an acceptable degree of certainty." Colella, 79 OCB 27, 64 (2007).

As the United States Supreme Court has stated, "It remains a cardinal, albeit frequently unarticulated, assumption that a backpay remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices. ('Only actual losses should be made good....')." Sure-Tan, Inc. v. NLRB, 467 US 883, 900-01 (1984). In that case, the Court reversed the Court of Appeals' award of back pay because it was "not sufficiently tailored to the actual, compensable, injuries suffered by the discharged employees." 467 US at 901. Had the Board here based its award on a review of the facts relating to each individual and tailored its award to the actual compensable injuries suffered by that individual, the result would have been an award of damages that reflected the actual damages (if any) suffered by that individual as a result of the 1,000 hour cap in 2010.

The Board's argument in defense of its use of its make-shift formula is unavailing. In Remedy I. (at. 14), the Board attempted to defend the formula by quoting from an NLRB decision stating that "[a] formula which closely approximates what the [employees] would have earned had they not been [injured] is acceptable if it is not unreasonable or arbitrary under the circumstances." Center Construction Company, 355 NLRB No. 198 at 2 (2010) However, by no stretch of the imagination can it be said that the Board's makeshift formula "closely approximates what the employees would have earned" were it not for the cap.

Furthermore, in Center Construction Company and the two other cases relied on by the Board to support its position, the issue of the amount of back pay lost by each employee had been the subject of hearings dedicated to that issue – hearings in which a complete factual record had

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[3] The average hours worked per hearing officer in 2010 (659 hours) was also far below the average in 2007 (701 hours) and 2008 (707 hours).

been compiled.[4] If a formula such as the one used by the Board here is ever appropriate, it would be in circumstances such as existed in those cases where the record is complete and the facts do not allow any greater precision. In this case, the factual record is incomplete and the formula is being used as a substitute for facts that could have been elicited had the parties and the Trial Examiner been afforded an opportunity to do so.

Finally, in belated recognition of the inadequacy of its makeshift formula, the Board in Remedy I (at 19-20) announced that an individual's availability to work as a hearing officer in 2010 and the number of hours that the hearing officer actually worked in 2011 could be raised by the City as part of its mitigation defense. But the Board's attempt to "fix" the problem by tinkering with its formula misses the point that the formula is fatally flawed.

Further, this approach unfairly puts the onus on the City to disprove the number of hours calculated pursuant to the Board's formula. As noted above, the Union as the party seeking damages should have borne the burden of proving in each case the actual damages that a hearing officer sustained which would include, of necessity, proving how many hours that hearing officer would have worked in 2010 were it not for the cap. It stands the process on its head for the City to be presented with an artificially contrived number of hours based on the Board's makeshift formula and for the City then to have the burden of proving that the hearing officer would not have worked that many hours as part of its defense.

In sum, the approach adopted by the Majority in this case – its preempting the compilation of a complete record with respect to damages, absolving the Union of its burden of proving the damages suffered, its reliance on a deeply flawed formula as the means of calculating damages, and its failure to take into account the sharp drop in available hours in 2010 -- has resulted in back pay awards that are not even rough estimates of the actual damages suffered as a result of the City 's imposition of the cap.

Unless this decision is set aside on appeal, these missteps will result in the City and its taxpayers being required to pay more than $405,000 in unproven damages to City employees for time in which they performed no work.[5]

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4 Intermountain Rural Elec. Assn., 317 NLRB 588 (1995), enf'd. 83 F.3d 432 (10th Cir. 996); Laborers Local 158 (Worthy Bros.), 301 NLRB 35 (1991), enf'd. 952 F.2d 1393 (1991).

5 In light of the foregoing, I do not address other errors in the Majority's decision such as its conclusion that the hearing officers did not have a duty to mitigate.

HEARING OFFICER HOURS

	2007 Hours	2008 Hours	2009 Hours	2011 Hours	2010 Hours
Badner	1272.75	1461.75	1568.00	378.75	967.50
Baranoff		1300.25	1537.50	1595.00	950.25
Barbour		1546.00	1855.50	1327.50	919.25
Brand			1166.00	984.75	983.50
Cohen	1250.50	1180.00	868.00	1075.00	895.00
Cox	1580.58	1317.08	1283.75	1139.50	935.75
Curry	1147.17	1574.75	1841.25	1853.75	1000.00
Dolan	1488.50	1450.92	1913.50	1295.00	931.00
Fieber			1193.75	859.15	940.25
Gluck	979.00	1179.25	1097.00	1136.25	941.75
Goichman		1531.75	1768.25	1359.00	1114.25
Greenberg	1285.75	1039.97	1523.50	408.50	963.50
Haken	1282.25	1354.75	1324.00	1035.25	969.00
Jackson	1358.50	1310.58	1550.50	1546.25	1007.50
Jacobowitz	1076.00	1218.25	1174.75	1068.00	921.75
Kegelman	1434.00	1426.00	1276.25	1197.25	945.75
Manzione	969.17	1014.50	1123.75	1295.75	954.75
Margolis	1318.25	1141.75	1209.00	519.50	838.75
McAuliffe		1222.75	1773.25	790.25	1027.75
Michael	918.58	1051.75	1047.50	1262.00	854.00
Mini		882.75	1495.50	1690.25	979.50
Nash		987.00	1297.25	875.00	914.00
Nisely	1564.75	1523.00	1329.50	972.25	857.75
Pfeiffer	956.22	1088.02	1044.25	1451.50	1000.00
Posner	1345.50	1308.50	1300.50	1091.25	995.25
Rivers	1605.75	1995.50	2003.75	1791.00	1002.50
Roberts		1020.75	1457.75	1120.25	949.00
Schwartz	1563.65	1906.25	2000.00	1852.75	1000.00
Sherbell	1735.00	1759.77	1701.25	855.50	916.50
Silverman	1435.27	1514.75	1565.50	1300.50	1004.00
Stephens	1568.50	1507.50	1555.50	840.50	914.50
Valcic	1268.25	1409.63	1084.00	401.50	1014.00