STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

P & M VANDERPOEL DAIRY, Respondent, and JOSE NOEL CASTELLON MARTINEZ, Charging Party.	Case Nos.: 2013-CE-016-VIS (40 ALRB No. 8) **SUPPLEMENTAL DECISION OF ADMINISTRATIVE LAW JUDGE**

Appearances:

Chris A. Schneider, Esq.,
Michael G. Lee, Esq.; and
Merced C. Barrera, GLA
For the General Counsel

Jose Noel Castellon Martinez, Charging Party

Howard A. Sagaser, Esq.,
Ian B. Wieland, Esq., and
Matthew Vanderpoel, Manager
For Respondent

Mary Miller Cracraft, Administrative Law Judge: In *P&M Vanderpoel Dairy* (2014) 40 ALRB No. 8, the Agricultural Labor Relations Board (the Board) found, inter alia, that P & M Vanderpoel Dairy (Respondent) discriminatorily

discharged Charging Party Jose Noel Castellon Martinez (Martinez) and his fellow employees Jose Manuel Ramirez Corona, Juan Jose Andrade, Alejandro Lopez Macias, and Jorge Lopez in violation of section 1153(a) of the Agricultural Labor Relations Act (the Act). The Board ordered Respondent to reinstate the employees and make them whole for all wages and other economic losses suffered as a result of their unlawful discharges. The parties were able to resolve all backpay issues except those involving Martinez.

On June 14, 2017, the Regional Director for Visalia issued a Notice of Hearing and Backpay Specification covering the period April 17, 2013, when Martinez was discharged from his job as a milker, and ending October 21, 2016, when an unconditional offer of reinstatement was issued to him. The period from April 17, 2013 ending October 21, 2016 is referred to as the backpay period. The specification set forth methodology, figures, and calculations utilized in making computations for gross backpay, interim earnings, net backpay, interest, and excess tax liability. The specification data was amended on October 19, 2017, increasing the amount of interim earnings by $887 and consequently reducing the net backpay figure by the same amount.

Gross backpay for Martinez was calculated using a comparable employee who performed milking duties and worked similar hours and days according to

payroll records provided by Respondent. The amount of gross backpay for the entire backpay period as set forth in the specification is $104,700.

The specification as amended listed interim earnings at $85,161, as reported by the California Employment Development Department (EDD) and Martinez. Net backpay, that is, the difference between gross backpay and interim earnings, was calculated at $22,207. With the addition of interest[1] ($2,605) and excess tax liability[2] ($1,598), Respondent's total liability per the amended specification was $26,410. Respondent answered the specification admitting and denying various of the allegations.

This supplementary compliance proceeding was held in Visalia, California, on October 31, 2017. After fully considering the record as a whole, including the pleadings, exhibits, testimony, and post-hearing briefs of the General Counsel and Respondent, the following findings of fact and conclusions of law are made.[3]

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[1] Interest was calculated in accordance with *Kentucky River Medical Center* (2010) 356 NLRB 6, and calculated through November 1, 2017.

[2] Adverse tax liability was computed pursuant to *Tortillas Don Chavas* (2014) 361 NLRB No. 10.

[3] On October 20, 2017, Respondent filed an amended answer. On October 27, 2017, the General Counsel filed a motion in limine seeking to strike Respondent's affirmative defenses set forth in the amended answer. At the hearing, the motion was granted in part and deferred in part. As to those rulings which were deferred, that is, taken with the case, rulings will be noted where relevant.

1. The Formulation for Backpay Set Forth in the Specification is Reasonable and Not Arbitrary

Prior to his discharge, Martinez worked for Respondent as a milker earning $8 per hour. The milkers worked 10-hour straight-time shifts and ordinarily earned overtime, described as "varying but frequent."[4] The General Counsel utilized the earnings of a comparable employee to calculate the amount of pay that Martinez would have earned had he not been unlawfully discharged. This comparable employee earned the same wage that Martinez earned, worked the same straight-time and overtime hours that Martinez worked, and held the same position, milker, that Martinez held.

The Act is patterned on the National Labor Relations Act (NLRA). The ALRB has adopted the National Labor Relations Board (NLRB) standard requiring that a reasonable and not arbitrary formula be utilized to calculate backpay. (*Pleasant Valley Vegetable Co-op* (1990) 16 ALRB No. 12, at p. 5.)

The Board's finding that Respondent committed an unfair labor practice in discharging Martinez is presumptive proof that some backpay is owed. (*Abatti Farms, Inc.* (1981) 9 ALRB No. 59, p. 2; *Minette Mills, Inc.* (1995) 316 NLRB 1009, 1010 (cited by Respondent); *Arlington Hotel Co.* (1987) 287 NLRB 851,

[4] See Decision of Administrative Law Judge James Wolpman (April 28, 2014), at page 4.

855, enfd in part, (8th Cir. 1989) 876 F.2d 678.) The formula adopted by the General Counsel for calculating backpay owed may not, of course, be the only method of calculation but it must be a reasonable method. (See *Oasis Ranch Management, Inc.* (1994) 20 ALRB No. 19, at p. 11 (cited by the General Counsel).)

The General Counsel has discretion in selecting a formula that will closely approximate backpay. That is, the General Counsel's burden is to establish only that the gross backpay amount in the compliance specification has been reasonably calculated and not an arbitrary approximation. (*Performance Friction Corp.* (2001) 335 NLRB 1117, 1118; *Mastell Trailer Corp.* (1984) 273 NLRB 1190, 1193.) Any uncertainty about how much backpay is owed to a discriminatee is resolved in the discriminatee's favor and against the respondent whose violation has caused the uncertainty. (*Alaska Pulp Corp.* (1998) 326 NLRB 522, 523, and cases cited at fn. 8, enfd in part sub nom *Sever v. NLRB* (9th Cir. 2000) 231 F.3d 1156.)

On the record as a whole, it is found that the General Counsel has adopted a reasonable backpay formula using a representative employee of Respondent. Using Respondent's payroll information, the backpay specification as amended sets forth in spreadsheet format the exact calculation of gross backpay on a quarterly basis. The backpay period is not in dispute. There is no arbitrary approximation contained in the specification as amended. Rather, the compliance specification

carefully incorporates the hours worked by the representative milker employee throughout the backpay period. Respondent does not dispute the formula.[5] Thus, it is found that the formula for calculation of gross earnings in the backpay specification as amended is reasonable and not arbitrary.

Similarly, the formulation utilized to calculate interim earnings throughout the backpay period is reasonable and not arbitrary. EDD records reported Martinez' earnings on a quarterly basis and these records were incorporated into the spreadsheet calculations utilizing a quarterly basis. Utilization of a quarterly basis for calculation is reasonable. (See, e.g., *Pleasant Valley, supra,* 16 ALRB No. 12, at p. 5 (allowing daily, weekly, or quarterly computations as practicable and reasonable).) The General Counsel also incorporated cash payments received and reported by Martinez into the interim earnings. Thus, it is found that the formula for calculation of quarterly interim earnings in the backpay specification as amended is reasonable and not arbitrary.

Compliance officer Cervantes testified that she utilized a National Labor Relations Board (NLRB) program to calculate the interest in accordance with the

[5] "Although [Respondent] does not dispute the formula used to calculate the gross backpay . . . that formula cannot produce an accurate gross backpay calculation when inaccurate information is used in the calculation." (Respondent's Reply Brief at p. 3.) The General Counsel's motion to strike Respondent's reply brief is denied as moot.

dictates of *Kentucky River Medical Center, supra*. Interest was computed through November 1, 2017. The backpay specification as amended calculates interest based on fluctuation of the prime interest rate compounded on a daily basis pursuant to *Kentucky River Medical Center, supra*. This method of calculation of interest has been repeatedly held reasonable and not arbitrary[6] and thus it is found that the calculation of daily compound interest on a sliding scale is reasonable and not arbitrary.

The final component of the backpay specification as amended requires reimbursement for the heightened income tax liability that may be assessed due to receipt of a lump-sum backpay award. This reimbursement was approved in *Tortillas Don Chavas, supra* ("The purpose of our tax compensation remedy . . . is to ensure that an employee who receives lump-sum backpay rather than regular income is truly made whole.") This component of the make-whole remedy has

[6] See, e.g., *J.R. Norton Co. v. ALRB* (1987) 192 Cal.App.3d 874, 902 (4th App. Dist.) (court will not disturb ALRB remedial order which utilizes a sliding interest rate on backpay awards and more adequately compensates victims of unfair labor practices and tends to encourage voluntary settlement of disputes and discourage dilatory tactics); *Sandrini Brothers v. ALRB* (1984) 156 Cal.App.3d 878, 888-889 (5th App. Dist.) (ALRB interest rates, tied to fluctuation in prime interest rate, are not punitive because they closely approximate the cost of money).

been repeatedly found to be reasonable.[7] Thus, it is found that the imposition of an amount to cover heightened income tax liability is reasonable and not arbitrary.[8]

Thus, on the record as a whole, it is found that the General Counsel's backpay specification provides a framework to clearly restore, to the extent feasible, the status quo ante which would have existed had no unfair labor practice occurred. As is readily apparent, determination of the exact situation which would have taken place absent the unfair labor practice may be problematic and inexact. Thus, this finding recognizes the wide discretion accorded the Region in making this determination.

2. Interim Earnings

Although Respondent does not contest the reasonableness of the calculation formula for interim earnings, it does assert that Martinez engaged in willful loss of earnings. Much of Respondent's attack on Martinez mitigation efforts is actually an attack on his credibility. This attack is found to be entirely unpersuasive.

[7] *Sandrini Brothers, id.*

[8] Despite attacking the compliance officer's experience, Respondent does not point to any specific errors committed in calculation of the backpay specification or in utilization of the NLRB program for making such calculations. Thus, Respondent's arguments in this vein are found to be without merit. Similarly, the motion in limine to strike the second affirmative defense of the amended answer, which was deferred for ruling, is granted for lack of evidence.

Specifically, Respondent attacks Martinez' veracity due to his inability to recall exact details and dates of various interim employers and applications. Respondent argues that Martinez testimony should not be credited due to his sometimes vague recollection and lack of paperwork. Given the passage of time, it is understandable that he could not pinpoint date and time for his discussions with potential employers. Moreover, employees who have been unlawfully discharged are not disqualified from backpay due to poor record keeping or uncertainty as to memory. (See *Laredo Packing Co.* (1984) 271 NLRB 553, 556, cited by the General Counsel; see also *Hickory's Best, Inc*. (1983) 267 NLRB 1274, 1276.) Poor recall of the specifics of a job search years later is readily understandable and does not automatically preclude a discriminatee from receiving backpay. (See, e.g., *United States Can* (1999) 328 NLRB 334, 337; *Arthur Young & Co.* (1991) 304 NLRB 178, 179.)

Martinez impressed as an honest witness who recounted an extensive and sincere effort to look for work. Martinez evidenced an open demeanor, answering each question with thought and nuance. Martinez' testimony is credited as serious and forthright.[9]

[9] The Regional Director's motion in limine to strike the third affirmative defense of Respondent's amended answer averring unclean hands on the part of Martinez is granted for lack of evidence to support this allegation.

To be sure, net backpay liability may be decreased if the discriminatee neglected to make reasonable efforts to find interim work. The defense of willful loss of earnings is an affirmative defense and Respondent bears the burden of proof. (*St. George Warehouse* (2007) 351 NLRB 961; see also, *O.P. Murphy Produce Co., Inc.* (1982) 8 ALRB No. 54, p. 3.) Proof of failure to make a reasonable search for work requires a showing that there were substantially equivalent jobs within the geographic area. If Respondent comes forward with such evidence, then the General Counsel must present evidence that the discriminate took reasonable steps to seek those jobs. (*Id.*)

After working day shifts for about a month at Respondent's dairy, Martinez was discharged by Respondent on April 17, 2013. The day after his discharge, Martinez found immediate work in landscaping and worked for about a month on a project in this capacity. The work was sporadic, once 6 days a week but usually 2-3 days per week. Martinez understood that every two months Respondent rotated its milkers between the day shift and the night shift. However, he was not employed by Respondent long enough to be rotated to the night shift.

When the project was completed, Martinez returned to milking work utilizing a network of friends who gave his name to dairies to fill in during employee absences. While working at one of these dairies in 2013, Martinez asked for fulltime work but was told he would be called if a position opened. Martinez

turned to picking fruit for three months during the summer and fall of 2013. Then for the remainder of 2013, Martinez worked in Bakersfield for a contractor planting grape plants for a new vineyard and coming back to prune them.

Throughout the entire backpay period, Martinez continued to work in seasonal field work or short-term gardening jobs as well as working as a milker. His jobs took him beyond Tulare County, where Respondent is located, as far south as Bakersfield. Martinez was employed in each of the quarters in the backpay period. At times, his interim earnings exceeded what he would have earned working for Respondent.

Throughout the interim backpay period, Martinez visited dairies and spoke with supervisors about employment. He also wrote his contact information on chalkboards at dairies and left his phone number with supervisors. Sometimes he was called to work at those dairies. Martinez also asked his friends who were employed at dairies for sources of work and in fact obtained work in this manner.

In early January 2014, Martinez worked for several dairies and then from late January through July 2014, Martinez worked for Sun Valley performing field work. Martinez worked for a dairy in the remainder of 2014 including working night shifts.

In 2015, Martinez continued to work at two, three, or four different dairies. One of these dairy jobs ended because Martinez got sick. He missed at least a week

of work and someone was hired to take his place. Martinez was working in the field when he got a call from another dairy. This call was initiated because a friend of Martinez recommended Martinez to the foreman. Martinez applied for milking jobs with two other dairies that year but was not hired even though he followed up by phone with the foremen.

At some point, Martinez decided that working at night was "really affecting my time with my children. I didn't have enough time to be with my children so I made the decision just to work during the day and not work at night any longer." Martinez could not remember what year or month it was when he made this decision. He testified at one point this decision was made in 2013 or 2014, at another point in 2016, and yet another in 2017. It is clear, however, that Martinez, a single man with three children, began sharing custody of his children with their mother. However, at the time he was employed with Respondent, there was no custody order as the couple were living together with the children.

EDD records indicate that Martinez worked at dairies as late as the first and second quarters of 2016. Martinez' testimony was clear that he did not reject working in a dairy. Rather, he rejected any job that required working at night. By this pattern of behavior, it is found that Martinez did not remove himself from the labor market or the dairy industry due to the custody issues.

Respondent sought to show that during the backpay period substantially equivalent jobs existed in the following ways: (1) the testimony of Martinez' three co-discriminatees, (2) the testimony of an expert witness, and (3) the testimony of Matthew Vanderpoel.

Although Respondent did not call the three co-discriminatees as witnesses, counsel averred at hearing that it sought to obtain their participation beginning three weeks prior to the hearing. Respondent also introduced evidence that it was unable to serve subpoenas on the three co-discriminatees for lack of contact information. On the day before the hearing, via email, Respondent sought assistance from the General Counsel to obtain the contact information. The General Counsel asserted that it was not free to disclose the information and further stated that serving a subpoena the day before a hearing was untimely.[10] Finally, the General Counsel filed a motion in limine seeking to strike Respondent's affirmative defense in its amended answer that Martinez' net backpay should be calculated by averaging the net backpay of Martinez' co-

[10] Administrative notice is taken of the ALRB Regulation at California Code of Regulations, title 8, section 20250, subdivision (c), which states, inter alia, that "Service of subpoenas shall be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance." Further, ALRB Regulations allow 5 days for moving to quash a subpoena. (Cal. Code Regs., tit. 8, § 20250, subd. (f).)

discriminatees. The motion was denied and that denial is affirmed and incorporated in this decision.

In any event, as may be seen from their interim earnings data, only one of the three co-discriminatees, Andrade, worked steadily in the dairy industry. Lopez had limited success and left the United States a year after his discharge. Corona, for the most part, did not work in the dairy industry. It is not possible to find, based on these experiences, that there were substantially equivalent jobs in the geographic area.

Respondent sought, but was not allowed, to call an expert witness to testify regarding the availability of dairy work for milkers in the Tulare County area. The General Counsel's motion in limine to exclude the documents and expert testimony was granted and the ruling on the record excluding this evidence is adopted. Respondent made an offer of proof at hearing that if allowed to testify, Jeff Schanbacher, Director of Operations for HR Mobil, working with 500 dairies in 15 states, is familiar with the hiring of milkers at dairies during the relevant time period. Based on a review of his company records for dairies in the Tulare, Visalia, Hanford, and Corcoran areas which are contracted with HR Mobil, in 2014 alone 296 milkers were replaced. In 2014, 568 milkers were hired. Schanbacher would also testify that Tulare County has the most cows of any dairy county in the nation. Finally, Schanbacher would testify that in his opinion there was a shortage of

trained milkers during this period and he was aware of instances in which untrained individuals were hired and trained to be milkers.

Had this testimony been admitted and credited, it would be entitled to little weight as there is no evidence regarding whether the statistics were based on a representative sample, that is, whether HR Mobil's customers were generally representative of all dairy operations. Further, the geographic area utilized for the statistics appears to be a broader area than Tulare County. These detractions are serious. Further, such evidence is typically entitled to little weight because it is impossible to ascertain whether specific jobs were available at the time Martinez needed work and whether he would have been hired had he applied. (See, e.g., *Parts Depot, Inc.* (2006) 238 NLRB 152 fn. 6; *United States Can Co.*, *supra,* 328 NLRB at 343; *Food & Commercial Workers Local 1357* (1991) 301 NLRB 617, 621.)

Finally, Respondent relies on the testimony of Matthew Vanderpoel. Since 2013 and continuing through 2015, Matthew Vanderpoel has been the sole manager in charge of hiring milkers at Respondent's dairy. In 2016, he began sharing this duty with another manager. During the backpay period, he testified he experienced an abundance of milkers available for hire. However, in response to leading questions, he testified that it was actually tough to find milkers beginning in 2013. He said that in 2014, conditions varied so that sometimes it was difficult

to find milkers and other times there were milkers for ready hire. Matthew Vanderpoel described 2015 and 2016 as more difficult times to find experienced milkers. At times between 2013 and 2016, he had to hire inexperienced milkers and train them. In 2013 and 2014, Matthew Vanderpoel estimated it took about 2 to 3 weeks to find an experienced milker in Tulare County. In 2015, the time was "a little bit less" and in 2016, it took about 1-2 weeks to find an experienced milker.

The entirety of this testimony is internally inconsistent. Moreover, even were his testimony to be understood to imply that milker jobs were readily available in the relevant geographic area, there is no relationship between availability of jobs and likelihood of success of a discriminatee such as Martinez whose application may have been impacted by such factors as age, past experience, and commute. Moreover, Martinez applications may have been impacted by having to explain his short tenure with Respondent.

Assuming, however, that the above evidence of the three co-discriminatees as well as Schanbacher and Matthew Vanderpoel, proves, as required by *St. George Warehouse, supra*, that there were substantially equivalent jobs within the geographic area, it is found that the General Counsel has come forward with substantial evidence that Martinez took reasonable steps to seek those jobs.

In sum, based on Martinez testimony and that of the compliance officer, it is found that Martinez made a reasonable, sincere search for work during his backpay period which resulted in his obtaining some interim employment during that time. The fact that he accepted short-term work at times indicates that he conscientiously sought to work even though permanent employment might have been preferable. (See, e.g., *Allegheny Graphics* (1996) 320 NLRB 1141, 1145.)

Respondent further argues that Martinez' duty to mitigate essentially required that he remain in the dairy labor market. However, Martinez testified that after initially unsuccessfully looking for milker work, he took other work but continued to look for dairy work throughout the interim backpay period. This did not constitute a willful loss of earnings. More importantly, though, Respondent's argument overstates the requirements of Board law. A discriminatee is not required, as Respondent contends, to remain in the exact labor market or continue to seek work in the same industry. Substantially equivalent employment is that which is suitable to the discriminatee's background and experience. (*S & F Growers* (1979) 5 ALRB No. 50 at pp. 2-3, citing *NLRB v. Madison Courier, Inc.* (D.C. Cir. 1974) 505 F.2d 391.) A discriminatee need not limit his search to identical work. (*S & F Growers, supra,* citing *Rutter Rex Mfg. Co.* (1971) 194 NLRB 19 (cited by Respondent).) Here, Martinez took what work he could find as quickly as he could find it. He managed to be employed each calendar quarter of

the backpay period. The fact that he was not fully or solely employed as a milker in the dairy industry is not fatal to his mitigation efforts.

Respondent further claims that Martinez left the labor market when he decided that he could no longer work at night due to custody issues involving his children. The record does not pinpoint the date when custody became a consideration for not working at night. Dates in 2013, 2014, 2016, and 2017 are mentioned. From this evidence, Respondent argues that Martinez left the relevant labor market and requests that backpay be tolled. To be clear, however, Martinez worked dairy jobs throughout the backpay period. He did not withdraw from the dairy industry but withdrew from working at night. Respondent asserts, however, that dairies uniformly require that milkers work both day and evening shifts from time to time. Martinez agreed that he understood that many dairies required night shift rotation. The record reflects that Martinez continued to work for dairies throughout the backpay period but quit one dairy job when he was asked to work at night. This does not rise to the level of leaving the relevant labor market. Accordingly, Respondent's argument is rejected.

Respondent notes that the other discriminates in this case exceeded Martinez in comparable interim earnings thus reducing their net backpay to an average of $1,382 rather than Martinez' net backpay of $22,207. Further, Respondent claims that the other discriminates were able to find milker employment in a market

heavily favoring immediate employment. Respondent's argument misses the mark. Only one of Martinez' three co-discriminatees found stable work in the dairy industry.

For example, co-discriminatee Jose Manuel Ramirez Corona's interim employment included seven quarters in field work, one quarter in field work and milking, one quarter solely as a milker, one quarter in milking and construction, and five quarters in construction. Except for one quarter, his interim earnings exceeded what he might have earned with Respondent had he not been unlawfully discharged. However, these interim earnings were not for the most part from employment with dairies. The net liability, including interest and adverse tax consequences, calculated by the General Counsel for Corona was $1,124. Corona's experience does not indicate that Martinez' net backpay should be reduced.

Co-discriminatee Jorge Lopez worked four quarters following his unlawful discharge and then removed himself from the labor market when he relocated to Mexico at the end of the first quarter of 2014. His four-quarter interim employment period was spent exclusively in work as a milker. In two quarters, he earned more than he would have earned absent the unlawful discharge and in the other two quarters he earned around $1,000 less than he would have earned working for Respondent. Lopez' experience does not indicate that Martinez' net backpay

should be reduced. The net liability, including interest and adverse tax consequences, calculated by the General Counsel for Jorge Lopez was $1,166.

Except for a part of the third quarter of 2013, co-discriminatee Juan Jose Andrade worked exclusively as a milker in his interim employment. In the second, third, and fourth quarters of 2013, Andrade earned slightly less than he would have earned absent his unlawful discharge. In 2014, 2015, and 2016, Andrade's interim earnings slightly exceeded what he would have earned from Respondent had he not been unlawfully discharged. The net liability, including interest and adverse tax consequences, calculated by the General Counsel for Andrade was $2,533. Of the four co-discriminatees, Andrade's success stands alone.

Despite the evidence that one other co-discriminatee was able to secure some higher earning placement solely in the dairy industry, Respondent's argument fails. Respondent presented no evidence that it reviewed the qualifications and age of the other discriminatees. Thus, little weight may be accorded to the fact that others earned more during the interim backpay period.[11]

[11] See *St. George Warehouse, supra* 351 NLRB at 503-504; *The Bauer Group,* (2002) 337 NLRB 395, 398-399 (success is not the test of reasonable diligence); *Food & Commercial Workers Local 1357* (1991) 301 NLRB 617, 621 (employer does not meet burden of showing inadequate job search by presenting evidence of low interim earnings); *United States Can, supra,* 328 NLRB at 343; and *Midwestern Personnel Services* (2006) 346 NLRB 624, 625.

Moreover, failure to find as much higher paying work as co-discriminatees does not establish that Martinez did not make a sufficient search for work.

As has been stated repeatedly,[12]

> 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.

Respondent also challenges the completeness of the interim earnings in the specification claiming that during the second and third quarters of 2013, Martinez received cash payments that were not included in the specification. Martinez testified that he received cash payments for landscaping work during the second quarter of 2013 and cash payments for work at Souza Dairy for three to seven days of work during either the second or third quarter of 2013. According to compliance officer Cervantes, Martinez reported cash payments of $300 per day for three days each week for the 13 weeks of the fourth quarter of 2013. Thus, the fourth quarter of 2013 shows gross pay of $3,900. Cervantes testified that Martinez reported this income was from Souza Construction. Cervantes did not attempt to verify the cash income because in her view, there is no way to verify a cash payment.

[12] *Sedgwick Realty LLC* (2001) 337 NLRB 245, 254.

Martinez testified that he did not work in construction. Martinez was not asked to complete an income questionnaire. Although Cervantes asked Martinez for pay stubs, according to Cervantes, he did not have any pay stubs to provide. Except for the fourth quarter of 2013, according to Cervantes, no other cash income is reflected in the specification. As ambiguities of this sort are due to the passage of time and resulted from Respondent's wrongdoing in the first place, the ambiguity is resolved in favor of Martinez. Thus, it is found that his cash payments are completely encompassed in the specification and that he did not work in construction.

Further, Respondent argues that because Martinez did not retain any job for longer than one year, it was unfair for the Region to calculate backpay for the entire backpay period. Respondent cites no authority for this proposition and none can be found. Accordingly, this argument is found to be without merit.

Respondent also challenges the failure to take an affidavit from Martinez,[13] the Region's lack of documentation regarding dates and times it spoke with Martinez and dates and places where Martinez searched for work, failure to conduct a fair and impartial investigation, and the length of time taken to formulate

[13] The Region was under no duty to take an affidavit. (See, e.g., *P & M Vanderpoel Dairy* (2014) 40 ALRB No. 8, at p. 23 ("We find no merit in Respondent's argument that the General Counsel was required to take workers' declarations during the unfair labor practice proceeding.").)

and prosecute the backpay proceeding. These arguments were addressed at hearing and overruled. The rulings are here affirmed. Such arguments are more properly directed to the administration of the ALRB than to an administrative law judge.

Respondent claims it was prejudiced by refusal of the government to turn over the entire backpay file to it. However, at the time of hearing, the government had turned over the entire file except for items it considered protected by attorney client privilege or work product doctrine. Those documents were reviewed *in camera* and found to be so protected.[14] Accordingly, the motion in limine to strike Respondent's fifth affirmative defense citing such alleged prejudice is granted.

Respondent claims that it should not be charged for a week of backpay when Martinez was sick. There is no evidence regarding whether Martinez would have received sick leave had he continued working for Respondent. Accordingly, resolving this against Respondent, it is found that the week is properly included in backpay. (See, e.g., *Performance Friction Corp., supra*, 335 NLRB at 1118 (where employer did not provide paid sick leave, gross backpay was adjusted for the time when discriminatee lost work due to illness).)

[14] A privilege log was requested and the General Counsel has attached as Exhibit A to its post-hearing brief. The privilege log is hereby accepted and made a part of the record in this case.

Respondent also claims that the government delayed the compliance process thus allowing the backpay period to unreasonably extend. The ALRB issued its decision finding the underlying violations on August 28, 2014. After settlement of three of the four discriminatees' cases in early 2017, the specification issued on June 14, 2017. By the time of hearing, three years had elapsed since the ALRB decision issued. On the record as it stands, it is impossible to lay blame on any particular entity for any delay. Moreover, as the General Counsel notes, any delay is not attributable to Martinez, the innocent wronged employee in this proceeding. (See, *Ace Tomato Company, Inc.* (2015) 41 ALRB No. 5, at p. 12 (cited by the General Counsel).)

Finally, Respondent claims that because of the methods utilized by the ALRB in computing backpay, the specification amounts are punitive rather than remedial. The methods utilized by the ALRB and NLRB to calculate backpay have been universally accepted and cannot be said to create a punitive remedy. Without further evidence or authority, this claim is found to be without merit.

The law requires an honest, good faith effort to find interim work. It does not require that the search be successful. Doubts, uncertainties, or ambiguities are resolved against the wrongdoing respondent. (*Midwestern Personnel Services, supra*, 346 NLRB at 625.) A discriminatee is held only to a standard of reasonable

diligence rather than to the highest degree of diligence. (*Minette Mills, Inc.*, *supra* 316 NLRB at 1010.)

Similarly, absence of a job application or showing that a discriminate failed to follow certain practices, such as reading and responding to newspaper advertisements, does not satisfy an employer's burden to show that a claimant did not exercise reasonable diligence. (See, e.g., *Acme Bus Corp.* (1998) 326 NLRB 1447, 1448-1449; *Coronet Foods, Inc.* (1997) 322 NLRB 837, 842, enfd in relevant part, (4th Cir. 1998) 158 F.3d 782.)[15] A discriminatee need only follow his or her regular methods for obtaining work. (*Tulatin Electric, Inc.* (2000) 331 NLRB 36, enfd (D.C. Cir. 2001) 253 F.3d 714.) Finally, periods of unemployment or underemployment do not necessarily equate to a showing of lack of reasonable diligence. (*McKenzie Engineering* (2001) 336 NLRB 336, 344.)

Moreover, the sufficiency of a discriminatee's efforts to mitigate backpay are determined with respect to the backpay period as a whole and are not based on isolated portions of the backpay period. (*Grosvenor Resort* (2007) 350 NLRB 1197, 1198.) The individual circumstances of any discriminatee must be taken into consideration in determining whether the discriminatee has exercised reasonable

[15] In the same vein, see *Newport News Shipbuilding* (1986) 278 NLRB 1030, fn. 1 (discharge from interim employment was not such willful or gross misconduct as to constitute a willful loss of earnings).

diligence when searching for interim employment. (*Id.* at 1199 (lack of private transportation warranted limiting search for work to locations accessible by public transportation or walking).) As the General Counsel notes, a discriminatee is required to make reasonable efforts to obtain substantially equivalent employment, meaning employment suitable to the discriminatee's background and experience. (*S&F Growers, supra*, 5 ALRB No. 50, at p. 2, adopting NLRB precedent set forth in *Mastro Plastics Corp.* (1962) 136 NLRB 1342, 1346-1347.)

The General Counsel has shown that the backpay calculations are reasonable and that Martinez employed reasonable diligence in seeking interim employment throughout the backpay period. Accordingly, it is recommended that Respondent be ordered to comply with the terms of the backpay specification as amended.

Dated: December 15, 2017

Mary Miller Cracraft
Administrative Law Judge
Agricultural Labor Relations Board