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East Orange, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

ESSEX VALLEY VISITING NURSES
ASSOCIATION AND NEW COMMUNITY
CORPORATION AND NEW COMMUNITY
HEALTH CARE, INC.

and Case No. 22-CA-24770

HEALTH PROFESSIONAL AND ALLIED
EMPLOYEES, LOCAL 5122

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for the General Counsel

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Newark, NJ, for the Respondent

SUPPLEMENTAL DECISION

Statement of the Case

MINDY E. LANDOW, Administrative Law Judge. This supplemental proceeding was tried before me in Newark, New Jersey on October 11 and 20, 2006.[1] A compliance specification and amended compliance specification and notice of hearing was issued on June 30 and September 12, respectively, predicated upon a decision and order of the Board dated November 30, 2004, and a corrected order dated January 14, 2005, reported at 343 NLRB No. 92 (2004), which provided that Essex Valley Visiting Nurses Association (herein EVVNA) take certain affirmative action including that of making its employees Patricia Jones, Shirley Lambert, Stella Savino and Anne Schepers whole for their losses resulting from Respondent's unfair labor practices in violation of Section 8(a)(1) and (5) of the Act. The Board determined that the appropriate backpay period ran from August 12, the date of the unlawful unilateral change, until March 14, 2002.[2] On November 18, 2005, the United States Court of Appeals for the Third Circuit entered its judgment enforcing the Board's order. In the instant proceeding General Counsel has named two other entities, New Community Corporation and New Community Health Care, Inc. (herein NCC and NCHC, respectively; collectively the three entities are referred to as Respondent), contending that at all material times [3] they have been a single employer and single integrated enterprise with EVVNA, a contention which Respondent denies.[4]

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[1] All dates are in 2006 unless otherwise specified.

[2] The Board found that EVVNA's backpay obligation ended on March 14, 2002 when the parties entered into a collective-bargaining agreement which contained a management rights clause privileging the Respondent to take the unilateral change at issue.

[3] The complaint in the underlying matter was issued on January 31, 2002, and a first amended complaint issued on May 31, 2002. The trial was held on June 12, 13 and July 10 and 11, 2002.

[4] At the close of the underlying hearing, Counsel for the General Counsel moved to amend the complaint to allege that NCC and NCHC are single employers with EVVNA. The administrative law judge denied the motion, noting that the General Counsel could raise this issue in a supplemental proceeding.

At the hearing, the parties stipulated that the method used to compute backpay in the amended compliance specification, as described in paragraphs five through eight therein and reflected in the work sheets affixed thereto as attachments (a) through (d), is appropriate. Respondent contends, for the reasons discussed below, that the compliance specification should be dismissed and no backpay is owed to the claimants. In the event it is found that backpay is owed, Respondent argues that the amount set forth in the in the amended compliance specification should be reduced insofar as there was a willful loss of earnings and failure to mitigate the accrual of backpay during the relevant period.

The issues to be resolved herein are (1) whether the compliance specification should be dismissed in its entirety; (2) whether the claimants failed to conduct a reasonable search for work and mitigate backpay and (3) whether EVVNA, NCC and NCHC constitute a single employer and should be held jointly and severally liable for purposes of any backpay liability herein.

Based upon the entire record,[5] including the transcript and exhibits in the underlying matter, of which I take administrative notice, the Board's Decision and Order, as affirmed; the testimony of the witnesses and my observation of their demeanor; documents entered into the record herein; stipulations of the parties; certain inferences drawn from Respondent's failure to satisfactorily comply with Counsel for the General Counsel's subpoenas duces tecum, as discussed below, and the briefs filed by Counsel for the General Counsel and Respondent, I make the following findings of fact and conclusions of law.

Respondent's Motion to Dismiss the Compliance Specification

At the hearing, and in its brief, Respondent moved for dismissal of the compliance specification. Respondent acknowledges that the Board found that it was in violation of Section 8(a)(1) and (5) of the Act by its unilateral transfer of the four nurses in question from their position as utilization management (UM) nurses to field nurses. Respondent argues, however, that the Board additionally concluded that EVVNA did not violate either Section 8(a)(3) or 8(a)(5) when it subsequently laid off the four nurses in question, and that the failure to bargain was not a factor in the subsequent adverse employment determination. Thus, according to Respondent, the "only reasonable reading of this decision is that the Board determined that the failure to bargain over the transfer is only a technical 8(a)(5) violation and the Nurses should not be entitled to any backpay." In support of this argument, Respondent points to the fact that the Board only ordered EVVNA to make whole the nurses for "any losses attributable to its unilateral transfer." Respondent argues that, because that transfer was not a factor in the subsequent decision to terminate the employment of the nurses, the Board "simply made it impossible" to find that the claimants are owed any backpay.

Counsel for the General Counsel argues, to the contrary, that Respondent's motion is in essence an untimely motion for reconsideration of the Board's finding that the nurses are entitled to a backpay remedy and that the lawful discharge did not toll Respondent's backpay obligation in any event.

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[5] At the underlying hearing, I reserved ruling on whether certain exhibits, proffered by Counsel for the General Counsel, should be admitted into evidence. Having reviewed the record in its entirety, I conclude that the exhibits have been sufficiently authenticated and, moreover, have probative value to the issues before me. Accordingly, General Counsel's exhibits 13, 14 and 18 are hereby admitted into evidence.

Respondent's reading of the Board's decision is flawed. Although the Board reversed the administrative law judge's finding that EVVNA unlawfully discharged the nurses, it specifically addressed the issue of whether, in the context of the violations found, backpay is owed to the four named claimants. As the Board reasoned, "[t]he lawful discharge of September 13, 2002 did not toll backpay as that discharge was from the field nurse position." Accordingly, EVVNA was ordered to make whole the nurses in the manner "as set forth in the amended remedy section of this decision." Contrary to Respondent's contentions herein, the Board found that, "the nurses are entitled to backpay, at the UM rate from the date of their transfer (August 12) until March 14, 2002," 343 NLRB No. 92, slip op. at 5 and fn. 15. On November 18, 2005, the Third Circuit granted default judgment enforcing the Board's Order.

Moreover, it is uncontested that Respondent failed to seek at any prior procedural stage either clarification, reconsideration or review of the Board's remedial findings. Respondent is, therefore, precluded from doing so here. *Scepter Ingot Castings, Inc*., 341 NLRB 997 (2004), enfd. 448 F.3d 388 (D.C. Cir. 2006), citing *Grinnell Fire Protection Systems Co*., 337 NLRB 141, 142 (2001); *Regional Import & Export Trucking*, 323 NLRB 1206, 1207 (1997); *Haddon House Food Products*, 260 NLRB 1060 (1982) (under Section 10(e) of the Act, the Board is without jurisdiction to modify a court-enforced Board order). Accordingly, Respondent's motion to dismiss the compliance specification is denied.

The Claimants' Alleged Failure to Mitigate Backpay

General Legal Framework

In a backpay proceeding, the General Counsel must first show the amount of gross backpay due to each claimant. The respondent then has the burden of establishing affirmative defenses including willful loss of interim earnings or any other factor that will eliminate or mitigate its liability. *Midwestern Personnel Services, Inc*., 346 NLRB No. 58 (2006) (and cases cited therein); *Atlantic Limousine*, 328 NLRB 257, 258 (1999), enfd. 243 F.3d 711 (3rd Cir. 2001). To be entitled to backpay, a claimant must make reasonable efforts to secure interim employment. *Electrical Workers Local 3 (Fischbach & Moore)*, 315 NLRB 1266 (1995) (citing *Mastro Plastics Corp*., 136 NLRB 1342 (1962), enfd. in relevant part 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966)). A respondent bears the burden of demonstrating that a claimant failed to exercise reasonable diligence in searching for work. Id.

The Board has long held that alternative employment must be "substantially equivalent to the position from which [the claimant] was discharged and is suitable to a person of [their] background and experience." *Southern Silk Mills*, 116 NLRB 769, 773 (1965). In determining the reasonableness of any claimant's efforts, factors such as age, skills, qualifications and the labor conditions in the area are appropriate for consideration. *Mastro Plastics*, supra at 1359; *Alaska Pulp Corp*. 326 NLRB 522, 535 (1998); *Laredo Packing Co*., 271 NLRB 533, 556 (1984).

It is equally well-settled that the test for mitigation is not measured by an individual's success in gaining employment, but rather by the efforts made to seek work. A respondent 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. *Black Magic Resources*, 317 NLRB 721 (1995); *Lloyd's Ornamental & Steel Fabricators*, 211 NLRB 217, 218 (1974). The mere "existence of job opportunities by no means compels a decision that the discriminatees would have been hired had they applied." *Delta Data Systems Corp*., 293 NLRB 736, 737 (1989); see also *Associated Grocers*, 295 NLRB 806 (1989).

Thus, a respondent must prove that the claimant did not seek or refused to accept suitable employment. *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991). This burden is not met by a showing of lack of employee success in obtaining interim employment or low interim earnings. *Arthur Young & Co*., 304 NLRB 178 (1991); *Food & Commercial Workers*, supra. Success is not a test of reasonableness. *Bauer Group*, 337 NLRB 395, 396 (2002), quoting *Minette Mills*, 316 NLRB 1009, 1010-1011 (1995).

An employee's poor recordkeeping or faulty memory regarding a job search that was conducted years ago will not disqualify that employee from backpay. *Midwestern Personnel Services*, supra, slip op. at 4; *United States Can Co*., 328 NLRB 334, 336 (1999), enfd. 254 F.3d (626) (7th Cir. 2001). In this regard, the Board has observed that "it is not unusual or suspicious that backpay claimants cannot remember the names of employers to whom they applied for work." *Arthur Young & Co*., supra at 179. Moreover, even if the evidence raises a doubt as to the diligence of a claimant's efforts to gain employment, such doubt is to be resolved in favor of the employee and against the respondent, who is responsible for the unfair labor practice. *Alaska Pulp Co*. supra at 535; *United Aircraft Corp*., 204 NLRB 1068 (1973).

Respondent's Evidence Regarding the Job Market for Nurses

Respondent contends that during the backpay period the job market was extremely favorable to registered nurses and that this demonstrates that the nurses improperly limited their job searches and/or did not diligently look for work.

In support of this argument, Respondent relies upon evidence, adduced in the underlying proceeding, that in September 2000, the registered nurse vacancy rate in New Jersey was 19% and expected to rise. The Union conceded at the time that EVVNA had been faced with a severe nursing shortage. Respondent additionally introduced into evidence a compendium of advertisements for registered nurse positions in New Jersey during the backpay period. In addition, there is evidence of job fairs conducted by local healthcare institutions during this time frame. Moreover, NCC Human Resources Director for Health Care William Baez[6] testified that, when he worked as nurse recruiter for NCHC in 2002, he found difficulty recruiting registered nurses. Specifically, Respondent relies upon Baez' testimony that nurses were a "very hot commodity" and that nursing applicants could "pick and choose" where they want to work.

The Job Responsibilities of the Utilization Management Nurses

The underlying record establishes that, as UM nurses, the four claimants were responsible for such tasks as appealing the denial of payment by various funding sources; responding to requests to review medical records and providing information necessary to authorize Medicare payment; ensuring that documents submitted to Medicare were correct and would justify payment; resolving questions regarding the appropriate funding source to be billed for patient care and making sure that proper compensation was received for services rendered. As the Board observed, "the UM's employed by [EVVNA] were registered nurses (RN's) who dealt with insurance companies, health maintenance organizations, Medicaid, Medicare and were responsible for ensuring that [EVVNA] was paid for the services it performed." 343 NLRB

[6] Baez's testimony is discussed in further detail below.

No. 92, slip op. at 1. As UM nurses, the claimants did not make visits to patients or perform direct patient care. As discussed below, Respondent contends that, as registered nurses, the claimants failed to mitigate backpay by not seeking staff or field nurse positions, in other words, those positions which entail direct patient contact.

Evidence Regarding the Nurses' Efforts to Search for Work

Stella Savino

Respondent contends that Savino did not diligently search for interim employment. Specifically, Respondent argues that Savino (1) improperly limited her job search to utilization management or similar types of positions; (2) limited her job search to part-time positions but ultimately accepted a full-time position after the backpay period had expired; (3) did not produce any documents evidencing her job search and (4) failed to list prospective employers on a form she completed for the Regional office.

The record establishes that Savino has been a registered nurse for approximately 25 years. In the underlying proceeding she testified that she was hired by EVVNA in 1990 or 1991 as a medical review nurse, which later turned into the UM position. She also testified that she had not performed direct patient care in about 20 years.

Savino testified that after she was laid off from her employment with EVVNA she looked for help-wanted advertisements in newspapers such as the Newark Star Ledger, nursing journals such as The Nursing Spectrum and via the internet. Savino testified that once she obtained employment, she disposed of all papers she had accumulated and did not retain any documents relating to her job search during the backpay period. Subsequent to being laid off from EVVNA, Savino searched for equivalent positions in utilization management or case management, and for positions with hours comparable to those she had with EVVNA, where she worked 30 hours per week, due to ongoing family responsibilities. Savino admitted that she did not search for field nurse positions, but testified that she was not qualified for these positions. Savino acknowledged that when testifying during the underlying proceeding she stated that she would be able to perform field work if provided with a clinical nursing refresher course.

Savino's job search report, which was provided to the Region in October 2002, lists seven prospective employers from whom she sought work during the period from September 2001 through April 2002. Savino also testified that she sent resumes and cover letters responsive to advertisements found in publications or on line which were not listed in her job report.

One employment prospect involved working with the Passaic County prosecutor assisting rape victims. Savino was told she would need additional schooling and would have to be on call for 24 hours at a time. Other employers listed are Patient Care, Cambridge Companions, Roche Pharmaceuticals, Jersey Care, Visiting Nurse of Totowa and Atlantic Health Systems. Respondent notes that there are no attempts to contact employers listed on Savino's job search report for the months from December 2001 through March 2002. Savino testified that she "probably" sought positions during this interim period. When asked why they were not listed she stated, "Because I probably didn't remember, many of the positions I applied to were post office box numbers, I did not even know where my resume was going." Savino did not have any job interviews in December 2001 or January or February of 2002. In March she was called back to a second interview with Jersey Care and also interviewed for a utilization review position at Columbus Hospital. She was subsequently offered a position in April, after the

backpay period had expired. Although this was a full-time position, Savino decided to accept it as it had become apparent that she was not going to be able to find part-time work in her field. Savino collected unemployment insurance for a period of approximately six months, from September 2001 to March 2002.

Shirley Lambert

Respondent contends that Lambert (1) improperly limited her job search to utilization management or similar types of positions; (2) did not interview for a single position; (3) submitted job search lists to the Region which contained gross inconsistencies and (4) attended a full-time computer course and abandoned any ability to search for work.

Lambert became a registered nurse in 1971. She worked for 19 years as a staff nurse and charge nurse. She was hired by EVVNA in 1991 and worked as a medical review nurse three days per week and as a field nurse for the remaining two. After approximately one year, she became a full-time medical review nurse, which later became the UM position. In this position she performed no patient care.

Lambert testified that after her employment with EVVNA was terminated, she went to the unemployment office to register for benefits and had a friend prepare a resume. Lambert began to attend open houses sponsored by prospective employers and attended seminars offered by the unemployment office. Lambert attended open house meetings at the University of Medicine and Dentistry of New Jersey (UMDNJ), St. Michaels and Jersey Care, among others. She recalled that at a UMDNJ open house held in November 2001, she spoke to both the director of home care[7] and the manager for the utilization management department. She provided them with her resume, and was told that someone would contact her. She additionally sent another copy of her resume, by facsimile transmission, to the UMDNJ human resource department, but did not hear back from them at the time. Subsequent efforts proved more fruitful, and Lambert eventually secured employment at UMDNJ in November 2002. Lambert acknowledged that she did not apply to any available staff nurse positions, stating that because she had not done such work in a number of years, she did not feel capable of doing it without re-training. In the underlying unfair labor practice proceeding, Lambert testified that she would have been willing to go into the field with a refresher course.

In forms supplied to the Region, Lambert listed various attempts to contact prospective employers.[8] Lambert testified that she supplemented these attempts with follow-up phone calls. She acknowledged that she failed to secure any interview with the employers listed in these forms, other than UMDNJ. Lambert additionally testified that the notations on the forms did not fully reflect the extent of her job search. In this regard, she stated she looked for work just about every day in newspapers such as the New York Times and the Star Ledger, as well as in the Nursing Spectrum. She also searched the internet.

In December 2001, Lambert began attending a computer skills course, arranged through and paid for by the state unemployment insurance office. This course met Monday through Friday from 9:00 a.m. to 5:00 p.m. She made an arrangement with her counselors, however,

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[7] Lambert explained that this reference to “home care” refers to the position of home care coordinator. This individual functions as an intake nurse, accepts referrals and sends referrals out for managed care patients. It does not refer to hands-on nursing in someone’s home, which is done by a visiting nurse.

[8] She listed approximately 26 such entities.

that if she was called for a job interview, she could miss class and complete her assignments on Friday, which was designated "career day," during which there were no classes. During the period of time when Lambert attended computer training, she continued an on-line search for jobs during her off hours. Eventually, Lambert obtained part-time employment with the Elizabeth Visiting Nurse Association as a home care coordinator. After that, Lambert received several job offers and accepted employment with UMDNJ. She began working there on November 18, 2002, in the utilization management department. [9]

With regard to her computer course, Lambert denied that she was unavailable to work during that period of time. She made it apparent to her instructors that she was looking for employment, and was reassured that she would be able to continue to look for work while participating in classes. [10] Lambert additionally testified that had she obtained employment during the time she was taking the computer course, she would have accepted it. She stated that any potential conflict with the computer course would have been resolved due to the fact that there are generally several intervening months between the dates when one is interviewed and when employment is confirmed. If there had been an actual conflict, Lambert testified that she would have accepted the offer of employment and would have attempted to obtain training at a different time. Lambert further testified that she decided to attend the course after seeking to obtain employment and realizing that computer skills were becoming more and more necessary to obtain work in her field.

Patricia Jones

Respondent contends that Jones (1) improperly limited her job search to utilization management or similar types of positions; (2) went on job interviews only to those positions "she felt she was qualified for" and (3) attended a computer course which severely hampered her ability to search for work.

Jones has been a registered nurse since 1981. She was hired in about 1991 as a community health nurse and field nurse and served as a field nurse, providing home care services and self-care instruction to individuals who had been recently hospitalized. In about 1992, she transferred to a medical review position.

Jones testified that after she was laid off from her employment with EVVNA she sent letters and resumes to many facilities, looking for help-wanted advertisements in periodicals such as Nursing Outlook, Nursing Advance, the Star Ledger and through "word of mouth." Jones submitted reports to the Region in which she listed those employers she contacted during her search for work during the backpay period. Jones initially testified that she might not have listed all the facilities she contacted during this period of time, but could not be certain. She later testified that she did not keep a record of every contact she made, and did not believe that she

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[9] Lambert supplied two documents to the Region in which she listed her efforts to seek employment. Certain prospective employers are listed in one or the other of these documents, but not both. As Lambert explained, "They're in addition to what I did., they're not different, it's just that when the form came I filled that out at that time, but I kept – when you have a lot of places you're sending it to, I'm sitting with the papers in front of me, I just list them as I go along. Maybe I should have compared them, I didn't but --. . . they're all what I did at that time."

[10] Lambert acknowledged that on the Claimant Expense Report which was submitted to the Region she originally noted that she would be unavailable to work during training. She explained that she deleted that statement after making arrangements which would enable her to continue to search for work by making up any missed course work on Friday.

had listed every job she applied for. In this regard, Jones testified that she sent out resumes practically every day. In September 2001, Jones had an interview for a utilization management position with East Orange Hospital. She also interviewed for a utilization management position at Orange Memorial Hospital. Jones also submitted her resume to St. Michael's Medical Center and Columbus Hospital. In October 2001, she interviewed for a staff nurse position at UMDNJ, but was not offered a position.[11] She additionally applied on a subsequent occasion for a home care planning coordinator position after meeting with the department director during a UMDNJ job fair, one of approximately three such job fairs she attended. Jones also applied for a position in the intake department of Bayada Nursing Agency, the utilization management department of Horizon Blue Cross, the quality assurance/medical records department of Parkway Manor Nursing Home and the utilization management departments of Care Advantage and St. James Hospital. Jones submitted applications to Jersey Care Home Health for home care/discharge planner and quality assurance positions. She applied for case management or utilization management positions with Kessler Institute and the Traveler's Insurance Company and submitted resumes to Executive Search Group, an employment agency and Hoffman LaRoche, a pharmaceutical company.

Jones collected unemployment insurance benefits from October 2001 to April 2002. Commencing in February and continuing through May 2002, Jones took a computer skills course, arranged and paid for by the state unemployment agency, which ran from 9:00 a.m. to 2:00 p.m., Monday through Friday. Jones testified that she took the course to increase her chances of obtaining employment, as computer proficiency appeared to be a requirement for jobs in her field. Jones further stated that she continued to seek work during the time she took the course, staying late and submitting resumes to prospective employers via the internet. She did not restrict herself to any particular work shift, and applied for some evening positions in medical records departments. Jones further testified that had she received a job offer while undergoing computer training, she would have accepted it. Jones eventually obtained employment in July 2002, and has had a series of positions since that time. Since February 2004, Jones has been employed as a UM nurse at UMDNJ. Jones acknowledged that, other than the one staff nurse position at UMDNJ, she did not apply for any other staff nurse position. She stated that with training she probably could have done the job, but she was not comfortable doing so without such training. She felt more qualified for positions similar to the one she held with EVVNA, because she hadn't been a bedside nurse for a long while.

Anne Schepers

Respondent contends that Schepers (1) only sought part-time positions, but then voluntarily accepted full-time hours at her new job; (2) improperly limited her job search to utilization management or similar types of positions and (3) admittedly stopped looking for work.

Schepers testified that she has been a registered nurse for approximately 25 years. Up until 1995, she worked in direct care nursing positions. In that year, she was working for EVVNA as a per diem staff nurse, and was transferred to the UM position.

After Schepers was laid off by Respondent, she collected unemployment insurance for six months. During this time, and thereafter, Schepers sent out resumes and went on a number of interviews with prospective employers including Blue Cross/Blue Shield, the University of

[11] Jones could not recall the precise outcome of the interview, and stated that she was either told that she was not qualified for the position or that nothing was available at the time.

Medicine and Dentistry of New Jersey, Jersey Care and Atlantic Health System, as described in reports she filed with the Region.[12] Schepers additionally testified that she "networked" though other nurses who were then employed, and looked for positions in The Nursing Spectrum.

Schepers testified that after she was laid off, she looked for work on a daily basis, and that the forms she completed for the Board listing her job search did not fully reflect the extent of her attempts to seek work. The positions she applied for were generally case management positions, with responsibilities similar to those she had when employed at EVVNA. She did not apply for direct care nursing positions. Further, Schepers had worked on a part-time basis for EVVNA[13] and she limited her job search to per diem or part-time positions, due to her family responsibilities. In early February 2002, Schepers obtained per diem employment with Atlantic Health Systems, where she conducted field-based screenings of individuals, measuring blood pressure, cholesterol and blood sugar levels. Schepers had initially applied for this position in November 2001, and acknowledged that while she scanned publications for available positions, she did not actively interview or apply for any other position after December of that year. Schepers began her employment in this position on February 4, 2002, after successfully completing a certification course which commenced on January 13. She continued to perform screenings on a per-diem basis and then began work two days per week as an occupational nurse, screening applicants for public employment. Eventually, this position became a full-time position; however, it appears from the record that this did not occur until after the backpay period had expired.

Schepers testified that she is familiar with the job responsibilities of a field nurse, but did not seek this type of position due to the fact that she had not performed such work for approximately seven years at the time of her layoff. While she deals directly with individuals in her current position, these are generally healthy individuals who are being screened for potential health problems, as opposed to ill patients or those who have recently been discharged from the hospital.

Respondent's Alleged Single Employer Status

Respondent's Operations at the Time of the Underlying Proceeding

Prior to its acquisition by NCC, EVVNA had previously been associated with and managed by East Orange General Hospital, under the aegis of Essex Valley Health Care Inc. (EVHC), a holding company with a real estate operation, in addition to the hospital. EVHC operated EVVNA, which provided skilled nursing services, as well as Care at Home, a company that supplied home health aides.

NCC is a large community development organization which manages various profit and non-profit organizations, including NCHC. At the time the EVVNA was acquired by NCC, and at the time of the underlying hearing in this matter, NCHC was a separate corporation, affiliated with other "New Community" entities. NCHC was responsible for the management of the health care facilities within the NCC organizational sphere including the New Community Extended Care Facility, (the Nursing Home), which is a skilled nursing facility. In addition NCHC operated a home health agency, several adult medical day care centers and a family service bureau.

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[12] In these reports, Schepers lists approximately ten employers who she contacted between September and November 2001

[13] Her work hours were 8:30 to 2:30 Monday through Friday.

Sometime prior to July 2000, EVHC asked NCC to take control over EVVNA and Care at Home. According to the underlying record, at the time of its acquisition, EVVNA was in severe financial condition, and EVHC was "dumping a lot of money into it." NCC wanted to acquire EVVNA, even though it was operating at a loss, because the two entities served compatible missions – i.e. providing health care services in the Newark, New Jersey area. As Administrative Law Judge Steven Fish found, in July 2000, the assets and control of EVVNA were transferred at no cost to NCC.[14] At that time, EVVNA was placed under the control of NCHC.

Monsignor Linder is the founder and CEO of NCC. As of July 2000, he was also a member of the Board of Directors of NCHC. Shakir Hoosain was then the CEO and Executive Administrator of NCHC, as well as the Nursing Home. Vincent Golden was the Financial Director of NCHC and all its health care affiliates. Frenchie Pierce was an officer of NCHC and the Director of Nursing for the Nursing Home.

Mary Hanna was the CEO of EVVNA at the time of the transfer. In July 2001, Hanna was replaced by Hoosain. The decision to install him as CEO of EVVNA was made by NCHC. At this time, Golden was the Director of Finance for both EVVNA and NCHC.

After the acquisition, the Board of Directors for EVVNA was reconstituted. According to Golden, "we formulated a separate board to manage it, which was part of the old board of directors of Essex Valley VNA and New Community board members."

In November 2000, Hanna wrote to Linder regarding EVVNA's critical nursing shortage, recommending a four-part plan to ameliorate the problem and requesting permission to implement it.[15] In July 2001, Hanna presented a report to the EVVNA Board of Trustees in which she discussed the difficulties that organization was having with the recruitment of nurses. As Hanna noted, "NCC Human Resources is seriously looking at options and developing some recommendations for consideration. . . As a temporary measure, Mr. Hoosain [then CEO of NCHC] is negotiating a contract for the nursing staff with an outside Agency. . . "

As noted above, in about July 2001, Hanna was replaced by Hoosain, who split his time between NCHC and EVVNA. The decision to replace Hanna was made by the Board of Directors of NCHC, and communicated to Hoosain by Linder.

In July 2001, both Hoosain and Golden joined EVVNA's bargaining team, which was then in the process of negotiating an initial contract with the Union. EVVNA proposed that all "New Community" employees receive the same health care package, with the exception that nurses would receive a prescription card as an additional benefit. After negotiations concluded, the resulting collective-bargaining agreement was signed by Hoosain as "Executive Administrator, New Community Health Care, Inc." as well as by Zenobia Brock-Smith as the "Executive Director, EVVNA."

In August 2001, when Hoosain implemented the transfer plan at issue in the underlying proceeding, he also transferred 13 other employees to various affiliates of NCC, "within the New Community Corp. network." Hoosain also consulted with Pierce regarding the UM's self-

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[14] NCHC Financial Director Vincent Golden testified that, as a not-for-profit corporation, EVVNA could not be formally sold to NCC.

[15] The recommendations included raising salaries, offering signing and recruitment bonuses, hiring a full-time nurse recruiter and the recruitment of foreign nurses.

evaluation of their clinical skills and further discussed the possibility of bringing the UM's into the Nursing Home to update their clinical skills.[16]

Due to EVVNA's poor financial condition, NCC provided funding to pay the salaries of its employees, including Hoosain's, although the nurses continued to receive their paychecks from EVVNA. NCC also provided, as Golden testified, a "significant amount" of services to EVVNA including management, accounting, human resources, legal representation, recruitment, transportation and security. In 2001, NCC provided services to EVVNA valued at $571,008. When Golden was asked whether these had been paid for, he replied, "I don't think so, not at this date it wasn't because obviously there was no cash to pay for it." There are loans on the books of NCC and EVVNA, to cover the costs of the loans and services provided, but there was no evidence that they had been paid or that any effort to collect these loans had been made.

As Golden explained: " [t]here's interchanges of services for fee . . . but we don't move funds around." With regard to whether there are loans outstanding, Golden replied, "Sure like in this year here [referring to 2001] Essex Valley could not afford their payroll. So the funding for the payroll had to come from somewhere else. So it was created a loan on Essex Valley's books that they have to pay back." According to Golden, this loan originated form NCC. As he explained, "It happens like on a monthly basis as cash is required. It's an intercompany transfer of funds which generates a liability on Essex Valley's books." When asked whether it gets paid back, Golden replied, "eventually it does, yes" When asked whether EVVNA's loans had been paid back, Golden answered "Not yet. I mean with what? Eventually, it'll get paid back. Well, as soon as they start making money, it'll be paid back on a periodic basis." Golden added:

> Until New Community may decide that they don't want to put more money into and lop it off, close it down. I'll give you an example, the nursing home. The nursing home ran a debt up of 5.5 million dollars over a five year period. . .And, as of last year, that debt has been fully paid back. So if New Community feels that the mission we're providing is a mission that should be provided and there's a need in the community, they'll go a long way as long as they [sic] comfortable, at some point in time that the operation will break even and then eventually pay back whatever debt they've incurred in their period of hard times."

As Judge Fish found, based upon this testimony as well as other evidence in the underlying proceeding, there was a continuing transfer of cash from NCC to EVVNA, generating an intercompany liability, to pay for EVVNA's losses. There is no evidence adduced in either the initial or this supplemental proceeding to show that this relationship has been altered, or that any of EVVNA's indebtedness to NCC has been repaid.

Respondent's Alleged Failure to Comply with General Counsel's Subpoena Duces Tecum

Three subpoenas duces tecum dated August 30 were issued by Counsel for the General Counsel. These were addressed to Jacky E. Clay or the Custodian of the Records of each of the named Respondents herein seeking the production of certain documents.[17] The documents sought are substantively identical. The subpoenas seek documents which show, inter alia, the

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[16] This proposal was later rejected.

[17] NCC's Human Resources (HR) department presently consists of Jacky E. Clay (Senior Director of Human Resources); Cecilia M. Faulks (Human Resources Director) and Baez (Human Resources Director for Health Care).

(1) names and addresses of the three named entities and documents showing use of the facilities; (2) owners of the Respondents, their assets, the share or percentage of each owner and purchase or transfer information; (3) managerial, personnel and organizational hierarchy and structure of the Respondents, including common management, supervision, facilities and equipment, employee interchange and/or integration of operations between the Respondents; (4) financial transactions between the Respondents including loans between them and purchases; (5) personnel or labor relations policies, including those relating to the common or integrated administration and maintenance of such policies; (6) the names of all attorneys, accountants, agents and subcontractors, including those who performed services for one Respondent but who were paid by another; (7) the business purposes of the Respondents including licenses, permits and filings which show common or individual registration; (8) insurance documents including information regarding which Respondent paid the premiums; (9) equipment, vehicles and property which have been commonly owned, leased or used by the Respondents; (10) tax returns of the Respondents for 2001 through 2005, including documents showing the tax preparer and the entity paying for any tax payments and (11) common solicitation or recruitment of business and personnel.

On September 6, Respondent filed a petition to revoke the subpoenas asserting that the General Counsel had waived its right to pursue NCC and NCHC, that the subpoenas sought information which is irrelevant and outside the backpay period, and that the subpoenas were improper and harassing, vague, overbroad, unduly burdensome and seeking information unrelated to this proceeding. On September 8, Administrative Law Judge Steven Davis issued an Order on Petition to Revoke Subpoena directing the Respondent to provide the information sought by the subpoenas, but for a more limited time frame than that sought by the Counsel for the General Counsel.[18]

The hearing in this matter, originally scheduled to commence on September 12, was thereafter postponed, upon the request of the Respondent, to October 3 and then, to October 11. On September 12, Counsel for the General Counsel wrote to Counsel for Respondent requesting that it be provided with the subpoenaed documents on a rolling basis as Respondent identified and reproduced those documents in advance of the hearing. That request was reiterated by letter dated October 2.

At the commencement of the hearing on October 11, Counsel for the General Counsel called for the production of documents and noted that Respondent's identified Custodian of the Records was not present. Counsel for the General Counsel acknowledges that on the first day of trial, Respondent did produce certain documents, [19] EVVNA's initial and successor collective-bargaining agreements,[20] as well as personnel handbooks, examples of letterhead used by Respondent and voided blank checks. On October 12, Counsel for Respondent sent General Counsel a letter which states, in relevant part:

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[18] The Judge directed Respondent to provide the documents sought for the time frame from January 1, 2002 to December 31, 2005.

[19] These documents consist of (1) a list of the EVVNA Board of Trustees as of January 1, 2004; (2) voided blank checks of the EVVNA and NCC operating accounts; (3) a one-page breakdown of EVVNA employees' health care coverage; (4) the EVVNA/Care at Home Board Report dated July 2001; (5) a flow chart showing the EVVNA organizational hierarchy; (6) copies of advertisements for nursing positions that were placed in the Star Ledger. These were admitted into evidence as General Counsel's exhibits 8,9,10,20, 22 and Respondent's exhibit 16.

[20] The former was placed into evidence in the underlying proceeding.

As a follow-up to our telephone conversation this morning, Respondents produced a number of documents at yesterday's hearing in response to your *subpoenas*. You claim that our production is deficient. As I informed you, we are willing to work with you and your office to produce additional records responsive to your *subpoenas*. It would be helpful to know exactly which specific documents you are seeking in order for us to search for them and produce them to you in a timely fashion. I also informed you that we would be amenable to schedule an on-site review of any additional documents.

Also, we have always been willing to produce Ms. Jackie Clay, NCC's Senior Director of Human Resources, to testify in this matter. Unfortunately, due to her vacation schedule, Ms. Clay will be unavailable to testify until the week of October 30, 2006. It is important to reiterate, however, that Ms. Clay would not have been able to testify at yesterday's hearing because the parties agreed that we would take testimony of the four nurses first. Accordingly, we propose one of the following dates for Ms. Clay to testify in this hearing: November 3, November 10, November 16 or November 17.

Counsel for the General Counsel responded by letter of October 12, again calling for production of the documents listed in the subpoenas, noting that the trial had been adjourned until October 20 and requesting that Respondent conduct a proper and comprehensive review of its files and produce any documents responsive to the subpoenas on that date. Counsel for the General Counsel further requested that Respondent be prepared to identify those documents which had been reviewed and make them available for possible inspection.[21]

The following day, Counsel for Respondent replied, attesting that there had been a good faith effort to comply with the subpoenas. In this regard, it was noted that Respondent had provided documents including, but not limited to, letterhead, collective bargaining agreements, employee handbooks, organizational charts, health care information, board member information, recruitment advertisements, board reports and financial information. Counsel maintained that certain of the documents sought by Counsel for the General Counsel were no longer in the possession of EVVNA, NCC or NCHC,[22] and stated "we will undertake a comprehensive search for documents responsive to the outstanding requests." Respondent reiterated that Clay was "more than willing" to testify upon her return from her scheduled vacation, and argued that the prejudice to Counsel for the General Counsel in this regard was "minimal."

On October 20, the second date of the hearing, Respondent produced additional documents, [23] and further presented NCC Human Resources Director for Health Care William Baez, who is Clay's subordinate, to testify as Custodian of the Records regarding his search for records responsive to the subpoena. Baez stated that some one to two weeks prior to his attendance at the hearing, Clay instructed him to search for documents relating to EVVNA that were stored in his office. However, Baez had never reviewed the subpoenas in connection with any document search or at any other point prior to the hearing. Moreover, when asked whether he conducted a search for particular items, as set forth in the subpoenas, he acknowledged that

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[21] Counsel for the General Counsel additionally noted that, even if the parties had agreed that the nurses were to testify initially, Clay was in breach of the subpoena and should have been made available on subsequent hearing dates.

[22] Respondent has failed to identify which documents, if any, are no longer in its possession.

[23] These documents related to transfers, health insurance and nurse recruiting and were entered into evidence as General Counsel's exhibit 7.

he had not.[24]

I then heard oral argument on the issues raised by General Counsel with regard to Respondent's alleged non-compliance with the subpoenas. Counsel for the General Counsel argued that Respondent failed to comply with the subpoenas by not producing Clay or any other individual prepared to testify as the custodian of the records in a timely fashion. On the initial hearing date, Counsel for the General Counsel was advised that Clay would not be available due to her vacation plans. It was noted that, while Baez attempted to testify in Clay's stead, he admittedly was never shown the subpoenas and, further, not asked to look for a number of items set forth therein. Counsel for the General Counsel requested that I impose sanctions pursuant to *Bannon Mills, Inc*., 146 NLRB 611 (1964), and related cases, based upon Respondent's alleged failure to provide various documents sought by the subpoenas. In particular, Counsel for the General Counsel points to Respondent's failure to produce documents relating to tax preparation, filing and payment, licenses, insurance policies, personnel actions, attorneys and agents of the three named entities, as well as documents reflecting their managerial personnel and organizational hierarchy.[25]

Counsel for Respondent concedes that Clay was unavailable on the first day of hearing and thereafter due to vacation plans, but asserts that in an effort to comply, it produced Baez, who could testify, at least in part, to the documents. Respondent further asserts that Clay would have testified at some later date, but the General Counsel was unwilling to accept this request. Counsel asserts that Respondent made a good faith effort to search for items responsive to the subpoenas, and asked Counsel for the General Counsel to identify those specific items it was seeking. Counsel for Respondent reiterated several arguments, originally raised in its petition to revoke the subpoenas, that the requests were voluminous, burdensome and ambiguous, and that the documents were of minimal importance to the single-employer theory. Respondent further argues that it produced numerous documents responsive to the subpoenas, and argues that because it has substantially complied with the subpoenas, sanctions pursuant to *Bannon Mills*, supra, are unwarranted.

Evidence Presented in the Supplemental Proceeding

The EVVNA organizational chart which was produced by the Respondent at the instant hearing shows that it is directed by a Board of Trustees. As of January 1, 2004, the EVVNA Board, consisting of 12 members, included among its membership Linder, Golden, Clay; NCC manager Kathleen Dedrick, and NCC Corporate Counsel Dan Williamson.[26] Monsignor Linder continues to be the CEO of NCC, and, as the top management official at EVVNA, he reports directly to the Board. The EVVNA Executive Director, Janet Cavallo, reports directly to Linder.

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[24] Baez testified that he was not asked to search for documents responsive to paragraphs 2, 3 (in substantial part) and 4. With regard to paragraph 5, Baez testified that documents which reflect employment decisions made by Clay with regard to EVVNA employees would not exist; however Baez acknowledged he did not search personnel files for such documents. Baez acknowledged that he was not asked to provide documents responsive to paragraphs 6, 7, 8, 9 or 10 of the subpoenas.

[25] As noted above, Respondent produced an EVVNA organizational flow chart and a list of the EVVNA Board of Trustees from 2004. No information was produced regarding NCC or NCHC. Baez testified, however, that such documents exist and would be maintained by Clay and Cavallo, and would exist in electronic form, as well.

[26] Baez, who identified these individuals, was not familiar with several members of the Board, and could not state whether they had any connection with NCC or NCHC.

The EVVNA Controller, Elizabeth Pinkham, reports to Adrian Lobo, the Chief Financial Officer of NCC, as well as to Cavallo.

The NCC's Human Resources (HR) department handles human resource matters for EVVNA. According to Baez, this has been the case since he began working for NCC commencing in January 2002. EVVNA personnel files are kept and maintained in NCC corporate headquarters, in the HR office.

Baez testified that the NCC HR department recruits employees for EVVNA by placing advertisements in newspapers and trade publications and by posting available jobs on the NCC website. Baez is listed as the contact person for such recruits. He will conduct an initial telephone screening, to see if the applicant has the requisite qualifications and experience. If the applicant appears to be a good match, he or she is referred to EVVNA Executive Director Cavallo for an interview. Baez testified that Cavallo makes personnel decisions such as hiring and firing on her own. According to Baez, unless there is some "questions from a consultative approach," the NCC HR department may not know about such decisions until after they are made. According to Baez, Cavallo determines employee compensation and start date. Baez testified that after a prospective employee is offered employment, he then completes the process by creating a "new-hire" packet, as well as the employee personnel record and medical file, which is maintained in his office. According to Baez, the NCC HR department's role is "entirely consultative" regarding matters such as compensation, benefits, employer relations, attendance, union relations, collective bargaining agreement interpretation and execution.

Baez's testimony regarding the "consultative" role of the NCC HR office is, in certain respects, called into question by other record evidence. For example, In January 2006, NCC HR Directors Clay and Faulks prepared and submitted a report to the NCC Board of Directors listing that department's "2005 Accomplishments." In pertinent part, this report contains the following summary:

> <u>Recruitment</u>:
>
> During 2005, we continued aggressive recruitment methods to hire RN's for EVVNA/CAH. The efforts included better marketing materials, development of an extensive RN mailing list, advertising on-line and through standard nurse publications, presence at healthcare employment fairs and presenting two Open House opportunities.
>
> In January of 2005, we had twenty RN's in EVVNA/CAH. At the close of 2005, we had a roster of twenty-two RN's, with an additional four RN's currently in the orientation process. Given that ten RN's resigned during 2005, this is an excellent accomplishment. Due to aggressive marketing, we were able to replace the RN's who resigned or were terminated and hire additional RN's to meet the needs of the Agency. In fact, at this time, we have the necessary complement of RN's to handle the existing clients.
>
> <u>Retention</u>:
>
> To ensure that we are competitive with the marketplace and able to attract and retain experienced, competent nurses, we instituted salary and benefit increases for RN's and LPN's.
>
> We hosted a Nurse Recognition Event in June of 2005 and the majority of EVVNA and Care at Home nurses attended the event.

The report further states that: "A new handbook for EVVNA and Care at Home was drafted in 2005. We are in the process of reviewing the draft and preparing a final copy for distribution. An update of the NCC Handbook was drafted and will be finalized during the first quarter of 2006."

There is also some record evidence that NCC managerial personnel have been involved in the discipline determinations of EVVNA employees. For example, in June 2004, NCC Extended Care Marketing Director Darnell Toliver issued a memorandum to an EVVNA employee reprimanding her on her failure to attain the required number of referrals and her poor attendance. A copy of this document was sent to "human resources." In July, 2004, Tolliver issued a discharge memorandum to another EVVNA employee for an unacceptable referral rate, stating in pertinent part: "your employment with New Community Corporation is being terminated immediately." A copy of this memorandum was sent to Clay, as well. Baez testified, however, that it was not a common practice for the NCC HR department to receive copies of such disciplinary notices for EVVNA employees. [27]

Moreover, there is some evidence that NCC HR personnel actively participate in collective-bargaining negotiations and investigate and respond to Union grievances regarding EVVNA employees. Baez testified that he attended one session in the most recent round of collective bargaining between EVVNA and the Union, and Clay was present at more that one. Baez further acknowledged that the NCC HR department is notified when grievances are filed on behalf of EVVNA employees. In this regard, the record reflects that Clay was involved in investigating a grievance filed by an EVVNA employee, and responded to a Union information request in connection with that grievance. Clay forwarded information regarding EVVNA employee absences to the Union along with information regarding disciplinary action which had been taken against certain other EVVNA employees. Baez further acknowledged that both he and Clay attended a grievance meeting involving this employee, along with EVVNA Executive Director Cavallo.

The NCC HR department also receives and maintains the Union dues deduction cards signed by EVVNA employees. Baez provides the Union with monthly information regarding employee status, and makes appropriate arrangements to have the dues deducted and transmitted to the Union. When asked about a letter from the Union confirming these arrangements, Baez replied that, "[t]his is a process by which our employees authorize us to deduct money from their pay to give to HPAE in the form of union dues."

EVVNA and NCC have separate payrolls. At NCC, employees are paid on a bi-monthly cycle and EVVNA employees are paid on a bi-weekly basis. NCC corporate headquarters are located at 233 Market Street. EVVNA is housed in a separate building constructed by NCC, which is leased to EVVNA. While Baez testified that he "believed" that EVVNA paid rent to NCC for such space, I note that documents pertaining to this sort of transaction were contemplated by Counsel for the General Counsel's subpoena, and none were produced.

NCC and EVVNA employees receive their health insurance through the same vendor.

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[27] It appears from the record that Tolliver is involved in EVVNA's marketing efforts, as well. A New Community Corporation Health Care Programs monthly operational report dated March 2004 contains an Executive Director's Report prepared by Zenobia Smith-Brock, dated March 16, 2004, on behalf of EVVNA, Care at Home and Home Friends. This report notes that "presently we have 600+ clients for Essex Valley" and that "we have implemented a new marketing initiative, with Darnell Toliver designated as Marketing Director. The new marketing area encompasses all health care operations."

The EVVNA plan, which is negotiated with the Union for represented employees, provides that nurses have a prescription medicine benefit which is not offered to other employees. Memoranda regarding changes in health insurance coverage are issued to "all employees," including those employed by EVVNA. All employees have access to a company-wide 403(b) pension plan and a credit union. The NCC HR department is also responsible for investigating and processing unemployment insurance and workers' compensation claims filed by EVVNA employees.

The record reflects that employees have been transferred between NCC affiliates without formal separation and hiring procedures, but that the accrual of benefits such as sick and vacation leave is processed by and subject to the terms applicable to each particular unit. For example on October 7, 2004, Baez issued a memorandum memorializing the transfer of a front-desk receptionist at the NCC Workforce Development Center to a position as a unit clerk with EVVNA. The memorandum provides for a final paycheck to be issued from NCC Workforce Development Center including the payment of accrued, but unused vacation time (less an overage of sick time), and further states that the employee would thereafter begin to accrue sick and vacation time with EVVNA.

As noted above, NCC provides various services to EVVNA. According to Baez, these services would be reflected in monthly budget reports, again an item which arguably would be encompassed by the General Counsel's subpoena. While Baez has limited familiarity with such reports, he testified that they would contain a description of services provided to EVVNA by NCC and their cost. I note that a May 2003 NCC Board Report shows that NCC was continuing to provide services to EVVNA in an annual budgeted amount of $410,279. Baez testified that he has never seen any documentation reflecting a request by NCC that EVVNA pay for such services or any other written agreement between the two entities.

With regard to NCHC, Baez testified:

> My understanding is that NCHC was an idea or a concept that our former administrator had to consolidate all of the health care at NCC meaning EVVNA, Varrick Home, the nursing with the day care under one separate incorporated organization, but my further understanding is that NCHC never happened, it never fruitioned, it never turned into anything.

NCC's website, however, contains the following information:

> New Community Health Care, which provides high quality and caring community-based health care services to Newark residents, has grown over time to become one of the largest and most central parts of the entire NCC Network. New Community Health Care employs 900 professionals and has an annual operating budget of $31 million. In 2001 New Community Health Care served 4,335 clients.
>
> Institutional Facilities include the New Community Extended Care Facility, a skilled nursing facility, and the New Community Adult Medical Day Care Centers, located at four different sites. Non institutional care includes the Essex Valley Visiting Nurse Association, Home Health Care and Individual and counseling [sic] through the family Service Bureau of Newark.

Respondent has failed to explain this apparent discrepancy between Baez's testimony and NCC's representations to the public about NCHC's status.

Moreover, the May 2003 NCC Board report referred to above contains a NCHC Executive Administrator's Report dated April 2003. The items reported under EVVNA include nurse recruitment and the reopening of the Union contract to increase wages, among others. Elsewhere in this document, EVVNA employees are listed as part of NCC's employee census.

Analysis and Conclusions

The Alleged Failure to Mitigate Backpay Liability

Respondent contends that the claimants improperly limited their job searches and/or did not diligently look for work. In support of this argument, Respondent contends that during the backpay period, the job market was extremely favorable for nurses; that the claimants failed to seek staff nurse positions for which they were qualified; that Savino and Schepers sought only part-time employment, thereby further limiting their opportunities for employment; that Jones' and Lambert's attendance at computer training courses effectively removed them from the job market and generally, that the claimants did not make a reasonable job search for interim employment.

As noted above, it is well settled that employees must attempt to mitigate damages by using reasonable diligence in seeking alternative employment." *NLRB v. Mastro Plastics Corp*., 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). The alternative employment must be "substantially equivalent to the position from which [the claimant] was discharged and suitable to a person of [their]background and experience. *Southern Silk Mills*, 116 NLRB 773 (1956). In determining whether positions are substantially equivalent, the Board will consider various factors, including the respective responsibilities and working conditions of each position, as well as the desire and intent of the employees concerned. *Mastro Plastics Corp*., supra at 1359. In a backpay proceeding, the burden is on the respondent employer seeking to mitigate its liability to establish that the claimant willfully incurred a loss of interim earnings by a clearly unjustifiable refusal to take desirable new employment, or that the discriminatee could have done better than he did in taking particular interim employment." *Moran Printing, Inc*. 330 NLRB 376, 376 (1999)(internal quotations and citations omitted).

The record establishes that throughout the backpay period, all of the claimants applied for and received state unemployment benefits. The Board has long held that the fact that an employee has registered for benefits and searched for work through an appropriate state agency is prima facie evidence of a reasonable job search. *Midwestern Personnel Services, Inc*., 346 NLRB No. 58, slip op. at 4 (2006); *Allegheny Graphics*, 320 NLRB 1141, 1145 (1996), enfd. sub nom. *Package Service Co. v. NLRB* 113 F.3d 845 (8th Cir. 1997); *United Aircraft Corp*., 204 NLRB 1068, 1071 fn. 6 (1973). Moreover, the claimants credibly testified that they sought substantially equivalent positions using appropriate methods and tools such as answering advertisements in newspapers and nursing periodicals, sending cover letters and resumes to prospective employers, utilizing the internet, attending job fairs and "networking" with employed colleagues.[28] See e.g. *Amshu Associates, Inc*., 234 NLRB 791, 794 (discriminatee made reasonable attempt to find work including reading want ads and responding by telephone, consulting superintendents, friends, relatives and local union, registering with

[28] In general, I found the claimants herein to be very credible witnesses. They were responsive throughout their testimony, and answered questions in a direct and thoughtful manner. They acknowledged any failure to record details of their job searches, or their inability to recall such details. Moreover, the nurses were examined about matters of some personal significance and potential embarrassment to them and maintained a dignified composure throughout.

state unemployment office and making other inquires.) I further find that the nurses provided substantial detail regarding their job search efforts, and although clearly they did not recall or record every attempt which was made, this is not in and of itself sufficient to establish a failure to make a reasonable search for work. *Midwestern Personnel Services*, supra; *Arthur Young & Co.*, supra.

Respondent relies on general job market conditions to show that jobs were available for the claimants. Even if this were to be the case, which, for the reasons discussed below, this record does not fully support, The Board has held that "the burden on the wrongdoer (the Respondent) is more substantial than that." *Midwestern Personnel Services*, supra, slip op. at 3. In the instant case, I find that the Respondent has not shown identifiable jobs in the relevant area which were available to the claimants.

Respondent has failed to demonstrate that there were positions available to the claimants for which they would have been hired during the backpay period. Moreover, Respondent has failed to demonstrate that those available positions involving direct care are substantially equivalent to the positions formerly held by the nurses, positions that were largely administrative in nature. Rather, the evidence adduced in the original proceeding as well as in the instant hearing establishes that the UM position is one which has significantly different tasks, skills and responsibilities than traditional patient care or field nurse positions.

As the Board observed in the underlying case, "the UM's employed by [EVVNA] were registered nurses (RN's) who dealt with insurance companies, health maintenance organizations, Medicaid and Medicare and were responsible for enduring that the Respondent was paid for the services it performed." 343 NLRB No. 92, slip op. at 1. When Savino, Lambert, Jones and Schepers were transferred to field nurse positions on August 1, 2001, they had not performed direct patient care for 20, 9, 9 and 6 years, respectively. The underlying record establishes that the nurses did not feel qualified to perform direct patient care responsibilities, at least not without additional training. They reiterated this point in their testimony in the supplemental proceeding. In my view, each nurse credibly drew a distinction between the duties they performed as UM nurses and those which would be required of a staff nurse or one in a comparable position.[29]

In this regard, Respondent's reliance on the purported existence of a favorable job market is misplaced. As a factual matter, the evidence relied upon by Respondent, as adduced in both the underlying and instant proceedings, pertains almost exclusively to a shortage of nurses to fill direct-care nursing positions. Further, Baez's testimony regarding the availability of nursing positions at the time he was recruiting for NCHC was scant and conclusory, and lacking in the specificity which would be necessary to meet Respondent's burden of proof in this regard. With respect to Respondent's introduction of classified advertisements, even assuming they contained advertisements of positions suitable to the nurses' training and experience, which has not been shown, the mere introduction of such evidence is not sufficient to prove either that positions were available or that the nurses would have been successful in obtaining one. *E & L*

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[29] I further note that in the underlying proceeding, Respondent took the position that the UM nurses were not qualified to perform direct patient care. In its discharge letter to the nurses, Respondent asserted that, "after several weeks of training, it is obvious that you are not qualified to perform the duties and responsibilities of a field nurse." As Counsel for the General Counsel notes, in the underlying decision, the Board referred to Hoosain's testimony to such effect: "I didn't want to have a liability on my hands if somebody were going to go out there and do something and someone gets hurt." 343 NLRB No. 92, slip op. at 3.

Plastics Corp., 314 NLRB 1956, 1058 (1994).[30]

Respondent cites to particular periods of time during the backpay period where the nurses purportedly abandoned their search for work. In general, the Board has held that the entire backpay period must be considered to determine whether there was, in light of all the circumstances, a reasonable effort to secure a substantially equivalent position to that from which the claimant was discharged. *E&L Plastics Corp*., supra at 1057. Moreover, as the Board has stated: "[A]n employer does not satisfy its burden showing that no mitigation took place because the claimant was unsuccessful in obtaining interim employment, by showing an absence of a job application by the claimant during a particular quarter or quarters of a backpay period or by showing the claimant failed to follow certain practices in his job search." *U.S. Can Co*., 328 NLRB 334 (1999). Respondent notes that Savino's job search report does not list any employer to which she sent a resume or interviewed with during the period of December 2001 through March 2002. Savino credibly testified, however, that she continued to seek employment through this period and that many of the listings required nothing more than a reply to a post office box number. Further, as noted above, her admittedly poor record keeping is not sufficient by itself to establish a failure to search for work. *Midwestern Personnel Services*, supra. Similarly, Respondent points to Lambert's failure to secure an interview for any position through September 2001 through March 2002. This, however, constitutes nothing more than an impermissible attempt to rely upon a claimant's failure to obtain employment to prove a failure to mitigate. See *Parts Depot, Inc*., 348 NLRB No. 9, slip op. at 1 fn. 6 (2006) (rejecting, inter alia, the respondent's "bootstrap attempt" to equate a lack of success with lack of trying). With regard to Schepers' alleged failure to seek employment during the period from December 2001 to February 2002, the evidence establishes that she was in the process of being considered for employment, hired and trained by Atlantic Health Systems during this time. In this regard, I note that Schepers' training began on January 13.

In arguing that the nurses failed to diligently seek interim employment, Respondent relies upon *Moran Printing,* supra. Respondent's reliance upon that case is inapposite, and only serves to highlight the differences between the circumstances therein and in the instant case. In *Moran Printing*, the Board found that one of the discriminatees failed to mitigate by engaging in only the most sporadic search for interim employment where he signed the union out-of-work book only twice after his discharge and further gave conflicting testimony regarding his efforts to seek work, which the judge discredited.

Respondent further contends that Savino and Schepers unreasonably limited their job searches to only part-time positions. These claimants had worked part-time for EVVNA to accommodate their family care responsibilities. The Board has dealt specifically with the issue of a claimant's right to reject employment which fails to accommodate personal or family needs. See e.g. *Kaase Co*., 162 NLRB 1320 (1967) (employee who worked the night shift to care for family members did not fail to mitigate backpay when she limited her search for work for interim employment to night shift work); *John S. Barnes Co*., 205 NLRB 585, 588 (1973) (discriminatee who had worked the day shift was not required to continue interim employment in the night shift when it posed too difficult a pattern of life for himself and his family.) This is true where the claimant has worked on a part-time basis as well. *Cassis Management Co*., 336 NLRB 961, 968 (2001) (claimant who worked part- time for respondent employer did not fail to mitigate backpay

[30] To the extent Respondent apparently argues that the nurses should have sought positions for which Respondent had deemed them unqualified, I find that the nurses should not be required to supplement their job searches with futile efforts in order to avoid the conclusion that they failed to mitigate their damages.

while limiting job search to part-time work, even where not much part-time work was available.) In other contexts as well, the Board has held that positions with significant differences in hours or shifts are not "substantially equivalent." See e.g. *Associated Grocers*, 295 NLRB 806, 807 (1989). Accordingly, I conclude that Savino and Schepers did not fail to mitigate backpay by limiting their job searches to the sort of part-time work they had previously performed for EVVNA. [31]

Respondent additionally contends that its backpay liability to Jones and Lambert should be tolled during the period of time that they attended computer training courses. I note that it was the state unemployment agency which arranged for Jones and Lambert to take these courses, and paid for them, as part of their ongoing search for work. Both witnesses credibly testified that, based upon their job search efforts and discussions with prospective employers, they believed that such training would enhance their skills and assist them in obtaining employment. Jones and Lambert further credibly testified that they continued to apply for work while undergoing training, and that they would have accepted work had it been offered to them during this period of time.

The Board has held that an employee who enrolls in a course of training or avails themselves of other educational opportunities during the backpay period may nevertheless be entitled to backpay while in school, so long as the claimant does not remove himself from the labor market. *J.L Holtzendorff Detective Agency,* 206 NLRB 483, 484-485 (1973); *Lozano Enterprises*, 152 NLRB 258, 259 (1962). Here, where considered in the context of the backpay period taken as a whole, Jones' and Lambert's computer training did not constitute a withdrawal from the labor market. To the contrary, such training, sponsored by the appropriate state unemployment agency, can be viewed as an attempt to mitigate backpay by fostering the development of those skills which had become increasingly necessary to the performance of the sort of work the nurses had previously performed for the Respondent. See *E&L Plastics Corp*. 314 NLRB 1056, 1058-1059 (1994). Accordingly, I find that neither Jones nor Lambert withdrew from the labor market; nor did they make themselves unavailable for work while attending computer training.

Accordingly, based upon the foregoing, I conclude that Savino, Lambert, Jones and Schepers each searched for work with reasonable diligence during the backpay period, and are entitled to the amounts set forth in the compliance specification.

The Named Respondents Constitute a Single Employer

Having found that there is backpay due to the claimants, it becomes necessary to determine whether NCC and NCHC should also be held liable for Respondent's backpay obligation under a single-employer theory. As noted above, Counsel for the General Counsel contends that EVVNA, NCC and NCHC are a single employer. Respondent argues to the contrary. As an initial matter, Respondent contends that Respondents NCC and NCHC were not afforded due process, as these entities had not previously been named as parties in this dispute. Respondent further argues that the General Counsel has failed to meet its burden to establish single-employer status.

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[31] Respondent argues that Savino eventually accepted a full-time position following the end of the backpay period and that Schepers later voluntarily accepted full-time hours at her new job. In this regard, both witnesses testified that their acceptance of full-time work resulted from changed personal circumstances. Savino accepted full-time work only after coming to the conclusion that no part-time work was available. Schepers testified to a change in the needs of her family.

The Due Process Issue

In support of its due process argument, Respondent cites to *Viking Industrial Security Inc. v. NLRB*, 225 F.3d 131, 136 (2d Cir. 2000) and *Northern Montana Health Care Ctr. v. NLRB*, 178 F.3d 1089, 1098 (9th Cir. 1999). In *Viking Industrial Security*, the Second Circuit refused to enforce a Board order imposing derivative liability. It found that a second corporation's interests in the underlying unfair labor practice proceeding had been unrepresented, and its due process rights denied, when it was held derivatively liable for the wrongful termination of an employee where the two corporations had been single employer at the time of the employee's termination, but had "gone their separate ways before the original unfair labor practice proceedings began," had been separate employers at all times thereafter, and where there was no evidence that the corporations had split to avoid liability, that the second corporation's absence was procured by deceit, or that its absence came about due to some fault of its own. 225 F.3d at 135. In *Northern Montana Health Care Ctr*., the Ninth Circuit found that a separate corporate entity not named in the complaint could not be bound by the Board's bargaining order, even where it constituted a single employer with the other named entities.

In this regard, the Board has held that, "it is well established that derivative liability for backpay may be imposed upon a party to a supplemental compliance proceeding even though it was not a party to the underlying unfair labor practice proceeding, if it was sufficiently closely related to the party that was found in the underlying proceeding to have committed the unfair labor practices." *Aiken Underground Utility Services*, 336 NLRB 1033 (2001), citing *Southeastern Envelope Co*., 246 NLRB 423, 424 (1979); see also *JMC Transport*, 283 NLRB 554, 560 (1987). Further, *Aiken* held that the General Counsel must show "that the [single employer] relationship existed at the time of the unfair labor practice proceeding, or at least at the time the complaint was served."

As the Board has noted:

> Once found to be [the charged company's] alter ego, the [newly added company] cannot complain that it should have had notice and an opportunity to defined itself against the underlying unfair labor practice charges. Since the interests of the alter egos are by definition identical, the alter ego finding in the compliance proceeding conclusively established that [the newly added company] did receive adequate notice, was present at the hearing, and did defend itself though the representation of [the charged company] in the earlier unfair labor practice proceeding.

Southeastern Envelope, 246 NLRB at 424.

Based upon the foregoing, I conclude that in the event NCC and NCHC are found to be a single employer with EVVNA during the period of time the underlying case was litigated, or at the time the complaint was issued, it is appropriate to hold them derivatively liable for the backpay due to the claimants. [32]

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[32] Thus, if the General Counsel can show, as *Aiken* instructs, that the single-employer relationship existed at the time of the unfair labor practice proceeding, the concern raised by the Second Circuit fails to obtain. With regard to *Northern Montana Health Care Ctr.*, supra, which lends some support to Respondent's argument, I find that Board law, which I am obliged to apply herein, holds to the contrary.

General Legal Principles

A single-employer relationship exists when two or more employing entities are a single-integrated enterprise. Four criteria determine whether such a relationship exists: (1) common ownership; (2) common management; (3) functional interrelation of operations; and (4) centralized control of labor relations. *Emsing's Supermarket, Inc.*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989). No single factor in the single employer inquiry is deemed controlling; nor do all of the factors need to be present in order to support a finding of single-employer status. Id.; *Dow Chemical Co.*, 326 NLRB 288 (1998); *Flat Dog Productions, Inc.*, 347 NLRB No. 104 (2006). "Rather, single-employer status depends on all the circumstances, and is characterized by the absence of the arm's-length relationship found between unintegrated entities." *Dow Chemical Co.*, 326 NLRB at 288.

Applying these principles, I agree with Counsel for the General Counsel that during the relevant times herein, EVVNA, NCC and NCHC have been a single employer based upon the factors of common ownership, common management, common control of labor relations and a degree of functional integration which is characterized by the absence of a traditional arms-length relationship.

Respondent's Non-Compliance with General Counsel's Subpoenas and Judge Davis' Order

As noted above, Respondent argues that "substantially complied" with the subpoenas issued by the General Counsel. Respondent notes that it provided General Counsel with a number of responsive documents on the first date of hearing and that it continued to act in good faith to fully comply, in particular as evidenced by the fact that it "voluntarily" offered to produce Baez, an individual allegedly with a working knowledge of most, if not all, of the documents provided by the Respondent. Respondent contends that General Counsel unreasonably refused to cooperate, instead threatening Respondent with *Bannon Mills* sanctions and other drastic remedies. Respondent argues that General Counsel acted unreasonably by not agreeing to a brief postponement request in order to allow Respondent to produce the Custodian of the Records. These actions, it is contended, are premature, improper and should not be condoned.

General Counsel points to the fact that Judge Davis substantially enforced the subpoenas; however without any reasonable excuse or advance notice, Respondent failed to produce Clay as its admitted Custodian of the Records. Although Baez attempted to testify in her stead, Baez stated that he did not review the subpoenas and was not asked to look for documents responsive to a number of paragraphs (specifically those paragraphs numbered 2,4,6,7,8,9,10) thereof. Further, Baez admitted that he failed to search for documents reflecting common managerial and supervisory personnel sought by paragraph 3. He additionally did not search employee personnel files to determine whether they would reflect a common or integrated administration of personnel and labor relations policies, as requested by paragraph 5. General Counsel contends that since Respondent failed to produce a witness to fully testify to the method and extent of its document production, it is appropriate to infer that such testimony would have revealed the existence of evidence which would not be supportive of Respondent's contentions. Accordingly, it is argued, all appropriate adverse inferences may be drawn from Respondent's failure to search for or produce such documents and that Respondent should be barred from relying upon secondary evidence that should have been substantiated by subpoenaed records. *Bannon Mills*, 146 NLRB 611 (1964).

In *McAllister Towing & Transportation Co.*, 341 NLRB 394, 417 (2004), the

administrative law judge, affirmed by the Board, noted that, "[a] subpoena is not an invitation to comply at a mutually convenient time. .. It is an exercise of the Board's power under Section 11 of the Act. Respondent was compelled to produce the documents when directed to do so. This is particularly so where, as here, Respondent had been in possession of the subpoenas well in advance of trial." That observation obtains in the instant case, as well.

Here, the subpoenas at issue were served on August 30. The hearing was thereafter postponed, pursuant to two requests by the Respondent. Thus, Respondent had a period of some six weeks to search for documents and arrange for a custodian of records to conduct and be prepared to explain this search, if necessary. On each date of the hearing, Respondent produced certain documents; however, General Counsel's subpoenas sought other documents, typically maintained by organizations in the course of doing business which, to the extent they exist, were required to be produced. These include, but are not limited to, documents showing the owners of the named Respondents and their respective assets; documents reflecting the managerial, personnel and organizational structure of NCC or NCHC; documents reflecting financial transactions among the named Respondents; documents containing information relating to the attorneys, accountants and other professional representatives of the named Respondents; licenses and permits and documents relating to insurance policies maintained by Respondents. These documents were not produced, and, for all the exhortations about "willingness" or "good faith" efforts at compliance, no reasonable explanation was provided by Respondent for its failure to do so. Thus, I find that Respondent has substantially failed to comply with the subpoenas.

Counsel for the General Counsel requests that I draw broad adverse inferences from this failure. General Counsel acknowledges that without the testimony of a custodian of the records it cannot specifically prove that certain documents exist and were not produced, and I agree. In this regard, I note that it was General Counsel's choice to reject a postponement of this matter thereby precluding an opportunity to question Clay, as the identified Custodian of Records, about any search for the missing records that might have been conducted, where they typically are maintained and why they were not produced. Nevertheless, it remained Respondent's burden pursuant to Judge Davis' order enforcing the subpoenas to timely produce a knowledgeable witness, demonstrate that documents were looked for and not found, or show that they were produced.

Upon consideration, however, I decline to impose the broad sanctions sought by the General Counsel, and automatically draw all inferences suggested. Rather, I find it appropriate to draw certain appropriate adverse inferences, based upon and related to the evidence which has been adduced both in the underlying and current proceedings, as well as the inherent probabilities that certain documents would exist and be maintained by the Respondent. I additionally find it appropriate to reject certain secondary evidence proffered by Respondent. My determinations in this regard are discussed specifically below. *McAllister Towing & Transportation Co.*, supra.

The Elements of Single Employer Status

Common Ownership

With respect to common ownership, I note that EVVNA is a not-for-profit corporation which, as Golden testified, could not be formally sold to NCC. Nevertheless, its assets were transferred to, and are wholly owned by NCC. In its brief, Respondent has characterized their relationship as one of parent/subsidiary. I note that the Board has held that "the relationship of privately held corporate parent to wholly owned corporate subsidiary" demonstrates common ownership for the purpose of single-employer status. *Masland Industries*, 311 NLRB 184, 186 (1993); see also *Dow Chemical*, 326 NLRB at 288. By analogy, in conjunction with the undisputed fact that the record establishes that NCC possessed full ownership of EVVNA's assets at the time of the unfair labor practices and underlying hearing, and in light of the fact that there is no evidence to establish that this has changed during the relevant period, I conclude that the element of common ownership exists, at least as between NCC and EVVNA.[33]

Common Management

Respondent argues that notwithstanding the aforementioned "parent/subsidiary" relationship, the other requisite elements of single-employer status are missing here. Relying upon *Dow Chemical*, supra,[34] Respondent contends that EVVNA and NCC are separate corporations, with different boards and argues that NCC has no role in the day-to-day operation of EVVNA.

With regard to NCHC, Respondent contends in its brief that the General Counsel, "utterly failed to establish any evidence that NCHC is related to NCC or EVVNA, or even whether NCHC continues to exist."[35] I note that when EVVNA was acquired by NCC, it was placed under the control of NCHC, then an extant organization with its own managerial and administrative personnel. Moreover, as noted above, NCC's website asserts that "New Community Health Care" is one of the "most central parts of the entire NCC network" which "employs 900 professionals and has an annual operating budget of $31 million." EVVNA is identified as being a constituent component of "New Community Health Care."

At the time EVVNA was placed under the control of NCHC, and continuing thereafter until such time as the underlying case was litigated, there was significant overlap in the directors and managerial personnel of all three named entities. Monsignor Linder, the founder and CEO of NCC was also a member of the Board of Directors of NCHC; Hoosain, the CEO and Executive Administrator of NCHC and the Nursing Home became the Director of EVVNA shortly after it was acquired by NCC; Golden was the Financial Director for NCHC and all its health

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[33] There is no evidence in the record regarding the ownership interests of NCHC; however, documents relating to this issue were subpoenaed by the General Counsel and not produced. I infer that such documents would have not been favorable to the Respondent's position herein. Moreover, after its acquisition, EVVNA was placed under the control of NCHC, apparently in the absence of any formal arms-length transaction. This evidence suggests an element of common ownership among all three named entities.

[34] In *Dow Chemical*, the Board found an absence of common management where the subsidiary had actual control over its day-to-day operations.

[35] In support of these contentions, Respondent apparently relies solely upon Baez's testimony regarding his "understanding" about what happened to NCHC.

care affiliates. As Golden testified, after EVVNA was acquired, its Board of Directors was reconstituted to include Board officers and managers of "New Community." In about July 2001, Hanna was removed and replaced by Hoosain, who together with Golden, assumed managerial control of EVVNA, folding those responsibilities into their extant positions. Hoosain maintained offices both at the Nursing Home and EVVNA. Moreover, the decision to replace Hanna was made by the NCHC Board of Directors. Thus the underlying record supports a finding that there was an element of common management among the three named Respondents.

Counsel for the General Counsel subpoenaed documents which would show or relate to common management, supervision and personnel of the three named Respondents. Baez testified that he did not search for documents responsive to this request, and none, other than the EVVNA organizational chart and one document reflecting the composition of the EVVNA Board of Trustees as of January 2004, were produced.[36] Baez identified at least 5 of the 12 members of this Board who also held high-level positions with NCC. Moreover, the Executive Director of EVVNA reports directly to the NCC CEO, and the EVVNA Controller reports to the NCC CFO.

I note that Counsel for the General Counsel specifically stated, in its letter of October 12, that it was seeking "documents reflecting managers, personnel and organizational structure of each of the Respondents." Moreover, Baez testified that such documents exist and would be kept by Clay as well as Cavallo, and in electronic form as well. As Respondent has presented no reason why such documents were not, or could not, be produced, I find it appropriate to infer that such documents would confirm that there was common management among EVVNA, NCC and NCHC during the relevant period.[37]

Functional Interrelation of Operations

In support of its contention that there is no interrelation of operations among the named Respondents, Respondent points to the evidence that EVVNA and NCC have always operated from separate facilities; have separate payrolls and operating accounts; that their payrolls run on separate cycles and that the nurses testified uniformly that they always received their paychecks from EVVNA. Respondent further contends that EVVNA employees have different health insurance plans and contribution rates, and that EVVNA handles its day-to-day operations without input from NCC.

The record establishes, however, that NCC was willing to assume responsibility for EVVNA, an entity then in significant financial debt, because EVVNA and NCHC shared consistent and complimentary missions – providing health care services to the Newark, New Jersey community. At the time EVVNA was acquired, NCC began paying the salaries of its employees, covering its losses and providing management and other support services to EVVNA. As Golden testified at the underlying hearing, NCC was prepared to continue doing so until such time as EVVNA operated at a profit or NCC decided "that they don't want to put more money into and lop it off, close it down." Thus, the record establishes that EVVNA was subject to no specific deadline for repayment of loans or payment for services provided; and that this fell fully within the discretion of NCC. Baez testified that he has never seen any documentation

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[36] Baez did produce documents reflecting the transfer of two employees, a request also encompassed in the relevant subpoena paragraph (Paragraph 2).

[37] Whether or not NCHC, as originally conceived, continues to be an extant organization, the record establishes that NCHC and its managerial and administrative personnel had a determinative role in managing EVVNA's affairs and that this continued, at least, until 2003.

reflecting a request by NCC that EVVNA pay for such services or any other written agreement between the two entities.

While NCC and EVVNA operate from separate facilities, EVVNA's facility was constructed for it by NCC. Although Baez testified that he "believes" that EVVNA pays rent for this space, I give no weight to such speculative testimony. I note that documents relating to such a relationship were among those contemplated by the subpoenas issued by Counsel for the General Counsel. Baez testified that he did not search for these documents and none were produced. I find that if such a lease arrangement existed, or that a transfer of funds in the form of rent was made, documentation of such arrangements or transfers would have been maintained and, moreover, could have easily been produced by the Respondent. I infer, therefore, that at all material times, there has been no formal lease agreement and, further, that EVVNA has not paid rent for its office space.

With regard to Respondent's reliance upon presumably separate insurance policies, I note that the health insurance for all employees is provided by the same vendor. Similarly, employees for EVVNA and NCC have access to company-wide benefits such as a credit union and 403(b) retirement plan. In this regard, I note that the General Counsel sought, through subpoenas, documents reflecting these insurance plans and information regarding the entity responsible for paying the premiums on such plans. Baez testified that he did not look for documents responsive to this request, and they were not produced. Again, I find that these are the sort of documents which are typically maintained by organizations in the course of doing business, and Respondent has failed to explain why these documents were not, or could not, be produced. Accordingly, based upon Respondent's failure to comply with the subpoena, coupled with undisputed record evidence regarding EVVNA's poor financial condition, I infer that NCC has, at all material times, funded EVVNA's insurance obligations.

Moreover, there is strong and undisputed evidence that the financial transactions between NCC and EVVNA have not been conducted at arms length and that, if not for the continuing material and financial support NCC provides to EVVNA, it would not continue to exist. See e.g. *Emsing's Supermarket, Inc.*, 284 NLRB 302, 304 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989) ("[the] facts, taken as a whole, clearly reveal not only a financial interdependency between [the two supermarkets alleged to be a single employer], but also a propensity on the part of [the owners] to operate the two stores in such a manner that the exigencies of one would be met by the other. This method of operating shows less than an 'arms length relationship'…"). This is true herein, as well. In particular, the evidence is clear that from the outset NCC undertook to meet the financial exigencies of EVVNA, without any requirement that those obligations be repaid pursuant to any agreement or schedule.

With regard to the role of NCHC, I note that the record establishes that NCC had the authority to put EVVNA's assets under NCHC's control. Moreover, the record establishes that NCC historically funded certain NCHC liabilities; in particular, the substantial losses incurred by the Nursing Home. According to Golden, this funding continued at NCC's discretion, until the Nursing Home became a profitable operation. Such evidence points to an absence of a traditional arms-length relationship between NCC and NCHC. This, together with the above-noted overlap in managerial and administrative personnel, leads me to conclude that during the relevant period of time NCC and NCHC constituted a single-integrated enterprise. *Blumenfeld Theatres Circuit*, supra at 215.

Based upon the foregoing, I find that the relationship among EVVNA, NCC and NCHC is one that is generally characterized by a lack of the sort of arms-length transactions that ordinarily would be found among unintegrated companies. *Dow Chemical*, supra.

Centralized Control Over Labor Relations

Respondent contends that the terms and conditions of employment for the employees of NCC and EVVNA are different, citing to the fact that each entity maintains its own employee handbook. Moreover, it is uncontested that only EVVNA employees are subject to the collective-bargaining agreement with the Union. Respondent further contends that only EVVNA signed the 2002 agreement; however the exhibit cited by Respondent is, in fact, signed by both the then-Executive Director of EVVNA and additionally by Hoosain as the "Executive Administrator" of "New Community Health Care, Inc." In fact, it is his signature which appears first.

Contrary to Respondent's contentions, the record establishes that NCC and NCHC and their administrative personnel have had significant input regarding EVVNA's labor relations. Immediately after EVVNA was acquired and put under NCHC's control, Hanna began reporting and making recommendations to Linder and the NCC Board of Directors regarding such matters as nurse recruitment and compensation and NCHC began employee recruitment efforts on EVVNA's behalf. After Hanna was replaced, Hoosain and Golden participated in collective-bargaining negotiations and, as noted above, Hoosain signed the resulting agreement on behalf of NCHC.[38]

In August 2001, Hoosain implemented the UM transfer plan at issue in the underlying case, an integral part of which was to transfer 13 employees to other "New Community" affiliates. The record establishes that Hoosain consulted with NCHC officer Pierce, among others, when making decisions relating to the transfer and training of the four nurses at issue herein. In 2003, the NCHC Executive Administrator's report discussed items such as nurse recruitment and the reopening of the Union contract for EVVNA nurses. Thus, the underlying record contains evidence of a substantial degree of centralized control over labor relations among the three named Respondents.

Relying upon Baez's testimony, Respondent contends that NCC does not make any decisions regarding the hiring and firing of EVVNA employees. Baez' testimony was, however, refuted by other record evidence. In this regard, I note that Baez testified that he did not search employee personnel files for evidence of this nature, even though he acknowledged both that those files were kept in his office that he was asked specifically to search files under his control. Further, while Baez testified that only Cavallo made determinations regarding the hiring, discharge and compensation of EVVNA employees, the only documentary evidence in the record relating to such issues shows this assertion to be incorrect. Thus, in 2004, NCC Extended Care manager Tolliver not only issued disciplinary warnings, but issued a termination notice to an EVVNA employee. Further, as noted above, the NCC HR department continues to take the responsibility for playing a significant role in the recruitment and hiring of nurses for EVVNA, which includes "aggressive recruitment methods," "instituting salary and benefit increases for RN's and LPN's" and "replac[ing] the RN's who resigned or were terminated and hir[ing] additional RN's to meet the needs of the Agency." Additionally, the record establishes that the NCC HR office drafted and reviewed the updated EVVNA/Care at Home personnel manual.

Moreover, the record developed herein establishes that NCC performs all human

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[38] Hoosain and Linder sought to recruit nurses for EVVNA by recruiting nurses from overseas, contracting with an agency to provide RNs. They additionally considered opening a school of nursing under New Community auspices.

resource functions for EVVNA, which does not have its own department to handle such matters. Thus, NCC maintains EVVNA personnel files, handles workers' compensation and unemployment insurance claims and deducts and transmits Union dues for EVVNA employees.[39] There is additionally undisputed evidence that NCC HR personnel investigate and respond to grievances and participate in collective bargaining negotiations relating to EVVNA employees.

Thus, I find that the record as a whole supports a finding that the responsibility for the establishment and implementation of Respondent's labor relations policies as applied to EVVNA employees during the relevant period is not lodged solely with EVVNA, but is, rather, shared with other managerial and supervisory personnel of NCC and NCHC.

Further, based upon Respondent's apparent and unexplained failure to conduct an appropriate search of personnel and other records, I infer that had Respondent conducted such a search, and produced relevant documents pursuant to subpoena, such documents would have shown that there has been common control of labor relations during all relevant periods of time herein, to an even greater extent than the record currently reflects. [40]

Accordingly, based upon the factors of common ownership, common management, functional interrelation of operations and common control over labor relations, I conclude that, at all relevant times, EVVNA, NCC and NCHC have been a single-employer and a single integrated enterprise. As set forth above, under the theory of derivative liability, they are jointly and severally liable for the backpay due in this case. See *Emsing's Supermarket*, 284 NLRB at 304; *Flat Dog Productions*, 347 NLRB No. 104, slip op. at 3.

Conclusion

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[41]

ORDER

IT IS HEREBY ORDERED that Respondent Essex Valley Visiting Nurses Association, New Community Corporation and New Community Health Care Inc., and their officers, agents, successors and assigns, shall jointly and severally pay the individuals named below the indicated amounts of total gross backpay and other reimbursable sums for the period from August 13, 2001 to March 14, 2002.

Patricia Jones	$26,306.44
Shirley Lambert	$26,974.68

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[39] I note that when asked about a letter relating to such dues deduction and transmission, Baez referred to the EVVNA employees as "our" employees.

[40] As the Board has noted, a single-employer finding may be made where there is "little or no employee interchange." *Blumenfeld Theatres Circuit*, 240 NLRB at 215. See *Jerry's United Super*, 289 NLRB 125, 135 (1988).

[41] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Stella Savino	$21,178.24
Anne Schepers	$13,650.30

Dated, Washington, D.C.

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Mindy E. Landow
Administrative Law Judge