

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

THE LORGE SCHOOL,

Respondent,

and

Case No. 2-CA-37967

LINDA COOPERMAN,

An Individual.

**ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Dated at New York, New York,
this 16th Day of February, 2010.

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I. STATEMENT OF THE CASE

On February 19, 2008, the Board issued its Decision and Order finding Respondent violated section 8(a)(1) of the National Labor Relations Act by discharging Linda Cooperman on August 1, 2006, and ordered reinstatement and backpay remedy.¹ On January 9, 2009, the United State Court of Appeals for the Second Circuit issued its Judgment enforcing the Board's Order in full.²

On February 13, 2009, the Regional Director for Region 2 issued and served on all the parties a Compliance Specification and Notice of Hearing. On March 16, 2009, Respondent filed an Answer admitting to the Backpay period and to the method of calculating gross backpay as set forth in the Compliance Specification. However, Respondent contends that discriminatee Linda Cooperman did not mitigate her damages. A hearing was held on April 14, 2009 before Administrative Law Judge Joel P. Biblowitz.

On November 18, 2009, Judge Biblowitz issued a supplemental decision and recommended supplemental order finding that Linda Cooperman's job search efforts "were more than adequate to satisfy her duty to attempt to mitigate her losses," and ordered Respondent, its officers, agents, successors, and assigns to make whole Cooperman by paying the amount specified in the Compliance Specification, with interest. (Supp ALJD, p.5 and p.11)

On January 19, 2010, Respondent filed exceptions to Judge Biblowitz's findings. It is the General Counsel's position that Judge Biblowitz's decision was correct as to matters of law and fact, and that the Board should reject Respondent's exceptions and adopt the Supplemental Decision and Recommended Supplemental Order in its entirety.

¹ The Lorge School, 352 NLRB 119 (2008).

² 305 Fed. Appx. 811 (2d Cir. 2009).

II. STATEMENT OF THE ISSUES

Respondent filed 12 separate exceptions to Judge Biblowitz's Supplemental Decision and Recommended Supplemental Order. However, Respondent's exceptions can be summarized into the following issues:

1. Whether the ALJ properly concluded that the jobs that Linda Cooperman applied for after she was unlawfully terminated were comparable to her position as the instructional supervisor at The Lorge School.³
2. Whether the ALJ properly concluded that Linda Cooperman conducted a reasonable, honest and good faith search for work, geographically as well as in the duration of her search, before she started her own business.⁴
3. Whether this case is one that must await the Supreme Court's decision on the power of a two-member board to issue decisions and orders in unfair labor practices and representation cases.⁵

III. STATEMENT OF THE FACTS

The facts have been completely and accurately set forth in the Administrative Law Judge's Supplemental Decision.

IV. ARGUMENT

(1) THE ALJ PROPERLY CONCLUDED THAT THE JOBS THAT LINDA COOPERMAN APPLIED FOR AFTER SHE WAS UNLAWFULLY TERMINATED WERE COMPARABLE TO HER POSITION AS THE INSTRUCTIONAL SUPERVISOR AT THE LORGE SCHOOL.

Respondent excepted to the Judge's finding that teaching and tutorial positions were not substantially equivalent to the position of instruction supervisor from which Cooperman was unlawfully terminated. The record evidence, as the Judge so found, showed that teaching and

³ This issue addresses Respondent's exception numbers 1, 4, 6, 7, 10, and 12.

⁴ This issue addresses Respondent's exceptions numbers 2, 3, 4, 5, 8, 9, and 12.

⁵ This issue addresses Respondent's exception number 11.

tutoring “were not ‘substantially equivalent’ in terms of pay and duties” to the instructional supervisor position. At the time Cooperman was terminated, teaching positions were paid between \$55,000.00 and \$65,000.00 annually. (Supp ALJD p. 7, fn 8) Cooperman’s salary as an instructional supervisor was \$75,000.00, which was ten to twenty thousand dollars more per year than teaching positions. The duties are even more drastically different. While teachers are responsible for matters inside a classroom, the position of instructional supervisor that Cooperman was hired for, according to Respondent’s job description, must, “[s]upervise classroom and specialty teachers through ...performance evaluations”, and “[m]ake recommendation to the Director for hiring or termination of instructional staff.” (GC Exh. 24; Tr. 15-16) These are in addition to those duties that the Judge noted in Cooperman’s testimony, which included scheduling classes, assigning teachers, and generally overseeing instruction and assessment of students. (Supp ALJD p. 2) These administrative and supervisory responsibilities are more equivalent to assistant principal and principals. Most significantly, while teachers are not required to have a license as a school administrator, assistant principals and principals are so required. Only those licensed as school administrators can evaluate teachers. (Tr. 146)

At the time Cooperman was working at The Lorge School, she was the only administrator who was certified to evaluate teachers. (Tr. 145-146, 154-155) Cooperman further testified that the job category permitted to evaluate teachers in the New York City school system was the job of principal. (Tr. 146) This is the single most important fact that was not disputed in the record, and which showed that the position of instructional supervisor is more equivalent to assistant principal or principal position. Therefore, the Judge’s conclusion that the assistant principal and principal positions Cooperman had applied for appeared to be comparable or “substantially equivalent” was well supported in the record evidence.

Respondent's argument that since Cooperman never actually performed the job of instructional supervisor, because she was discharged before the school year began, and her ultimate responsibilities could not be specifically determined only further support Judge Biblowitz's conclusion for three reasons. First, Respondent's own job description for the position of instructional supervisor clearly lists administrative and supervisory responsibilities that were more equivalent to assistant principal and principal positions. Second, Cooperman's testimony was uncontroverted that during the two weeks she was being trained by Dr. Dawe, the instructional supervisor whom she was replacing, that she was responsible for all aspects of the curriculum and instructions, including mentoring, evaluating, and hiring teachers. (Tr. 15-16) Lastly, it is well settled that any ambiguities should be decided against the wrongdoer whose conduct has created the situation creating the uncertainty. NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d at 572-573; Neely's Car Clinic, 255 NLRB 1420, 1421 (1981); George A. Angle, 252 NLRB at 1157, *enfd* 683 F.2d 1296 (10th Cir. 1982); Otis Hospital, 240 NLRB 173, 174 (1979); United Aircraft Corp., 204 NLRB 1068 (1973).

As to Respondent's attempt to argue that Cooperman never worked as a principal, and was aiming to ascend the hierarchy to a better job than she had at The Lorge School rather than mitigate her losses by finding a teaching job, Respondent's ignorance of the record evidence fatally weakens its argument. As the record demonstrates, her last job was the functional equivalent of being a principal, as the Judge credited and so found. (Supp ALJD p. 2; Tr. 19, 21-22) Furthermore, Cooperman has the necessary certificates from the New York City Board of Education that qualified her to apply for assistant principal and principal positions through its online job bank. Without these certificates, she would not have been eligible to apply for any school administrator positions, including assistant principal and principal positions. Cooperman

went to numerous interviews. She was selected by more schools to interview for principal positions than assistant principal positions. Furthermore, there is no requirement that in order to mitigate losses a discriminatee must seek positions not substantially equivalent to that from which they were discharged. Here, Cooperman already retired as a teacher and was collecting her teacher's pension. (Tr. 147-148) Therefore, the Board should affirm Judge Biblowitz's conclusion that Cooperman had the educational background and experience that qualified her for assistant principal and principal positions, and that she properly limited her job search to these positions.

- (2) THE ALJ PROPERLY CONCLUDED THAT LINDA COOPERMAN CONDUCTED A REASONABLE, HONEST, AND GOOD FAITH SEARCH FOR WORK, GEOGRAPHICALLY AS WELL AS IN THE DURATION OF HER SEARCH, BEFORE SHE STARTED HER OWN BUSINESS.

Respondent excepted to the Judge's finding that Cooperman's search for work in Manhattan, the Bronx, and the northern suburban counties of New York City was not an unduly circumscribed job search. For just Manhattan and the Bronx alone, each month between September 2006 and October or November 2006, Cooperman applied to approximately 80 assistant principal and principal jobs through the New York City Department of Education online job bank. After approximately two months of not being successful with getting a job in Manhattan and the Bronx, she expanded her search to include Brooklyn and Queens even though that would increase her travel time to more than an hour and a half each way. (Tr. 37-40, 89) Cooperman's testimony regarding her travel time to and from each of the boroughs was not at all challenged by Respondent. In Respondent's brief in support of its exceptions, Respondent requested the Board to take administrative notice that Brooklyn is only 20 minutes away from

The Lorge School. This request is pointless and would not add depth to any Board decision because while entering Brooklyn may take only 20 minutes by subway from The Lorge School, Brooklyn covers a land mass of 93 square miles. Travelling to a specific school in Brooklyn will most certainly take much longer because Cooperman would be traveling from Pound Ridge, New York, which is a remote rural suburb north of New York City.

Respondent attempted to argue that Cooperman prematurely ended her job search in April 2007 “by steadfastly refus[ing] to apply for any education position.” It appears that Respondent mischaracterized the undisputed record evidence. Not only does the record clearly show that from the moment Cooperman was unlawfully terminated, she made it her job to look for education work, *she continued to interview for education jobs until the end of August 2007*, even though she stopped actively going online earlier in the summer of 2007 to apply for more of the same types of jobs, for which she already went to numerous interviews. (Supp. ALJD pp. 3-4; GC brief pp.3-6; GC Exh. 10) The record shows that Cooperman was determined to work and to be self-supporting.

Counsel for the General Counsel agrees with the legal precedent cited by Respondent that the NLRB “may give appropriate weight to a clearly unjustifiable refusal [by the discriminatee] to take desirable new employment.” See Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). The facts in this case show that despite Cooperman’s relentless search for work and many interviews she obtained, she was not offered any new employment to which she even had a chance to refuse.

Although Cooperman did not sign the lease for the business she started with her husband until September 2007, there was no gap in her efforts to mitigate her losses after she was unlawfully terminated. First, the record clearly shows that Cooperman was still interviewing in

June, July and August 2007. Second, the record demonstrates the extent of work required to start a business prior to signing the lease. After signing the lease, the record has abundant evidence regarding the time and resource commitment Cooperman devoted to getting the business off the ground. (Supp ALJD pp. 3-4; GC Brief pp. 7-8, 11) Respondent offered no evidence that she could have continued her search for work and continued to build her business simultaneously. (Respondent's Exception No. 9) It is important to note that Cooperman devoted herself completely to searching for a job as a school administrator for almost a full year before starting her own business. There is no evidence that had she continued searching for work in the manner in which she was, that she would have successfully found employment. For Respondent to say that by engaging in self-employment Cooperman "curtailed all her other job seeking responsibilities" is to deny the Board's precedent that self-employment is an adequate and proper way for a discriminatee to attempt to mitigate loss of wages. (See cases cited in Supp ALJD p. 8) Furthermore, Respondent is incorrect that the record is silent as to why Cooperman needed to devote all her time to building the business. To the contrary, Cooperman's uncontradicted testimony is that she needs to apply herself full time in order to secure a reasonable chance for the business to succeed. In sum, the record evidence soundly supports the Judge's conclusion that Cooperman's decision to be self employed by going into business was consistent with the inclination to work and be self supporting, and therefore no justification exists to cut off her backpay in April 2007.

- (3) THIS CASE IS NOT ONE THAT MUST AWAIT THE SUPREME COURT'S DECISION ON THE POWER OF A TWO-MEMBER BOARD TO ISSUE DECISIONS AND ORDERS IN UNFAIR LABOR PRACTICES AND REPRESENTATION CASES.

As a matter of justice to discriminatees and certainly of sound legal practice, the Board must affirm Judge Biblowitz's conclusion that the doctrine of *res judicata* bars Respondent from raising this two-member Board issue now, when Respondent could have, but did not, raise it before the issuance of the Board's underlying decision and order, or before the Second Circuit Court of Appeal's Judgment and Mandate. As the Judge found, the principle of *res judicata* applies to jurisdictional issues (Supp ALJD p. 10) Moreover, as noted by the Judge, the Board has determined that it has the authority to make decisions with two sitting members of the Board. See e.g., Regency Grande Nursing & Rehabilitation Center, 354 NLRB No. 93, slip op. at 1 fn. 1 (2009).

CONCLUSION

Based upon the foregoing, Counsel for the General Counsel respectfully submits that Respondent's Exceptions be rejected in their entirety and that the Administrative Law Judge's Supplemental Decision and Recommended Supplemental Order be affirmed.

Dated at New York, New York,
this 16th Day of February, 2010.



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An Individual

AFFIDAVIT OF SERVICE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated below I filed General Counsel's ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE electronically through the NLRB E-File system and served the document via email upon the following persons, addressed to them at the following addresses:

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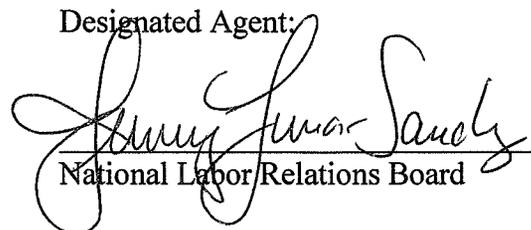
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Subscribed and Sworn to this:
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Qualified in Queens County
My Commission Expires Aug. 14, 2010