St. Barnabas Hospital *and* United Salaried Physicians and Dentists. Case 2–CA–31504

March 31, 2006

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On March 8, 2005, Administrative Law Judge Raymond P. Green issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and United Salaried Physicians and Dentists (the Union) each filed an answering brief. The General Counsel and the Union each filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, St. Barnabas Hospital, New York, New York, its officers, agents, successors, and assigns, shall make whole the individuals named below, by paying them the amounts following their names, plus interest accrued to the date of payment, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws:

Dr. Joseph A. Kazigo	$126,442
Dr. Soula Priovolos	296,816
Dr. Prakashchandra Rao	260,753
Dr. Yilmaz Gunduz	268,304
TOTAL BACKPAY:	$952,315

Rita Lisko Esq., for the General Counsel.
Joel Cohen Esq. and *Brett Schneider Esq.,* for the Respondent.
Ralph DeRosa Esq., for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York City on December 1, 2, 3, and 8, 2004. This is a supplemental hearing to determine the backpay of Drs. Soula Priovolos, Yimaz Gunduz, Joseph A. Kazigo, and Prakashchandra Rao for the loss of any earnings they suffered as a result of their discharges on June 15, 1998.

The Board's underlying decision is reported at 334 NLRB 1000 (2003), and was enforced by the Second Circuit Court of Appeals on February 28, 2003. In substance, the specification alleges that the Respondent owes certain amounts to the named individuals for net loss of earnings during the backpay period plus dental, medical, and disability expenses that they incurred which would have been covered by the Respondent had they not been discharged. The backpay period runs from June 15, 1998, to June 30, 2000.

On the entire record in this case including my observation of the demeanor of the witnesses and after reviewing the briefs filed by the parties, I make the following

FINDINGS AND CONCLUSIONS

I. THE GROSS BACKPAY CALCULATIONS

As noted above, the backpay period begins on June 15, 1998, and runs until June 30, 2000, which is the date that the Respondent no longer was responsible for running Lincoln Hospital, which is the medical facility involved in this case. As such, the General Counsel concedes that as of June 30, 2000, reinstatement by the Respondent was no longer feasible.

The gross backpay is based on the average weekly earnings of the discriminatees during the period of time immediately before their discharges by the Respondent. The General Counsel then projected those amounts, with any reasonable wage increases and benefits, into the backpay period as being the remuneration that they would have received had they not been discharged.

The Respondent disputed the inclusion of "on call" work into the gross backpay figures but I can see no reason to exclude that from the calculation of backpay. While it is true that the original case involved the question of whether the doctors had a right to refuse what had been designated as voluntary oncall work, the evidence was that these doctors almost always performed that work when asked to do so. There is therefore, no reason to conclude that they would not have followed the same practice in the backpay period.

Insofar as gross backpay is concerned, the Respondent conceded that the General Counsel's backpay formula and the calculations thereof were accurate. He also conceded that if the oncall amounts were found to be properly included in the gross amounts, then the calculations provided by the General Counsel would be correct. Inasmuch as I have concluded that the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge that Dr. Prakashchandra Rao's 1997 net profits from his private practice constitute a reasonable basis to compute his interim earnings and backpay due. See *Kansas Refined Helium Co*., 252 NLRB 1156 (1980), enfd. sub nom. *Angle v. NLRB*, 683 F.2d 1296 (10th Cir. 1982).

[3] In adopting the judge's decision, Member Schaumber views as incomplete the judge's statement of applicable case law which could be read to minimize the employee's obligation to mitigate his damages. Further, Member Schaumber does not rely on the language cited by the judge and the supporting caselaw set forth in sec. II of the judge's decision that "a discriminatee is not required to apply for work during each and every quarter."

oncall earnings should be included in the gross backpay of each individual, there is really no dispute regarding the accuracy of the calculations of those amounts as set forth by the backpay specification as amended.

The General Counsel calculated net backpay for each individual as being the gross amounts minus interim earnings. The calculations were made on a quarterly basis in accordance with long established Board and court precedent.

II. GENERAL PRINCIPLES

The general principles governing backpay proceedings are well settled. The finding of an unfair labor practice is presumptive proof that some backpay is owed. *NLRB v. Mastro Plastics Corp.*. 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). Once the General Counsel has shown the gross backpay due in the specification, the employer has the burden of establishing affirmative defenses which would mitigate his liability, including willful loss of earnings and interim earnings to be deducted from the backpay award. *NLRB v. Brown & Root, Inc.,* 311 F.2d 447, 454 (8th Cir. 1963); see also *Sioux Falls Stock Yards Co.,* 236 NLRB 543 (1978).

The Respondent cannot meet its burden of proof merely by presenting evidence of lack of employee success in obtaining interim employment or of so-called "incredibly low earnings but must affirmatively demonstrate that the employee did not make reasonable efforts to find interim work." *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575–576 (5th Cir. 1966). The Respondent needs to present credible evidence to establish that during the backpay period there were sources of actual or potential employment that the claimant failed to explore. It also must show if, where, and when the discriminatee would have been hired had he applied. *NLRB v. Inland Empire Meat Co.*, 692 F.2d 764 (9th Cir. 1982); *McLoughlin Mfg. Corp.*, 219 NLRB 920, 922 (1975); *Isaac & Vinson Security Services,* 208 NLRB 47, 52 (1973). *Champa Linen Service Co.*, 222 NLRB 940, 942 (1976).

Although a discriminatee must make reasonable efforts to mitigate his loss, he is held only to reasonable exertions, not to the highest standard of diligence. *NLRB v. Arduini Mfg. Co.*, 394 F.2d 420, 422–423 (1st Cir. 1968); *Otis Hospital*, 240 NLRB 173, 175 (1979). Success is not the measure of the sufficiency of the discriminatee's search for employment. The law only requires an "honest, good faith effort." *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955). A discriminatee is not required to apply for each and every possible job that might have existed in the industry, or even to apply for work during each and every quarter. *Champa Linen Service*, 222 NLRB at 942; *Madison Courier, Inc.*, 202 NLRB 808, 814 (1973); *Sioux Falls Stock Yards*, 236 NLRB at 551; *Cornwell Co.,* 171 NLRB 342, 343 (1968). What constitutes a reasonable effort depends upon the circumstances of each case. *Cornwell Co.*, supra; *Mastro Plastics Corp.*, 136 NLRB at 1359. In determining the reasonableness of this effort, the employee's skill, qualifications, age and labor conditions in the area are factors to be considered. Id. However, even where the evidence raises doubt as to the diligence of the claimant's efforts to gain employment, it is the discriminatee who must receive the benefit of the doubt rather than the Respondent wrongdoer whose conduct has created the situation giving rise to the uncertainty. *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d at 572–573; *Neely's Car Clinic*, 255 NLRB 1420, 1421 (1981); *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157, enfd. 683 F.2d 1296 (10th Cir. 1982); *Otis Hospital*, 240 NLRB 173, 174 (1979).

Finally, it should be noted that the Board and the courts have held that:

> It is not enough that the respondent thinks that employees should have been able to secure jobs. Suspicion and surmise are no more valid bases for decision in [the] backpay hearing than in an unfair labor practice hearing. [*Laidlaw Corp.*, 207 NLRB 591, 594 (1973), enfd, 507 F.2d, 1381 (7th Cir. 1974), cert. denied 422 U.S. 1042 (1975).]

III. DR. KAZIGO

Dr. Kazigo testified that soon after being terminated by the Respondent, which is a public hospital, he started making inquiries at other hospitals. Part of that effort was to inquire at private hospitals including Columbia Presbyterian where he already had a part-time position. But he was advised that in order to work at a private hospital he would have to set up his own private practice, incur the cost of medical malpractice insurance, and earn his living as a surgeon by having his patients admitted to the hospital. Feeling that this was a road he didn't want to take at his age, Dr. Kazigo also applied for a job as a surgeon at Nassau County Medical Center. In this regard, the evidence shows that he applied for and was accepted at Nassau County Medical Center in July 1998, a date not long after being discharged by Respondent.[1]

Having accepted a job offer at Nassau County Medical Center, Dr. Kazigo could not immediately start work because of the process of obtaining privileges. Believing that it would take some time to go through that process, he decided to take a 1-month vacation in Uganda, the country of his birth.

The process of obtaining privileges is a process applicable to all hospitals in New York. It requires a physician to furnish copies of medical licenses, university and medical diplomas, work histories, references, etc., to the prospective employing hospital. Once supplied, a committee of the hospital has to investigate these and other matters of the applicant. In addition, a public hospital like Nassau County Hospital requires some additional red tape.

[1] The Respondent asserts that none of the discriminatees made adequate searches for employment because they did not respond to advertisements placed in the New York Times. A review of the set of advertisements introduced into evidence by the Respondent indicates that only a small subset were for surgery or emergency room physicians which were the positions for which these discriminatees were certified. To the extent that there were advertisements for house physicians, there was testimony that those types of jobs, although performable by the discriminatees, were not generally equivalent either in pay, prestige, or interest, to the jobs that they held while at the Respondent. In any event, the discriminatees went about their job searches by means that they believed to be reasonable; that being to contact their friends, colleagues, and associates in the medical field. This is usually called "networking" and is perhaps, the most efficacious way of getting a new job.

There is no dispute that the granting of privileges is a precondition for a surgeon or other physician to be employed at a public or private hospital in New York. Nor is there any dispute that it can take from several weeks to several months to go through the process of obtaining even temporary privileges. (A physician can be put to work conditionally once having obtained temporary privileges.)

The amount of time that it can take to get privileges or even temporary privileges is somewhat indeterminate as it depends upon the amount of information furnished by the job applicant, the responsiveness of the institutions to which inquiries are made and the availability of qualified hospital personnel to do this task at any given time.

Dr. Joan McInerney, the chairman of the department of emergency medicine at Nassau County Medical Center (now called Nassau University Medical Center), testified that she was the person responsible for hiring both Drs. Kazigo and Priovolos. She made it plain that the process for both individuals was quite long. In the case of Dr. Kazigo, he received notification of his privileges in October 1998 to be effective on November 6, 1998. He began working at the hospital on November 17, 1998. (I will discuss Dr. Priovolos' situation later.)

The Respondent asserts that Dr. Kazigo did not mitigate his loss because he accepted employment that entailed a "significant reduction in pay" from the job he held at the Respondent. I do not agree.

Dr. Kazigo had been employed as a general surgeon at the Respondent for many years and the testimony was that the pay scale at that institution was relatively high compared to other county and public hospitals. He could have gone into private practice, but having been employed in the public sector with a secure salary, I don't think that he is required to take the risk, particularly at his age, of starting out anew as an entrepreneur. Nor do I think that the offer from Nassau County Hospital was so deficient that a reasonable person in his position should have refused the offer and waited for an indefinite time for a better one. Nassau County Hospital offered him a surgeon's position at a starting salary of $120,000 per year, which compared to his base annual salary at the Respondent of $165,000. But the Nassau County Hospital offer does not strike me as a beggarly wage. And as a new employee, Dr. Kazigo was hardly in a position to demand the same pay that someone already employed for many years would be getting. There is no credible evidence that a better offer was just around the corner. And I think that the Respondent would have had a better argument about lack of mitigation if Dr. Kazigo had refused this offer and had opted to wait for a better paying job to come along.[2]

The Respondent also argues that when employed at Nassau County Hospital, Dr. Kazigo did not work the same number or hours that he worked while employed at the Respondent. But the Respondent did not offer evidence that a similar number of additional hours were offered to him or that he refused to work such hours.

In sum, the evidence concerning Dr. Kazigo shows that he made adequate efforts to gain employment in his field shortly after his discharge; that he soon managed to get an offer from Nassau County Hospital; and that he started to work at that institution within a reasonable time after his privileges were granted. While he took a month off to go to Uganda, he did so at a time when the investigation of his credentials was being undertaken by his prospective employer and he had a reasonable expectation that this process would not be completed until after he returned to the United States.[3]

There was no dispute raised as to Dr. Kazigo's interim expenses, these consisting of travel expenses, union dues, and an annual membership fee to Nassau Hospital. As I have accepted the General Counsel's theory of the case, rejected the Respondent's contentions and taken into account those facts that are not in dispute, the total net backpay amount owed to Dr. Kazigo is $126,442 plus interest.

IV. DR. PRIOVOLOS

Like Dr. Kazigo, Dr. Priovolos made inquiries of friends and associates immediately after her discharge. And like Dr. Kazigo, she wound up at Nassau County Medical Center in July 1998, as her other efforts were not bearing fruit. In early July 1998, Dr. Priovolos met with Dr. McInerney and she was offered, "shift work" as an attending in the emergency medicine department. Although not a position with a yearly salary, the offered pay was about $2 per hour more than a similarly placed salaried physician because it compensates for the lack of other benefits.

Being assured of a job offer (conditioned of course on obtaining privileges), Dr. Priovolos mailed in her job application on July 13, 1998. She sent in her application for privileges on September 18 because she did not receive that application until September 10, 1998. (There is no evidence that Dr. Priovolos intentionally delayed sending in her application for privileges.)

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[2] The Respondent cited a few cases and asserted that they stood for the proposition that a discriminatee is required, at least for the initial period of his or her unemployment, to obtain a job at a substantially equivalent rate of pay. However, in *Tubari Ltd. v. NLRB*, 959 F.2d 451 (3d Cir. 1992) (one of the cited cases), the respondent there argued that the discriminatees willfully incurred losses by immediately accepting employment that provided significantly lower pay. This contention was rejected by the court and even while stating that a discriminatee "should not recklessly accept lower paying employment," the court went on to state that "a discriminatee who seeks and accepts interim employment in good faith should not be penalized for his anxiety to comply with the dictates of the Board and the courts, or because he succumbs to compelling financial pressures, or even if he exercises what to the comfortably employed or affluent may be seen as bad and hasty judgment."

[3] Before his discharge from the Respondent, Dr. Kazigo also worked part time at Columbia Presbyterian Hospital. As that job was essentially a moonlighting job, his earnings at Columbia whether he continued to work there or quit, would not be relevant to this case. There was an intimation that he may have increased his hours at Columbia for a period of time after his discharge but even so, this was not quantified and the Respondent did not prove that his interim earnings from Columbia during that time were any different than what he earned there before his discharge. In this regard, if a discriminatee held a second job before the unlawful action, and continued to hold that job through the backpay period, earnings from the second job are not deductible from backpay. *Acme Mattress Co.*, 97 NLRB 1439, 1443 (1952), and *U.S. Telefactors Corp.*, 300 NLRB 720, 722 (1990).

Dr. Priovolos had previously placed her name on a roster for Doctors Without Borders while still employed at the Respondent. She testified that because Dr. McInerney told her that it would take some time for her to get privileges, she decided that this would be a good time to volunteer. So she notified that organization that she was available and was given a 6-week assignment in Sri Lanka. Dr. Priovolos left on that assignment on September 21, 1998.[4] She subsequently extended her assignment to January 1999.

Dr. McInerney testified that the credentialing committee at Nassau County Medical Center would have begun reviewing Dr. Priovolos' credentials shortly after receiving her submission. But she also testified that a necessary condition for granting privileges would be a personal face-to-face interview. And since Dr. Priovolos was not available for a personal interview until her return from Sri Lanka on January 6, 1999, that step in the process could not be completed while she was out of the country. Thus, although Dr. Priovolos started working at the hospital in February 1999, shortly after receiving her privileges effective on January 18, 1999, her receipt of privileges was delayed because she was unavailable to have the personal interview.

Acting as a volunteer physician in places where medical care is not readily available, is a worthy pursuit. But if a physician wants to do this kind of charitable work, he or she does so at her own expense. The Board does not require Dr. Priovolos' former employer to subsidize her charity. The question here is whether she took herself out of the job market for at least some portion of the backpay period.

When Dr. Priovolos left the United States she did so immediately after she had received and sent in her application for privileges. And based on the testimony of Dr. McInerney, it is probable that the granting of temporary privileges to Dr. Priovolos would have taken a similar amount of time that it took in Dr. Kazigo's case. (About 3 months.)

Thus, while Dr. Priovolos' first tour in Sri Lanka would not have impacted on the start of her employment at Nassau County Medical Center, the extension of her tour most certainly did. This is because she was not available for a personal interview which was a precondition for obtaining her privileges and, therefore, for the commencement of work. Assuming that she had been available for an interview, it seems probable to me that she would have received privileges by late November or early December 1998. That being the case, her sojourn in Sri Lanka would, in my opinion, be responsible for her being unavailable for work from say December 1, 1998, to the date that she actually commenced work which was in early February 1999. For convenience sake, I shall round off the period of her unavailability by delineating that period as being from December 1, 1998, to January 31, 1999. (Rounded off as 5 weeks in December 1998 and 4 weeks in January 1999.)

As in the case of Dr. Kazigo, the Respondent asserts that Dr. Priovolos should have waited for a better job to come along. For the same reasons stated above, I reject this argument as there was no showing that a better (or at least a higher paying job), was on the foreseeable horizon. The Respondent contends that the job offered to her at Nassau County Medical Center was even worse than the job offered to Dr. Kazigo because it was a "part-time" job with no fixed income. But the evidence shows that soon after Dr. Priovolos started her employment, her hours of work went up to about 40 hours per week. And as noted above, her rate of pay was essentially the same as that of salaried physicians who were employed at the hospital.

In the ensuring period of time, Dr. Priovolos also managed, in May 1999, to get another part-time job, performing surgery at Kings County Hospital. At some point toward the end of 1999, when her hours increased sufficiently at Kings County Hospital, she left Nassau County Medical Center and started to work exclusively at Kings County Hospital.

Because I have concluded that Dr. Priovolos removed herself from the labor market for a short period of time in the fourth quarter of 1998 and the first quarter of 1999, I am going to reduce her gross and net backpay accordingly. In this regard, I am going to reduce her backpay for the fourth quarter of 1998 by $20,615 and reduce her gross backpay for the first quarter of 1999 by $16,492.

As I have rejected the other contentions made by the Respondent and because there are no other disputes regarding the General Counsel's backpay calculations (including such expenses as union dues, AMA dues, license fees, etc.), I conclude that the Respondent owes Dr. Priovolos backpay in the amount of $296,816 plus interest.

V. DR. RAO

Prior to his discharge, Dr. Rao had a part-time private practice. He testified that on average, he spent about 20 hours per week at his private practice. This set of patients mainly were those admitted to Our Lady of Mercy Medical Center in the Bronx.

After being discharged by the Respondent, Dr. Rao made some inquiries about obtaining permanent employment at other hospitals but chose, after a time, to forego that route and attempt to expand his own private practice. Clearly, self employment was a legitimate means for Dr. Rao to mitigate his losses, especially in the field of medicine where many or perhaps most physicians are self employed. And despite the contention that Dr. Rao did not effectively make efforts in this direction until around August 16, 1999, at the earliest, Dr. Rao's testimony was that he did make some efforts to find interim employment before taking steps to expand his practice. For example, he testified that he sought employment at Metropolitan Hospital.

In September 1998, Dr. Rao made a proposal to Bronx Lebanon Hospital to provide services starting in the beginning of November 1998. In 1998, he earned $4320 from his services at Bronx Lebanon Hospital. His income tax returns show that his 1999 earnings from Bronx Lebanon were $66,337 or $1276 per week and that his 2000 earnings were $43,620 or $839 per week. On a quarterly basis, Dr. Rao's earnings from Bronx Lebanon Hospital are summarized as follows:

Q3 1998	0

[4] Although essentially a volunteer job, Dr. Priovolos did receive a small stipend from Doctors Without Borders, which the General Counsel included in her interim earnings.

Q4 1998	$4,320
Q1 1999	16,588
Q2 1999	16,588
Q3 1999	16,588
Q4 1999	16,588
Q1 2000	10,907
Q2 2000	10,907

In his efforts to increase his private practice, Dr. Rao notified colleagues that he was available on a full-time basis to perform surgery. In November 1998, he opened a new and bigger office in the Bronx where he hired a secretary.

In September 1999, Dr. Rao rented additional office space in Nyack, New York, after having applied for privileges in June 1999 at two hospitals located in that area. He received temporary privileges at Nyack Hospital on November 30, 1999, and received privileges at Suffern Hospital on September 14, 2000.

In sum, I think that the Respondent has not met its burden of proving that Dr. Rao did not make an adequate search for work after his discharge on June 15, 1998. *NLRB v. Arduini Mfg. Co.*, 394 F.2d 420, 422–423 (1st Cir. 1968); *Otis Hospital*, 240 NLRB 173, 175 (1979).

Dr. Rao's tax returns show the following with respect to his private practice. In 1996, his net profit from his private practice was $55,413. In 1997, his net profit from that practice was $79,106. In 1998 (the year he was discharged by the Respondent), his net profit was $98,170. In 1999 (the year after his discharge), his net profit was $134,016. In 2000, his net profit was $132, 475, this reflecting, according to the General Counsel an increase in his office rental, employment cost, and other expenses.

In calculating Dr. Rao's interim earnings, the General Counsel correctly points out that the calculation must be based on his net earnings (profits) and not his gross earnings. *Boilermakers Local 27 (Daniel Construction)*, 271 NLRB 1038, 1041 (1984). Moreover, his expenses in setting up, or in this case expanding his private practice needs to be taken into account. *California Dental Care, Inc*., 281 NLRB 578 (1986). Finally, in Dr. Rao's case, we can attribute to interim earnings only those net profits over and above what he earned while conducting similar business at the time of his employment at the Respondent.

Dr. Rao was discharged halfway into 1998 and, therefore, his net profit for all of 1998 would, in my opinion, be an inflated figure in comparison to his prior earnings from his practice when employed by the Respondent. Thus, even though incurring some additional expenses starting in November 1998 when he rented new office space, I think it is reasonable to conclude that his ability to devote more time to his private practice after June 1998 would have resulted in an increase in his profits during 1998. Put another way, I think it is probable that had it not been for his discharge in June 1998, Dr. Rao's net profits from his preexisting private practice for 1998 would have been substantially similar to those in 1997 because of the limitation on his time imposed by his duties as a full-time employee of the Respondent. Although not perfect, I think that it would be fair to use Dr. Rao's 1997 net profits as the base from which to measure his additional income by virtue of the expansion of his private practice after his discharge.

Based on his annual tax returns, Dr. Rao's net profits in 1997 were $1521 per week; his net profits in 1998 were $1888 per week or $24,544 per quarter; his net profits in 1999 were $2577 per week or $33,501 per quarter; and his net profits in 2000 were $2548 per week or $33,124 per quarter. Therefore, in calculating his net interim earnings based on the expansion of his private practice after his discharge, I shall calculate these as the difference between his 1997 weekly rate and the succeeding years' weekly rates.[5] Thus, in 1998, from June 15 to December 31, 1998, the interim earnings obtained from Dr. Rao's increased private practice would be at the rate of $367 per week. In 1999, the interim earnings obtained from his increased private practice would be at the rate of $1056 per week. And for the 6 months in 2000, the interim earnings obtained from Dr. Rao's increased private practice would be at the rate of $1026 per week. (I have rounded off the numbers to the nearest dollar.)

Recalculating Dr. Rao's interim earnings by combining his income from Bronx Lebanon Hospital and his earnings from the net increase in his private practice leads us to the following calculations:

	Private Practice	***Bronx Lebanon***	***Total***
Q2 1998	$734	0	$734
Q3 1998	4,771	0	4,471
Q4 1998	4,771	$4,320	9,091
Q1 1999	13,728	16,588	30,316
Q2 1999	13,728	16,588	30,316
Q3 1999	13,728	16,588	30,316
Q4 1999	13,728	16,588	30,316
Q1 2000	13,338	10,907	24,245
Q2 2000	13,338	10,907	24,245

There was no dispute raised at the hearing about the General Counsel's calculations regarding Dr. Rao's expenses for reimbursement for medical insurance and for reimbursement for disability insurance.[6] These were calculated respectively at $20,842 and $1851. Accordingly, I shall also recalculate Dr. Rao's net backpay as follows:

[5] I am using Dr. Rao's yearly tax returns as the basis for determining the base line for his predischarge private practice income because that is how the information was available. Dr. Rao's gross income and expenses were not summarized on a monthly basis. I do note that it would be possible to use a different baseline; that being the 12-month period preceding his discharge by averaging his annual net profits from 1997 and 1998. Under that formula, his average net profit for the 12-month period prior to his discharge would be $1704.50. Accordingly, his predischarge private practice profit would be $183 per week higher that his weekly 1997 profits. Therefore, the calculations for his postdischarge private practice interim earnings would be $183 per week lower and his net backpay would correspondingly be $183 per week higher. This formula is a bit more complicated than the one I used to calculate his average predischarge private practice profits and that is why it was not chosen. But I would have no difficulty in accepting this alternative approach for determining his postdischarge interim earnings.

[6] I really don't know what these items refer to. But I assume that the parties do and since they don't disagree, I won't worry about it.

	Gross Backpay	*Interim Earnings*	*Net Backpay*
Q2 1998	$8,031	$734	$3,776
Q3 1998	52,200	4,471	47,729
Q4 1998	52,200	9,091	43,109
Q1 1999	52,200	30,316	21,884
Q2 1999	52,200	30,316	21,884
Q3 1999	52,200	30,316	21,884
Q4 1999	52,200	30,316	21,884
Q1 2000	52,200	24,245	27,955
Q2 2000	52,200	24,245	27,955
		TOTAL	$238,060

Therefore, based on all of the above, I conclude that the total amount of backpay owed to Dr. Rao is $260,753 plus interest.

VI. DR. GUNDUZ

Even before being discharged by the Respondent, Dr. Gunduz had contemplated changing or expanding his field of expertise from general surgery to vascular surgery. (This is surgery involving blood vessels.) His initial plan was to get a 1-year fellowship.

Dr. Gunduz testified that in pursuit of this goal, he contacted Dr. Asher at Maimonides Medical Center who told him that certified 1-year fellowships were rare and that most, including his own at Maimonides, were 2-year programs. Under normal circumstances, and usually done after completing one's residency in surgery, the 2 fellowship years, where the doctor would have some attributes of a student, would be paid at the rate of about $47,000 per year. Dr. Asher told Dr. Gunduz that normally the program would consist of 1 year doing mostly clinical work and 1 year doing a significant amount of research.

In any event, Dr. Gunduz, prior to his discharge, sent out applications to various fellowship programs. On May 20, 1998, he received notification from the National Matching Resident Program that he had been matched with Maimonides for a fellowship to start on July 1, 2000. Dr. Gunduz testified that a few days after his termination from the Respondent, he sent a letter to Dr. Asher and accepted the fellowship. He also testified that although he was unsure before, he ultimately decided to take the fellowship because his inquiries into the availability of other employment had indicated to him that there was nothing out there with any certainty.

In late June 1998, Dr. Gunduz met with Dr. Asher and they reached a different arrangement. Instead of a starting the fellowship on July 1, 1998, it was agreed that it would be postponed to 2000. Instead, Dr. Gunduz was offered a position as an attending physician in the vascular surgery department of Maimonides with general privileges as a surgeon but very limited privileges as a vascular surgeon. (This meant that although Dr. Gunduz could perform some extremely limited vascular surgery procedures on his own, the bulk of that practice had to be done under the direct supervision of a doctor with privileges.) In addition, Dr. Asher told Dr. Gunduz that the first year research work would not be required as part of the 2-year program.

Dr. Gunduz began working at Maimonides in July 1998 after being granted full privileges in general surgery and limited privileges in vascular surgery. In accordance with the agreement that he would be hired as an attending surgeon, he was paid at the rate of $90,000 per year.[7] At the end of 1999, Dr. Gunduz received an $8000 bonus thereby bringing his earnings for that year to $98,000.

The following year, his situation changed again because he officially started his fellowship on July 1, 2000. As of that date, Dr. Gunduz therefore became a "resident" and thereby had all of his privileges revoked inasmuch as residents are considered to be students. At that point, his earnings and benefits were reduced but this is of no consequence to this case, inasmuch as the backpay period ended on June 30, 2000.

The Respondent argues that notwithstanding his discharge on June 15, 1998, Dr. Gunduz had planned even before that date to leave the Respondent. In this regard, the evidence clearly shows that Dr. Gunduz thought seriously about leaving the Respondent and going back to being a resident in order to obtain certification in vascular surgery. And this was not merely a matter of thinking about it; it was something, which he took active steps to accomplish.

But that being said, I don't think that the Respondent has proven that Dr. Gunduz would have quit had he received the offer before his discharge. He might have, but Dr. Gunduz testified that he was not interested in doing a 2-year fellowship and that he was not interested in lowering his earnings to $47,000 per year. He testified that he would have turned down a 2-year fellowship offer and only changed his mind after and because he lost his job.

Moreover, after discussions in late June 1998 with Dr. Asher, Dr. Gunduz was not offered and did not accept a position as a "resident." Instead he was offered and accepted a position as an attending general surgeon who would work in the vascular department and learn by doing under the direction of the other attending surgeons. Instead of being paid a resident's salary, he and Dr. Asher agreed upon a salary of $90,000 per year, which was raised in 1999 to $98,000.

The Respondent also argues that Dr. Gunduz did not mitigate his loss by virtue of the fact that he accepted a job that paid substantially below what he was paid at the Respondent. This is the same argument made with respect to Drs. Kazigo and Priopolos and amounts to an assertion that Dr. Gunduz should have waited for a better offer to come along. But I rejected that argument with respect to the other two discriminatees and I see no reason to accept it with respect to Dr. Gunduz. His situation is not that dissimilar. He testified that he made inquiries regarding other employment and determined that his likelihood of immediate success was not too high. Perhaps feeling that a bird in the hand was worth two in the bush, Dr. Gunduz accepted an employment offer from Maimonides which paid a sizeable amount of money in comparison to the average American's earnings and which offered the additional inducement of giving him a new skill set in vascular surgery.

Having accepted the General Counsel's theory of the case and rejecting the Respondent's contentions regarding Dr. Gun-

[7] According to Dr. Gunduz, he initially was offered $80,000 but after asking for $100,000, he and Dr. Asher settled on the $90,000 figure. Dr. Gunduz commented that he agreed to the figure because, as he put it; "Beggars can't be choosy."

duz, and there being no dispute regarding the calculations made by the General Counsel, I conclude that the Respondent owes Dr. Gunduz backpay in the amount of $268,304 plus interest.

[Recommended Order omitted from publication.]