GREATER NEW BEDFORD INFANT TODDLER CENTER AND DISTRICT 65, UNITED AUTO WORKERS, AFL-CIO, UP-2493 (11/23/88). SUPPLEMENTARY DECISION ON COMPLIANCE. (NOT PREVIOUSLY REPORTED.)

63.7 discrimination -- union activity
82.11 back pay
82.112 mitigation
82.13 reinstatement
82.21 posting orders
83. Compliance

Commissioners participating:

Paul T. Edgar, Chairman
Maria C. Walsh, Commissioner
Elizabeth K. Boyer, Commissioner

Appearances:

Alice Smith - Representing the Greater New Bedford Infant Toddler Center

John F. McMahon, Esq. - Representing District 65, United Auto Workers

SUPPLEMENTARY DECISION ON COMPLIANCE

Statement of the Case

On April 17, 1987, the Labor Relations Commission (Commission) issued a Decision on Appeal of a Hearing Officer's Decision finding that the Greater New Bedford Infant Toddler Center (Employer or Center), a privately owned and operated day care center, had violated Section 4(3) of Massachusetts General Laws, Chapter 150A (the law) by terminating employee Yvonne Houtman and by reprimanding employee Patricia Cook for engaging in protected, concerted activities, and by making certain statements to employees that interfered with, restrained and coerced them in the exercise of their rights guaranteed under the Law.[1] No appeal for judicial review was taken by the Employer pursuant to G.L. c.150A, §6.

As part of its Order, the Commission directed the Employer to take the following affirmative steps:

2. Expunge from its records the August 30, 1983 reprimand addressed to Patricia Cook, together with any and all copies of any references to the same.

[1] The Commission's Decision is reported at 13 MLC 1620 (1987).

3. Immediately offer Yvonne Houtman reinstatement to her former position and make her whole for any loss of benefits and wages she suffered as a result of the Center's decision to discharge her, plus interest on any sums owing, at the rate specified in M.G.L. c.231, Section 6B, with quarterly computation, from the date of discharge.

4. Post in the Center, where notices to employees are usually posted, the attached Notice to Employees, and leave the same posted for a period of not less than thirty (30) consecutive days.

On July 21, 1987, the Commission received a request by the charging party, District 65, United Auto Workers, AFL-CIO (Union) seeking enforcement of the Commission's April 17, 1987 Order. The Commission investigated the issues relating to compliance, and subsequently conducted a formal hearing on June 29, 1988, on the issues that were in dispute. Upon the entire record in this matter, the Commission concludes as follows:

Facts

The background facts of this case are extensively detailed in the initial decision by the Hearing Officer, as modified by the Commission in its Decision on Appeal.[2]

At the June 29, 1988 compliance hearing, the parties stipulated as follows:

1. Prior to her termination from employment as a cook with the Center on October 14, 1983, Yvonne Houtman worked 17-1/2 hours per week at $5.20 per our. Thus on a quarterly basis her gross earnings at the Center were $1,183.00.

2. The Employer has not extended an unconditional offer of reinstatement to Houtman at any time.

3. Gross back pay (GBP) in this case is comprised solely of loss of salary. The Union does not seek to include within the GBP calculation any other loss of economic benefits which the Employer may have extended to Houtman in the course of her employment.

4. Houtman's GBP for the 4th quarter of 1983 equals $1,001.

5. Houtman was unable to secure interim employment from the time of her discharge through the end of 1984.

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[2] The full text of the Hearing Officer's Decision is found at 12 MLC 1131 (H.O. 1985).

6. Houtman's GBP in 1984 equals $4,732, or $1,183 per quarter. She received $2,200 in state unemployment benefits in 1983 and 1984. Her net back pay (NBP) equals $2,532.

7. Houtman's GBP in 1985 equals $4,732, or $1,183 per quarter. She did not receive unemployment compensation in that period. She obtained interim employment in January 1985 at Papagino's of America at the rate of $3.75/hour. Her wage rate increased to $4.00/hour on July 1, 1985. Based on a 17.5 hour work week, her interim earnings for the first half of 1985 equal $853.13, and for the second half of 1985 equal $910.[3] She had no other interim employment in 1985.

8. Houtman's GBP in 1986 equals $4,732, or $1,183 per quarter. Her wage rate increased to $4.25/hour on January 1, 1986, to $4.50/hour on July 1, 1986, and to $4.75/hour on August 1, 1986. Based on a 17.5 hour work week, her interim earnings for 1986 equal $4,077.50. She had no other interim employment in 1986.

9. Houtman's GBP in 1987 equals $4,732, or $1,183 per quarter. Her wage rate in her interim employment increased to $5.00/hour on February 1, 1987. Based on a 17.5 hour work week, her interim earnings in 1987 were $4,658.50.[4] She had no other interim employment in 1987.

10. Houtman's GBP in 1988 equals $2,366.00 to date, or $1,183.00 per quarter. Her wage rate for interim employment increased to $6.00 per hour on February 1, 1988. She had no other interim employment in 1988.

11. A cost-of-living-adjustment (COLA) figure of 3.81% will be applied to the interim earning figures referred to in paragraphs 6, 7, 8, 9, and 10, above.[5]

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[3] The plain arithmetic of HOURLY WAGE RATE x HOURS WORKED PER WEEK x WEEKS PER QUARTER demonstrates that Houtman earned the interim amount of $853.13 per quarter in the first half of 1985, and $910 per quarter in the second half of 1985.

[4] Although the parties' calculation of interim earnings appears incorrect by slightly more than one hundred dollars, we shall nonetheless adopt it for the calculations in this case because there may be some rationale that was not presented with the stipulation.

[5] A wage increase that a discriminatee would have received from the respondent during the back pay period should be included in the computation of gross back pay, and not in a discriminatee's interim earnings. We therefore apply the COLA figure supplied by the parties to Houtman's gross back pay, in accordance with established principles in these matters. See, NLRB Casehandling Manual (Part 3), Compliance Proceedings, para. 10554; Richard W. Kaase, 162 NLRB 1320, 1323-24 (1967).

12. The parties agree that there shall be no liability subsequent to June 27, 1988.

During her employment at the Center. Houtman had no day care expenses since her two children were cared for at the Center at no cost. She testified that after her termination she paid approximately $15 per week for day care, including the period during which she was looking for work. No receipts were offered into evidence, nor were specific dates established demonstrating when the costs were incurred. Whether the asserted cost covered both of her children is also unclear. At the time Houtman was terminated, one of her children was almost 2 years, 8 months old. The record does not reveal the age of her other child. The age cutoff for children cared for at the Center is 2 years, 9 months.

In October 1983, Alice Smith (Smith), the Center's Director, hired Daniel Diaz as a cook to replace Houtman. In November 1985, a sanitary inspector from the New Bedford Board of Health inspected the Center and found among other things that the Center did not have a second sink on the premises. This violated a local ordinance, and he issued a citation to the Center. Smith decided at that point to eliminate the Center's cooking facility based upon space considerations, and entered into an oral contract with a local caterer to provide meals for the children. The caterer began providing meals for the children that same month. Diaz was transferred from the cook position to a position of handyman, in which he remained until January 1986.

The Union contends that the elimination of the cook position would not have resulted in Houtman's termination since Houtman, although not claimed to be qualified for the handyman position, is claimed to be qualified to work as a teacher's aide. The qualifications for a teacher's aide position at the Center are a high school diploma and one year's experience working under a teacher. The work experience must be adequately documented by the applicant and approved by the Commonwealth's Office for Children (OFC). At the discretion of the OFC licensor the work experience requirement can be waived, provided the newly-hired employee works directly under a teacher for the first year of employment. On at least one occasion the OFC licensor has approved the hiring by the Center of a teacher's aide who did not have the requisite work experience.

Houtman has a high school diploma, and the Employer was aware of this. She had also taken some college courses in child care. She did not have one year's work experience as a teacher's aide. There was no evidence that a teacher's aide position was vacant at any time after November 1985 when the cook's position was eliminated.

With respect to the Notice to Employees which the Commission ordered the Employer to post, the evidence is as follows: The Union proffered testimony through former employee Patricia Cook and George Cavalho, the husband of former employee Donna Cavalho, that they visited the Center shortly after the issuance of the Hearing Officer's Decision in August 1985 and did not see any official notice from the Commission on the Center's bulletin board. The Union offered no evidence

concerning the Notice that the Commission ordered the Center to post in its Order of April 17, 1987. The Employer testified that notwithstanding its appeal of the Hearing Officer's Decision it posted the Notice to Employees, issued by and attached to the Hearing Officer's Decision, on the staff bulletin board inside the Director's office, and, further, that it circulated a copy of the Notice among employees. The Employer also maintains that the Hearing Officer's Notice remained on the bulletin board until July 1987 when the Center relocated. The Employer offered no evidence that it had posted the Notice attached to the Commission's Decision of April 17, 1987.

ANALYSIS

I. Computation of Net Back Pay

The formula for determining the amount of back pay compensation to which a discriminatee is entitled under a Commission "make whole" order has been set forth as follows:

NET BACK PAY = GROSS BACK PAY - (INTERIM EARNINGS - EXPENSES)

Plymouth County House of Correction, 6 MLC 1523, 1524 (1979). Gross back pay is the total amount of wages and other economic benefits which the employee would have received but for the employer's unlawful conduct. Interim earnings are amounts earned during the back pay period which offset the loss of compensation resulting from the termination. Expenses are generally considered to be those incurred in earning the interim earnings. Id.

A. Gross Back Pay and Back Pay Period

The parties essentially stipulated to the amount of the gross back pay which Houtman would have earned had she been continuously employed at the Center after October 1983. Her rate of pay and her total gross earnings, broken down both quarterly and annually from October 1983 through June 1988,[6] are clearly set forth in the parties' stipulations. (No economic losses other than salary are alleged.)

The parties do not agree, however, about the duration of the back pay period. There is no question that back pay begins in this instance on the date of Houtman's discharge. See, O'Connell and Macarelli d/b/a North Shore Legal Clinic, 7 MLC 1983, 1984 (1981). Nor is there any question that the Employer did not comply with the Commission's order to offer Houtman reinstatement to her previous position, so as to have tolled its back pay liability at that time. See, Plymouth County House of Correction, supra at 1524, and cases cited therein. The sole question for our consideration is whether, as the Employer asserts, back pay tolled in November 1985 when the cook position was abolished at the Center.

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[6] The parties stipulated that the Center's back pay liability ended as of June 27, 1988.

In cases decided by the National Labor Relations Board legitimate and substantial business reasons have in some situations justified an employer's failure or refusal to reinstate an employee to his former position. "One such reason may be elimination of the employee's job for substantial and bona fide cause not related to any labor dispute." McDonnell Douglas Corp., 270 NLRB 1204, 117 LRRM 1130 (1984). In this case, the New Bedford Board of Health cited the Center in November 1985 for not having a second sink on the premises as required by local ordinance. It appears that Smith then transferred the Center's cook to the position of handyman, eliminated the meal preparation facility at the Center, and contracted with an outside caterer to supply meals to the children in accordance with state requirements. Thus, we conclude that in November 1985, the Employer eliminated for legitimate good faith reasons the position from which Houtman was discharged. Therefore the Employer's obligation to reinstate her to her former job ceased at that time.[7]

However, where an unlawfully discharged employee's former job is no longer available, the employer's reinstatement obligation includes an offer of reemployment to a substantially equivalent position.[8] See, Newton School Committee, 8 MLC 538, 1566 (1981), aff'd, 388 Mass. 557, 581 (1983). See, also, KSLM-AM & KSKD-FM, 275 NLRB No. 184, 120 LRRM 1013 (1985). While the Union does not challenge the legitimacy of the Employer's decision to contract out for food services and abolish the cook position rather than comply with the board of Health mandate, it argues that Houtman possessed the necessary qualifications for assignment as a teacher's aide at the Center and that the Employer should be deemed to have been required to transfer Houtman in November 1985 to that position when her former position was abolished. Thus, the principal question is whether, but for the unlawful discharge,Houtman would have survived the contracting out of cooking duties by means of a transfer into a teacher's aide position. Even assuming that the Employer could have offered Houtman the position of teacher's aide as a substantially equivalent position to that of cook (i.e., that the OFC licensor would have agreed to the Employer's request to waive the requirement of one-year's experience) the record contains no evidence to suggest that a teacher's aide position, or any other equivalent position, was vacant at the time that the cook's position was abolished. Thus, there is no support for a conclusion that Houtman would have been retained

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7 Since the Employer failed to establish, in mitigation of its back pay liability, the precise date in November on which it eliminated the cook position, we cannot conclude for purposes of our back pay calculation that this occurred prior to November 30. Houtman is therefore entitled to back pay for the entire month of November in 1985.

8 While we note that our Order in this case did not specifically mention the alternative of reinstatement to a substantially equivalent position, we need not decide whether the Employer could have been required under the terms of our Order to reinstate Houtman to a teacher's aide position, in the absence of evidence that a vacant aide position existed, as discussed infra.

in a different position after the Employer's legitimate November 1985 decision to abolish the job as cook. Accordingly, the Employer's reinstatement and gross back pay obligations ceased at the end of November 1985 when Houtman's former position was eliminated.

Based on the parties' stipulations, we derive the following gross back pay figures for October 1983 to November 1985:

1983 (4th quarter)	=	$1,001.00
1984 (all 4 quarters)	=	4,732.00, or 1,183/quarter
1985 (1st, 2nd and 3rd quarters)	=	3,549.00, or 1,183/quarter
1985 (4th quarter)	=	788.67[9]

The parties further stipulated that a cost-of-living adjustment of 3.81% was to be applied to the gross pay in each year of the back pay period. By stipulation, Houtman's 1983 gross back pay is $1,001.00. Applying the COLA figure to Houtman's 1984 GBP, the total amount is $4,914.00.[10] By the same calculation to her 1985 GBP, the total amount equals $4,679.69.

B. Mitigation and Set-Off

The parties agree that Houtman earned a total of $1,763.13 from her interim employment in 1985, and we therefore will subtract those interim earnings from that year's gross back pay amount.

Additionally, the parties agree that Houtman received a total of $2,200.00 in state unemployment benefits in 1983 and 1984.[11] As the Commission has previously noted, the deduction of unemployment compensation from back pay in effect treats unemployment compensation as if it were part of interim earnings. Newton School Committee, 8 MLC 1538, 1559 (1981), aff'd, 388 Mass. 557, 581 (1983). The Commission accepted that position in Newton School Committee because "failure

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[9] The calculation for the last quarter of 1985 represents two-thirds (i.e., October and November) of the stipulated quarterly sum.

[10] We have adjusted for the cost of living by taking Houtman's 1983 hourly rate of $5.20, multiplying by the COLA figure of .0381%, and adding the product to the hourly wage. The resulting 1984 hourly wage is $5.40. By the same method of computation, Houtman's 1985 hourly wage is $5.61.

[11] The Employer makes no contention that Houtman failed to make adequate efforts to secure interim employment during the period of her unemployment. Moreover, it is evident from their stipulations that both parties, apparently in order to simplify the calculation, deducted the total amount of these monies attributable to both 1983 and 1984 from gross back pay for 1984.

to deduct these sums would result in employees being made more than whole." Id. at 1560. The Commission discerned that the amounts of unemployment compensation paid to the employees in Newton were not recoverable by the Director of the Division of Employment Security, since the Director's authority pursuant to G.L. c.151A, §7 to reconsider a determination was limited to overpayment made within one year of the original determination. Thus, although receipt of back pay would ordinarily disqualify a person from receipt of full unemployment benefits,[12] the employees in the Newton case incurred no risk of disqualification for unemployment benefits or recoupment. However, since that time, G.L. c.51A, §7 has been amended to remove all time limitations on the Director's authority to seek recoupment "with respect to an award of back pay received by an individual for any week in which unemployment benefits were paid...." G.L. c.151A, 7, as amended by St. 1983, c.451, §12. The elimination of the time bar against reconsideration or recoupment in this circumstance removes a significant premise underlying the Commission's Newton analysis. Where the Commission has offset back pay by the amount of unemployment compensation received, the discriminatee will be made less than whole should DES later seek recoupment of any part of the unemployment payments it made to the discriminatee during the back pay period. On the other hand, if the Commission determines that unemployment payments should not be deducted from gross back pay, see Plymouth County House of Correction, 6 MLC 1523, 1533 (1979), a discriminatee would in effect have been compensated twice in the event that DES does not later seek recoupment -- i.e., lost wages as well as unemployment payments.

As we noted in Newton School Committee, the "Commission is free to either deduct or not deduct such sums from gross back pay as part of its authority to fashion remedies which best effectuate the purposes of the Law." 8 MLC at 1560. We believe that in view of the statutory amendment to G.L. c.151A, §7, conferring discretionary authority upon DES to seek recoupment of overpayments resulting from a back pay award, we shall not deduct from gross back pay any amounts paid to Houtman as unemployment compensation. Rather, we will notify DES of our decision and order and leave to that agency the determination concerning Houtman's liability, if any, for repayment of unemployment compensation received for any of the period of time covered by our back pay award.[13]

C. Day Care Benefits

The Union maintains that Houtman incurred expenses during the back pay

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[12] School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 581 (1983), citing Meyers v. Director of Div. of Employment Security, 341 Mass. 79, 81-82 (1960).

[13] DES would have to determine, for example, whether Houtman might have been eligible for unemployment compensation beginning in or after December 1985, had she been legitimately terminated at that time from the position to which she was entitled to have been reinstated.

period which should be deducted from her interim earnings. Specifically, prior to and during her interim employment, Houtman paid $15 per week for day care for her two children. Since both children were cared for at the Center without cost to Houtman during her employment there, her day care expenses after termination would not have been incurred but for the Employer's unlawful discrimination. However, the Employer presented some evidence that the Center only cares for children between the ages of six weeks and two years, nine months and that Houtman's son Isaiah was two years, seven and a half months old at the time of Houtman's termination. It also offered testimony that it does not provide or subsidize the cost of day care for employees whose children are older than two years, nine months. Since it appears that had Houtman not been terminated, the Employer would no longer have provided day care service for Houtman's son Isaiah due to his age, we decline to treat Isaiah's daycare expenses after Houtman's termination as a cost that resulted from the unlawful termination.[14] The record contains no evidence of the age of Houtman's second child, and therefore we cannot determine when his day care costs would have become Houtman's responsibility. Because the Employer had the burden of proving that the expense was not a result of the discharge, we will resolve this issue in Houtman's favor. Accordingly, we conclude that she would not have incurred the $15/week expense of day care for her second child but for the Employer's unlawful action. Therefore, we will deduct from her interim earnings this additional expense.

II. Posting

Although the parties offered contradictory testimony concerning the Employer's compliance with the Hearing Officer's order that the Employer post a Notice to Employees, we need not resolve that factual dispute. More pertinently, we find no evidence on the record to establish that the Employer has ever posted the Notice to Employees required by the Commission as part of its April 17, 1987, Decision and Order. Accordingly, we conclude that the Employer to date has failed to comply with the Commission's Order requiring Notice posting, and we shall renew our order that the Employer post the Notice to Employees.

ORDER

Based upon the foregoing, and pursuant to the authority vested in the Commission by Section 11 of the Law, IT IS HEREBY ORDERED that the greater New Bedford Infant Toddler Center shall:

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[14] Although there is a one and a half month time span between Houtman's termination and the date on which Isaiah would have become ineligible for the Center's services, there is no evidence that Houtman actually incurred day care costs during that period.

1. Immediately pay to Yvonne Houtman the sum of thirteen thousand, one hundred and eighty-two dollars and five cents ($13,182.05) in accordance with the computation contained in the Appendix to this Supplemental Decision;

2. Post at the Center, where notices to employees are usually posted, the attached Notice to Employees, and leave the same posted for a period of not less than thirty (30) consecutive days.

3. Notify the Commission within 30 days of the steps taken to comply with this Decision by sending to the Commission a photocopy of the check payable to Yvonne Houtman in the amount of $13,182.05; signed receipt of the payment from Houtman; and a signed affidavit from a responsible agent of the Center stating the date when the attached Notice was posted, the locations where posted, and the name of the person who signed the Notice.

Failure to pay the full amount of the back pay compensation specified in paragraph 1, above, within thirty (30) days of the date of this decision will subject the Employer to further interest obligations and may subject the Employer to further sanctions upon enforcement.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN

MARIA C. WALSH, COMMISSIONER

ELIZABETH K. BOYER, COMMISSIONER

[NOTE: "Notice to Employees" is omitted.]

APPENDIX

Back Pay Computation

YVONNE HOUTMAN

This computation is made on a quarterly basis in order to facilitate the compounding of quarterly interest. School Committee of Newton, 388 Mass. 557, 579-580 (1983).

Quarter 1: October 14, 1983 to December 31, 1983

Item	Amount	Reference
Gross back pay	$1,001.00	Stipulation #4.
Interim earnings	0.00[15]	Decision at 14-16.
Interim expenses	0.00	Decision at 17.
Net back pay	$1,001.00	

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Quarter 2: January 1, 1984 to March 31, 1984
Quarter 3: April, 1984-June 30, 1984
Quarter 4: July 1, 1984-September 30, 1984
Quarter 5: October 1, 1984-December 31, 1984

Item	Amount	Reference
Gross back pay	$1,228.50	$5.20/hr x .0381 COLA=$5.40/hr x 17.5 hrs/wk x 13 wks.
Interim earnings	0.00	Decision at 14-16.
Interim expenses	0.00	Decision at 17.
Net back pay	$1,228.50	

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[15] Although Houtman received unemployment payments in this quarter, we will not consider the unemployment compensation an interim earning.

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Quarter 6: January 1, 1985 to March 30, 1985
Quarter 7: April 1, 1985-June 30, 1985

Item	Amount	Reference
Gross back pay	$1,276.28	$5.40 x .0381 COLA=$5.61
Interim earning	853.13	x 17.5 hrs/wk x 13 weeks.
Interim expenses	195.00	Decision at 18 ($15/wk x 13 weeks)
Net back pay	$ 6.8.15	

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Quarter 8: July 1, 1985 to September 30, 1985

Item	Amount	Reference
Gross back pay	$1,276.28	See Quarters 6 and 7, above.
Interim earnings	910.00	Stipulation #7; $4.00 x 17.5 hrs. x 13 weeks.
Interim expenses	195.00	See Quarters 6 and 7, above.
Net back pay	$ 561.28	

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Quarter 9: October 1, 1985-November 30, 1985

Item	Amount	References
Gross back pay	$ 850.85	Decision at 12. See Quarters 6, 7, and 8, above.
Interim earnings	606.66	See Quarter #8, pro rated for Oct. & Nov. only.
Interim expenses	130.00	See Quarters 6 and 7, above.
Net back pay	$ 374.19	

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Greater New Bedford Infant Toddler Center and District 65, United Auto Workers, AFL-CIO, 15 MLC 1653

INTEREST=12% per annum, compounded quarterly

Net back pay + interest to December 30, 1985 =

Quarter #1	=	$1,268.04
Quarter #2	=	1,510.90
Quarter #3	=	1,466.89
Quarter #4	=	1,424.17
Quarter #5	=	1,382.69
Quarter #6	=	675.47
Quarter #7	=	655.80
Quarter #8	=	578.12
Quarter #9	=	374.19

TOTAL net back pay $9,336.27 AS OF December 31, 1985
x 12% annual interest, compounded quarterly from 1/1/86 to 9/30/88 = $12,923.58
+ pro-rated share of 1988, 4th quarter = $258.47
GRAND TOTAL, net pay plus interest total = $13,182.05