

In the Matter of BOSTON SCHOOL COMMITTEE
and
BOSTON PUBLIC SCHOOL BUILDINGS CUSTODIANS
ASSOCIATION

Case No. MUP-9067

(Compliance)

82.11 back pay
82.111 interest
82.112 mitigation
92.37 subpoenas and motions to quash

February 27, 2003

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Peter G. Torkildsen, Commissioner

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**SUPPLEMENTARY DECISION AND ORDER ON
COMPLIANCE**

Statement of the Case¹

On March 2, 1994, the Labor Relations Commission (the Commission) issued an unpublished decision in this case, finding that the Boston School Committee (the School Committee) had violated Sections 10(a)(3) and (1) of M.G.L. c.150E (the Law) by laying off thirty-nine (39) temporary and provisional custodians in retaliation for engaging in protected, concerted activity and ordering the School Committee, *inter alia*, to:

Make the temporary and provisional custodians whole for any loss of wages or other benefits which they have suffered as a result of their unlawful layoffs, plus interest on all sums due calculated in the manner specified in *Everett School Committee*, 10 MLC 1609 (1984).

The Appeals Court² subsequently affirmed the Commission's decision and order and, on June 11, 1996, the Supreme Judicial Court³ denied the School Committee's request for further appellate review. Both the School Committee and the Boston Public

School Buildings Custodians' Association (the Association) subsequently asked the Commission to assist in determining the amount of back pay owed to each of the affected employees as a result of the Commission's order.

Following a series of pre-hearing conferences, Mark A. Preble, Esq., a duly-designated Commission hearing officer (Hearing Officer), conducted a hearing between October 27, 1997 and May 5, 1998, at which the parties had a full opportunity to be heard, to examine⁴ and cross-examine witnesses, and to introduce evidence.⁵ On September 15, 1998, the parties filed Joint Stipulations of Fact, which were incorporated into the Findings of Fact. Both parties filed briefs on or about January 18, 2000. The Hearing Officer issued Recommended Findings of Fact on March 13, 2002. On May 6, 2002, the parties filed challenges to the Recommended Findings of Fact, and the School Committee filed a motion requesting to file a supplemental brief. That motion was allowed, and the School Committee and the Union filed supplemental briefs on May 28, 2002 and June 13, 2002 respectively. The parties filed responses to each other's challenges to the Recommended Findings of Fact on May 28, 2002.

Throughout the compliance proceeding, the parties worked diligently to resolve as many claims as possible. Due to their efforts, the original class of thirty-nine (39) custodians to whom the School Committee owed back wages or other benefits was reduced to eight (8) employees. Accordingly, this Supplementary Decision on Compliance is limited to the issues concerning the remaining eight custodians.

Findings of Fact⁶

Both the Union and the School Committee challenged portions of the Hearing Officer's Recommended Findings of Fact. After reviewing those challenges and the record, we adopt the Hearing Officer's Recommended Findings of Fact and summarize the relevant portions below.

Introduction

The City of Boston (the City) is a public employer within the meaning of Section 1 of the Law. The School Committee is the representative of the City for the purpose of dealing with school employees. The Association is an employee organization within the meaning of Section 1 of the Law and is the exclusive collective bargaining representative for certain custodians employed by the School Committee.

Prior to June 30, 1992, the School Committee employed several temporary or provisional custodians.⁷ In August 1991, a dispute

1. The Commission has designated this case as one in which the Commission will issue a decision in the first instance pursuant to 456 CMR 13.02(2).

2. The Appeals Court's decision is reported at 40 Mass. App. Ct. 327 (1996).

3. The Supreme Judicial Court's order is reported at 422 Mass. 1111 (1996).

4. In lieu of direct testimony, the Association offered affidavits signed by each of the custodians.

5. In a ruling dated April 26, 1999, the Hearing Officer allowed the School Committee to substitute certain documents for documents that it had offered during the course of the hearing. On May 12, 1999, the School Committee filed those substitute documents.

6. The Commission's jurisdiction in this matter is uncontested.

7. Under civil service rules, employees who are hired from a civil service list are considered permanent employees. However, a public employer may also hire employees as temporary or provisional if there is no active or certified list from which permanent appointments may be made.

arose concerning whether the temporary and provisional custodians were or should be in the bargaining unit represented by the Association. The dispute generated a grievance, a charge of prohibited practice, and numerous discussions between the parties. Ultimately, the Association filed two representation petitions with the Commission, seeking either to add-on or accrete the temporary and provisional custodians into the bargaining unit represented by the Association. A Commission hearing officer scheduled a hearing for July 3, 1992. On or about June 25, 1992, the School Committee informed all of the temporary and provisional custodians that they would be laid off, effective June 30, 1992. On January 22, 1997, following the Supreme Judicial Court's decision to deny the School Committee's Request for Further Appellate Review, the School Committee offered to reinstate those employees who had not been previously re-hired.

At the time of the layoffs on June 30, 1992, the following employees were night junior custodians: Thomas Burns (Burns), James Carney (Carney), Robert Fallon (Fallon), Fran Romero (F. Romero), Gesenia Romero (G. Romero), Berenice Tejada (B. Tejada), and Luis Tejada (L. Tejada). At that time, the weekly pay rate for a night junior custodian was \$483.07. At the time of the layoffs, Thomas Mullen (Mullen) was a day junior custodian and received a weekly rate of pay of \$458.07.

As more fully described below, many of the laid off employees received unemployment compensation for part of the back pay period. The City subscribes to a reimbursable system to finance its unemployment insurance costs. Under that system, the City does not make quarterly unemployment insurance contributions. Rather, the City is billed monthly for the costs associated with any benefits actually paid to employees. The parties have stipulated that any unemployment compensation benefits received by the laid off employees were paid by the City. The parties have further stipulated that, if the Commission ordered the laid off employees to reimburse the Department of Employment and Training (DET) for any unemployment benefits received during the layoff period, the DET would ultimately reimburse the City for those amounts.

The unemployment rate in the Boston area fell sharply during the period between July 1992 and January 1997. The chart below shows the average annual unemployment rates for both the City of Boston and the Boston Metropolitan Statistical Area⁸ from 1992 through January 1997:

YEAR	CITY OF BOSTON	BOSTON METROPOLITAN STATISTICAL AREA
1992	8.0	7.6
1993	6.6	6.0
1994	5.8	5.2
1995	5.4	4.7
1996	4.5	3.7
1997*	4.4	3.8

8. The Boston Metropolitan Statistical Area includes Boston and the surrounding areas up to southern New Hampshire and includes approximately two-thirds of the Commonwealth's total workforce.

9. 1997 includes the average unemployment rate for January 1997.

The average duration of unemployment in Massachusetts also dropped during that period. For example, in 1992, 21.9% of those unemployed were unemployed for less than five weeks, compared with 31.6% in 1996. In 1992, 21.8% of those unemployed were unemployed for fifty-two weeks or more, compared with only 7.2% in 1996. The chart below shows the average duration of unemployment in Massachusetts from 1992 through 1996:

Year	< 5 Weeks	5 - 14 Weeks	15 - 26 Weeks	27 - 51 Weeks	52 + Weeks
1992	21.9	25.5	17.7	13.1	21.8
1993	28.1	27.1	17.1	10.1	17.7
1994	28.9	29.7	16.2	9.4	15.8
1995	30.0	34.1	14.4	8.6	12.9
1996	31.6	33.0	16.7	11.4	7.2

Many of the custodians had taken civil service examinations both prior to and after the layoffs. The civil service examination process begins with an application and is followed by a written examination. The Commonwealth of Massachusetts Human Resources Division (HRD) then corrects and tabulates the examinations. From the individual scores, HRD compiles an overall list of candidates ranked by score.¹⁰ From that list, HRD generates lists for communities seeking to fill a vacancy. Because candidates can also indicate geographical preferences, the lists generated for the individual communities only contain those candidates who have listed that community as a preference. The overall list compiled following an examination is only valid until the next examination has been administered and a new list is compiled. Therefore, to be considered for positions that are offered following subsequent examinations, a candidate must take and pass the subsequent examination.

Each list generated for communities seeking to fill a vacancy also contains a place for each candidate listed to sign his or her name to indicate that, if selected, he or she will accept the appointment. For a candidate to be considered for a position, he or she must personally appear and sign the list.

At the same time it sends the list to the community, HRD mails a card announcing the vacancy to each of the candidates on the list. The cards indicate the appointing authority, the position offered, and the deadline for applying. However, unless the candidate notifies HRD of a change of address, HRD uses the address that the candidate originally listed on his or her application. Further, other than a quality control test to assure that the total number of cards sent to all of the candidates is equal to the total number of candidates on the list, HRD does not have a procedure to assure that the cards sent are actually received by the candidates.¹¹

Seventy percent (70%) is a passing score on the building custodian/municipal service examination. However, HRD requires appointing authorities to justify the selection of any candidate not

10. Because some classes of employees, like disabled veterans, are given preferences, those employees move up on the list.

11. [See next page.]

within the formula “ $2n + 1$,” where “ n ” is equal to the number of vacancies. For example, if a community was seeking to fill two vacancies, it would be required to justify the selection of any candidate who was not among the top five (i.e. $2 \times 2 + 1$) candidates who personally appeared and indicated that, if selected, they would accept the position.

HRD offered examinations for building custodian/municipal service in September 1991 and April 1995. Using the lists generated from those examinations, communities in Massachusetts hired 403 building custodians between the period June 1992 and February 1997. Although many of those positions were in communities in Western Massachusetts (e.g., 14 in Pittsfield, 12 in Northampton, and 17 in Westfield), many of those positions were in communities in the Boston area (e.g., 59 in Boston, 31 in Quincy, and 11 in Somerville).

Each of the civil service positions also has a corresponding standard job description. The job description of a custodian includes duties like general cleaning and maintenance of buildings and grounds. For example, custodians are required to adjust and perform preventative maintenance on heating, ventilation, and air conditioning (HVAC) equipment, move furniture, replace light bulbs, collect and dispose of trash, sweep, mop and wax floors, cut grass, rake leaves, and shovel snow. Custodians are also required to operate or to use hand tools and cleaning equipment, like floor polishers, rug shampoo machines, and vacuums.

The skills required to be a custodian are applicable to other occupations. Professor Dana C. Hewins (Professor Hewins)¹² testified that the skills required to be a custodian are comparable to twenty-seven (27) other job titles within the United States Department of Labor’s (DOL) *Dictionary of Occupational Titles*.¹³ To reach his opinion, Professor Hewins reviewed the civil service position description for building custodian and the Boston School Department position description for junior custodian and used criteria developed by the DOL that considers factors like physical, mental, and vocation preparation requirements. Based on Professor Hewins’s opinion, we find that the skills required to be a custodian are generally applicable to the occupations listed in footnote 13.

Professor Hewins and his staff also reviewed the classified advertisements from the *Boston Sunday Globe* for the period July 1992 through June 1996 and discovered several hundred advertised po-

sitions that, in Professor Hewins’s opinion, were comparable to a custodian. To reach that opinion, Professor Hewins looked for positions that were among those that he had determined were comparable. Although many of the positions that Professor Hewins identified were, on their face, comparable to a position as a custodian, others were not. For example, in the February 7, 1993 edition of the *Boston Sunday Globe*,¹⁴ Professor Hewins identified a position listed as “Janitorial” as a comparable position. That position required only a driver’s license.¹⁵ However, Professor Hewins also identified “Horticultural Specialist” as a comparable position. That position required “a class II driver’s license, hoister’s license, familiarity with herbicides and pesticides, and related experience.” Professor Hewins also identified positions that required significant specialized or supervisory experience or live-in status. Therefore, although we find that there were some positions advertised in the *Boston Sunday Globe* during the period July 1992 through January 1997 for which some of the affected custodians may have been qualified, we do not find that, as a general matter, the positions identified by Professor Hewins were comparable to the positions held by the affected custodians.

Finally, using all of his research, Professor Hewins testified that, in his opinion, although a 26-week period of unemployment would not be extraordinary in 1992, the probability would be “overwhelmingly high” that a custodian who conducted a “minimally adequate”¹⁶ job search would be re-employed after one year.¹⁷

After reinstating the remaining custodians on January 22, 1997, the School Committee supplied each custodian with a questionnaire concerning their activities and income during the period of the layoff. The questionnaires included the following headings: 1) Employment During Period; 2) Unemployment Compensation; and 3) Mitigation. The questionnaire concluded with the statement “signed under the pains and penalties of perjury,” and had a place for the employee to sign his or her name. The questionnaire also asked employees for copies of various tax forms and other supporting documentation. As more fully discussed below, the custodians responded to the questionnaires with varying degrees of completeness.

Thomas Burns

Burns was forty-one years old at the time of the hearing and has a tenth-grade education. Prior to his employment with the School Committee, Burns worked as a warehouse worker, a

11. For example, HRD does not send the cards via certified mail. However, HRD will correct its records and mail a new card if it receives a returned card with a forwarding address.

12. In a ruling dated March 6, 1998, the Hearing Officer set certain conditions upon which the School Committee could present Professor Hewins as an expert witness. Specifically, the Hearing Officer declined to allow the Union’s motion to depose the expert prior to hearing, but ordered the School Committee to provide the Union with any information that was not currently included in the record that the expert witness intended to rely upon in his testimony no later than thirty (30) days prior to hearing.

13. Those titles are: custodian, building; janitor, institutional; industrial cleaner; commercial cleaner; commercial janitor; industrial janitor; institutional cleaner; laboratory equipment cleaner; floor waxer; floor polisher; carpet cleaner; residential/restoration cleaner; industrial machine cleaner; hotel housekeeper; hotel por-

ter; restaurant porter; air transportation cleaner; hospital custodian; health care custodian; commercial property cleaner; sanitation worker; environmental service worker; groundskeeper; light fixture servicer; maintenance helper; and mechanic helper.

14. The Hearing Officer randomly selected the February 7, 1993 edition as a representative sample. A survey of other editions yielded similar results.

15. That position listed a starting salary of \$6.50 per hour.

16. Professor Hewins defined “minimally adequate” as submitting three or more job applications each week.

17. Professor Hewins also gave his opinion about each of the affected custodians individually, concluding that each should have been able to secure employment within six to twelve months of their layoff.

groundskeeper in the Boston Parks Department, and as a rubbish collector.¹⁸ He owns his own automobile and has a class 1 driver's license, a class A hoisting license, and a commercial driver's license (CDL).

From November 1982, and continuing to the date of the hearing (including the period of his employment with the School Committee and the period of his layoff), Burns worked full-time for the Massachusetts Bay Transportation Authority (MBTA) in a variety of positions, including laborer and heavy equipment operator. At the time of his layoff in June 1992, he worked the night shift (12 midnight - 6:45 A.M.) at the MBTA, earning approximately \$40,000 per year.

In addition to his work at the MBTA, Burns also worked sporadically as an on-call watchman in 1994 and 1995. However, after September 1995, he was no longer called. The parties stipulated that, in addition to his income from the MBTA, Burns earned \$1,162.76 during the period of his layoff. Because he worked full-time for the MBTA, Burns did not receive unemployment compensation during the period of his layoff.¹⁹

After his layoff, Burns responded to announcements for civil service custodian positions, including positions in Somerville, Malden, and Medford and indicated that, if selected, he would accept the position.²⁰ He also submitted written applications for positions to B.J.'s Wholesale, Hood's Milk, R.B. Remodeling, Somerville Lumber, Home Depot,²¹ Gerald Hickey Tree Service, and Boston Water & Sewer.²² Burns also made verbal inquires about positions at Modern Continental, G.F. White, and B.F.I.²³ He did not apply for a position at any of the area hospitals or universities.²⁴

The School Committee reinstated Burns in January 1997. The parties stipulated that his gross back pay during the period of his layoff was \$114,970.66.

James Carney

Carney was forty-three years old at the time of the hearing and has a high school diploma. Prior to his employment with the School Committee, Carney worked as a store clerk at Filene's Basement in Boston and as a housekeeper and security guard at Shattuck Hospital. Carney began his employment with the School Commit-

tee in December 1990. He took the civil service examination for building custodian/municipal service in 1989, 1992, and 1995.²⁵ In 1992, he received a score of 92% on that examination.²⁶ Carney has a driver's license and owns his own automobile.

During the period of his employment with the School Committee and continuing until the day of the hearing, Carney worked at Shattuck Hospital holding several security positions, including patrol officer, lieutenant, and interim chief. Although not originally civil service positions, in 1993 the security positions at Shattuck Hospital became civil service positions. Carney took the examination and passed.²⁷

During the period of his layoff, Carney worked additional overtime hours at Shattuck Hospital. The parties stipulated that those additional hours resulted in interim earnings of \$27,153.93. Because he worked full-time, Carney received no unemployment compensation during the period of his layoff.²⁸

During the period of his layoff, Carney submitted written employment applications at the Blades & Boards restaurant in 1992 or 1993, Brook Farm Rehabilitation Hospital in 1995 or 1996, and the Star of David Nursing Home in 1995 or 1996. Carney also applied at Flanagan's Supermarket and made verbal inquires at Goodyear Tire, two local pubs, and a few construction sites.²⁹ He also inquired about security positions at Wachenhutt Security but, because the pay was significantly less than he was receiving through his overtime work at Shattuck Hospital, he did not pursue the inquiry.

Carney responded to civil service announcements for building custodians in Brookline and Braintree. However, he did not respond to many others, including several in which the individuals selected appeared lower on the civil service list than Carney. For example, in May 1993, the Waltham School Department hired nine custodians, including four who appeared lower on the list than Carney. Other instances where at least one individual who was selected appeared lower than Carney on the civil service list include the Town of Watertown in November 1994, the Milton School Department in January 1995, the Malden School Department in March 1995, the Newton School Department in May 1995, and the Revere School Department in June 1995. He did not pursue security positions through the civil service system.

18. Burns has also worked as a bartender.

19. Professor Hewins opined that Burns's position at the MBTA was a disincentive to seek a position to replace his custodian position.

20. Burns took the civil service examination for building custodian/municipal service, but the record does not indicate when he took that examination or what score he received.

21. Burns applied for a position as a truck driver at Somerville Lumber and Home Depot. However, because he is limited in the number of hours he can drive a truck, his position at the MBTA prohibited him from obtaining another position as a driver.

22. Burns submitted an application to B.J.'s Wholesale in November 1995, Hoods Milk in 1993, and R.B. Remodeling in March 1996. However, he was unable recall when he had applied for the other positions.

23. Burns could not recall when he had made any of those inquires and did not specify the types of positions he had sought. Further, although Burns testified that he

had made other verbal inquires, the Hearing Officer declined to make that finding. The Hearing Officer noted that Burns and the other custodians were asked to recall events that, in some cases, had occurred more than five years before the hearing in this matter. However, the Hearing Officer declined to make a finding based on Burns's vague recollection that he had made other inquires.

24. There is nothing in the record about whether any of the area hospitals or universities had vacant positions or were accepting applications at the time.

25. Carney also took the examination for campus police officer in 1988.

26. There is nothing in the record about Carney's scores on the other examinations.

27. There is nothing in the record about the score that Carney received.

28. Professor Hewins opined that Carney's position at the Shattuck Hospital was a disincentive to seek a position to replace his custodian position.

29. Carney could not recall when he made any of the inquiries.

The School Committee reinstated Carney in January 1997. The parties stipulated that his gross back pay during the period of his layoff was \$114,970.66.

Robert Fallon

Fallon was forty years old at the time of the hearing and has a high school education. Prior to his employment with the School Committee, Fallon worked in several restaurants in various capacities, including cook, chef, and shift manager. Fallon also received training in cooking at an apprenticeship-type program through the Sheraton Hotel.

Beginning in 1989 or 1990, and continuing to the date of the hearing (including the period of his employment with the School Committee and the period of his layoff), Fallon worked at the Farragut House, a restaurant in South Boston. After beginning his employment with the School Committee in 1991, Fallon continued to work at the Farragut House from 7:30 A.M. to 12:00 P.M. five days per week. After his layoff in 1992, Fallon worked approximately fifteen additional hours each week, initially earning \$11.00 per hour and then, beginning in 1996, \$12.00 per hour.³⁰ Because the restaurant had already hired his replacement, he could not return to his prior position. In addition to his work at the Farragut House, Fallon worked at Nick's Comedy Stop in Boston, earning \$9,360.00 in 1993 and \$3,375.00 in 1994.

Because he was working at the Farragut House, he did not collect unemployment compensation at any time during the period of his layoff.³¹ The parties were unable to stipulate to Fallon's interim earnings. We find that, at a minimum, Fallon had the following interim earnings during the period of his layoff:

1992	\$4,290
1993	\$17,940 ³²
1994	\$11,955 ³³
1995	\$8,580
1996	\$9,360
1997	\$540
Total	\$52,665

In 1993, Fallon unsuccessfully applied for work as a cook or chef at the Parker House. He did not look for work as a custodian or laborer and did not apply to any universities or hospitals.

Fallon took the civil service examination for building custodian/municipal service in 1992 and received a score of 85%. How-

ever, Fallon did not respond to any of the announcements that HRD had sent announcing civil service custodian positions. He did not take the civil service examination that was offered in 1995.

The School Committee reinstated Fallon in January 1997. The parties stipulated that his gross back pay during the period of his layoff was \$114,970.66.

Thomas Mullen

Mullen was forty-seven years old at the time of the hearing and did not complete his high school education. He does not have a driver's license. Prior to working at the School Committee, Mullen worked as a laborer and a custodian, and held various positions at the Stop & Shop Bakery in Boston, including custodian, shipper, machine operator, pie maker, and bread baker. He also worked at various meatpacking plants loading trucks. Mullen began his employment with the School Committee in 1991. Mullen took the examination for building custodian/municipal service in 1988, 1992, and 1995. In 1992, Mullen received a score of 90%.

During the period of his layoff, Mullen worked at the Post Office for thirty days during the holiday season in 1993, until he was laid off. Thereafter, the Post Office recalled him for approximately six months in 1994, five months in 1995, and a brief period in 1996. While working at the Post Office, Mullen worked forty hours each week and earned \$8.00 per hour. He also received unemployment during 1993, 1994, 1995, and 1996. The parties stipulated that Mullen earned \$29,842.17, including \$11,247.00 in unemployment compensation, during the period of his layoff.

During the period of his layoff, Mullen looked for work at Sharon's Variety, a local variety store that his niece manages, and local factories, including Agar Meat, Coca-Cola, and Gillette.³⁴ Mullen also responded to HRD announcements for positions in Quincy, at Boston City Hospital, and at the School Committee. Although he was interviewed for one position and submitted a work history report for another, he was not hired for any of them. However, Mullen failed to respond to a civil service vacancy in the Quincy Public Schools in September 1992. He did not apply at any universities or temporary agencies.³⁵

The School Committee reinstated Mullen in January 1997. The parties stipulated that his gross back pay during the period of his layoff was \$109,020.66.

Luis Tejada

L. Tejada was forty-one years old at the time of the hearing. He was born in the Dominican Republic, where he received eight

30. Fallon testified that, until 1996, his rate of pay was \$10.00 or \$11.00 per hour at the Farragut House and that, during the period of his layoff, he worked 10 to 15 additional hours each week. Despite a subpoena and the Hearing Officer's instruction, Fallon did not produce any information to document his income for the period of his layoff. Further, although he testified that his income information may have been thrown away when he separated from his wife, Fallon testified that he separated from his wife in 1992—prior to most of the years in question. Therefore, in the absence of any documentation to the contrary, we find that, at a minimum, Fallon earned \$11.00 per hour from 1992 until 1996 and \$12.00 per hour from 1996 until his reinstatement. We also find that Fallon worked a minimum of fifteen additional hours each week at the Farragut House during the entire period of his layoff.

31. Professor Hewins opined that Fallon's position at the Farragut House was a disincentive to seek a position to replace his custodian position.

32. This amount includes \$8,580 from the Farragut House and \$9,360 from Nick's Comedy Stop.

33. This amount includes \$8,580 from the Farragut House and \$3,375 from Nick's Comedy Stop.

34. Mullen could not recall when he made any of the inquiries.

35. Mullen did not inquire at any temporary agencies because he believed that he would need computer skills.

years of elementary and two years of middle school education. Prior to his employment with the School Committee, L. Tejada was steadily employed, primarily as a cleaner.³⁶ He took the civil service examination for building custodian/municipal service in 1992 and received a score of 77%.³⁷ However, shortly after taking the examination, L. Tejada moved without notifying HRD. As a result, he received no cards announcing civil service vacancies. He did not take the civil service examination for building custodian/municipal service in 1995. Although L. Tejada speaks, understands, and reads some English, his primary language is Spanish.³⁸

L. Tejada lives in Boston with his mother. He has a driver's license and, for a period after his layoff, owned an automobile. He received no interim earnings during the entire period of his layoff and did not file tax returns in 1993, 1994, 1995, or 1996. The parties have stipulated that L. Tejada received \$2,376 in unemployment compensation during the period of his layoff.

During the period of his layoff, L. Tejada unsuccessfully looked for work at various times with various companies, including automobile rental companies, cleaning companies, hotels, and restaurants.³⁹ Some of his inquiries were in person or through other people, some over the telephone, and others in writing. L. Tejada also traveled to the Dominican Republic on several occasions during the period of his layoff. His family owns a coffee plantation there and he went to check on it from time to time.⁴⁰

The School Committee reinstated L. Tejada in January 1997. The parties stipulated that his gross back pay during the period of his layoff was \$114,970.66.

Berenice Tejada

B. Tejada was forty-seven years old at the time of the hearing. She was born in the Dominican Republic, where she received some high school education but did not graduate. She immigrated to the United States approximately thirty years ago. B. Tejada's primary language is Spanish.⁴¹ As described below, B. Tejada has studied English, but still has difficulty with the English language. She does not own an automobile.

Prior to her employment with the School Committee, B. Tejada worked steadily in a variety of jobs, including cleaning, laundry, ironing, sewing, airport security, and as a waitress. She took the civil service examination for building custodian/municipal service sometime after her layoff in 1992.⁴²

During the period of her layoff, B. Tejada was employed twice. In 1995, she worked part-time at Burger King, earning \$5.00 per hour. She left that position because she had been told that she could get a position as a building cleaner at the John Hancock building.⁴³ However, she did not get the position. In 1996, B. Tejada worked part-time for Janitronics. The parties have stipulated that she earned \$22,672.00, including \$12,252.00 in unemployment compensation, during the period of her layoff.

B. Tejada also studied English at Oficina Hispana in 1992 and 1993. Although she did not recall the exact dates of her attendance, her course met five days per week for four hours each day.

During the period of her layoff, B. Tejada filled out written applications for work at the Marriott Hotel at Logan Airport, as a school bus driver,⁴⁴ at Brigham & Women's Hospital, the Holiday Inn, CVS, and Woolworths in the Dedham Mall.⁴⁵ B. Tejada also visited the Dominican Republic for 2-3 weeks during the holiday season one year.

The School Committee reinstated B. Tejada in January 1997. The parties stipulated that her gross back pay during the period of her layoff was \$114,970.66.

Fran Romero

F. Romero was fifty-eight years old at the time of the hearing. He was born in the Dominican Republic and has a fourth grade education. F. Romero does not speak, read or write English.⁴⁶ F. Romero came to the United States in 1968 and worked in the garment industry in New York City for approximately ten (10) years before coming to Boston. Prior to being employed by the Boston School Committee in late 1991,⁴⁷ F. Romero worked as a general building cleaner. He has never taken the civil service examination for building custodian/municipal service.

of the plantation, but in other years, he would receive nothing. In addition, other than the fact that he had traveled to the Dominican Republic several times, there is nothing in the record about how often he went, when those trips were, or how long he was away.

36. L. Tejada also worked for a short time manufacturing tapes in New York prior to coming to Boston in 1973 and as a gas station attendant.

37. When L. Tejada completed his civil service application, he listed only Boston as a geographical preference.

38. L. Tejada testified with the assistance of an interpreter.

39. With rare exception, L. Tejada was unable to recall when he had applied for any specific position. The School Committee questioned the veracity of L. Tejada's testimony concerning his efforts to obtain employment during the period of his layoff and offered the testimony of Bienbeaido Bello (Bello) to contradict his testimony. Specifically, although L. Tejada testified that he had inquired about a position at Janitronics, where Bello is employed as a vice president, Bello testified that he had never received a written application from L. Tejada. Further, although Bello receives many applications, he would have remembered L. Tejada's application because L. Tejada is his nephew. Although the Hearing Officer credited Bello's testimony, L. Tejada did not claim to have filed a written application at Janitronics. Rather, he testified that he had made a telephone inquiry and was told to check back at a later date.

40. L. Tejada had inherited a share of the plantation from his grandfather. He testified that, in good years, he would receive approximately \$2,000 from the operation

41. B. Tejada testified with the assistance of an interpreter.

42. There is nothing in the record about what score she received.

43. B. Tejada also testified that the job at Burger King was a lot of work for \$5.00 per hour.

44. B. Tejada does not possess the required license to be a school bus driver.

45. Although B. Tejada recalled that she had applied at the Holiday Inn before working at Burger King, she did not recall when she applied at any of the other locations.

46. F. Romero testified with the assistance of an interpreter.

47. F. Romero testified that he was laid off on July 1, 1992, after working for eight (8) or nine (9) months.

During the period of his layoff, F. Romero provided child care for his daughters. From 1993⁴⁸ through approximately February 1996, F. Romero lived with his daughter, Lissette, in Michigan. After F. Romero's daughter, G. Romero, who is also among the custodians who were laid off on June 30, 1992 (see below), returned to work in February 1996, F. Romero returned to the Boston area and lived with G. Romero. From February 1996 until his return to the School Committee in January 1997, F. Romero provided childcare to G. Romero's children, for which he received \$3,800.00. The parties have stipulated that F. Romero received \$9,665.00, which includes \$5,865.00 in unemployment compensation, during the period of his layoff.

Although F. Romero testified that he looked for work during the period of his layoff, the Hearing Officer found his testimony vague, inconsistent, and not credible. First, when completing the School Committee's questionnaire in April 1997, F. Romero listed only Janitronics and Stop & Shop as employers from whom he had sought work—both in 1996. In the affidavit that he signed on October 23, 1997, he listed a number of prospective employers, including: the Sheraton Hotel, the Marriott Hotel, Janitronics Cleaning Company, Burger King, Consolidated Cleaning Company, various department stores at the Dedham Mall, Stop & Shop, Brigham & Women's Hospital, Nynex, Dunkin Donuts, Prudential Food Services, the Bay Tower Room restaurant, and Papa Gino's. However, when testifying at the hearing, F. Romero could not recall inquiring about positions with many of the employers listed in his October 23, 1997 affidavit. Further, although he testified that he only met Bello on the day he applied for a position at Janitronics, in fact, Bello is a relative⁴⁹ who has known F. Romero for many years. The Hearing Officer also credited Bello's testimony that F. Romero did not inquire about a position at Janitronics.⁵⁰ Finally, F. Romero testified that he signed both the School Committee's questionnaire and his affidavit dated October 23, 1997—even offering specific details about the conditions under which he does and does not use his middle initial. However, even a casual comparison reveals that the signatures are not the same. Moreover, the signature on the School Committee's questionnaire appears to have been made by his daughter, G. Romero.⁵¹ Accordingly, the Hearing Officer discredited all of F. Romero's

testimony about his efforts to obtain employment during the period of his layoff.

The School Committee reinstated F. Romero in January 1997. The parties stipulated that his gross back pay during the period of his layoff was \$114,970.66.

Gesenia Romero

G. Romero was twenty-six years old at the time of the hearing and has a twelfth-grade education.⁵² Prior to her employment with the School Committee, G. Romero worked as a cashier and for a contractor who provided security at Logan Airport. She is a single mother of two, including one child who was born during the period of her layoff. She owns her own automobile. In 1994, G. Romero took the civil service examination for building custodian/municipal service and received a score of 92%.

During the period of her layoff, G. Romero had no interim employment. The parties were unable to stipulate to G. Romero's interim earnings. We find that she received \$6,175.00 in unemployment compensation during 1992.⁵³ Further there is no dispute that, during the period of her layoff, she received a total of \$15,326.76 in AFDC benefits.⁵⁴

At some point, G. Romero sought employment at Brigham & Woman's Hospital, Beth Israel Hospital, Children's Hospital, Brookside Clinic, and Bradlees in the Dedham Mall.⁵⁵ G. Romero did not complete the mitigation section of the School Committee's questionnaire. Although she testified that she did not see it, she completed that same section on her father's questionnaire and listed two employers from whom her father had allegedly sought employment. The Hearing Officer found it incredible that G. Romero assisted her father in completing his copy of the questionnaire and did not see the mitigation section on her own questionnaire, which she signed on the same day. Further, the Hearing Officer found G. Romero's testimony incredible, because one of the potential employers listed on her father's questionnaire was Janitronics—an employer from whom G. Romero testified that *she* had sought employment. For the reasons set forth above, the Hearing Officer also discredited G. Romero's testimony concern-

48. There is nothing in the record to provide a more specific date.

49. Although the exact relationship is unclear, both Bello and B. Tejada, who is F. Romero's ex-wife, referred to L. Tejada as a nephew. G. Romero testified that Bello is married to her fourth cousin.

50. Bello testified pursuant to a School Committee subpoena. Despite the obvious adverse impact that his testimony would have on the claims of L. Tejada, F. Romero, and G. Romero, there is nothing in the record to suggest that he was biased toward them. The Hearing Officer found that his testimony was consistent and his demeanor demonstrated straightforward, truthful responses.

51. G. Romero testified that, although she had completed the School Committee's questionnaire for F. Romero, F. Romero signed it. However, the Hearing Officer noted that the signature on that document—particularly the last name—appeared quite similar to the signature on G. Romero's own School Committee questionnaire. The Hearing Officer recognized that F. Romero had difficulty with the English language and did not discredit his testimony because his daughter signed his name to the School Committee's questionnaire. Rather, the Hearing Officer discredited F. Romero's testimony because the Hearing Officer found that F. Romero was untruthful when he testified that he had signed his name to both documents.

52. G. Romero nearly completed her senior year of high school, leaving in April.

53. In its brief, the School Committee argues that G. Romero received a total of \$6,422.00 in unemployment compensation during 1992 and 1993. However, a Form 1099 from the Division of Employment Security indicates that she received \$6,175.00 in 1992, and there is nothing in the record about G. Romero's unemployment compensation during 1993 or how the additional \$247.00 was calculated.

54. Although G. Romero testified that her AFDC benefits began in October 1994, we find that her benefits actually began in October 1993. First, in both the School Committee's questionnaire and in her affidavit, she stated that she had received AFDC benefits from 1993 until 1996. In addition, a report from the Department of Public Welfare (now known as the Department of Transitional Assistance) that G. Romero attached to the School Committee questionnaire and that was introduced into the record as School Committee Exhibit #2 indicates that her benefits began in October 1993.

55. G. Romero did not recall when she had applied for any one position.

ing her father's signatures on his copy of the School Committee's questionnaire and his affidavit.⁵⁶

Finally, although G. Romero testified that she had spoken with Bello about a position, for the reasons stated in footnote 50, above, the Hearing Officer credited Bello's testimony that the conversation never occurred.

The School Committee re-hired G. Romero in January 1997. The parties stipulated that her gross back pay during the period of her layoff was \$90,817.16.

Opinion

Back Pay, Interim Earnings, and Back Pay Period

The formula for computing the amount of back pay owed to an unlawfully discharged employee is:

Net back pay = gross back pay - (interim earnings - expenses).

Gross back pay is the total amount of wages and other economic benefits the employee would have received but for the employer's unlawful conduct. Interim earnings are amounts earned during the back pay period that offset the loss of compensation resulting from the termination. Expenses are the costs incurred in earning the interim income. *Greater New Bedford Infant Toddler Center*, 15 MLC 1653 (1988); *Plymouth County House of Correction*, 6 MLC 1523 (1979). The period of back pay runs from the date of the unlawful discharge to the date when the employee is unconditionally offered reinstatement to the former position. *Id.*

Here, the back pay period runs from June 30, 1992, the date of the layoff, until January 22, 1997, the date the School Committee offered to unconditionally reinstate the affected employees. The parties stipulated to the gross back pay for all of the custodians. The parties also stipulated to the interim earnings for all of the custodians except Fallon and G. Romero. With regard to those two employees, we adopt the Hearing Officer's recommended findings of fact regarding their interim earnings. None of the affected employees had any expenses. The employees' gross back pay, interim earnings, and net back pay are listed in Appendices "A"- "H".

Mitigation and Set-off

1. Unemployment Compensation

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. *Greater New Bedford Infant Toddler Center*, 15 MLC at 1659-1660, citing *Newton School Committee*, 8 MLC 1538, 1560 (1981), *aff'd sub nom. School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983). When determining whether to deduct unem-

ployment compensation from gross back pay, the Commission examines whether that compensation is recoverable by the Department of Employment and Training (DET). If DET can recoup the unemployment compensation, the Commission does not deduct that compensation and notifies DET of its decision, leaving to that agency the determination concerning the affected employee's liability, if any, for repayment. *See, e.g., Greater New Bedford Infant Toddler Center*, 15 MLC at 1659-1660; *Plymouth County House of Correction*, 6 MLC at 1533 n.8. If, on the contrary, DET cannot recover the unemployment compensation, the Commission deducts that compensation from gross back pay to avoid making employees more than whole. *See, e.g., Newton School Committee*, 8 MLC at 1559-1560.

Here, the Commissioner of DET has the authority pursuant to M.G.L. c. 151A, §71, as amended by St. 1990, c. 154, §39 and St. 1990, c. 177, §326, to recover unemployment benefits for an unlimited amount of time.⁵⁷ Accordingly, we will not deduct unemployment compensation from gross back pay and, instead, will notify DET of our decision and order, so DET may take whatever action it deems appropriate.

2. AFDC Benefits

The Commission has not previously considered whether AFDC benefits are deducted from gross back pay. Unlike unemployment benefits, AFDC benefits cannot be recouped. In particular, M.G.L. c. 118, §10 provides that AFDC benefits are not subject to trustee process and cannot be assigned to another individual.⁵⁸ Moreover, the Commission has generally noted that it will not deduct welfare payments from gross back pay, because that income is not attributable to new employment. *Town of Townsend*, 1 MLC 1450, 1453 (1973). Accordingly, we will not deduct the monies received by G. Romero in AFDC benefits from her gross back pay.

3. Search for Interim Employment

Employees discharged in violation of the Law have an obligation to mitigate back pay liability by seeking appropriate interim employment. The employer has the burden of proof on the issue of mitigation. To meet that burden, an employer must demonstrate that: 1) one or more discoverable opportunities for comparable employment were available in a location as convenient as, or more convenient than, the place of former employment; 2) the employee unreasonably made no attempt to apply for the comparable jobs; and 3) it was reasonably likely that the employee would have obtained one of those jobs. *Commonwealth of Massachusetts*, 16 MLC 1455, 1459-1460 (1989); *Newton School Committee*, 8 MLC at 1561; *See also, Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Ryan v. Superintendent of Schools of Quincy*, 374 Mass. 670 (1976).

56. However, as stated in footnote 51, above, the Hearing Officer did not discredit G. Romero's testimony because she signed her father's name to the School Committee's questionnaire. The Hearing Officer discredited G. Romero's testimony because she was untruthful when testifying that she had not signed her father's name.

57. M.G.L. c. 151A, §71 provides in part: "The commissioner may reconsider a termination whenever he [or she] finds that (1) an error has occurred in connection therewith; or (2) wages of the claimant pertinent to such determination but not con-

sidered in connection therewith have been newly discovered; . . . provided, however, that with respect to (1) and (2) no such redetermination shall be made after one year from the date of the original determination . . . and provided, further, that the time limitations specified . . . shall not apply with respect to an award of back pay received by an individual for any week in which unemployment benefits were paid to such individual."

58. M.G.L. c. 118, §10 states in part: "Aid hereunder shall not be subject to trustee process and no assignment thereof shall be valid[.]"

[A]n improperly discharged employee "is entitled to recover his [or her] back salary less what he [or she] did in fact earn following his [or her] discharge or in the exercise of proper diligence might have earned in another employment." To require that the former employer prove conclusively that the former employee would have obtained employment in a comparable job would impose an impossible burden on a former employer and, as a practical matter, virtually would abolish the established principle that a discharged employee must take the consequences of his or her failure to seek reasonably available comparable employment.

Black v. School Committee of Malden, 369 Mass 657, 662 (1976), citing *McKenna v. Commissioner of Mental Health*, 347 Mass. 674, 677 (1964); See, *Newton School Committee*, 8 MLC at 1561, *aff'd sub nom. School Committee of Newton v. Labor Relations Commission*, 388 Mass at 580-581. Where a group of employees have been discharged, the efforts of each employee to secure interim employment must be considered independently. *Plymouth County House of Correction*, 6 MLC at 1533, citing *NLRB v. Madison Courier*, 471 F. 2d 1037, 88 LRRM 1403 (D.C. Cir. 1972).

Here, the School Committee established the first element of the mitigation analysis. Based on the HRD lists generated from the September 1991 and April 1995 building custodian/municipal civil service examinations, the communities in the Boston area had numerous vacant, comparable positions available between June 1992 and February 1997. For example, Boston had 59 building custodian positions, Quincy had 31 building custodian positions, and Somerville had 11 building custodian positions. Further, the classified advertisements in the *Boston Sunday Globe* showed that some comparable positions in the Boston area were available between July 1992 and January 1997. We next turn to examine the job search efforts of the affected employees and their likelihood of obtaining a comparable position.

a. Burns

The School Committee argues that Burns did not make reasonable efforts to secure other employment, because he made only nine job search inquiries over a four and one-half year period. The School Committee also points out that Burns testified that he figured he did not need a second job because he was already working full-time. The School Committee relies on that testimony to contend that Burns abandoned his job search. The School Committee concludes that Burns is not entitled to any back pay because he failed to mitigate his damages. In the alternative, the School Committee asks the Commission to find that the back pay obligation ended in July 1993, the time Hewins testified it was more probable than not that Burns would have obtained other employment.

Contrary to the School Committee's contention, Burns did not abandon his job search. Burns found sporadic employment as an on-call watchman in 1994 and 1995. On undisclosed dates, he responded to vacancy announcements for civil service custodian positions in Somerville, Malden, and Medford and indicated that, if selected, he would accept the position. Burns also submitted job applications at B.J.'s Wholesale, Hood's Milk, R.B. Remodeling,

Somerville Lumber, Home Depot, Gerald Hickey Tree Service, and Boston Water & Sewer.⁵⁹ Burns made verbal inquiries at some point about job openings at Modern Continental, G.F. White, and BFI. Thus, the School Committee has not met its burden of showing that Burns unreasonably made no attempt to apply for comparable jobs.

Even if the School Committee had met the second element of its burden of proof, it has not established that it was reasonably likely that Burns would have obtained a comparable, available job. Here, the School Committee relies on Hewins's testimony to establish the third element of its burden of proof. In particular, Hewins gave his expert opinion that it was more probable than not that Burns would have found comparable employment within six to twelve months had he conducted a minimally adequate job search. Hewins based his expert opinion on Burns's age, work experience as a heavy laborer, and possession of several specialty licenses, which Hewins characterized as "labor market positives." However, this evidence is too broad to establish that it was reasonably likely that Burns would have obtained an available, comparable job. See, *Commonwealth of Massachusetts*, 16 MLC at 1461 n.15 (evidence establishing that nurses with the employee's particular work experience were in demand as an employment commodity would not suffice to satisfy the employer's burden to prove that the employee had a reasonable prospect of being hired for one or more available and comparable employment opportunities); *Compare, Ryan v. Superintendent of Schools of Quincy*; 374 Mass. at 675-676 (when determining whether it was reasonably likely that employee could have obtained a comparable job, court considered available market for comparable positions, likelihood of employee obtaining a favorable reference from former employer, and employee's age). Moreover, the School Committee proffered no evidence showing the number of applicants for each comparable position available to Burns or the qualifications of those applicants compared to Burns. See, *Newton School Committee*, 8 MLC at 1563 (because there were 25-30 applicants for each comparable, available position, employer failed to demonstrate, without further evidence, that former employees had a reasonable prospect of being hired). Because the School Committee failed to meet its burden of proof, we conclude that Burns mitigated his damages and award him back pay from June 30, 1992 through January 22, 1997.

b. Carney

The School Committee argues that Carney made insufficient efforts to find another job because he was primarily employed at Shattuck Hospital and was disinclined to find another position. The School Committee points out that Carney applied to only about eight employers over a four and one-half year period and failed to apply for numerous civil service custodian positions. The School Committee compares Carney's conduct to abandoning his job search and concludes that Carney is not entitled to any back pay. The School Committee argues alternatively that the back pay obligation ceases on either: 1) December 1, 1993, the date on which Carney failed to respond to a Waltham School Committee

59. Burns applied to B.J.'s Wholesale in November 1995, Hood's Milk in 1993, and R.B. Remodeling in March 1996. The record is silent regarding when Burns applied for the remaining positions.

notice to appear for a civil service custodian position; or 2) July 1, 1993, the date on which Hewins testified that it was reasonably likely Carney would have obtained comparable employment.

Similar to Burns, the evidence establishes that Carney did not abandon his job search. He submitted employment applications at the Blades & Boards Restaurant in 1992 or 1993, Brook Farm Rehabilitation Hospital in 1995 or 1996, and the Star of David Nursing Home in 1995 or 1996. On undisclosed dates, Carney applied to Flanagan's Supermarket and made verbal inquiries at Goodyear Tire, two local pubs, and several construction sites. Unlike Burns, however, Carney never found another position during the entire period of his layoff. Moreover, Carney failed to respond to many civil service announcements for building custodian positions. Significantly, the evidence shows that several of the individuals selected to fill those positions appeared lower on the civil service list than Carney. In May 1993, the Waltham School Department hired nine custodians, including four who appeared lower on the list than Carney. The following employers selected at least one individual who appeared lower on the civil service list than Carney to fill building custodian positions: the Town of Watertown in November 1994, the Milton School Department in January 1995, the Malden School Department in March 1995, the Newton School Department in May 1995, and the Revere School Department in June 1995. The preponderance of the record evidence demonstrates that Carney unreasonably made no attempt to apply for available, comparable civil service building custodian positions, and that it was reasonably likely that he would have been hired to fill one of those vacancies due to his position on the civil service list. Accordingly, the School Committee has met its burden of proof regarding Carney.

The Association contends that Carney failed to receive 24 civil service announcements between 1993 and 1995 because the cards went to the wrong address. The Association also argues that Carney received announcements for positions paying less than what he had earned working for the School Committee. However, the Association did not proffer any evidence to explain Carney's failure to respond to the civil service announcements discussed above. The Association also asserts that many of the civil service openings were for positions far outside of the City of Boston and singles out Revere as an example. The Association argues that, because the openings were in inconvenient locations, they were not comparable positions. However, Carney applied for a civil service building custodian position in Braintree, which is as far, if not farther, away than Revere. Thus, the Association's rebuttal argument is unpersuasive.

The record here shows that the first opportunity that Carney had to apply for an available, comparable job for which it was reasonably likely he would have been selected was in the Waltham School Department in May 1993. Because Carney failed to respond to the civil service announcement for that position, we conclude that Carney failed to mitigate his damages after that date and award him back pay from June 30, 1992 through May 31, 1993.

c. Fallon

The School Committee contends that Fallon failed to mitigate his damages. The School Committee asserts that Fallon only applied for two jobs over the course of four and one-half years. The School Committee also points to Fallon's testimony that he "fell back" on the job he had at the Farragut House as evidence of Fallon abandoning the job search. The School Committee further argues that Fallon's refusal to comply with the School Committee's subpoena for his tax records and/or payroll information deprived the School Committee of the opportunity to determine whether he had worked longer hours to mitigate his damages. The School Committee concludes that Fallon is not entitled to any back pay for those reasons. Alternatively, the School Committee posits that the back pay obligation ends on July 1, 1993, the date on which Hewins testified that it was reasonably likely Fallon would have obtained comparable employment. The School Committee also contends that, if the Commission awards Fallon any back pay, the entire amount of his Farragut House earnings must be deducted, because the School Committee was unable to determine if Fallon earned any extra income by increasing his hours at that job.

Fallon worked at Nick's Comedy Stop in 1993 and 1994. However, the record indicates that Fallon did not make any attempts to find another job after 1994. He did not complete any job applications, did not respond to any civil service vacancy announcements, and failed to take the civil service examination in 1995. Although the Association argues that Fallon mitigated his damages by working more hours at the Farragut House, holding a second job does not eliminate an employee's obligation to mitigate back pay by searching for work. *Cobb Mechanical Contractors, Inc.*, 333 NLRB No. 142 (2001); See, *Commonwealth of Massachusetts*, 16 MLC at 1460; *Newton School Committee*, 8 MLC at 1565-1566; *Town of Townsend*, 1 MLC at 1453. Consequently, the preponderance of the evidence demonstrates that Fallon unreasonably made no attempt to apply for available, comparable positions after 1994.

The School Committee relies on Hewins's testimony to establish that it was reasonably likely that Fallon would have obtained a comparable job. In particular, Hewins gave his expert opinion that it was more probable than not that Fallon would have found comparable employment within six to twelve months had he conducted a minimally adequate job search. Hewins based his expert opinion on Fallon's job experience as a cook, which Hewins characterized as a "labor market positive," the overall state of the economy, and the large number of comparable positions available. However, for the reasons articulated above, that evidence is insufficient to establish the third element of the School Committee's burden of proof.

The School Committee also argues that the Commission should either not award Fallon any back pay or deduct the entire amount of his Farragut House earnings as interim income because Fallon failed to comply with the School Committee's subpoena for his financial records. By refusing to do so, the School Committee contends that Fallon deprived it of the opportunity to ascertain if there was any increase in his Farragut House earnings. However, the School Committee was able to cross-examine Fallon during the hearing in an effort to obtain that information. Compare, *Newton School Committee*, 8 MLC at 1564-1565 (employee not entitled to

any back pay because he failed to appear at the hearing, thus depriving the school committee of any opportunity to ask questions relating to mitigation). Therefore, we conclude that Fallon mitigated his damages and award him back pay from June 30, 1992 through January 22, 1997.

d. Mullen

The School Committee argues that Mullen failed to use reasonable efforts to find another job and, therefore, is not entitled to any back pay. Specifically, the School Committee contends that working intermittently at the U.S. Post Office and applying for twelve jobs over a four and one-half year period were insufficient to mitigate his damages. The School Committee also points out that Mullen failed to respond to a civil service vacancy announcement in the Quincy Public Schools in September 1992. The School Committee further asserts that, if Mullen is entitled to back pay, the obligation must cease on July 1, 1993, the date on which Hewins testified that it was reasonably likely Mullen would have found another comparable job.

The record reflects that Mullen made efforts to mitigate his damages. He worked at the U.S. Post Office for 30 days in 1993, six months in 1994, five months in 1995, and a brief period in 1996. While employed there, Mullen worked 40 hours per week earning \$8.00 per hour. Additionally, Mullen looked for work at local factories and at Sharon's Variety. He also responded to civil service announcements for positions in Quincy, Boston City Hospital, and at the School Committee. Even if the Commission agreed that Mullen unreasonably failed to apply for the civil service building custodian position with the Quincy Public Schools in September 1992, there is nothing in the record indicating that it was reasonably likely that Mullen would have been hired to fill that position. Further, for the reasons described above, Hewins's testimony is inadequate to establish the third element of the School Committee's burden of proof. Accordingly, we conclude that Mullen mitigated his damages and award him back pay from June 30, 1992 through January 2, 1997.

e. L. Tejada

The School Committee argues that L. Tejada is not entitled to any back pay. In support of its argument, the School Committee draws attention to the fact that L. Tejada was unemployed for the entire period of his layoff and only applied for fifteen positions during that time. He did not take the 1995 civil service examination and failed to respond to four civil service vacancy announcements. If the Commission concludes that L. Tejada is entitled to back pay, the School Committee asks that the Commission limit the back pay obligation to either: 1) January 1993, when L. Tejada failed to respond to a civil service vacancy announcement with the School Committee; or 2) July 1, 1993, the date on which Hewins testified that it was reasonably likely that L. Tejada would have found other employment.

Although the record reflects that L. Tejada made some efforts to find another job on undisclosed dates during the period of his layoff, it also shows that he never found one. Further, L. Tejada was in the Dominican Republic checking on his family's coffee plantation and not looking for work for unknown amounts of time. The record also demonstrates that L. Tejada did not receive any civil

service vacancy announcements, because he had not notified HRD of his change in address. Additionally, L. Tejada failed to take the 1995 civil service examination. When considering the record evidence as a whole, the preponderance of that evidence shows that L. Tejada unreasonably made no attempt to apply for a comparable job. Consequently, the School Committee has met the second element of its burden of proof.

The School Committee relies on Hewins's expert testimony that, given the economy and the large number of comparable positions available, it was more probable than not that L. Tejada would have found comparable employment within six to twelve months had he conducted an adequate job search. However, for the previously-discussed reasons, that testimony is insufficient to establish the third element of the School Committee's burden of proof. The School Committee further contends that L. Tejada's failure to respond to a January 1993 civil service vacancy announcement for a position with the School Committee limited its back pay liability. However, the School Committee did not proffer any evidence showing that it was reasonably likely that L. Tejada would have been hired for that position. Because the School Committee did not establish the third element of its burden of proof, we conclude that L. Tejada mitigated his damages and award him back pay from June 30, 1992 through January 22, 1997.

f. B. Tejada

The School Committee contends that B. Tejada withdrew from the job market between 1992 and 1993 when she attended *Oficina Hispana* to learn English four hours a day, five days a week. In response to B. Tejada's claim that she looked for a job while attending classes, the School Committee points out that B. Tejada was unemployed from 1992 to 1994. The School Committee further asserts that B. Tejada's job search was inadequate, because she only applied to five employers over three and one-half years. The School Committee concludes that B. Tejada is not entitled to back pay between 1992 and 1993. Further, the School Committee asserts that its back pay obligation would extend from January 1, 1994, when B. Tejada re-entered the job market, to June 1, 1995, when Hewins testified it was reasonably likely that she would have found another job. In the event the Commission determines B. Tejada is eligible for back pay during the entire period of her layoff, the School Committee argues that it should not be penalized for her decision to quit her job at Burger King. Thus, the School Committee contends that its back pay obligation should be tolled or reduced by an amount equivalent to the income she would have earned from Burger King had she not quit.

The fact that B. Tejada attended English classes, without more, does not demonstrate that she withdrew from the job market. *See, Plymouth County House of Correction*, 6 MLC at 1535-1537 (employee who was enrolled as a full-time student, looked for employment after his layoff, and found a part-time job driving a taxi made adequate efforts to mitigate his damages); *Compare, Newton School Committee*, 8 MLC at 1564-1565 (employee who moved to California to attend motorcycle mechanics school and did not attend Commission hearing abandoned job search). However, B. Tejada was unemployed between 1992 and 1994. Although B. Tejada applied for jobs at the Marriott Hotel, Brigham &

Women's Hospital, the Holiday Inn, CVS, and Woolworths, the record does not reflect when she did so, except that she had applied at the Holiday Inn before working at Burger King in 1995. Without more information in the record showing that B. Tejada was actively looking for a job between 1992 to 1994, the preponderance of the evidence demonstrates that she unreasonably made no attempts to apply for comparable jobs during that period. Because she obtained employment at Burger King in 1995 and Janitronics in 1996, the preponderance of the evidence shows that her job search efforts were sufficient during those years. Therefore, the School Committee has established the second element of its burden of proof regarding the period between 1992 and 1994.

The School Committee again relies on Hewins's testimony that B. Tejada was reasonably likely to obtain a comparable position within twelve to eighteen months of her layoff had she conducted an adequate job search because of the economy and the large number of comparable positions available. However, as previously explained, that evidence is inadequate to meet the third element of the School Committee's burden of proof. Thus, we find that B. Tejada mitigated her damages and award her back pay from June 30, 1992 to January 22, 1997. Further, we do not toll or reduce the School Committee's back pay obligation by an amount equal to the income B. Tejada would have earned from Burger King had she not quit, because that job was not comparable to B. Tejada's night junior custodian job.⁶⁰ See, *Plymouth County House of Correction*, 6 MLC at 1535 (employee was not obligated to re-enlist in the National Guard to mitigate his damages, because Commission did not consider weekend service to be substantially equivalent to the job the employee lost).

g. F. Romero

The Hearing Officer discredited all of F. Romero's testimony about his efforts to obtain employment during the period of his layoff. Because there is no reason to overturn the Hearing Officer's credibility determination, we conclude that F. Romero unreasonably made no attempt to apply for available, comparable jobs. We next analyze whether the School Committee has met the third element of its burden of proof.

The School Committee asks the Commission to infer that it was reasonably likely F. Romero would have obtained a job at Janitronics had he applied, because: 1) F. Romero was related to Bello, Janitronics's vice president; and 2) F. Romero's ex-wife, B. Tejada, obtained employment there in 1995. However, F. Romero's familial connection with Bello and B. Tejada's employment at Janitronics, without more, do not make it reasonably likely that F. Romero would have been hired at Janitronics. See, generally, *Goncalves v. Labor Relations Commission*, 43 Mass. App. Ct. 289 (1997) (an inference is a generalization based on the logi-

cal connection between two facts, so that the existence of fact A makes the existence of fact B more or less probable). The School Committee also relies on Hewins's testimony to show that it was reasonably likely that F. Romero would have obtained comparable employment within twelve to eighteen months given the economy and the large number of comparable jobs available. However, for the reasons set forth above, that testimony is insufficient to establish the third element of the School Committee's burden of proof. Consequently, we conclude that F. Romero mitigated his damages and award him back pay from June 30, 1992 to January 22, 1997.

h. G. Romero

The School Committee argues that G. Romero is not entitled to any back pay because she failed to conduct an adequate job search. The School Committee asserts that G. Romero only applied for four jobs over four and one-half years and never found another position during that time. If G. Romero is entitled to any back pay, the School Committee asserts that its liability must terminate by July 1, 1993, the date by which Hewins testified that it was reasonably likely that G. Romero would have found a comparable position.

G. Romero looked for jobs at Brigham & Women's Hospital, Beth Israel Hospital, Children's Hospital, Brookside Clinic, and Bradlees. However, she never found another job during the period of her layoff. Moreover, the Hearing Officer discredited G. Romero's testimony that: 1) she did not complete the mitigation section of the School Committee's questionnaire because she had not seen it; and 2) she had spoken to Bello about a position at Janitronics. The preponderance of the evidence demonstrates that G. Romero unreasonably made no attempt to apply for comparable positions. Accordingly, the School Committee has met the second element of its burden of proof.

The School Committee relies on Hewins's testimony to show that it was reasonably likely that G. Romero would have obtained a comparable position within six to twelve months had she conducted a minimally adequate job search. However, as described more fully above, that evidence is insufficient to establish the third element of the School Committee's burden of proof. Consequently, we conclude that G. Romero mitigated her damages and award her back pay from June 30, 1992 to January 22, 1997.

Interest

The Commission has considerable discretion under Section 11 of the Law to fashion appropriate remedies, including awarding interest on back pay awards. *School Committee of Newton v. Labor Relations Commission*, 388 Mass. at 579-580. Here, the School Committee urges the Commission to adopt M.G.L. c. 231, §6C⁶¹ instead of M.G.L. c. 231, §6B⁶² for both the rate and the method of calculating interest on the make whole order. The School Commit-

60. If B. Tejada had worked 40 hours per week at Burger King earning \$5.00 per hour, she would have earned gross pay in the amount of \$200 per week compared to her pay of \$483.07 per week at the School Committee.

61. Section 6C provides in part: "In all actions based on contractual obligations, . . . interest shall be added . . . to the amount of damages . . . at the rate of twelve per cent per annum from the date of the breach or demand."

62. Section 6B states in part: "In any action . . . for personal injuries . . . there shall be added . . . to the amount of damages interest thereon at the rate of twelve percent per annum from the date of commencement of the action[.]"

tee points out that both sections of the statute have the same rate of interest - 12%. The School Committee argues, however, that the method of calculating interest under §6C is more consistent with the Commission's holding in *Everett School Committee*, 10 MLC 1609 (1984), than the method of calculating interest under §6B. In particular, the School Committee contends that the method of calculating interest under §6C provides that interest be calculated from the date that the employee lost use of the withheld money rather than be calculated on the entire monetary award for the entire period of time. However, it is unnecessary to adopt the method of calculating interest pursuant to §6C, because the Commission specifically noted in *Everett School Committee* that it did not adopt the same time period for accruing interest in §6B. Rather, the Commission stated that it would continue to order interest to accrue from the date of the monetary loss until the date of reimbursement. *Id.* at 1613-1614 n.7. Accordingly, the School Committee's concern is unwarranted.⁶³

The School Committee next requests that the Commission reconsider its decision to compound interest quarterly. The School Committee contends that the statutory interest rate of 12% already provides the affected employees with a windfall due to the current lower prevailing interest rates, and that compounding interest penalizes employers. However, the Commission is well within its discretion to order compound interest. *Secretary of Administration and Finance v. Labor Relations Commission*, 434 Mass. 340, 347-348 (2001). Consequently, we order the School Committee to pay 12% interest compounded quarterly.

Conclusion

We conclude that: 1) Burns, Fallon, Mullen, L. Tejada, B. Tejada, F. Romero, and G. Romero are entitled to back pay from June 30, 1992 to January 22, 1997; 2) Carney is entitled to back pay from June 30, 1992 to May 31, 1993; and 3) Burns, Fallon, Mullen, L. Tejada, B. Tejada, F. Romero, G. Romero, and Carney are entitled to interest on the back pay owed to them at the rate specified in M.G.L. c. 231, §6B from the date they lost use of the money until the date of reimbursement, except the periods from October 29, 1999 to November 30, 1999 and from December 14, 1999 to January 18, 2000, compounded quarterly in the manner specified in *Everett School Committee*, 10 MLC at 1609.

Order

WHEREFORE, 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 School Committee shall:

1. Pay to Burns the amount of one hundred thirteen thousand eight hundred seven dollars and ninety cents (\$113,807.90) plus interest at the rate specified in M.G.L. c. 231, §6B from the date Burns lost use of the money until the date of reimbursement, except the periods from October 29, 1999 to November 30, 1999 and from December 14, 1999 to January 18, 2000, compounded quarterly in the manner specified in *Everett School Committee*, 10 MLC at 1609.

2. Pay to Carney the amount of twenty-three thousand six hundred seventy dollars and forty-three cents (\$23,670.43)⁶⁴ plus interest at the rate specified in M.G.L. c. 231, §6B from the date Carney lost use of the money until the date of reimbursement, except the periods from October 29, 1999 to November 30, 1999 and from December 14, 1999 to January 18, 2000, compounded quarterly in the manner specified in *Everett School Committee*, 10 MLC at 1609.

3. Pay to Fallon the amount of sixty-two thousand three hundred five dollars and sixty-six cents (\$62,305.66) plus interest at the rate specified in M.G.L. c. 231, §6B from the date Fallon lost use of the money until the date of reimbursement, except the periods from October 29, 1999 to November 30, 1999 and from December 14, 1999 to January 18, 2000, compounded quarterly in the manner specified in *Everett School Committee*, 10 MLC at 1609.

4. Pay to Mullen the amount of ninety thousand four hundred twenty-five dollars and forty-nine cents (\$90,425.49) plus interest at the rate specified in M.G.L. c. 231, §6B from the date Mullen lost use of the money until the date of reimbursement, except the periods from October 29, 1999 to November 30, 1999 and from December 14, 1999 to January 18, 2000, compounded quarterly in the manner specified in *Everett School Committee*, 10 MLC at 1609.

5. Pay L. Tejada the amount of one hundred fourteen thousand nine hundred seventy dollars and sixty-six cents (\$114,970.66) plus interest at the rate specified in M.G.L. c. 231, §6B from the date L. Tejada lost use of the money until the date of reimbursement, except the periods from October 29, 1999 to November 30, 1999 and from December 14, 1999 to January 18, 2000, compounded quarterly in the manner specified in *Everett School Committee*, 10 MLC at 1609.

6. Pay B. Tejada the amount of one hundred four thousand five hundred fifty dollars and sixty-six cents (\$104,550.66) plus interest at the rate specified in M.G.L. c. 231, §6B from the date B. Tejada lost use of the money until the date of reimbursement, except the periods from October 29, 1999 to November 30, 1999 and from December 14, 1999 to January 18, 2000, compounded quarterly in the manner specified in *Everett School Committee*, 10 MLC at 1609.

7. Pay F. Romero the amount of one hundred eleven thousand one hundred seventy dollars and sixty-six cents (\$111,170.66) plus interest at the rate specified in M.G.L. c. 231, §6B from the date F. Romero lost use of the money until the date of reimbursement, except the periods from October 29, 1999 to November 30, 1999 and from December 14, 1999 to January 18, 2000, compounded quarterly in the manner specified in *Everett School Committee*, 10 MLC at 1609.

8. Pay G. Romero the amount of ninety thousand eight hundred seventeen dollars and sixteen cents (\$90,817.16) plus interest at the rate specified in M.G.L. c. 231, §6B from the date G. Romero lost use of the money until the date of reimbursement, except the periods from October 29, 1999 to November 30, 1999 and from December 14, 1999 to January 18, 2000, compounded quarterly in the manner specified in *Everett School Committee*, 10 MLC at 1609.

SO ORDERED.

APPENDIX "A"

Thomas Burns

\$114,970.66 - Gross back pay

63. According to the parties' agreement, interest will not accrue from October 29, 1999 to November 30, 1999 and from December 14, 1999 to January 18, 2000.

64. This amount was derived by multiplying 49 weeks (June 30, 1992-May 31, 1993) by Carney's weekly rate of pay (\$483.07).

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(1,162.76) - Interim earnings
\$113,807.90 - Net back pay

APPENDIX "B"

James Carney
\$114,970.66 - Gross back pay
(27,153.93) - Interim earnings
\$ 87,816.73 - Net back pay

APPENDIX "C"

Robert Fallon
\$114,970.66 - Gross back pay
(52,665.00) - Interim earnings
\$ 62,305.66 - Net back pay

APPENDIX "D"

Thomas Mullen
\$109,020.66 - Gross back pay
(18,595.17) - Interim earnings
\$ 90,425.49 - Net back pay

APPENDIX "E"

Luis Tejeda
\$114,970.66 - Gross back pay
None - Interim earnings
\$114,970.66 - Net back pay

APPENDIX "F"

Berenice Tejeda
\$114,970.66 - Gross back pay
(10,420.00) - Interim earnings
\$104,550.66 - Net back pay

APPENDIX "G"

Fran Romero
\$114,970.66 - Gross back pay
(3,800.00) - Interim earnings
\$111,170.66 - Net back pay

APPENDIX "H"

Gesenia Romero
\$90,817.16 - Gross back pay
None - Interim earnings
\$90,817.16 - Net back pay