

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

NV ENERGY INC.

And

Case 28-CA-22476

ARTHUR GOODSPEED, an Individual

NV ENERGY INC.'S ANSWERING BRIEF TO GOODSPEED'S EXCEPTIONS

Respectfully submitted,

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**ATTORNEYS FOR RESPONDENT NV
ENERGY INC.**

COMES NOW, Respondent NV Energy Inc. (“the Company” or “NVE”), pursuant to the Rules and Regulations of the National Labor Relations Board (“the Board” or “NLRB”), and files its Answering Brief in response to the “Appeal or Exceptions” (“Exceptions”) filed by Claimant Arthur Goodspeed (“Goodspeed”).

I. **PROCEDURAL HISTORY**

On August 25, 2009, the parties held a full-day hearing in front of Administrative Law Judge Mary Miller Cracraft to determine whether NVE violated the Act as alleged in the Complaint. During the hearing, both parties were represented by counsel, both parties presented evidence, and both parties were afforded the opportunity to cross-examine witnesses. Following the hearing, each party timely filed a Post Hearing Brief. On November 5, 2009, Judge Cracraft issued a thorough and well-reasoned decision, ultimately finding that “Respondent did not violate the Act as alleged in the complaint and, accordingly, the complaint is dismissed.” *See* Decision at 9:5-10. On December 2, 2009, Goodspeed—apparently proceeding without the assistance of Counsel for the General Counsel—filed with the Board and sent to counsel of record his Exceptions to Judge Cracraft’s findings. Pursuant to the Board’s Rules & Regulations, NVE hereby timely files its Answering Brief.

II. **GOODSPEED’S ADMINISTRATIVE FAILURES**

As a threshold matter, the Company notes that, due to the broad-stroke format of Goodspeed’s Exceptions, Goodspeed fails to adhere to the relevant portions of the Board’s Rules and Regulations that require each exception to “set forth specifically the questions of procedure, fact, law, or policy to which exception is taken,” and “concisely state the grounds for the exception.” *See* NLRB R&R 102.46(b)(1). Further, Goodspeed’s Exceptions run afoul of the Board’s Rules & Regulations by failing to contain a single citation—precise or otherwise—to

either: (a) the portions of the record relied upon; or (b) relevant legal authorities. *See id.* These administrative failures have made it difficult to provide an Answering Brief that is “limited to the questions raised in the exceptions.” *See* NLRB R&R, §§ 102.46(b), (c), (d). Indeed, because Goodspeed did not file his Exceptions in compliance with the relevant provisions of the Board’s Rules & Regulations, Goodspeed’s Exceptions may, without reaching the merits, be disregarded on that basis alone. *See* NLRB R&R § 102.46(b)(2) (stating that “[a]ny exception which fails to comply with the foregoing requirements may be disregarded.”).

III. **SUMMARY OF JUDGE CRACRAFT’S FINDINGS OF FACT**¹

On the morning of April 9, 2009, Goodspeed (a six-week employee) and two other NVE probationary employees went to NVE’s Human Resources department to lodge complaints about the manner in which they were being treated by their trainer. *See* Decision at 4:8-42. The employees met with HR Partner Michael Linear-Liston, and Linear-Liston was receptive to their complaints. *See* Decision at 4:41-5:2. At the conclusion of the meeting, Linear-Liston told the employees that he would investigate their complaints, and that the employees should return to class. *See* Decision at 4:51-5:2. Later that day, Goodspeed was called out of his training class to have a follow-up meeting with Linear-Liston and NVE’s Manager of Training, Evelyn Hollins. *See* Decision at 5:4-19. Judge Cracraft noted in her decision that Linear-Liston initiated the parties’ afternoon meeting by assuring Goodspeed that it was not a disciplinary meeting, and that he and Hollins were just following up on the employees’ earlier complaints about their trainer. *See* Decision at 5:21-26. Judge Cracraft also determined that neither Linear-Liston nor Hollins

¹ It would seem that a certain level of factual background is important for context in the instant Brief. In her Decision, Judge Cracraft issued findings of fact with which the Company takes no exception. Accordingly, for the convenience of the Board, and in the interest of brevity, the Company herein provides a bare-bones factual summary, all of which is entirely consistent with Judge Cracraft’s findings of fact.

had the authority to terminate Goodspeed's employment "on the spot" during that meeting, and that a discharge during that meeting would have been "impossible." *See* Decision at 5:32-36, 7:27-8:2. As the meeting progressed, Goodspeed interrupted Linear-Liston several times, asked for union representation, became increasingly agitated, and went off on various tangents. *See* Decision at 5:26-6:49. Ultimately, Judge Cracraft found that Goodspeed concluded the meeting by abruptly resigning his employment. *See* Decision at 8:6-7, 35-36.

IV. **ARGUMENTS & AUTHORITIES**

A. It is well established that the Board requires a "clear preponderance" of the evidence to overrule an ALJ's credibility determinations.

As this panel is aware, the Board's long-standing policy is to not overrule an administrative law judge's credibility resolutions unless the "clear preponderance of all of the relevant evidence convinces [the Board] that [the ALJ's findings] are incorrect." *See DPI New England*, 354 NLRB No. 94, n.3 (2009) (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950) *enfd* 188 F.2d 362 (3rd Cir. 1951)). As set forth herein, Goodspeed's Exceptions do not approach this exacting standard.

B. Judge Cracraft's determination that the Company "did not violate the Act as alleged in the complaint" is based entirely upon credibility resolutions that she made in favor of the Company.

This was a case in which an evaluation of the parties' credibility was paramount to reaching a final conclusion. Because there was neither a recording nor a transcript of the parties' April 9, 2009, meeting, Judge Cracraft was left with nothing to review outside of the relevant documents, the testimony, the inherent probability of the testimony, and the witnesses' relative demeanors. Not surprisingly, a review of Judge Cracraft's decision reveals that her findings of fact, her analysis, and her conclusions of law turned solely upon her determination that the

Company's version of events was more plausible, probable, and credible than the version offered by Goodspeed. *See* Decision at 8:7-20.

In her analysis, Judge Cracraft specifically stated that she found the testimony of the Company's witnesses to be "genuine and credible," and that Goodspeed's testimony was "confusing, lacking in context, and improbable." *See* Decision at 8:8-16. When the parties presented conflicting testimony on a particular point, Judge Cracraft uniformly credited the Company's version of events over that which had been offered by Goodspeed. *See, e.g.,* Decision at 5:13-17; 5:30-36; 8:7-16. In fact, when Goodspeed's testimony conflicted with that of every other witness who testified regarding the notion of an on-the-spot termination, Judge Cracraft found that it would have been "impossible" for Goodspeed's version of events to be true. *See* Decision at 3:32-36. Finally, whereas Judge Cracraft found the Company's testimony was "corroborated by the disinterested testimony of the union steward and the [union's] senior business manager," she found Goodspeed's testimony to be "belied by the uniform testimony of the Company's witnesses," and otherwise "difficult to believe." *See* Decision at 8:10-31. It is, therefore, clear that Judge Cracraft's various credibility determinations formed the basis of her ultimate conclusions that: (1) the afternoon meeting on April 9th was not a disciplinary meeting; and (2) that Goodspeed resigned his employment. *See* Decision at 5:32-36, 8:6-36.

C. Goodspeed's Exceptions are insufficient to warrant overruling Judge Cracraft's decision.

As noted above, Goodspeed's Exceptions do not contain a single citation to the record or the law. In the absence of citations and references to supporting evidence and authority, Goodspeed's Exceptions amount to little more than Goodspeed's effort to have his version of the story heard one last time. Essentially, then, Goodspeed's Exceptions provide a one-sided summary of the testimony that he offered previously, in person, before Judge Cracraft. At this

stage, however, Goodspeed's written assertions are not subject to: (a) the penalties of perjury; (b) direct and cross examination; or (c) an evaluation of his demeanor relative to that of other witnesses. Conversely, during the parties' Hearing, all of the foregoing factors were present, and all of the foregoing factors did play an invaluable role in forming Judge Cracraft's analysis and conclusions of law.

It is clear that Goodspeed believes that the Company violated his *Weingarten* rights, but his analysis ignores the fact that, in order to invoke the *Weingarten* protections, it must first be determined that the employee held a "reasonable belief" that an interview might result in disciplinary action.² See *Southwestern Bell Telephone Company*, 338 NLRB 552 (2002). In electing to credit the Company's version of events over the version offered by Goodspeed, Judge Cracraft necessarily determined that Goodspeed could not "reasonably" have held such a belief.³ Consistent with that determination, Judge Cracraft concluded that the Company, "did not violate the Act as alleged in the complaint." See Decision at 9:7-8.

V. **CONCLUSION**

This was a case about credibility. At the hearing, the witnesses presented to Judge Cracraft two conflicting versions of the parties' meeting on April 9, 2009. With the benefit of

² A *Weingarten* analysis requires an employee's "reasonable belief" to be measured by objective standards under all of the circumstances of the case. *Southwestern Bell* 338 NLRB 552 (2002); *Weingarten*, 420 U.S. at 257, n5. Similarly, a *Weingarten* analysis also requires the employer to evaluate the employee's request for representation on an objective basis. *Id.*

³ To this end, Judge Cracraft specifically noted that: (1) Goodspeed had, just two-weeks prior, participated in a nearly identical investigation that did not result in discipline (Decision at 8:21-26); (2) another employee was questioned on the same day, by the same people, regarding the same instructor, yet was not disciplined or discharged (Decision at 8:32-36); and (3) given the Company's disciplinary procedures, it would have been "impossible" for Goodspeed to have been discharged during that meeting (Decision at 5:32-36). Moreover, Judge Cracraft made a factual determination that, at the outset of the meeting, Linear-Liston told Goodspeed that the meeting was not disciplinary. See Decision at 5:20-26. A statement such as that weighs heavily in favor of what a reasonable employee would have believed under the circumstances. See *Spartan Stores, Inc., v. NLRB*, 628 F.2d 953, 958 (6th Cir. 1980).

the ability to evaluate the witnesses' testimony and relative demeanor, Judge Cracraft determined that the Company's version was "genuine and credible," and that Goodspeed's version was "confusing, lacking in context, and improbable." It is understandable that Goodspeed, as the claimant, naturally would disagree with the Judge's decision; Goodspeed's Exceptions, however, fail to offer any actual evidence that Judge Cracraft's credibility resolutions were faulty, baseless, or otherwise incorrect. Thus, under the Board's well-established legal standard articulated herein, Goodspeed's exceptions fail to offer the requisite "clear preponderance" of relevant evidence sufficient to overrule Judge Cracraft's credibility-based decisions. The Company, therefore, respectfully requests that the Board affirm in its entirety Judge Cracraft's Rulings, Findings, and Conclusions of Law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of December 2009, a true and correct copy of the foregoing was filed with the via the Board's E-filing system. A true and correct copy of the foregoing was served upon the following individuals in compliance therewith.

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