UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MCPc, Inc.

And Case No. 6-CA-063690

JASON GALANTER

MCPc, INC.'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent MCPc, Inc. ("MCPc"), by and through undersigned counsel and in accordance with 29 U.S.C. § 160, 29 C.F.R. § 102.46 and the authorities described in the accompanying Brief in Support hereof, hereby files the following Exceptions to the Decision issued by the Administrative Law Judge ("ALJ") in the above-captioned case:

Findings of Law

I. The Charging Party did not engage in activity protected by Section 7 of the National Labor Relations Act (the "Act").

The ALJ, at "Legal Analysis" Section IIA, pages 9 to 10 of the Decision, incorrectly found that Charging Party engaged in "protected concerted activity" by relying upon only a partial and therefore improper definition of such activity derived selectively from controlling authority.

II. MCPc lawfully terminated Charging Party because of his unprotected misconduct.

The ALJ, at "Legal Analysis" Section IIC, page 13 of the Decision, erroneously found that MCPc asserted "shifting defenses" based upon the ALJ's impermissible consideration, for the purpose of making such a finding, of MCPc's Position Statement, which the ALJ admitted into evidence solely for its permissible use as an "admission by party-opponent," *see* R. (Vol. I) at 95-97, R. (Vol. II) at 175-76.

III. The ALJ utilized incorrect legal principles to arrive at his decision that MCPc discharged Charging Party in violation of the Act.

The ALJ, at "Legal Analysis" Section IIC, pages 12 to 13 of the Decision, improperly assessed the parties' burdens of proof regarding discharge of Charging Party for cause by only partially applying the controlling authority of *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), and otherwise improperly applying authority.

IV. Counsel for the General Counsel failed to disprove MCPc's lawful rationale for terminating Charging Party.

The ALJ, at "Legal Analysis" Section IIC, page 13 of the Decision, unnecessarily looks for, and finds as evidence of unlawful discharge, pretext in MCPc's nondiscriminatory rationale for terminating Charging Party without first determining, as he should have, that counsel for the General Counsel met her burden of proving that MCPc discharged the Charging Party for unlawful reasons or that Charging Party did not engage in the misconduct on which MCPc based its decision to discharge him.

V. MCPc's confidentiality policy does not violate the Act.

The ALJ, at "Legal Analysis" Section I, pages 6 to 8 of the Decision, inappropriately based his determination that MCPc's confidentiality policy violated Section 7 of the Act upon mischaracterized, out-of-context and/or improperly cited legal authorities.

Findings of Fact

VI. Charging Party was discharged because of his recurring and serious deceit.

The ALJ, at "Legal Analysis" Section IIB, pages 10 to 12, erred when he determined that MCPc unlawfully and impermissibly discharged Charging Party based only upon an overly-broad confidentiality policy, thereby failing to account for substantial record evidence, not sufficiently refuted by counsel for the General Counsel, indicating that Charging Party was terminated because of his unprotected repeated and egregious dishonesty. *See, e.g.*, R. (Vol. I) at 120 (Test. of M. Trebilcock) (showing that MCPc's CEO terminated Charging Party because the latter "wasn't trustworthy and [MCPc] could not move forward with" the continued employment of such a person), *id.* at 121 ("Well, my gut was telling me that, you know, everything was adding up to a lack of trust," in particular "the fact that [Charging Party] had access to the information, and he had already compromised two employees that . . . I trust."); R. (Vol. I) at 132-33 (Test. of J. Kaiser) (explaining that, contrary to ALJ's findings, Charging Party should ***not*** have had but did have access to MCPc's human resources information, that Charging Party "had a network connection from his house that was up 24/7 that would have provided him unlimited access," and that MCPc's information technology managers "would have removed" such access if they had known of it); R. (Vol. II) at 160-61 (Test. of N. Damin) (corroborating, without challenge from counsel for the General Counsel, CEO's testimony that Charging Party attempted to blame release of confidential information on other long-term MCPc employees who in fact firmly denied any such misconduct).

VII. Other witnesses' credible testimony supports MCPc's position and refutes Charging Party's self-serving testimony.

The ALJ generally made credibility determinations directly disproved by the record and, at times, by the ALJ's own findings. *Compare* Decision at 4 ("Findings of Fact" Section III), 5 (*id.* Section IV) & 11 ("Findings of Law" Section IIB) (crediting explicitly and implicitly the otherwise unsubstantiated testimony of Charging Party) *with id.* at 3 n. 12 ("Findings of Fact" Section IIB), 4 n. 16, 5 nn. 22 & 23 (stating ALJ's clear disbelief of Charging Party's sworn testimony). *Compare* Decision at 4 (discrediting without citing

any record evidence the testimony of MCPc's CEO, which was corroborated by other witnesses), 5 n. 3 (stating that an audit of MCPc computer use in early February 2011 "undermine[d] the testimony of [MCPc] witnesses who assumed" Charging Party "engage[d] in . . . unauthorized access of Company files."), 5 & 5 n. 19, 22-23 (crediting while simultaneously expressing disbelief in testimony of MCPc's CEO), *with id.* at 5 (noting that events leading to Charging Party's discharge occurred between February 24 and March 4, 2011, well after the February 7 audit referenced at p. 5 n. 3), R. (Vol. I) at 86 (Test. of J. Farmer) (supporting MCPc CEO's testimony that Charging Party "specifically" referred to a $400,000 salary and spoke of Peter DeMarco), *id.* at 90 (refuting ALJ's conclusion about, and otherwise corroborating, MCPc CEO's testimony about who told CEO of the Charging Party's misconduct).

VIII. Counsel for the General Counsel failed to prove that Charging Party did not improperly access MCPc's confidential information.

The ALJ, at "Findings of Fact" Section IIB, page 3 note 12 of the Decision, erroneously found that Charging Party did not exercise unauthorized access to MCPc's confidential files by relying selectively upon only testimony of the Charging Party himself, whom the ALJ repeatedly and expressly determined to be a non-credible witness, *see* Decision at 3 n. 12, 4 n. 16, 5 n. 22-23, and in disregard of the timeframe relevant to the charged violation, *see id.* at 3 n. 12, 3, 5; *cf.* R. (Vol. II) at 170-71 (Test. of J. Galanter).

IX. MCPc did not assert "shifting defenses."

The ALJ, at "Legal Analysis" Section IIC, page 13 of the Decision, incorrectly determined that MCPc's "shifting defenses indicate . . . pretext" underlying MCPc's assertion that Charging Party was discharged for cause; the only "shifting defense" was seemingly asserted on MCPc's behalf by counsel for the General Counsel. *Compare* R. (Vol. I) at 11-12, 30-31, 65-66, R. (Vol. II) at 154-56 (showing how counsel for the General Counsel attempted to deflect MCPc's actual defenses by raising on her own the issue of Charging Party's work performance), *with* R. (Vol. I) at 36-37, 110-11, R. (Vol. II) at 146-47 (containing testimony elicited by counsel for MCPc merely to counter counsel for the General Counsel's depiction of Charging Party as a model employee).

X. MCPc's CEO thoroughly investigated Charging Party's misconduct prior to the discharge of Charging Party.

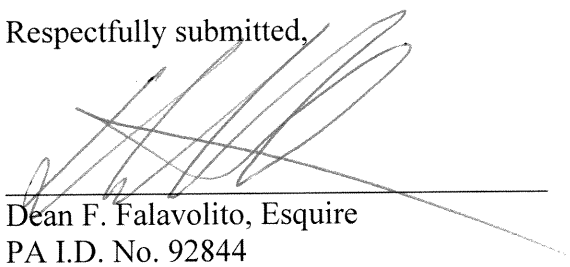
The ALJ, at "Legal Analysis" Section IIC, page 13 of the Decision, also erred by concluding that MCPc conducted only a "sparse investigation" into Charging Party's breach of MCPc's employee conduct policies when in fact MCPc's CEO offered uncontroverted and corroborated testimony that MCPc seriously investigated Charging Party's misconduct prior to even considering terminating Charging Party. *See* Treblicock Test. at 114-22, 130; Kaiser Test. at 132-33; Damin Test. at 160-61.

XI. Counsel for the General Counsel failed to show that Charging Party more likely than not obtained the information at issue by honest means.

The ALJ, at "Findings of Fact" Section III, page 4 and page 4 note 18, erred when, despite overwhelming record evidence to the contrary, he deemed "credible and unrefuted" Charging Party's claim that his disclosure of an executive's salary was "derived from internet research that he conducted several weeks earlier" and "focused on . . . a comparable pay salary for a similar position in 2008 [of] $362, 500." *Cf., e.g.*, Decision at 4 n. 16 (crediting also testimony of a coworker that the Charging Party "referred to . . . [an] executive who was recently hired at a salary of $400,000."), 5 ("[Charging Party] . . . alternated between several vague possibilities" of where he obtained the salary information, and he ultimately "relented and suggested that he may have heard it from [salespeople] in the Buffalo office."), 5 n. 22 ("***I do not credit*** [Charging Party's] testimony that he mentioned" a different executive's arguably comparable compensation) (emphasis added), 5 n. 23 (noting that Charging Party's "testimony revealed that he was purposefully vague and evasive" when asked by MCPc's CEO about where he obtained the information, and that such testimony changed on cross-examination). *See also* R. (Vol. I) at 74, 76 (Test. of D. Tamburino) (relying on affidavit given near time of incident in question and remarking that Charging Party specifically raised issue of $400,000 salary); Farmer Test. at 86, 87 (stating again that Charging Party mentioned $400,000), 92 (denying outright Charging Party's claim that office employees, by internet or otherwise, tried to determine executive compensation); Trebilcock Test. at 114-17 (specifying that Charging Party's conduct raised CEO's alarm because of specificity of $400,000 number).

WHERFORE, Respondent MCPc, Inc. requests that the decision of the Administrative Law Judge be reversed and/or otherwise not adopted by the Board

Respectfully submitted,



Dean F. Falavolito, Esquire
PA I.D. No. 92844
Laura E. Caravello
PA I.D. No. 312091
Burns White LLC
Four Northshore Center
106 Isabella Street
Pittsburgh, PA 15212
Phone: (412) 995-3000
Fax: (412) 995-3300
dffalavolito@burnswhite.com
lpcaravello@burnswhite.com
Counsel for MCPc, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of MCPc, INC.'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION has been served upon all counsel of record via electronic mail this 3rd day of July, 2012, addressed as follows:

Julie R. Stern, Esquire
United States Government
National Labor Relations Board
Region 6
1000 Liberty Avenue, Room 904
Pittsburgh, PA 15222-4111
(Julie.Stern@nlrb.gov)

Alan C. Blanco, Esquire
Rothman Gordon, P.C.
310 Grant Street
Third Floor, Grant Building
Pittsburgh, PA 15219
(ACBlanco@rothmangordon.com)

Dean F. Falavolito, Esquire
Laura E. Caravello, Esquire