UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PUBLIC SERVICE COMPANY OF NEW MEXICO

and **Cases 28-CA-023391**
28-CA-066164

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 611, AFL-CIO

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel files the following Brief in Support of Exceptions to the Decision of Administrative Law Judge Eleanor Laws, [JD(SF)-28-12] (ALJD), issued on June 22, 2012, in the above captioned cases.

I. STATEMENT OF THE CASE

Pursuant to charges filed by the International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO (hereinafter "the Union"), a Consolidated Complaint was issued by the Regional Director of Region 28. The Consolidated Complaint alleges Public Service Company of New Mexico (herein "Respondent") engaged in conduct in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (hereinafter "the Act"). A hearing was held on the issues raised by the Consolidated Complaint on November 15 -18, 2011 and January 18-19, 2012 before Administrative Law Judge Eleanor Laws.

On June 22, 2012, Judge Laws issued her decision in the case finding Respondent violated Section 8(a)(1) and (5) of the Act. Specifically, Judge Laws found Respondent violated Section 8(a)(1) of the Act by: a) threatening and interrogating employees,

b) refusing to process a discrimination complaint initiated by bargaining unit employee Eric Cox unless he proceeded without his Union representative; c) denying bargaining unit employee Eric Cox's request to have his Union representative of choice represent him at an investigatory interview; d) unilaterally making changes to the Informal Step of the contractual grievance and arbitration process by requiring stewards at the initial stage of the Informal Step to explain in detail which articles of the contract are alleged to be violated and how these articles have been violated, refusing to sign in receipt of grievances that have been put to writing after oral grievances have been presented, and requiring more than one supervisor to be present during Informal Step grievance meetings.

In addition, Judge Laws found Respondent violated Section 8(a)(1) and (5) of the Act by a) unilaterally changing the requirement for Union representatives to access its ESC facility in Albuquerque, New Mexico in January 2011; 2) unilaterally changing the requirement for Union representatives to access its San Juan Generating facility in Farmington, New Mexico on July 15, 2011; and 3) refusing to provide the Union with the following relevant information it requested;

> the total number of medical appointments scheduled and approved by supervision for any and all medical appointments for bargaining unit or non-bargaining unit employees subject to the Respondent's policy; the total number of medical appointments scheduled and approved by supervision for any and all medical appointments for bargaining unit or non-bargaining unit employees subject to Respondent's PTO policy and required to provide a doctor's note to verify a medical appointment; the names, classifications and work locations of any and all employees subject to Respondent's PTO policy; and bargaining unit or non-bargaining unit employees who have scheduled a medical appointment with their supervisor;
>
> the discipline issued to Rex Foss for violations of Respondent's policies, including Do the Right Thing, which occurred as a result of Mr. Foss's involvement in the Carlisle and Montgomery leak incident; information pertaining to crew changes, including who

> from management made the decisions and how employees were informed of the decisions;
>
> a list of any bargaining unit employees or otherwise who have been discharged by Respondent for violation of the Employee Safety Manual; a list of any bargaining unit employees or otherwise who have been discharged by Respondent for violation of "other established safety procedures; a list of any bargaining unit employees or otherwise who have been disciplined by Respondent for violation of the Employee Safety Manual; a list of any employees bargaining unit or otherwise who have been disciplined by Respondent for violation of "other established safety procedures"; and
>
> Respondent's policy requiring discipline to be administered if any employee has been charged with 40 hours of "unscheduled absences" and the effective date of that policy; the "unscheduled time off requirements" referred to in Eric Morgan's January 25, 2011 email and the policy containing; the policy requiring employees to Pre-Approve for PTO on any day not designated a regular work day by the collective-bargaining agreement; the definition of "unscheduled absence" and the policy containing the definition; the names classifications and work locations of any and all Respondent's bargaining unit and non-bargaining unit employees disciplined for accruing 40 hours of "unscheduled absences" from April 1, 2008 or the date the policy became effective to March 1, 2011 whichever period is shorter.

Judge Laws, however, erroneously found: a) the evidence was insufficient to establish Respondent unilaterally implemented changes to the Informal Step of the contractual grievance and arbitration procedures by refusing to meet with Union representatives on "company time" (Acting General Counsel's Exception 2); b) Respondent, by Supervisor Gary Cash, did not threatened employees by informing them Union Assistant Business Manager Ed Tafoya was not allowed on its property (Acting General Counsel's Exception 3); c) Respondent did not unilaterally change the schedules of Meter Reader employees by requiring they work on Saturdays in violation of the collective-bargaining agreement and past practice (Acting General Counsel's Exception 4); d) Respondent did not subject employee

and Union Steward Eric Cox to new work requirements by requiring him to report to supervisors or managers offices and report his Union activities. (Acting General Counsel's Exception 5); e) Respondent's meeting with Plant was held solely for the purpose of informing her of a previously made disciplinary decision and as a result did not unlawfully refuse Plant's request for Union representation at the meeting; (Acting General Counsel's Exception 6); and f) the Union was not entitled to an email associated with Plant because Plant was not aggrieved by Respondent's denial of her request for Union representation and the requested document only became relevant if, in the future, Plant was subjected to an investigation or discipline in connection with the requested document. (Acting General Counsel's Exception 6). The Judge also inadvertently dismissed paragraph 9(d)(2) of the Consolidated Complaint (Acting General Counsel's Exception 1)

II. ARGUMENT

A. The Judge Inadvertently Dismissed Paragraph 9(d)(2) of the Consolidated Complaint (Exception 1)

The Judge, after her analysis of the allegations surrounding paragraph 9(d)(3) of the Consolidated Complaint, inadvertently recommends the dismissal of paragraph 9(d)(2), which alleges Respondent implemented changes to the Informal Step of the grievance-arbitration procedure by refusing to sign in receipt of grievances put in writing after presentation of the oral grievance. In fact, the Judge, in her Conclusions of Law, specifically concludes Respondent unilaterally made changes to the Informal Step of the grievance-arbitration procedure by refusing to sign in receipt of grievances. (ALJD, pg. 52, lines 4-5). Acting General Counsel, in support of this limited exception, only seeks to conform the Judge's Order and Notice with her factual findings and Conclusions of Law.

B. The Judge erred in not Finding Respondent implemented changes to the Informal Step of contractual grievance and arbitration procedures by refusing to meet with Union representatives on "company time" (Exception 2)

The Judge erred in not finding that Respondent implemented changes to the Informal Step of the contractual grievance and arbitration procedures by refusing to meet with Union representatives on "company time". (ALJD page 14, lines 29-30) The Judge concluded that the General Counsel did not submit evidence to support this complaint allegation. (ALJD page 14, lines 27-28) This is not correct. Stewards Barnard and Cox, for example, both explained the past practice was to approach the supervisor to see if they were free to discuss the grievance at the Informal Step. Barnard and Cox stated supervisors more times than not were available and would agree to meet and discuss the grievance. This practice changed when supervisors began telling Union Stewards they had to schedule an appointment to discuss grievances. None of this was considered by the Judge in her decision. As such, the Acting General Counsel respectfully submits the Judge erred in not considering this evidence and further erred in not finding that Respondent violated Section 8(a)(5) of the Act by implementing a change to the parties' contractual grievance and arbitration procedures and practices by refusing to talk Union representatives during "company time".

C. Respondent Communicated Tafoya Not Allowed on Property (Exception 3)

The Judge erred in recommending the dismissal of paragraph 5(g) of the Consolidated Complaint and finding the evidence does not establish employees were listening to the telephone conversation between Assistant Business Agent Tafoya and Supervisor Gary Cash. In this regard, the record clearly demonstrates Cash directly told employees Tafoya was not allowed on Respondent's property. (TR 53)

In January 2011, Tafoya was contacted by a bargaining unit employee and asked to come to Respondent's facility to review a training program Respondent was, at that time,

implementing. The record establishes Cash approached the employee while the employee was on the phone with Tafoya. (TR 53) Tafoya testified he overheard Cash tell the employee he was not allowed on Respondent's property and could not come to the training session to represent employees. (TR 53) The Judge incorrectly concluded the evidence did not establish employees were listening to the conversation between Tafoya and Cash or were subsequently informed of it. The evidence, however, reveals employees were in the physical presence of Cash at the time this statement was made and employees were directly informed by Cash that their bargaining representative was not allowed to come to the facility. (ALJD page 17, lines 19-20) Further, the record reveals Cash, on a later date, and during an unlawful interrogation, also informed other employees Tafoya was not allowed to come inside Respondent's facility.[1] (TR 243)

In her decision, the Judge, found Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing the requirement for Union representatives to access its facility. (ALJD page 20, lines 2-5; page 24, lines 6-7) The Judge also found merit to paragraphs 5(h) and 5(i) of the Consolidated Complaint alleging Respondent, by its agents other than Cash, threatened employees by informing them Tafoya was not allowed on company property. (ALJD page 21, lines 5-9) These findings by the Judge clearly establish Respondent developed a policy of excluding Tafoya from its property, and had been communicating this policy to its employees.

A review of the undisputed testimony demonstrates, as cited above, and in support of Acting General Counsel Exception 3, the Judge erred in dismissing paragraph 5(g) of the Consolidated Complaint and finding the evidence did not establish employees were listening

[1] The Judge found merit to paragraph 5(j) of the Consolidated Complaint alleging Cash interrogated employee Eric Cox regarding his Union activities by questioning Cox about discussions he had with Tafoya.

to the telephone conversation between Tafoya and Cash in January 2011, and, in turn, did not hear Cash state Tafoya was not allowed on Respondent's property. Based on the foregoing, the Acting General Counsel respectfully submits the Judge erred in not finding the evidence of this statement being made by Respondent as establishing a violation of Section 8(a)(1) of the Act.

D. Respondent Unilaterally Imposed Mandatory Overtime on Meter Readers (Exception 4)

The Judge correctly cites the facts in support Acting General Counsel's Exception 4, which excepts to the finding overtime work was contemplated in Article 17A of the collective-bargaining agreement. Based on this finding, the Judge dismissed paragraph 9(c) of the Consolidated Complaint, which alleges Respondent committed a unilateral change when changing employees work schedule by requiring them to work overtime on Saturdays. (ALJD page 24, lines 38-41) The Judge's findings in support of her dismissal are inconsistent with the legal framework surrounding the bargaining relationship between an employer and its employees' bargaining representative.

An employer is required to provide a union notice and the opportunity to bargain regarding changes having a "significant, substantial, and material" impact on terms and conditions of employment. See, *Success Village Apartments*, 348 NLRB 579 (2006). Here, the issue is whether Respondent was privileged to *require* Meter Readers to work Saturdays without first bargaining with the Union. The evidence clearly establishes Respondent was not privileged to unilaterally impose this new work requirement on employees.

Paragraph 9(c) of the Consolidated Complaint states Respondent unilaterally implemented a new work requirement that meter-reading employees had to work on Saturdays in violation of Section 8(a)(5) of the Act. Meter Readers complained to Tafoya

they were being required to work overtime and these hours were being schedule on Saturday. (ALJD page 24, lines 25-26) The Judge found, in response to this news, that Tafoya filed a grievance over this issue. (ALJD page 48, line 24) Added to this Respondent does not dispute it required Meter Reader employees to work on Saturday.

Article 15A of the collective-bargaining agreement defines the working hours of Meter Readers and Collectors as a Monday through Friday 8-hour day/40 hour a week schedule or a Monday through Thursday 10-hour a day schedule. (ALJD page 24, lines 19-23) Article 17A of the collective-bargaining agreement defines the overtime rates for Meter Readers and Collectors. The Judge erroneously relies on the parties' collectively-bargained rates for hours worked (in Article 17A) over and above those hours agreed to by the parties in Article 15A as dispositive, and dismissed paragraph 9(c) of the Consolidated Complaint on the grounds "overtime was contemplated" by this provision. (ALJD page 24, lines 35-36) However, Article 17A of the collective-bargaining agreement only demonstrates the parties contemplated *the rate* at which Meter Readers are to be paid when working hours in excess of those the parties agreed to in Article 15A of the agreement. While it is undisputed the parties' agreement contains overtime rates, there is no language in the agreement requiring Meter Readers to work hours outside of those established in Article 15A.

Further, there is no contention by Respondent or other evidence suggesting the Union waived its right to bargain on mandatory overtime for Meter Readers. The Board, in *Provena St. Joseph Medical Center,* 350 NLRB 808 (2007), reaffirmed it's the doctrine on the clear and unmistakable waiver standard in determining whether an employer has the right to make unilateral changes to employees' terms and conditions of employment during the life of a collective-bargaining agreement. The Board cited its long established principle that a

party may contractually waive its right to bargain about a subject when the waiver is in clear and unmistakable language. 350 NLRB at 811-812. In the present case, there is no such contractual language. In fact, Respondent agreed to overtime language *requiring* employees in its other business units to work overtime in recognition of Respondent's business needs. (See Joint Exhibit, Article 16A and 16B). It is clear Respondent and the Union contemplated the scheduling of work in excess that defined in Article 15A, as it established rates for that work in Article 17A. However, the Judge erroneously attributes the silence of the overtime in Article 15A and the establishment of overtime rates in Article 17A as contemplation of *mandatory* overtime. This is simply not the case.

There is no doubt that employees' schedule and hours of work have a significant, substantial, and material impact on their terms and conditions of employment. It is not disputed that after imposing the mandatory overtime on Saturdays, Respondent notified employees that failure to report on those days would be considered unscheduled absences. (ALJD page 24, lines 26-28; Tr. 101) As such, Respondent requiring Meter Readers to work Saturdays, without providing the Union with notice and an opportunity to bargain, violates Section 8(a)(5) of the Act. Based on these facts, and in support of Acting General Counsel Exception 4, the Judge erred in finding overtime work was contemplated in Article 17A of the parties' collective bargaining agreement and further erred in dismissing paragraph 9(c) of the Consolidated Complaint and finding there was no evidence to prove the overtime requirement was unilaterally implemented by Respondent violated the parties' agreement or deviated from past practice in violation of Section 8(a)(5) of the Act.

E. Respondent Imposed More Onerous Working Conditions on Cox (Exception 5)

The Judge erred in finding Supervisor Dale Smyth's requirement that Cox report to his office and explain the Union activity he (i.e. Cox) was engaged in as a one-time request by Respondent, which was too insignificant to establish the imposition of an onerous working condition. ALJD page 36, lines 7-8)

Article 9 of the parties' collective-bargaining agreement states, in part, that Respondent agrees employees shall not be interfered with or discriminated against by reason of their faithful performance of their duties as stewards. Section 8(a)(3) of the Act states, in pertinent part, "[i]t shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment *or any term or condition of employment* to encourage or *discourage* membership in any labor organization." Board precedent, consistent with spirit and letter of the Act, establishes retaliation against a Union Steward for performing activities as a steward violates Section 8(a)(3) of the Act. See *Garland Coal & Mining Co*., 276 NLRB 963, 965 (1985), citing *McGuire & Hester*, 268 NLRB 265 (1983).

The evidence, as the Judge found, establishes Smyth approached Cox and, in the presence of employees, insisted he reveal the nature of the grievances he was working on and the names of the employees who sought to file grievances. Smyth instructed Cox to report to his office and continued interrogating Cox about the specifics of his Union activity. (ALJD page 33, lines 46-47; page 34, lines 4-6) The Judge correctly found merit to paragraph 5(k)(1) and (2), which is the allegations related to Smyth's unlawful interrogation of Cox and Smyth's threat to continue questioning Cox in his office. (ALJD page 33, lines 38-40) These allegations were clearly supported by the evidence. The Judge also found merit to paragraph 5(j) of the Consolidated Complaint, which alleges Cash engaged in the

exact same conduct. (ALJD page 34, lines 19-21) The findings Respondent's supervisors interrogated Union Stewards and demanded to know what grievances and investigations they were working on is clearly established by the record, and this evidence was relied upon by the Judge in finding Respondent's conduct violated Section 8(a)(1) of the Act.

These two instances show where Respondent imposed additional requirements on Cox's terms and conditions of employment, as provided in the parties' collective-bargaining agreement, while he attempted to perform his duties as a Union Steward. The weight of the evidence also supports a finding Respondent imposed additional requirements on Cox, by requiring him to report to his supervisor's office and respond to aggressive interrogations about his Union activity, and threatening him with discipline if he did not yield to that authority. Board precedent, consistent with spirit and letter of the Act, establishes that retaliation against a Union Steward for performing activities as a steward violates Section 8(a)(3) of the Act. See *Garland Coal & Mining Co*., 276 NLRB 963, 965 (1985), citing *McGuire & Hester*, 268 NLRB 265 (1983). The conduct here was taken by Respondent in retaliation for Cox carrying out his Union Steward duties in violation of Section 8(a)(3) of the Act.

Accordingly, the Judge erred in dismissing paragraph 6(a) of the Consolidated Complaint and finding a one-time request to go to Smyth's office too insignificant to establish the imposition of an onerous working condition, as the evidence demonstrates this requirement was imposed on more than one occasion.

F. Respondent Violated Marie Plant's Weingarten Rights (Exception 6)

The Judge erred in finding Respondent did not engage in conduct in violation of Section 8(a)(1) of the Act by refusing employee Marie Plant's request for Union

representation at the October 7, 2010 disciplinary interview. (ALJD page 40, lines 22-24) The Judge's decision accurately lays out Plant's role as a Union Steward and her representation of an employee who was terminated approximately three weeks before the October 7 interview for the misuse of a company-issued fuel card, which is closely related to the allegation Respondent confronts Plant with during the interview. Respondent's assertion it called Plant into the conference room *only* to present her with "information" about what was said in an e-mail it received from an employee is unreasonable in light of the confrontational and accusatory nature of the information.

Whether an employee reasonably believes an interview might result in discipline is measured by an objective standard that considers all circumstances of the case and not simply the employee's subjective motivation. *NLRB v. J. Weingarten*, 420 U.S. 251, 257, fn. 5 (1975); *United Telephone Co. of Florida*, 251 NLRB 510, 513 (1980). An employee's rights under *Weingarten* generally apply to an interview when an employer investigates an employee's alleged misconduct, such as theft or fraud. See *Exxon* 223 NLRB 203 (1976) (employer denied representative when investigation involved alleged adulteration of gasoline, an obvious form of dishonesty) *United States Postal Service*, 241 NLRB 141 (1979) (violation when employer denied representative when conducting investigation of unauthorized purchases)

Judge Laws correctly found Plant twice requested union representation during the October 7 interview with her immediate supervisor Chris Jamarillo and Joanne Garcia, Respondent's Human Resources Consultant. (ALJD, page 38, lines 5-7; page 39, lines 26-27 and 36-37) Garcia and Jaramillo, in suggesting there was no need for Union representation, advised Plant the meeting was only informational. (ALJD, page. 38, lines 5-7) They then

informed Plant of an e-mail message from employee Jason Montoya that Plant thought about using her company-issued fuel card for personal fuel purchases. (ALJD, pg. 38, lines 10-12). Jaramillo and Garcia testified it was determined Plant would not be disciplined. Yet, Garcia also testified she was maintaining a copy of the e-mail in an investigation file she maintained on Plant. (TR 711)

In *J. Weingarten*, an employee was subjected to an interview because it was reported she took money from a cash register. During the investigation into the alleged theft, the employee requested union representation on a number of occasions but her request was denied. The Court agreed with the Board and found the employer committed an unfair labor practice by denying the employee's right to union representation. The Court stated "[t]he action of an employee in seeking to have the assistance of his union representative at a *confrontation* with his employer clearly falls within the literal working of [Section 7] that '(e)mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.'" *Id*. at 260 (emphasis added). The Court added "[t]he union representative whose participation he seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview." *Id*. at 260-261.

Like the employee in *J. Weingarten*, Plant was *confronted* with evidence Respondent received about her potential misconduct. The contention Respondent was *only* informing Plant of the contents of the document ignores the totality of the facts surrounding the

interview. Specifically, an employee, who Plant represented in her role as Union Steward, was discharged for carrying out the exact same conduct Plant allegedly contemplated, the same conduct she was confronted with during her interview. Also, Garcia, Respondent's Human Resources Consultant, testified she maintained a copy of the e-mail alleging this contemplation of misconduct in a file she kept on Plant. These established facts alone are sufficient to find Plant was reasonable in believing discipline could result from the interview.

The Judge, in citing *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979), found the meeting was held solely for the purpose of informing Plant of a previously made disciplinary decision. (ALJD page 39, lines 39-46) The record does not contain any testimony from witnesses suggesting the purpose of the October 7 meeting was to inform Plant of a previously made disciplinary decision. Plant was not informed of a decision made to discipline her or any other employee during the interview. Also, there is no testimony Respondent's objective was to inform Plant of the employee discharged for misusing his company-issued fuel card, as Plant served as this employee's Union Steward and was already aware of the discharge. The Judge also stated there was no evidence Garcia or Jamarillo asked Plant questions or otherwise sought to gather information from her. (ALJD page 40, lines 22-24) The Judge noted her impression of the existence of a power struggle between Respondent and the Union and a need for the parties to change this dynamic. (ALJD page 5, lines 36-40) With this astute observation, there can be little doubt the type allegations Respondent confronted Plant with during the interview, in the manner it did, would elicit a verbal response from an employee in defense of the allegations.

Under the circumstances Plant was confronted with during the interview, it was reasonable for her to request a union representative when Garcia and Jaramillo confronted

her with the allegations in the e-mail. The Judge found Plant requested a union representative on two separate occasions during this interview. (ALJD page 39, page 26-27 and 36-37) The evidence demonstrates Plant's request was reasonable. Respondent's witnesses' testimony on what was discussed during the interview illustrates the reasonableness of Plant's request.

The unmistakable purpose of this meeting was to *confront* Plant with statements made in the e-mail message. It is these types of *confrontations* between an employee and her employer underlying the rationale the Supreme Court set forth in *J. Weingarten*. Accordingly, in support of Acting General Counsel's Exception 6, the Judge erred in finding Plant was not entitled to a Union representative, because the meeting was held solely for the purpose of informing her of a previously made disciplinary decision and erred in not finding that Respondent's denial of Plant's request for Union representation violated Section 8(a)(1) of the Act.

F. Respondent failed to Provide the Union with Requested Information (Exception 7)

In relation to the Judge's error in finding Respondent did not violate Plant's *Weingarten* rights during the October 7, 2012 interview, the Judge also erred in finding Respondent did not violate Section 8(a)(5) when it refused to provide the Union with information related to Plant's interview. (ALJD page 42, lines 1-2) Specifically, as declared in Acting General Counsel's Exception 7, the Judge erred in finding Plant was not aggrieved and the Union's request for the e-mail may become relevant if, in the future, Plant is subjected to an investigation or discipline in connection with the e-mail. (ALJD page 41, lines 37-41)

The Supreme Court recognizes the employer's general obligation to provide information needed by its employees' bargaining representative for the proper performance of its duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). Information pertaining to employees within the bargaining unit is presumptively relevant to a union's representational duties, including information necessary to decide whether to proceed with a grievance or arbitration. Bargaining representatives are not required to make a specific showing of the relevance of requested information unless the employer has rebutted the presumption of such. *International Protective Services, Inc.*, 339 NLRB 701 (2003), *Deadline Express*, 313 NLRB 1244 (1994).

The Board has long held the contents of an employee's personnel file constitute information relevant to a requesting labor organization's performance of its statutory responsibilities. For example, in *Fleming Companies Inc.*, 332 NLRB 1086 (2000), the Board concluded the entire contents of an employee's personnel file constituted relevant information, as the documents contained in the personnel file were "'intrinsic to the core of the employer-employee relationship . . . .'" The Board's adherence to this principle is also illustrated by the Board in *Grand Rapids Press*, 331 NLRB 296 (2000). In *Grand Rapids Press*, the union contested the discharge of two employees and requested the employer provide the entire personnel files of 22 bargaining unit employees in order to obtain memorandums related to disciplines of those employees and to determine whether additional grievances were cognizable under the collective-bargaining agreement. The Board, in affirming the judge's decision, reinforced the principle on the relevancy of personnel files and its contents, and concluded each of the 22 personnel files contained disciplinary records were presumptively relevant. *Id.* at 299.

Here, the Judge erroneously found the Acting General Counsel did not establish the requested email was necessary or relevant for the Union to carry out its statutory duties. (ALJD page 41, lines 33-34) In support of this finding, the Judge relies on Plant was not being disciplined and the absence of a pending grievance or potential discipline related to Plant. (ALJD page 41, lines 35-37) These findings are inconsistent with the Board principle articulated in *Grand Rapids Press, supra*, that an employee's personnel file and its contents are presumptively relevant. The record clearly establishes Garcia, who is Respondent's Human Resources Consultant over the Business Unit in which Plant works, maintains a copy of the e-mail in a file she keeps on Plant. (TR 711) The maintenance of the e-mail in Plant's file, standing alone, creates the potential the e-mail can be used against Plant in the future. A document such as this email, which suggests impropriety, placed in an investigatory file maintained by an employer, is quintessentially a form of discipline being given to the employee. As such, there is no doubt the e-mail is relevant to the Union's representational function.

Accordingly, and in support of Acting General Counsel's Exception 7, the Judge erred dismissing paragraph 8(a) of the Consolidated Complaint and erred in finding the Union was not entitled a requested email associated with Plant because Plant was not aggrieved by Respondent's denial of her request for Union representation and the requested document only became relevant if, in the future, Plant was subjected to an investigation or discipline in connection with the requested document. Acting General Counsel submits, contrary to the Judge's finding, that Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide the Union this requested document.

III. CONCLUSION

For the foregoing reasons, Counsel for the Acting General Counsel respectfully requests the Acting General Counsel's Exceptions to the Administrative Law Judge's Decision be granted and an appropriate order issue and that Respondent be found to have committed additional violations of Section 8(a)(1), (3) and (5) of the Act, as discussed above.

Dated at Indianapolis, Indiana this 20th day of July 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION in PUBLIC SERVICE COMPANY OF NEW MEXICO, Cases 28-CA-023391 et al. was served by E-Gov, E-Filing, E-Mail on this 20th day of July 2012, on the following:

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