

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

SHANDS JACKSONVILLE MEDICAL CENTER, INC.

and

Case 12-CA-026649

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, COUNCIL 79, AFL-CIO

and

Case 12-CA-027197

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, LOCAL 1328, AFL-CIO

and

Case 12-CA-026829

DELLA HIGGINBOTHAM, an Individual

**ACTING GENERAL COUNSEL'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits the following exceptions to the Decision of Administrative Law Judge (ALJ) Ira Sandron, dated July 3, 2012, in the above-captioned cases:¹

1. The ALJ erred by failing to find that Respondent expressed animus against alleged Mishaun Palmer and other Local 1328 representatives because of their union activities during 2009. [TR 99, 131, 184-188, 203-204, 206; GC 31(a), 31(b)]

2. The ALJ erred by failing to find that Respondent's interrogation of alleged discriminatee Mishaun Palmer, during its investigation of her distribution of union literature on February 8, 2010, was coercive because it tended to chill employees from engaging in protected concerted activities, such as distributing union literature. *United Services Automobile Association*, 340 NLRB 784, 786 (2003). [ALJD, p. 8, ln. 28-37; p. 9, ln. 1-5]

¹ The following references are used in this document and in the Acting General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision:

[ALJD p. __, ln. __] = ALJD page and line numbers.

[TR __] = transcript page number.

[GC Ex __] = General Counsel's exhibit number.

[R Ex __] = Respondent's exhibit number.

3. The ALJ erred by failing to find that the testimony of Respondent manager Dan Kurmaskie at Palmer's unemployment benefits appeals hearing on April 14, 2010, shows that Respondent did not rely cite her alleged false statement during Respondent's investigation of her distribution of union literature, as grounds to discharge her. [ALJD, p. 9, ln. 32-43]

4. The ALJ erred by implying that Counsel for the Acting General Counsel's statements at trial and in his post-hearing brief suggest that Respondent's overly broad no-distribution rule is no longer in effect. [ALJD, p. 12, ln. 27-28]

5. The ALJ erred by failing to accurately and fully set forth the Acting General Counsel's theory for finding that deferral to the arbitration award concerning the grievance regarding the discharge of Mishaun Palmer is improper on the basis that the unfair labor practice issue was not considered by the arbitrator, by inferring that the Acting General Counsel merely relied on the fact that background evidence the Respondent's animus towards Palmer was not presented to the arbitrator. [ALJD, p. 13, ln. 40-42]

6. The ALJ erred by failing to find that in the arbitration hearing concerning the discharge of Palmer, the Union did not contend that Palmer was discharged for her union activities, and the parties did not litigate that issue before the arbitrator. [ALJD, p. 13, ln. 40-42]

7. The ALJ erred by failing to consider the Acting General Counsel's theory that deferral to arbitration is inappropriate in this case because the arbitrator was not presented with, and did not consider, the unfair labor practice issue, i.e. that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Palmer because she violated Respondent's overly broad no distribution rule by engaging in union activities, contrary to Board law in *The Continental Group, Inc.*, 357 NLRB No. 39 (2011), *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006), and similar cases. [ALJD, p. 13, ln. 40-42]

8. The ALJ erred by failing to find that the arbitrator did not consider whether Respondent's asserted reasons for discharging Palmer were pretextual or whether Respondent would have discharged Palmer if she had not engaged in union activity.

9. The ALJ erred by failing to make findings of fact and conclusions of law that deferral to the arbitrator's award is not appropriate because the arbitrator was not presented with, and did not consider, the unfair labor practice issues concerning Respondent's discharge of Mishaun Palmer. [ALJD, p. 13, ln. 40-42]

10. The ALJ erred by failing to accurately and fully set forth the Acting General Counsel's theory that deferral to the arbitration award concerning the grievance regarding the discharge of Mishaun Palmer is improper because the arbitrator's decision is clearly repugnant to the purposes and policies of the Act. [ALJD, p. 15, ln. 6-14]

11. The ALJ erred by finding that "the portion of the award in question is wholly severable from Palmer's protected activity, as opposed to the situation in *Cone Mills Corp.*" [ALJD, p. 15, ln. 12-13]

12. The ALJ erred by failing to find that deferral to the arbitrator's award is clearly repugnant to the Act not only because the arbitrator denied Palmer a make whole remedy, but also because the arbitrator determined that Respondent's discharge of Palmer was justified based on rationales supplied by the arbitrator that were not relied upon by Respondent when it discharged Palmer, i.e. based on the arbitrator's findings that Palmer allegedly lied to Respondent in her statement to Respondent concerning the events of February 4, 2010, and that Palmer lied at the arbitration hearing. [ALJD, p. 15, ln. 37-42]

13. The ALJ acknowledged that the arbitrator **penalized** Palmer "for what he deemed her perjury," but the ALJ improperly failed to find that the penalty imposed by the arbitrator on Palmer was clearly repugnant to the purposes and policies of the Act in the circumstances of this case. [ALJD, p. 15, ln. 8-42]

14. The ALJ incorrectly implied that Palmer engaged in perjury merely because the ALJ and the arbitrator found other witnesses to be more credible than Palmer with respect to testimony concerning the date that she distributed union literature to other employees. [ALJD, p. 15, ln. 15-42]

15. The ALJ erred by failing to find that in deciding to withhold one year of backpay from Palmer and effectively suspending Palmer for one year, the arbitrator improperly relied on reasons that were not relied on by Respondent as a basis for her discharge, i.e. Palmer's alleged lie to Respondent during its investigation of the incident for which she was discharged, and Palmer's alleged lie to the arbitrator in her testimony at the arbitration hearing. [ALJD, p. 15, ln. 37-40]

16. The ALJ erred by finding that "Arbitrator Potter's award satisfies the required standards for deferral." [ALJD, p. 15, ln. 44-45]

17. The ALJ erred by failing to find that the arbitrator did not correctly enunciate the applicable statutory principles or apply them in deciding the statutory issue concerning Respondent's discharge of Palmer. [ALJD, p. 15, ln. 44-45]

18. The ALJ erred by concluding that "the 8(a)(3) and (1) allegation pertaining to Palmer should be dismissed." [ALJD, p. 15, ln. 45-46]

19. The ALJ erred by failing to find and conclude that Respondent's decision to discharge Palmer on February 12, 2010, violated Section 8(a)(1) and (3) of the Act, inasmuch as Palmer was discharged because she engaged in union activities in violation of Respondent's overly broad no distribution policy, and deferral to the arbitrator's decision in inappropriate in this case. [ALJD, p. 15, ln. 45-46 ; ALJD fn. 41 on p. 15-16; ALJD p. 17, ln. 1-7]

20. The ALJ erred by failing to find and conclude that Respondent's discharge of Palmer violated Section 8(a)(1) and (3) of the Act under the *Double Eagle* and *Continental Group* line of cases, or, in the alternative, under *Wright Line*. [ALJD, p. 15, ln. 45-46 ; ALJD fn. 41 on p. 15-16; ALJD p. 17, ln. 1-7]

21. The ALJ erred by recommending the dismissal of the allegations of the complaint pertaining to Respondent's discharge of Mishaun Palmer in violation of Section 8(a)(1) and (3) of the Act and by failing to recommend that the Board appropriately remedy Respondent's unlawful discharge of Mishaun Palmer . [ALJD, p. 17, In. 10 to p.18, In. 15 and Appendix]

22. The ALJ erred by failing to find that Respondent disparately and discriminatorily treated Mishaun Palmer as compared to similarly situated employees. [ALJD, p. 11, In. 27 to p. 12, In. 12]

23. The ALJ erred in finding that deferral to arbitration is appropriate because the Board should modify the standard for deferral to arbitration decisions as set forth in General Counsel's Memorandum GC 11-05. [ALJD, p. 13, In. 5 to p. 15, In. 46]

24. The ALJ made the following inadvertent errors in his decision:

(a) In one place misspelling alleged discriminatee Palmer's first name as Mischaun rather than as Mishaun, the correct spelling. [ALJD, p. 2, In. 13]

(b) Referring to Supervisor Novetta Butler as Natalie Butler. [ALJD, p. 4, In. 19-20]

(c) Referring to the local union representing the nonprofessional employees of Respondent as Local 328, rather than as Local 1328, the correct number. [ALJD, p. 5, In. 25]

(d) Using the word "instigation" instead of the word "instigating." [ALJD, p. 9, In. 20]

(e) Quoting a portion of the arbitrator's decision as stating "[I]t is clear that she misled Kurmaskie by omission when he questioned her as well as in her written statement and lied under oath at the hearing. . . . [L]ying is a very **severe** offense. . ." [emphasis added] [ALJD, p. 11, In. 1-3] The correct bolded word should be "serious."

(f) Referring to *American Commercial Lines*, 291 NLRB 1066, 1074–1075 (1988), by stating, "[i]n that case, the arbitration board limited the remedy to hiring hall violations occurring during the term of the labor contract and did not address postcontract violations, which therefore went **remedied**." [emphasis added] [ALJD, p. 14, In. 19-22] The correct bolded word should be "unremedied."

(g) Referring to the last name of Respondent's director of clinical services as Mitchell. [ALJD, p. 16, In. 3] However, his proper last name is Williams, as correctly reflected in other parts of the ALJ's decision. [ALJD, p. 2, In. 27; p. 3, In. 3; p. 4, In. 34, 44; p. 12, In. 14, 16] {Exception 27}

(h) Using the word "your" rather than word "you" in the first line of the first WE WILL NOT paragraph of his recommended Notice to Employees. [ALJD, Appendix]

It is respectfully requested that the Board modify the Administrative Law Judge's Decision in the above respects, as further explained in the accompanying brief.

Dated at Tampa, Florida this 31st day of July, 2012.

Respectfully submitted,

/s/ Rafael Aybar

Rafael Aybar
Counsel for the Acting General Counsel
National Labor Relations Board, Region 12
201 East Kennedy Blvd., Suite 530
Tampa, Florida 33602
Tel. (813) 228-2652
Fax (813) 228-2874
E-mail: Rafael.Aybar@nrlrb.gov

Certificate of Service

I hereby certify that copies of the **ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** in Case 12-CA-026649 et al. was served on the 31st day of July 2012, on the following persons and by the following means:

By electronic filing at www.nlr.gov to:

Lester A. Heltzer
Executive Secretary
National Labor Relations Board – Room 11602
1099 Fourteenth Street, N.W.
Washington, D.C. 20570-0001
Facsimile: (202) 273-4270

By electronic mail to:

Charles P. Roberts, III, Esq.
Constangy, Brooks & Smith, LLP
100 North Cherry Street, Suite 300
Winston-Salem, North Carolina 27101
Facsimile: (336) 748-9112
E-mail: croberts@constangy.com

John F. Dickinson, Esq.
Constangy, Brooks & Smith, LLP
200 West Forsyth Street, Suite 1700
Jacksonville, Florida 32202
Facsimile: (904) 236-5714
E-mail: jdickinson@constangy.com

Alma Gonzalez, Esq.
American Federation of State, County and
Municipal Employees, Council 79, AFL-CIO
3064 Highland Oaks Terrace
Tallahassee, Florida 32301
Facsimile: (850) 224-2961
E-mail: agonzalez@afscmefl.org

Respectfully submitted,

/s/ Rafael Aybar

Rafael Aybar
Counsel for the Acting General Counsel
National Labor Relations Board, Region 12
201 East Kennedy Blvd., Suite 530
Tampa, Florida 33602
Tel. (813) 228-2652
Fax (813) 228-2874
E-mail: Rafael.Aybar@nlrb.gov