

**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 BRIEF IN SUPPORT OF EXCEPTIONS  
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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## **I. STATEMENT OF THE CASE AND ISSUES PRESENTED**

Administrative Law Judge Ira Sandron (the ALJ) issued his Decision in these cases on July 3, 2012, reported at JD–35–12. The only case at issue in the Acting General Counsel's exceptions is Case 12-CA-026649, which involves allegations that Shands Jacksonville Medical Center, Inc. (Respondent) violated Section 8(a)(1) of the Act by, at all material times, maintaining an overly broad no-distribution policy prohibiting employees from engaging in unauthorized distribution of written or printed material of any description and that, on or about February 12, 2010,<sup>1</sup> Respondent violated Section 8(a)(1) and (3) of the Act by discharging employee Mishaun Palmer because she violated Respondent's overly broad no-distribution policy and because she engaged in union activities by distributing union literature in her capacity as a steward for American Federation of State, County and Municipal Employees, Council 79, AFL-CIO (Council 79) and American Federation of State, County and Municipal Employees, Local 1328, AFL-CIO (Local 1328). Council 79 and Local 1328 are herein collectively referred to as the Union.

Judge Sandron properly found that Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an overly broad no-distribution policy which required employees to obtain permission to engage in any distribution activity. [ALJD, p. 16, ln. 37-39]<sup>2</sup>

The Acting General Counsel's exceptions concern the ALJ's dismissal of the allegation that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Mishaun Palmer on February 12, because she violated Respondent's overly broad no-distribution policy and because she engaged in union activities by distributing union literature in her capacity as a steward, and the ALJ's finding that deferral to an arbitration award concerning the discharge of

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<sup>1</sup> All dates are in 2010, unless otherwise noted.

<sup>2</sup> The following references are used throughout this document:

[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.

Palmer is appropriate. The arbitrator decided that Respondent did not have just cause to discharge Palmer, but which nevertheless withheld backpay and accrued benefits from Palmer for approximately one-year, from her discharge, until her reinstatement pursuant to the arbitration award, because she allegedly lied during Respondent's investigation of her distribution of union literature and during the arbitration hearing.

Respondent specifically relied on and enforced its overly broad no-distribution policy against Palmer when it discharged her on February 12. The ALJ did not reach a finding on the merits concerning that issue of whether Respondent violated Section 8(a)(1) and (3) of the Act by discharging Palmer, but found that it was appropriate to defer to the arbitrator's decision. [ALJD, p. 15, ln. 44-46]

Respondent exhibited animus against Local 1328 officials because of their vigorous protection of the rights of bargaining unit employees during investigatory meetings with Respondent's management, and during grievance meetings and arbitration hearings. Respondent cited the content of Local 1328 literature that was distributed by Palmer as grounds to fire her. At the time Respondent decided to discharge Palmer on February 12, it provided several reasons, which are noted on her discharge corrective action form, as justification for her termination. Those reasons included that Palmer: 1) instigated a sick-out, work slow-down or work stoppage, in violation of the parties' collective bargaining agreement; 2) violated one of Respondent's no-solicitation, no-distribution policies by distributing the Union literature in a work area, during work time [R Ex 7]; 3) violated Respondent's overly broad no-distribution policy, identified as corrective action guideline class II, #4 [R Ex 6]; 4) failed to clock out on Union business during the time she distributed the Union literature; and 5) falsified her payroll records by claiming to have been working when she was distributing the Union literature, identified as corrective action guideline class III, #26.

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At the hearing, Respondent appeared to abandon those defenses for Palmer's discharge or, at least, gave them very little weight. Instead, Respondent focused its defense almost entirely on the proposition that the Board should defer to the arbitrator's decision. The arbitrator found that although Respondent did not have just cause to discharge Palmer, she was not entitled to backpay because the arbitrator did not credit her testimony at the arbitration hearing and because she lied to Respondent during its investigation of her distribution of the union literature.

The Acting General Counsel submits that deferral to the arbitrator's decision concerning Palmer is inappropriate under extant Board law because the arbitrator did not consider the unfair labor practice issue and the award is clearly repugnant to the Act. The Acting General Counsel further submits that deferral is inappropriate under proposed changes to the standard for deferral to arbitration decisions set forth in General Counsel's Memorandum 11-05.

In particular, the arbitrator was not presented with, and did not consider, the statutory issue that Palmer was discharged because of her union activities, and pursuant to Respondent's overly broad no-distribution policy. Moreover, the arbitrator's decision is repugnant to the Act because the arbitrator substituted his judgment for that of Respondent by denying backpay on a basis not relied upon by Respondent for Palmer's discharge. Thus, although the arbitrator ordered that Palmer be reinstated because there was no just cause to discharge her, he allowed Respondent to penalize Palmer, through the withholding of one-year's worth of backpay and benefits, because she engaged in the protected concerted activity of distributing union literature. Although Palmer was reinstated to her former job on February 21, 2011, she has not been made whole for her loss of earnings and benefits during the period from February 12, 2010 through February 21, 2011, Respondent's records have not been expunged to remove the record of her discharge, and Respondent's employees have not been assured of their rights under the Act by physical or electronic posting of an appropriate Notice to Employees.

The Acting General Counsel respectfully submits this brief in support of the Acting General Counsel's Exceptions to the ALJ's Decision, which is being filed simultaneous herewith.

The main issues addressed in the Acting General Counsel's exceptions are:

1. Did Respondent violate Section 8(a)(1) and (3) of the Act by discharging Mishaun Palmer because she violated its overly broad no distribution policy and engaged in other union activities?
2. Should the Board defer to the arbitrator's decision finding that Respondent did not have just cause to discharge Mishaun Palmer, but denying her make whole relief for the period from February 12, 2010 through February 21, 2011 and otherwise failing to provide for remedial relief that would be required under a Board order, because the decision is clearly repugnant to the Act and/or because the arbitrator was not presented with, and did not consider, the unfair labor practice issue?
3. Should the Board modify its deferral standards in Section 8(a)(1) and (3) post-arbitral deferral cases, as urged by the Acting General Counsel in GC Memorandum 11-05?

## **II. STATEMENT OF FACTS**

### **A. Background and parties**

Respondent operates an acute care hospital in Jacksonville, Florida. Respondent is a level one trauma center with 696 beds that services northeast Florida and southeast Georgia. Respondent employs approximately 3500 employees, including about 500 supervisors and managers. [TR 54, 65]

Dan Staifer started his employment with Respondent on June 21, 2004, as the director of labor relations. He is currently the director of employment and employer relations overseeing the hiring of employees and handling of employee grievances and related issues. Staifer reports to Lesli Ward, vice-president of human resources. Ward reports to Jim Burkhart, president and CEO. George Thomas, EEO manager, reports to Staifer and Ward. [TR 51-53]

Respondent has a collective-bargaining agreement with Council 79, including Local 1328, which represents Respondent's non-professional unit employees, and Local 1781, which represents Respondent's professional unit employees. There are approximately 2200

employees in both bargaining units combined. [TR 55] There are about 600 dues paying members in Local 1328. [TR 125]

In February 2010, Council 79's relevant officers were: Jeanette Wynn, president; Nicolas Dix, regional director; Alma Gonzalez, special counsel and Brad Gonzalez, consultant. [TR 156]

In 2010, Local 1328's officials were: Jacqueline Cangro, president; Gale Forest, vice-president; Rutha Harris, secretary-treasurer; alleged discriminate Mishaun Palmer, recording secretary; and Malcolm Franklin and Essie Glover, Union trustees. Local 1328 had nine executive board members and 10 stewards. [TR 126-127]

**B. Respondent maintains an overly broad no distribution policy. Exception 4.**

At all material times, including during February 2010, Respondent has maintained a policy HR-02-010 titled "Employee Corrective Action," which was initially approved in December 2002, revised in May 2007 and last reviewed in March 2009. [TR 37; R Ex 6] That policy has been in effect since at least 2004, when Director of Labor Relations Staifer started working for Respondent. [TR 55-57] Pages 5 to 8 of HR-02-010 consist of "Employee Corrective Action Guidelines." [R Ex 6] HR-02-010 applies to all of Respondent's employees, and is accessible to all employees on Respondent's intranet computer system called Infonet, which was in effect as of February 2010. [TR 57-58] In addition, Respondent requires all new employees to review all policies at the start of their employment. [TR 58] Page 6 of HR-02-010 contains the following rule as part of the "Employee Corrective Action Guidelines:"

Class II – Offenses or Deficiencies

.....

4. Unauthorized distribution of written or printed material of any description.

.....

Prescribed Corrective Action

1st Occurrence:        Written reprimand and/or suspension from duty of up to three (3) days without pay.

2nd Occurrence:        Termination of employment

The level of corrective action, even for a first occurrence is determined by the seriousness and circumstances of the incident. In some cases, termination even for a first occurrence is appropriate.

[R Ex 6, p. 6]

The ALJ incorrectly implied that 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] The record evidence does not support that implication, inasmuch as Counsel for the Acting General Counsel stated at trial and in his post-hearing brief that, at all material times, Respondent's overly broad no-distribution rule has been in effect. [TR 24, 56; GC brief to the ALJ at p. 4, 6, 27]

**C. Respondent exhibited union animus towards Local 1328. Exception 1.**

Local 1328 official Cangro testified that Respondent began complaining to the Union about the role of Local 1328 officials while representing employees. In particular, on February 18, 2009, Respondent and the Union held a meeting at Respondent's human resources conference room regarding Respondent's complaints about the role of Union officials while engaged in employee representational duties. Present during the meeting were human resources director Staifer, Respondent counsel Margaret Zabijaka, Council 79 regional director Dix and Local 1328 president Cangro. During the meeting, Staifer said that he had received complaints about Cangro and Union stewards. Dix asked for specifics. [TR 203-204] In a March 12, 2009 e-mail, Staifer complained to Dix and Cangro regarding the role of Union officials, including Palmer, while representing employees. [TR 206; GC Ex 31(a)] In his e-mail, Staifer accused Palmer of engaging in "inappropriate and intimidating" behavior towards administrative manager Richard Woll, when in fact all she did was request relevant information from Woll during the course of representing a bargaining unit employee. [GC Ex 31(b)] Such evidence demonstrates the high degree of animosity that Respondent held against Local 1328 Union officials in general, and Palmer in particular, for vigorously representing unit employees.

On December 3, 2009, Palmer attended a labor management meeting held in Respondent's learning resource center (LRC) conference room to discuss the partnership agreement noted in the collective-bargaining agreement between Respondent and the Union. [TR 184] Present were Respondent officials Lesli Ward, Dan Staifer and John Dickinson, and Union officials Dix, Cangro, Harris and Palmer. [TR 185] During the meeting, Ward threatened Cangro that if her behavior continued (i.e., representing employees in a comprehensive and assertive manner), Cangro would be written up on corrective action. Palmer testified that Cangro's behavior was never erratic, harsh or irrational. [TR 185-186] At that point of the meeting, Palmer stopped taking notes and said that this was just a bashing session and nothing was being accomplished. [TR 187] Labor-management meetings were usually held monthly, but it appears that Respondent called this special meeting to use as a forum to intimidate Cangro so that she would not be such a zealous advocate for the unit employees and would be more conciliatory toward Respondent's positions regarding contract enforcement issues. [TR 188] Staifer and Respondent's counsel conceded that Respondent had a poor working relationship with Local 1328. [TR 99, 131]

**D. Respondent discharged Mishaun Palmer because she violated its overly broad policy prohibiting distribution of union literature and because of the content of the union literature she distributed.**

Mishaun Palmer has worked for Respondent since May 21, 2001, except for the gap in her employment from February 12, 2010, when she was discharged, until February 21, 2011, when she was reinstated pursuant to the aforementioned arbitration award. [TR 147]

Palmer's job title is financial admissions representative in the admissions department. Her job duties include registering patients for in-patient and outpatient procedures, as well as verifying patients' insurance information. In February 2010, Palmer worked Monday through Friday from 7:30 a.m. to 4:00 p.m., with a 30-minute lunch break scheduled at 12:30 p.m., but which varied depending on patient care. [TR 147-149, 322-323]

Palmer worked in both the clinical admissions “front line,” where patients are already registered in the system and all that is needed are patient signatures, and in “the pond” (back area), which is the pre-admission testing area where patients have already registered. Her supervisor was Novetta Butler, supervisor. Butler reported to Shirley Forbes, manager, who in turn reported to Dan Kurmaskie, director of patient access in the admissions department. [TR 150-151, 153] Kurmaskie started working in the admissions department in May 2008. He testified that there are about 90-95 employees in the admissions department, most of whom are financial representatives, and the rest are financial counselors. [TR 324]

Except for the gap in her employment caused by her alleged unlawful discharge on February 12, Palmer has been a steward for Local 1328 since 2008 and its recording secretary since 2009. As the recording secretary, Palmer takes notes at labor conferences, as well as at labor-management, executive board, special and membership meetings. As a steward, Palmer helps employees at grievance meetings and hearings. [TR 154-155] Palmer testified that she conducted union activities every day at work, sometimes all day, and clocked out into the Union call center when doing so. [TR 158, 160]<sup>3</sup> Kurmaskie dealt with Palmer in her capacity as a Union official during the grievance procedure, and he handled about three to five grievances with Palmer as the Union representative. [TR 325, 355]

In mid-January 2010, Palmer started drafting a Union flyer, which she finished on February 4, 2010. At certain times, Dix, Cangro and Palmer worked on the flyer together. Palmer obtained information from the internet to include in the union flyer. Cangro read the flyer and Dix approved it.

The flyer consists of four pages which state as follows:<sup>4</sup>

WHAT WOULD HAPPEN TO THE EMPLOYEES AT SHANDS WITHOUT A UNION

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<sup>3</sup> Palmer swiped her time card in Respondent’s Kronos time clock system in order to record her union time. [TR 161]

<sup>4</sup> The page-wide lines in the below quotation of the flyer indicate page breaks. The flyer is in evidence as R Ex. 9.

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SHANDS WORK

BECAUSE

WE WORK!!!

- WHAT WOULD SHANDS DO WITHOUT 1<sup>ST</sup>, 2<sup>ND</sup>, 3<sup>RD</sup> SHIFT EVS?
- WHAT WOULD SHANDS DO IF ALL THE NURSES CALLED OUT FOR ONE DAY?
- WHAT WOULD HAPPEN IN THE CAFETERIA IF THE FOOD SERVICE WORKERS ALL GOT SALMONELLA POISONING?
- WHAT WOULD SHANDS DO IF ALL THE RADIOLOGY TECHS DECIDED TO LEAVE AT 10:00AM?
- WHAT WOULD SHANDS DO IF ALL REGISTRARS AND CUSTOMER SERVICE REPS DECIDED FRIDAY AND SATURDAY IS A GOOD DAY TO STAY HOME AND ENJOY?
- WHAT WOULD SHANDS DO IF ALL LAB EMPLOYEES CALLED OUT?
- WHAT WOULD SHANDS DO IF THE OR TECHS WERE NO SHOW FOR A DAY?
- THESE ARE JUST SOME ... WHAT WOULD SHANDS DO!!!

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LET LEADERSHIP DO THEIR OWN INVESTIGATING WITHOUT YOUR INPUT! KNOW YOUR RIGHTS. WRITING STATEMENTS FOR LEADERSHIP CAN LEAD UP TO SUSPENSION/TERMINATION. EMPLOYEES DO NOT HAVE TO WRITE STATEMENTS OR BE WITNESSES. IF YOU FEEL THAT YOU HAVE BEEN THREATENED OR COERCED, THERE ARE LEGAL OPTIONS THAT CAN BE TAKEN AGAINST THE EMPLOYER.

COME TO THE UNION IF YOU HAVE ANY ISSUES OR COMPLAINTS (YOU CAN REMAIN ANONYMOUS) ...

ALL UNION CONTACT INFORMATION IS POSTED ON THE BOARD BY THE CAFETERIA IN THE CLINICAL CENTER AND PAVILION .... DON'T BE AFRAID TO ASK FOR HELP. WE ARE HERE TO MAKE SURE YOU ARE TREATED FAIRLY.

WE DON'T SUPPORT WORK PLACE VIOLENCE OR INAPROPRIATE BEHAVIOR ... WE WOULD LIKE TO SAVE A JOB THAN HAVE A JOB OPENING ..... CONTACT YOUR UNION REP IF YOU HAVE ANY ISSUES.

SINCE 2004, SHANDS HAVE HAD MORE SUSPENSIONS AND TERMINATIONS AND THE RATE IS GETTING HIGHER. WE HAVE OVER 20 PENDING CASES WAITING TO BE GRIEVED.

HR AND LEADERSHIP ARE GETTING THE EMPLOYEES ON:  
o TIME AND ATTENDANCE

o RUDE AND DISCOURTEOUS BEHAVIOR (IF A PATIENT, GUEST OR SUPERVISOR SAY "YOU DID IT OR SAID IT", IT'S POSITIVE YOU WILL END UP WITH A CORRECTIVE ACTION)

BUT WHEN SHANDS LEADERSHIP EXHIBITS INAPPROPRIATE BEHAVIOR THEY ARE NOT PUNISHED, SO IS IT FAIR TO THE EMPLOYEES TO BE PUNISHED IF LEADERSHIP CAN'T FOLLOW "SHANDS BEST BEHAVIOR" AND NOT BE PUNISHED FOR THEIR ACTIONS.

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AFSCME LOCAL 1328

PLEASE BE MINDFUL ...

PLEASE CONTACT THE UNION REPRESENTATIVE PRIOR TO GOING IN THEIR WORK AREA. THE UNION REP HAS TO HAVE ADEQUATE NOTICE IN ORDER TO DO UNION BUSINESS FOR THE EMPLOYEE.

IF THERE IS AN EMERGENCY PLEASE CHECK THE BULLETIN BOARDS FOR A LIST THAT HAS THE UNION REPS NAMES AND PHONE NUMBERS

PLEASE CALL YOUR REPRESENTATIVE ON YOUR BREAK IF YOU HAVE ANY QUESTIONS THAT ARE NOT PERTAINING TO A CORRECTIVE ACTION OR ANYTHING THAT IS NOT GOING TO LEAD UP TO A CORRECTIVE ACTION.

PLEASE REMEMBER AN EMPLOYEE HAS FOUR HOURS TO OBTAIN A UNION REPRESENTATIVE FOR REPRESENTATION. (FROM THE TIME THAT THE EMPLOYER STATES THAT "THIS CAN LEAD UP TO" OR MAY BE A CORRECTIVE ACTION)

MOST OF THE PHONES AT SHANDS ARE BEING MONITORED, PLEASE BE MINDFUL OF PERSONAL CALLS.

\*\*\*\*\*NOTE\*\*\*\*\*

ANY EMPLOYEE THAT WOULD LIKE TO GET OUT OF THE UNION WILL HAVE TO WAIT FOR THE ANNIVERSARY DATE OF THE COLLECTIVE BARGAINING AGREEMENT

SEPTEMBER 10, 2009 –JUNE 30, 2012.

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Palmer explained that the purpose of the flyer was to inform employees about work-related issues, such as work coverage. Palmer testified that the Union flyer was not meant to create a work stoppage or slowdown. [TR 157-158, 214; R Ex 9] Cangro testified that the purpose of the Union flyer was to give employees information regarding their rights and to remind them that the Union was there for them. [TR 215]

Palmer testified that she had the union flyer with her at work on February 4, but did not distribute them until the following day. [TR 161, 165-166] Cangro who worked in the “pond,” testified that, during the afternoon of February 4, she did not hear any discussion by Palmer or others regarding the union flyers and did not see Palmer distribute Union flyers to employees in the pond or any other work area. [TR 216-220] Like the arbitrator who heard the grievance concerning Palmer’s discharge by Respondent, the ALJ credited the testimony of employees Vivian Griffin, Ethel Overstreet and Sharnee Thomas, called as witnesses by Respondent, that Palmer distributed the aforementioned flyers to them on the afternoon of February 4. The ALJ discredited Palmer’s denial that she distributed flyers on February 4, and discredited the testimony of Palmer and Cangro regarding the events of that afternoon. [ALJD, p. 2, ln. 43 to p. 4, ln. 5; ALJD, p. 7, ln. 35 to p. 8, ln. 7]

Palmer testified that she distributed the union flyers on February 5, before 7:00 a.m. [TR 165, 170-171] On February 11, Palmer and Cangro distributed union flyers during lunch time in the cafeteria. [TR 172] Cangro confirmed that, after February 5, she distributed the flyers with Palmer at the cafeteria table during lunch time. [TR 213] Cangro also distributed the union flyers with Local 1328 officials Essie Fay Glover and Gale Forest. [TR 215]

The ALJ found that later on February 4, employee Overstreet gave a copy of the flyer to supervisor Novetta Butler, who in turn gave it to manager Dan Kurmaskie. [ALJD p. 7, ln. 4-10]

Pursuant to Kurmaskie’s request, employees Thomas, Griffin and Overstreet each sent him electronic mail messages concerning their receipt of the flyer on February 4, on February 5, February 9, and February 10, respectively. Thomas and Oversteet wrote that they got the flyer from Thomas, and Griffin wrote that she found it in her chair, and that Palmer later asked if she had any questions about it. [ALJD p. 8, ln. 24-26; R Ex. 1-, 11, 12]

On February 8, Kurmaskie went to Palmer’s back desk in the morning. Kurmaskie showed Palmer the flyer she had distributed and asked Palmer if she knew anything about it. Palmer said yes. Kurmaskie asked Palmer whether she passed out the flyer on February 4,

between 3:00 p.m. and 4:00 p.m. Palmer said that she did not pass it out on February 4, but that she passed flyers out on February 5. Kurmaskie told Palmer that he needed her to write a statement to that effect. Later that day, supervisor Butler called Palmer at about 10:00 a.m. and said that Kurmaskie wanted to meet with her at 1:00 p.m. Palmer got sick and left before 1:00 p.m., so the meeting did not take place that day. [TR 173-175]

On February 9, Palmer wrote her statement, pursuant to Kurmaskie's instructions. Later that day, Kurmaskie called Palmer, confirmed that she had written the requested statement, and went to Palmer's desk and picked up the statement from her. [TR 175-176; R Ex 15] Palmer wrote that Kurmaskie had asked her to write a statement that she gave two employees a packet and disturbed them during working hours from 3:00 p.m. to 4:00 p.m. on February 4; that she was busy working during that time; and that she passed out some "important information" on the morning of February 5 before she clocked in for work. [R Ex 15; fully quoted in ALJD, p. 8, In. 35 to p. 9, In. 5]

On February 10, manager Kurmaskie called Palmer at about 10:00 a.m. and said that he wanted to meet with her in the conference room at 1:00 p.m. Palmer asked if she needed a Union representative and Kurmaskie replied yes. The meeting was attended by Kurmaskie, supervisor Butler, Cangro and Palmer. During the meeting, Kurmaskie had the union flyer in a manila folder and asked Palmer if she knew anything about it. Palmer said yes. Kurmaskie said that it had come to his attention that between 3:00 p.m. and 4:00 p.m. on February 4, Palmer went to employees and disturbed them while they were working. Palmer replied that she did not pass out the union flyers on February 4. Cangro then asked Kurmaskie for the names of the witnesses. Kurmaskie said no because he was still investigating the incident. The meeting lasted about 15-20 minutes. [TR 177-179]

On February 10, Respondent counsel John Dickinson of Constangy, Brooks & Smith, LLP sent a letter to Local 1328 President Cangro, objecting to the content of the flyer distributed by Palmer based on Respondent's contention that it contained misinformation and strongly

suggested that employees call in sick or engage in a slow-down or work stoppage, and that employees refrain from cooperating in Respondent's internal investigations. [GC 49]

On February 12, Kurmaskie told Palmer that he wanted to meet with her later that day in the conference room at 1:30 p.m. Palmer asked if she needed a Union representative and Kurmaskie replied yes. The meeting was held in the admissions conference room. Present were Kurmaskie, Butler, human resources representative Rosemarie Mason, Local 1328 representatives Cangro and Gale Forest, and Palmer. Kurmaskie had Palmer's discharge notice. He read it to Palmer, but did not explain the allegations. Palmer asked Kurmaskie and Mason about the alleged falsification of time, but neither one of them explained it to her. Cangro then asked for the witness statements. Kurmaskie said that he did not have them, but that Cangro could get them from Mason. Mason, in turn, said that she did not have them, but would later get them to Cangro. Kurmaskie gave Palmer the discharge paperwork to sign. The meeting lasted about 15 minutes. [TR 180-182; R Ex 2]<sup>5</sup>

The discharge notice cited the following correction action received by Palmer in the previous two years:

09-25-09	Written Reprimand	Habitual Absenteeism <sup>6</sup>
03-16-09	Written Counseling	Habitual Absenteeism
02-13-09	Written Reprimand	Habitual Tardiness
12-12-08	Written Counseling	Habitual Absenteeism
09-08-08	Written Counseling	Habitual Tardiness
04-17-08	Written Counseling	Failure to follow work instructions

The discharge notice described the incident requiring corrective action on this occasion as follows:

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<sup>5</sup> Respondent manager Staifer testified that Kurmaskie decided to discharge Palmer, and that he and the human resources department reviewed the decision and documentation regarding her discharge in order to determine whether it was within Respondent's acceptable guidelines. [TR 61, 76]

<sup>6</sup> Palmer testified that the reasons for her absenteeism issues listed in her discharge corrective action form were related to hypertension, migraine headaches and not having initially been approved for leave under the Family Medical Leave Act (FMLA), and that she did not have any further time and attendance issues after being approved for leave under the FMLA. [TR 183; R Ex 2]

On 2-4-10, during work time, Mishaun Palmer distributed material promoting or instigating a sickout, slow down, or work stoppage to Admissions employees in their work areas and work time. She did not clock out for Union business prior to distributing the material on 2-4-10. According to Ms. Palmer's signed statement on 2-5-10, Ms. Palmer passed the "very important information" in work areas, and then clocked in at 7:30 a.m.

The discharge notice cited the specific rules violated as:

Class III, #26 - Falsification of time, attendance, payroll, or other Shands Jacksonville records; Violation of Collective Bargaining Agreement Article 3:3.1, 3.2(a)2, 3.2(A) 5; Class II, #4 - Unauthorized distribution of written or printed materials of any description and HR 02-019.

HR 02-019 is a Respondent policy on Solicitation, Distribution and Sale of Items. [R Ex 7] HR 02-019 states, in relevant part:

POLICY: ...No distribution other than that required for the normal operation of Shands Jacksonville is allowed during working time or in working areas of the Hospital or grounds. Working time includes time that employees (including both the person doing the solicitation and the person to whom it is directed) are actually on duty.

PROCEDURE:

A. Solicitation, Distribution and Sale of Items by employees and non-employees on the Shands Jacksonville campus

1. Persons not employed by Shands Jacksonville may not at any time, solicit, sell or distribute merchandise, services and/or literature to employees on Hospital property for any purpose unless it is Hospital sponsored.
2. The sale, distribution or demonstration of products, articles or materials by an employee for personal gain is strictly prohibited.
3. Violators of this policy should be reported immediately to the responsible cost center Director/Manager and the Chief Human Resource Officer/designee. Employees violating the policy will be subject to corrective action.

#### **E. The arbitration award concerning Mishaun Palmer's discharge grievance**

On February 15, the Union filed a grievance on Palmer's behalf regarding her discharge. [TR 37; R Ex 3] On April 23, the Regional Director for Region 12 of the Board issued a letter deferring the unfair labor practice charge concerning Palmer's discharge to the grievance arbitration procedure contained in the parties' collective bargaining agreement. [R Ex 4 and 35]

On November 10, an arbitration hearing was held concerning Palmer's discharge before Arbitrator Richard H. Potter. [R Ex 5] On January 18, 2011, Respondent and the Union filed post-hearing briefs with the arbitrator. On February 3, 2011, Arbitrator Potter issued his arbitration award finding that Respondent did not have just cause to discharge Palmer, but denying her any make whole remedy. On February 11, 2011, Arbitrator Potter issued a clarification of his arbitration award, pursuant to the parties' request. [R Ex 34]

The arbitrator found that Palmer did not engage in any of the misconduct cited by Respondent in the discharge notice she received. [R Ex 30, p.10 of 11; R Ex 31] Rather, the arbitrator determined that Palmer should not receive backpay based on his findings that Palmer "lied by omission" in her written statement to Respondent and in an interview with Kurmaskie by stating only that she handed out the flyer on February 5, and failing to state that she also handed out the flyer on February 4; that Palmer lied "by commission" under oath at the arbitration hearing; and that "lying is a very serious offense." [R Ex 30, p.10 of 11; R Ex 34]

On March 17, 2011 and March 25, 2011, the Union and Respondent, respectively, each submitted a letter to Region 12, setting forth their positions concerning the propriety of Board deferral to the arbitrator's decision. [GC Ex 3 and 4]

### **III. ARGUMENT**

#### **A. Under the *Double Eagle* and *Continental Group* line of cases, the ALJ erred by recommending dismissal of the allegation that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Mishaun Palmer for engaging in union activities in violation of its overly broad no distribution rule. Exceptions 18 to 21.**

The ALJ properly found that Respondent's no distribution policy is overly broad and violates Section 8(a)(1) of the Act. However, the ALJ incorrectly concluded that "the 8(a)(3) and (1) allegation pertaining to Palmer should be dismissed." [ALJD, p. 15, ln. 45-46] On Palmer's discharge corrective action form, Respondent stated that one of the reasons it discharged

Palmer was because she violated the no-distribution policy which the ALJ found to be overly broad, referenced as corrective action guideline Class II, #4 in HR 02-010, which prohibits employees from engaging in unauthorized distribution of written or printed material of any description. [R Ex 6, p. 6] Thus, the ALJ incorrectly failed to find that Respondent's decision to discharge Palmer on February 12, violated Section 8(a)(1) and (3) of the Act, inasmuch as Respondent relied on its overly broad no distribution policy as a basis for the discharge. [ALJD, p. 15, ln. 45-47; p. 16, ln. 46-48]

The ALJ improperly failed to find that Respondent's decision to discharge Palmer on February 12, violated Section 8(a)(1) and (3) of the Act, pursuant to the *Double Eagle* and *Continental Group* line of cases. [ALJD, p. 15, ln. 45-47; p. 16, ln. 46-48] The Board has long held that discipline imposed pursuant to an overbroad rule is unlawful. See, e.g., *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), enfd. 414 F.3d 1249 (10<sup>th</sup> Cir. 2005), cert. denied 546 U.S. 1170 (2006); *Saia Motor Freight Line, Inc.*, 333 NLRB 784, 785 (2001); *Opryland Hotel*, 323 NLRB 723, 728 (1997); *A.T. & S.F. Memorial Hospitals*, 234 NLRB 436 (1978). Recently the Board clarified this principle, which it referred to as the *Double Eagle* rule, in *The Continental Group, Inc.*, 357 NLRB No. 39 (2011). The Board noted two justifications for the *Double Eagle* rule. First:

...because the mere maintenance of an overbroad rule creates a potential chilling effect on the exercise of protected rights, it is reasonable to infer that the enforcement of such a rule would have a similar, or perhaps even greater, chilling effect on the exercise of protected rights, even if it is enforced against activity that could have been proscribed by a properly drawn rule.

Second: "...in the absence of a valid employer rule prohibiting the conduct at issue, the conduct maintains its protected status." *The Continental Group, Inc.*, 357 NLRB No. 39, slip op. at p.3.

The Board then held:

...in situations in which the conduct for which an employee is disciplined under an overbroad rule clearly falls within the protection of Section 7 of the Act (e.g., concerted solicitation, distribution, or discussion of terms and conditions of employment)—and even though the employer lawfully would be entitled to place restrictions on that conduct via a narrowly tailored rule—both of the above-

described justifications for the *Double Eagle* rule apply. Accordingly, in such situations, the Board will apply the rule and find that the discipline violates the Act (unless the employer is able to establish the available affirmative defense outlined below).

357 NLRB No. 39, slip op. at 3-4. The Board's example of a situation in which both of these justifications apply is where an employer relies on a rule that prohibits all employee solicitation on its premises in order to discipline an employee who solicits support for a union during working time. 357 NLRB No. 39, slip op. at 4, fn. 9. The instant case is directly analogous to that example. Thus, Respondent relied on its rule prohibiting all distribution by employees on its premises to discharge Palmer who, according to Respondent, engaged in distribution during working time in a work area. Both justifications for the *Double Eagle* rule apply in this case.<sup>7</sup>

Accordingly, under the *Double Eagle* rule, even if Palmer passed out union flyers during work time and/or in a work area, Respondent violated Section 8(a)(3) and (1) of the Act by discharging her pursuant to its overly broad no distribution rule, notwithstanding that it could have discharged her for such conduct if it had a valid no distribution rule. Consequently, the ALJ committed reversible error by recommending dismissal of the 8(a)(1) and (3) allegations and dismissal of the complaint.

The flyers distributed by Palmer asked rhetorical questions and were designed to demonstrate that employees were essential to Respondent's operations. The flyer contains language critical of management but that language does not go so far as to ask employees to engage in a work stoppage in violation of the parties' contractual no-strike clause or otherwise lose the protection of the Act.

**B. In the alternative, under *Wright Line*, the ALJ erred by recommending dismissal of the allegation that Respondent violated Section 8(a)(1) and (3) of the Act by discharging**

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<sup>7</sup> The other situations discussed in *The Continental Group*, where the conduct for which the employee is disciplined is wholly distinct from Section 7 activity, and where the employee is disciplined for conduct that touches the concerns animating Section 7 (i.e. conduct that seeks higher wages), but which is not protected by the Act because it is not concerted, are not applicable here. 357 NLRB No. 39, slip op. at 4.

**Mishaun Palmer for engaging in union activities in violation of its overly broad no distribution rule. Exceptions 18 to 22.**

Counsel for the Acting General Counsel respectfully submits that a *Wright Line*<sup>8</sup> analysis is not necessary in this case because the conduct for which Respondent claims to have discharged Palmer was union activity protected by Section 7 of the Act. See *Felix Industries*, 331 NLRB 144 (2000), enfd. denied on other grounds, 251 F.3d 1051 (D.C. Cir. 2003). Moreover, even if a *Wright Line* analysis is deemed appropriate, the credited evidence shows that Respondent discharged Palmer for her union activities, in violation of Section 8(a)(1) and (3) of the Act.<sup>9</sup>

The ALJ properly found that Dan Kurmaskie, who discharged Palmer, is not a credible witness, and the credible evidence shows that Respondent's alleged defenses for discharging Palmer are pretextual and they reveal Respondent's unlawful motive.

**1. General Counsel's prima facie case**

Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. Proving these four elements creates a presumption that the adverse

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<sup>8</sup> *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982).

<sup>9</sup> To the extent it is necessary, the ALJ incorrectly failed to perform a *Wright Line* analysis concerning the allegation that, on February 12, Respondent discharged Palmer, in violation of Section 8(a)(1) and (3) of the Act. [ALJD, p. 15, ln. 45-47; p. 16, ln. 46-48]

employment action violated the Act.<sup>10</sup> To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996); *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

All of the elements of a prima facie case have been established regarding the discharge of Palmer. First, the record evidence establishes that Palmer was engaged in protected activity by distributing union literature. Second, Respondent was aware that Palmer distributed union literature, inasmuch as it disciplined her specifically for engaging in such activity. Third, Palmer suffered an adverse employment action by Respondent's decision to discharge her on February 12. Fourth, it is undisputed that the reason for Respondent's decision to discharge Palmer was her distribution of union literature. Also, there is evidence that Respondent exhibited union animus toward Local 1328 and its officials, including Palmer, which was demonstrated during the hearing. Accordingly, there is a presumption that Respondent's discharge of Palmer violated the Act.

Under a *Wright Line* analysis, in order to rebut General Counsel's prima facie case, Respondent is required to show that prohibited motivations played no part in its discharge of Palmer. If Respondent cannot rebut the prima facie case, it must demonstrate that the same personnel action would have taken place for legitimate reasons, regardless of Palmer's union activities. In this regard, General Counsel submits that the totality of the circumstances establishes that Respondent's discharge of Palmer was, at least in part, motivated by her union activities, and therefore violated Section 8(a)(1) and (3) of the Act.

## **2. Respondent's defenses**

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<sup>10</sup> More recently, the Board has indicated that, "Board cases typically do not include [the fourth element] as an independent element." *Wal-Mart Stores, Inc.*, 352 NLRB 815, fn. 5 (2008); citing *Gelita USA Inc.*, 352 NLRB 406, fn. 2 (2008); *SFO Good-Nite Inn, L.L.C.*, 352 NLRB 268, 269 (2008).

Respondent proffered various inconsistent and shifting reasons for discharging Palmer. However, the record evidence amply demonstrates that Respondent's alleged justifications for discharging Palmer are pretextual and indicative of Respondent's true intent to discriminate against her because of her union activities.

**a. No-strike clause in Article 3.1 of the collective-bargaining agreement**

Respondent contended that it discharged Palmer because she instigated a sick-out, work slow-down or work stoppage, in violation of Article 3.1 of the parties' collective bargaining agreement. However, at the hearing, Respondent took the position that it now accepts the arbitrator's finding that Palmer's distribution of union literature cannot be reasonably construed as a violation of the no-strike clause found in Article 3.1 of the parties' collective bargaining agreement. [TR 35; R Ex 30, p. 8 of 11; R Ex 35]

Indeed, the facts show that Respondent's original reliance on the assertion that Palmer instigated a sick-out, work slow-down or work stoppage in violation of the collective bargaining agreement was not only unfounded, but rather demonstrated that its decision to discharge Palmer was motivated by its animus against Local 1328. In this regard, as the arbitrator noted in his decision, none of the employees who received the union flyer believed they were being called upon to take any action, call in sick, or participate in a work stoppage. The arbitrator also noted that Cangro testified at the arbitration that several other union stewards and officials passed out the union flyers, yet there was no assertion by Respondent that anyone else was "inciting" employees to participate in a work action. [R Ex 30, p. 8 of 11]<sup>11</sup>

If Respondent truly believed that a work stoppage was possible, it could have sought judicial restraint under Article 3.2B of the parties' collective bargaining agreement which specifically refers to such remedy. [R Ex 35, p. 9 of 64] However, Kurmaskie admitted that

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<sup>11</sup> At the hearing, Respondent's counsel made a standing objection that re-litigating the facts of the arbitration is irrelevant, based on its position that it accepts the arbitrator's findings of fact. [TR 50]

Respondent did not take any action to prevent a work stoppage or slowdown. [TR 366] This indicates that Respondent really did not take the union flyer as a threat of such action.

It is also noted that Cangro undisputedly testified that Respondent manager Staifer approved her request to distribute the same flyers as Palmer had distributed, and that other stewards also passed out the flyer, but that Palmer was the only one cited for instigating a walk out. Indeed, Cangro testified that she and the other Union officials distributed the same flyers as Palmer distributed, but without any consequence. [TR 215] Thus, Respondent's decision to discharge Palmer for allegedly instigating a sick-out, work slow-down or work stoppage was unwarranted and indicates that its motive was unlawful.

**b. Respondent's no-solicitation/no-distribution policy**

Respondent also claimed that it discharged Palmer because she distributed the union flyers in a work area, during work time, thereby violating its no-solicitation, no-distribution policy, referenced in HR-02-019 [R Ex 7] and in Article 3.2A of the collective bargaining agreement. [R Ex 35]<sup>12</sup>

Respondent's counsel stipulated that in the admissions department, as well as in other

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<sup>12</sup> Respondent conveniently did not cite the policy number of HR 02-010, the clearly overly broad no distribution policy which was quoted on Palmer's discharge notice, unlike HR 02-019, which is only referenced by policy number on the discharge notice, and therefore appears to have been relied on by Respondent to a lesser degree. In any event, Respondent cited the specific language from HR 02-010.

departments, prior to Kurmaskie's arrival, employee solicitations of varying types were widespread. Respondent's counsel noted that Respondent is not asking to overturn that aspect of the arbitrator's decision, and that Respondent accepts the arbitrator's finding that Respondent's enforcement of its no solicitation and no distribution policy was lax. [TR 34, 131-132; R Ex 30, p. 6 of 11 and 7 of 11; ALJD p. 10, ln. 23-25] The ALJ also noted that Respondent does not contest this conclusion. [TR 284, 298]

There is also evidence that Respondent did not discipline other employees as harshly as Palmer. Palmer was discharged for a Class II violation of the distribution policy, whereas several other employees received lesser or no discipline for violation of the same policy. On June 12, 2009, admitting supervisor Lauretta Anglin was found to have violated the solicitation policy, among other offenses, but only received five days suspension. [R Ex 24] On February 24, Respondent issued discipline to environmental services technician, Michael Shanks, for violating the no-solicitation policy, among other offenses. Respondent initially issued Shanks a five-day suspension, but on November 1, the discipline was reduced to a written reprimand following the filing of a grievance. [R Ex 25 and 26]

A number of employees including witnesses presented by Respondent during the arbitration hearing blatantly violated the policy and received no discipline.<sup>13</sup> With respect to supervisor Novetta Butler, Palmer testified that Butler had been selling items for various fundraisers for at least 10 years, when Palmer began working in her department. Butler had never been disciplined until February 15, several days after Respondent discharged Palmer, even though Butler had distributed literature in violation of "Class II #4 Unauthorized distribution of written or printed materials of any description" on February 3, the day before the incident involving Palmer. [R Ex 23] It appears that Respondent's discharge of Butler was an after-the-

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<sup>13</sup> For example, Overstreet remembered soliciting supervisors and management employees who were church oriented for donations, and told her direct supervisor Butler about the fundraiser. [R Ex 5, pp. 44-47] Thus, management clearly was aware of her actions, but did not impose any discipline.

fact attempt to justify its discharge of Palmer by creating a pretense of consistent enforcement of its solicitation and distribution policy.

Respondent also failed to follow its own policy and procedure regarding employee corrective actions. For Class II offenses of solicitation, a first occurrence warrants only a written reprimand and/or suspension without pay for three days. Palmer had never received a Class II discipline prior to this incident. Termination is only warranted for a Class II offense based on the seriousness and circumstances of the incident, and based on the above, Respondent failed to show that the alleged policy violation was serious enough to warrant such a harsh disciplinary action.

Taken as a whole, the evidence demonstrates that Respondent disparately and discriminatorily treated Palmer as compared with similarly situated employees. Respondent more harshly enforced its no distribution rule against her because she distributed union literature, whereas others who solicited and distributed during work time for other causes, such as fundraisers and sales, were treated more leniently. Thus, Respondent's anti-union motivation is clearly revealed.

**c. Respondent's policy regarding clocking out for union business**

Respondent asserted that it discharged Palmer because she failed to clock out on Union business while she distributed the union flyers during work time, thereby violating Article 7.6 of the collective-bargaining agreement which provides as follows:

Designated Union Stewards shall be allowed reasonable time, without loss of pay, to investigate and settle grievances at step one and above, if such investigations are essential for the prompt and effective settlement of the grievance in question. Stewards shall obtain approval from their immediate supervisor (which approval shall not be unreasonably denied) ... They must clock into a Union business cost center established under the Hospital payroll system...

Respondent further contended that, by failing to clock out on Union business when allegedly distributing the union flyers on work time, Palmer falsified her payroll records by

reporting that she was working when she was distributing the union flyers, in violation of corrective action guideline Class III, #26.

Director of Labor Relations Staifer initially disputed that Palmer was disciplined for failing to clock into the Union cost center and stated that the discipline was more for passing out information during work time. However, after reading the discharge form, Staifer admitted that Palmer was discharged, in part because he failed to failure to clock out for union business on February 4. [TR 63] As the ALJ found, by February 8, Respondent, according to an email on that date by Staifer, had determined that Palmer did not clock into the union business cost center on February 4. [ALJD p. 8. In. 28-29; R Ex. 37] Also, director of patient services Kurmaskie testified that the falsification of time referenced on Palmer's discharge form related to the allegation that, while Palmer was clocked in, she was doing something other than the job duties assigned to her by Respondent. [TR 371]

Employee Overstreet testified that employees sometimes received more innocuous union literature in the "pond" where she works (e.g. a picnic flyer) without having to clock out. [TR 282] Overstreet also admitted that she has distributed non-work related literature in the work area. [TR 284] Likewise, employee Thomas testified that she has received union documents in the pond before without clocking out, and that this was not unusual. [TR 300, 314] Moreover, Staifer and Kurmaskie admitted that they were not aware of any employee, other than Palmer, ever being disciplined for failing to clock out for union time. [TR 64, 360] Based on the ALJ's finding that Palmer distributed union literature on February 4 during working time, it appears that at most she spent two minutes performing "union business" without clocking out and into the union business cost center. Obviously, Respondent would not have discharged Palmer, a 10-year employee, for merely failing to perform work on a single occasion for two minutes, if she had not been engaged in union activities during those two minutes.

Class III offenses do not require termination, but rather, any Class III offense may be cause for termination, to be determined by the seriousness of the offense. If two minutes of

performing actions unrelated to work constituted a falsification of time warranting discharge, then Respondent would probably have to discharge most of its work force. The record establishes that employees do not perform actual work every single minute of every single day. Respondent conceded that it does not consider a two-minute period of the workday, such as several employees taking a bathroom break at the same time, as a serious problem. [R Ex 5, pp. 121, ln. 23 to p. 122, ln. 8]

**d. Respondent's belated reliance on Palmer's February 9, 2010 statement concerning the events of February 4 as an independent basis to discharge her based on falsification.**

Respondent asserts that the reference to "Class III, #26 falsification of time, attendance, payroll or other Shands Jacksonville records" on Palmer's discharge notice not only refers to Palmer's alleged falsification of time records by failing to clock out for union business during the brief moments that she distributed copies of the flyer to employees Thomas, Overstreet and Griffin, but also refers to Palmer's alleged falsification of the statement she provided to Kurmaskie on February 9. [R Ex 15]. However, the evidence shows that the latter claim was not grounds for discharging Palmer, and was not made until after Respondent discharged Palmer.

Director of Labor Relations Staifer initially claimed that he did not recall why Respondent included this reason for discharging Palmer, even though Kurmaskie discussed it with him. Staifer then claimed that Respondent cited Palmer for a Class III, #26 infraction because Palmer wrote a statement denying that she distributed the union flyers on February 4, while other witnesses stated that she did so. Staifer testified that Palmer was cited because she wrote that she distributed union flyers on February 5, but omitted that she did so on February 4. [TR 66-67]

However, as the ALJ found and as the record shows, Palmer's discharge form does not state that she lied during Respondent's investigation, or that her failure to admit in that statement that she distributed flyers on February 4 was part of the reason for her discharge, nor does it make any other reference to that statement. It is also undisputed that in its position

statement submitted during the investigation of the unfair labor practice charge in this case, Respondent made no reference to its claim that it fired Palmer because she lied in her statement to Respondent. [TR 70-75; R Ex 2; ALJD, p. 9, In. 36-42]<sup>14</sup> Rather, Respondent simply stated, “the Employer terminated Ms. Palmer for violating several policies and procedures in the collective bargaining agreement related to her distribution of non-work materials during her work time and the work time of others and in the work areas of the Employer’s premises.” [TR 72-74; GC Ex 14]

The ALJ properly discredited manager Kurmaskie’s testimony except where it was corroborated by more reliable evidence, and particularly discredited Kurmaskie’s assertions that the falsification violation alleged in Palmer’s discharge notice was her written denial that she had engaged in distribution on February 4, which Kurmaskie claimed he had determined to be a lie, and that this was the leading reason that Respondent discharged Palmer. [ALJD, p. 4, In. 7-30; ALJD, p. 9, In. 32-45] Kurmaskie testified that he determined that Palmer lied, but again Palmer’s discharge form does not state that she lied in her statement submitted to Respondent pursuant to its inquiry about February 4. [TR 358; R Ex 2]

Kurmaskie testified at Palmer’s unemployment benefits appeals hearing, which was held on April 14, about two months after Respondent discharged Palmer. The ALJ erred by failing to make a findings of fact regarding Kurmaskie’s testimony at the unemployment hearing.

**Exception 3.** Kurmaskie’s testimony is on pages 28-63 of the transcript of the unemployment hearing. [GC Ex 9] The transcript shows that Respondent submitted its time detail for Palmer for February 1 to 12 in advance of the unemployment hearing. [GC Ex 9, p. 21; R Ex 16] Respondent also submitted the emails it had solicited from employees Thomas, Oversteet and Griffin concerning the events of February 4. [GC Ex 9, p. 23-24] The unemployment hearing officer reviewed all of the documents that had been submitted, including a 24 page packet

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<sup>14</sup> The ALJ found Staifer to be equivocal in his testimony. [ALJD, p. 4, In. 12-13]

submitted by Respondent, and it is clear that Palmer's February 9 statement was not included, though it was later read into the record. [GC Ex 9, p. 12-28, p. 23-25 as to the contents of Respondent's 24 page packet]

Moreover, although manager Kurmaskie testified at length at the hearing, and noted the conflict between the testimony of Palmer and the testimonies of Thomas, Overstreet and Griffin, he did not directly claim that Palmer's statement of February 9 was a falsification referenced in her discharge notice. [GC Ex 9, p. 28-63] [GC Ex 9, p. 40], and instead only cited the falsification of time records, as shown in the following exchange between the unemployment appeals hearing officer and Kurmaskie:

Q And you stated Class 3 falsification of time, attendance and payroll. How was that violated if the Claimant stated that, in her statement, that she passed the items out prior to her clocking in to work at 7:30?

A Based on investigation and in the course, you can see that on -- in the packet, items -- Page Numbers 4, 5, 6, and 7, based on our statements provided from the witnesses, it is in conflict with the statement referenced on Page 2 where Ms. Palmer said that she did not pass out materials, but it conflicts, and it does say February the 4th versus February the 5th.

Q Okay. I mean -- okay. So the Claimant, in her statement, said that she passed the items out on February the 5th before she clocked in, and the witnesses stated that they received the documents on February the 4th and that—

A Between the hours of 3 and 4; that is 4 correct.

Q Okay. Which I can understand, after reviewing the Union's information, how that might come into conflict, but I'm still not understanding the falsification of time and attendance and payroll if the Claimant is just saying that she passed it out before she clocked in, and the witnesses are saying that they got a day before, before she clocked out. So I'm not understanding how her time-- how her time was falsified if she kept saying that she did it -- that she passed out materials at one point, and the witnesses are saying she passed -- are they saying that -- are you saying that she clocked in or clocked out when she wasn't supposed to?

A No. What we're saying is that on Page 24 of the document that you don't necessarily have at this time, but both parties do, that on 2/4/2010, she -- in our Kronos system, it reflects that she worked her eight hours not clocking out at any given time. The witnesses were given the material on the 4th while Ms. Palmer was working, and that is distribution of the materials as well as the falsification of time.

[GC Ex 9, p. 31-32] Thus, Respondent only contended that Palmer violated Class III, #26 by not clocking out on Union business while claiming to have been working.<sup>15</sup> [TR 373; R Ex 15]

Accordingly, the ALJ improperly failed to find that at Palmer's unemployment benefits appeals hearing of April 14, Kurmaskie did not claim to have relied on Palmer's alleged lie during Respondent's investigation of her distribution of union literature, as an additional basis to discharge her. [ALJD, p. 9, ln. 32-43] **(Exception 3)**. Such a finding is consistent with the ALJ's findings that Respondent did not rely on Palmer's alleged lie to Kurmaskie during its investigation of her distribution of union literature, as a basis to discharge her.

At the unfair labor practice hearing, Kurmaskie claimed that he was the sole decision maker regarding Palmer's discharge, and that he decided to discharge Palmer, rather than issue her a suspension or lesser discipline, because she lied and engaged in other violations. However, Palmer's discharge form makes no mention of any lying by Palmer. [TR 374; R Ex 2]

By the time of the arbitration hearing on November 10, Respondent had formulated the argument that an additional basis for Palmer's discharge was that she lied during Respondent's investigation. The evidence regarding the unemployment hearing further demonstrates that Kurmaskie lied at the unfair labor practice hearing, as found by the ALJ, by asserting that the Respondent relied on the fact that Palmer lied in her February 9 statement as the leading reason for its decision to discharge her. The obvious self-serving reason for the change in Kurmaskie's rationale is to support Respondent's deferral argument.

Kurmaskie admitted that he does not recall ever issuing discipline to any other employee for submitting a statement that he later determined was contradicted by other employee witness

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<sup>15</sup> After Kurmaskie's above-quoted testimony, Respondent's counsel asked Kurmaskie a leading question as to whether Respondent determined that, in addition to falsifying her time records by not clocking out for non-work related business, Respondent also determined that Palmer falsified her written statement. However, even then, although he responded affirmatively, Kurmaskie did not directly state that Respondent had determined that Palmer lied, only that her statement conflicted with the statements of the other employees. [GC Ex 9, p. 43; R Ex 15] Significantly, Kurmaskie did not state that Respondent referenced the Class III, #26 violation on Palmer's discharge form because it considered her written statement to constitute a falsification of Respondent's records.

statements. [TR 377] Moreover, even when Respondent issued discipline to employee Mary Blocker for misrepresenting the truth, the discipline was limited to a written reprimand and classified as insubordination. [GC Ex 5] This is further evidence that Respondent disparately treated Palmer because of her union activities.

If Respondent had really intended to discharge Palmer because she gave it a false statement on February 9, it would likely have cited her for a Class III, #25 offense, which prohibits falsification of material and/or omission of fact from any material requested at any time by Respondent. Acting General Counsel submits that Class III, #25, more closely fits than Class III, #26, which Respondent did cite, which prohibits falsification of time, attendance, payroll or other records, and obviously referred to Respondent's contention, stated at the time of the discharge, that Palmer failed to clock out for union business during the time she distributed union flyers on February 4. Thus, as the ALJ essentially held, it is evident that Respondent did not rely on any finding that Palmer lied in her written statement about her distribution of the union flyer as grounds for her discharge.

Additional evidence of Respondent's disparate treatment of Palmer is found in documents regarding discipline of other employees for falsification offenses. [TR 49, 233] On May 7, 2009, Respondent issued a three-day suspension for falsifying its records to employee Julia Kieffer, who had six incidences of prior discipline including suspension. [GC Ex 15] On November 2, 2009, Respondent issued a three-day suspension to employee Dorian Jackson, who had four incidences of prior discipline including suspension, in part, for falsifying Respondent's records. [GC Ex 16] Respondent suspended Savannah Hartzog for falsifying its records, before discharging her for the same reason on December 9, 2009, while noting that she had two incidences of prior discipline, in addition to the earlier suspension. [GC Ex 17] On December 29, 2009, Respondent issued a two-day suspension to employee Elise Maddox, who had five incidences of prior discipline for absenteeism, in part, for falsifying Respondent's records. [GC Ex 18]

Respondent also treated other employees who had Class III insubordination offenses with less severity. On May 1, 2009, Respondent issued a three-day suspension to employee Josephine Aquino, who had seven incidences of prior discipline including absenteeism, for engaging in insubordination and negligence. [GC Ex 2] On January 12, Respondent issued a written reprimand to employee Lashay Brown, who had three incidences of prior discipline, for engaging in insubordination. [GC Ex 6]

In summary, Respondent's records show that it treated Palmer much more harshly than it treated other employees because of her union activities.

In the case of Palmer, Respondent ignored the provision in the parties' contract that requires it to use progressive discipline where appropriate. When Respondent discharged Palmer, she had no prior Class II or Class III offenses or suspensions, and no previous discipline more severe than a written reprimand or a written counseling. With this record, her alleged actions on February 4 were not so serious as to warrant discharge. Respondent's departure from its treatment of other employees, in view of the progressive discipline policy, is further evidence that it was motivated to discharge Palmer because of her union activities. This is especially so in light of the fact of Respondent's counsel admitted that Respondent did not

rely heavily on Palmer's prior disciplinary record as a basis for her discharge. [TR 46]<sup>16</sup>

Respondent's various unsupported, conflicting and shifting reasons for discharging Palmer demonstrate that the real reason for her discharge stemmed from its intent to discriminate against her because of her protected union activities and to discourage employees from engaging in these activities. The reasons proffered by Respondent for discharging Palmer are pretextual and, therefore, indicative of illegal motivation. *Active Transportation*, 296 NLRB 431 (1989). Furthermore, it is well-settled under Board case law, that when a false reason is advanced "one may infer that there is another reason (an unlawful reason)" for the employer's action. *Associated Services for the Blind*, 299 NLRB 1150, 1152 (1990); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 62 LRRM 2401 (9<sup>th</sup> Cir. 1966). Accordingly, General Counsel submits that Respondent discharged Palmer in violation of Section 8(a)(1) and (3) of the Act. Consequently, the ALJ committed reversible error by recommending dismissal of that allegation in the complaint.

**C. It is inappropriate for the Board to defer to the arbitrator's decision concerning Mishaun Palmer because the arbitrator was not presented with and did not consider the unfair labor practice issue and the award is clearly repugnant to the purposes and policies of the Act. Exceptions 5 to 17.**

In *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), the Board held that it would defer to an arbitration award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. The Board has further conditioned deferral on the arbitrator's consideration of the unfair labor practice issue. *Raytheon Co.*, 140 NLRB 883 (1963).

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<sup>16</sup> Kurmaskie testified that Palmer's prior disciplinary record played a part in Respondent's decision to discharge her. Because Kurmaskie was vague and evasive, the ALJ had to ask him five times whether Palmer's disciplinary record played a major or minor part in the decision to fire her and whether Respondent would have discharged Palmer if she had no prior discipline. Kurmaskie ultimately vaguely responded that it could have gone a different direction if Palmer had no prior discipline, but he did not specifically answer the ALJ's question. [TR 367-369] Based in part on this testimony, the ALJ properly found Kurmaskie to be an incredible witness. [ALJD, p. 4, ln. 7-12]

In *Olin Corp.*, 268 NLRB 573 (1984), the Board held that it will find the unfair labor practice issue to have been adequately considered if the contractual issue is factually parallel to the unfair labor practice issue, and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.<sup>17</sup> The Board also stated in *Olin* that the “clearly repugnant” standard does not require that an arbitrator’s award be totally consistent with Board precedent, but only that the award not be “palpably wrong,” i.e. not susceptible to an interpretation consistent with the Act.<sup>18</sup> Finally, the Board specified that the party opposing deferral has the burden of demonstrating that the standards for deferral have not been met.

The Acting General Counsel does not dispute that the arbitration process in the instant case was fair and regular and the parties agreed to be bound. It must therefore be examined to ascertain whether the arbitrator adequately considered the unfair labor practice issue, and whether the arbitrator’s decision was clearly repugnant to the purposes and policies of the Act.

**1. The arbitrator was not presented with and did not consider the unfair labor practice issue. Exceptions 5 to 9, 16 and 17.**

The ALJ misunderstood and/or incorrectly articulated the Acting General Counsel’s theory as to why deferral to the arbitrator’s decision is improper. In this regard, the ALJ inaccurately and incompletely characterized the Acting General Counsel’s theory by stating “[t]he Acting General Counsel contends that background evidence of the Respondent’s animus toward Palmer for her union activity was not presented to the arbitrator and that deferral is improper on that basis.” [ALJD, p. 13, ln. 40-42]

The Acting General Counsel presented several arguments as a basis for finding that the Board should not defer to the arbitrator’s decision, which the ALJ failed to specifically address. In particular, the Acting General Counsel argued that deferral of Palmer’s discharge grievance

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<sup>17</sup> The Board in *Olin* emphasized that it was not returning to the rule established in *Electronic Reproduction Service*, 214 NLRB 758 (1974), that deferral is warranted if there was an “opportunity” to present the unfair labor practice issue to the arbitrator. 268 NLRB at 575, fn. 10.

<sup>18</sup> *Laborers Local 294 (AGC of California)*, 331 NLRB 259, 260 (2000).

to the arbitrator's decision is not appropriate because the arbitrator did not consider the unfair labor practice issue, inasmuch as: 1) the arbitrator was not presented with, and did not consider, the question as to whether the discharge of Palmer was unlawful because it was premised on Respondent's overly broad no distribution rule; 2) the arbitrator was not presented with, and did not consider, the question as to whether the discharge of Palmer was unlawful under the *Double Eagle* line of cases, whether or not she distributed flyers during work time or in work areas; 3) the Union did not contend that Palmer was discharged for her union activity and the parties did not litigate that issue before the arbitrator; and 4) 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.

Several Board decisions have provided some guidelines relevant to the standards of factual parallelism and factual presentation articulated in *Olin*. In *M & G Convoy, Inc.*, 287 NLRB 1140, 1145 (1988), the Board affirmed the administrative law judge's conclusion that the contractual and statutory issues were not factually parallel and it was not appropriate to defer to an arbitrator's award where the arbitrator addressed only the issue of whether the employee was discharged "without just cause" under the applicable agreement, whereas the complaint dealt with the question of whether the employee had been discharged for having filed a Board charge or having engaged in concerted protected activities. As no evidence had been submitted to the arbitrator regarding the charging party's protected activities or the employer's reactions to them, the arbitrator had no basis for considering the statutory issues. In *Dick Gidron Cadillac, Inc.*, 287 NLRB 1107, 1111 (1988), the Board adopted the administrative law judge's conclusion that deferral was not warranted where the only issue formally presented to, and considered by the arbitrator, was whether there was "just cause" for discharge, and no additional evidence bearing on the statutory issue was presented by the union in support of the grievance. In that case, the ALJ stated that "it would be manifestly unfair to infer that the

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arbitrator decided the unfair labor practice issue when it was never formally presented to him and was obviously alluded to but tangentially and when it certainly was not addressed by the parties.”

The record evidence here establishes that the contractual issue was not factually parallel to the unfair labor practice issue. The question of whether Respondent retaliated against Palmer because she exercised her Section 7 rights was not considered by the arbitrator. The issue presented to the arbitrator was whether Respondent had “just cause” to terminate Palmer’s employment. The alleged causes were for violations of several contractual provisions. The arbitrator was not charged with determining whether there was an alternative reason for the termination based on the Act, only whether Respondent’s stated cause for termination was sufficient.

The arbitrator was not presented with, and did not consider, the question as to whether the discharge of Palmer was unlawful because it was premised on the overly broad no distribution rule.<sup>19</sup> Thus, the arbitrator failed to consider whether the discharge of Palmer was unlawful under the *Double Eagle* line of cases, even if she distributed union flyers during work time and in a work area. In addition, the Union did not contend that Palmer was discharged for her union activity, and the arbitrator did not consider that issue, and 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.

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<sup>19</sup> The ALJ found that at the arbitration hearing of November 10, the Respondent’s policy restricting distribution of literature was litigated by the parties. [ALJD, p. 10, ln. 19-20] Presumably, the ALJ was referring to Respondent’s no distribution policy HR-02-010 titled “Employee Corrective Action,” which he found to be overly broad and violative of Section 8(a)(1) of the Act. However, it is clear that, at the arbitration hearing, Respondent and the Union did not litigate the issue of whether Respondent’s no distribution rule violated the Act or whether Respondent’s reliance on the no-distribution rule, as a reason for discharging Palmer, also violated the Act on that basis.

Because these statutory issues were not presented to or considered by the arbitrator, the Board should not defer to the arbitration award.<sup>20</sup>

**2. The arbitrator's decision is clearly repugnant to purposes and policies of the Act. Exceptions 10 to 17.**

In considering whether or not arbitration awards are clearly repugnant to the purposes and policies of the Act, the Board generally finds deferral inappropriate when the precipitating event causing an employee's termination was his or her protected concerted activities.<sup>21</sup> Thus, in *110 Greenwich Street Corp.*, 319 NLRB 331 (1995), the Board refused to defer to an arbitral award where the arbitrator upheld the termination of employees for protesting their employer's withholding of their wages.<sup>22</sup> Here, as discussed above, Palmer was engaged in union activities when she distributed union literature, and it is undisputed that Respondent discharged her for that protected conduct.

In addition, in the circumstances of this case, where Respondent discharged Palmer pursuant to an overly broad no distribution rule and based on her union activity, the arbitrator's decision to order Respondent to reinstate Palmer without backpay was clearly repugnant to the Act. The Board has deferred to arbitration decisions and grievance settlements that awarded

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<sup>20</sup> The January 18, 2011 post-arbitration briefs of Respondent and the Union do not raise the unfair labor practice issues pertaining to the discharge of Palmer as issues to be considered or decided by the arbitrator. [R Ex 28 and 29]

<sup>21</sup> See, e.g., *Mobil Oil Exploration & Producing*, 325 NLRB 176, 177-78 (1997), *enfd.* 200 F.3d 230 (5<sup>th</sup> Cir. 1999) (finding deferral to an arbitrator's award inappropriate when arbitrator upheld employee discipline based on his initiation of protected concerted action to oppose incumbent union leadership); *Garland Coal & Mining Co.*, 276 NLRB 963, 964-65 (1985) (finding repugnant an arbitrator's decision to uphold discipline of an employee for conduct supporting the union's interpretation of the collective bargaining agreement that was characterized as insubordination); *Key Food Stores*, 286 NLRB 1056, 1056-57, 1071-72 (1987) (Board upheld ALJ finding that arbitrator's decision was repugnant where arbitrator found that employee's protected activities were insubordinate).

<sup>22</sup> See 319 NLRB at 331, fn.3, 335 (1995) (Board refused to defer where the arbitrator found just cause for employees' discipline based on their display of a controversial placard demanding the payment of wages)

no backpay because the employee had engaged in some type of misconduct.<sup>23</sup> However, in *Cone Mills Corporation*, 298 NLRB 661 (1990), the arbitrator and the Board found that the discriminatee was discharged in retaliation for her protected concerted activity as shop steward. Although the arbitrator ruled that the employee was discharged in violation of the Act, his remedy included only reinstatement and not backpay. The Board found that deferral was not warranted because the arbitrator's decision was clearly repugnant to the purposes and policies of the Act. The Board noted that the employee was discharged for union activity and "in spite of the absence of any finding that [the employee] engaged in conduct in response to the Respondent's provocation that was so extreme or egregious as to be unprotected," the arbitrator nevertheless concluded that her insubordination was sufficient to warrant the denial of backpay.<sup>24</sup> "Absent such misconduct, the arbitrator's refusal to award [the employee] backpay has the effect of penalizing [the employee] for engaging in those protected activities that the arbitrator found precipitated her discharge, a result that is plainly contrary to the Act."<sup>25</sup>

The arbitrator's award here is not susceptible to an interpretation consistent with the Act. The arbitrator found that Palmer did not engage in any of the misconduct cited by Respondent in her discharge notice. [R Ex 30, p.10 of 11; R Ex 31] Rather, the arbitrator determined that Palmer should not receive backpay based on his findings that Palmer "lied by omission" in her written statement to Respondent and in an interview with Kurmaskie by stating only that she handed out the flyer on February 5, and failing to state that she also handed out the flyer on

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<sup>23</sup> See, e.g., *Catalytic, Inc.*, 301 NLRB 380, 382-383 (1991) (deferral to grievance settlement providing for reinstatement without backpay where employee allegedly engaged in "gross insubordination" by countermanding the employer's orders regarding reporting times); *Combustion Engineering*, 272 NLRB 215, 216-217 (1984) (deferral where arbitrator denied backpay based on one employee's "poor attitude towards improving his performance" and another employee's "obdurate attitude towards improving his attendance.")

<sup>24</sup> *Id.*, at 666.

<sup>25</sup> *Id.*, at 667. See also *Consolidated Freightways*, 290 NLRB 771, 773 (1988), in which the Board found that an employer's offer of reinstatement was based on a repugnant arbitral award which had omitted backpay and, therefore, deferral was not warranted. The Board held that "to defer here to the arbitrator's remedy would permit the Respondent to discipline an employee for activity found by us and the arbitrator to be protected; clearly not an 'interpretation consistent with Board policy.'"

February 4; that Palmer lied “by commission” under oath at the arbitration hearing; and that “lying is a very serious offense.” [R Ex 30, p.10 of 11; R Ex 34] Thus, the arbitrator found that Palmer merely “misled” Respondent by omission, thereby relying on grounds for denying backpay to Palmer that were not even mentioned in her discharge notice.<sup>26</sup> In addition, the arbitrator denied Palmer backpay because she lied at the arbitration hearing, and “lying is a very serious offense.” Thus, the arbitrator fashioned his own reason for denying Palmer backpay that was not even suggested by Respondent, and certainly could not have been known to Respondent when it discharged her, because it did not occur until the arbitration hearing. The arbitrator’s substitution of his own rationale for the punishment of Palmer for the rationales of Respondent, which the arbitrator rejected, is clearly repugnant to the Act in the circumstances of this case.

Hence, the ALJ incorrectly failed to find that, in deciding to withhold one year of backpay from Palmer (and thereby condoning a one-year suspension), the arbitrator improperly relied on reasons (i.e., Palmer’s alleged lie to Respondent and to the arbitrator) that were not relied on by Respondent, as a basis for her discharge. [ALJD, p. 15, ln. 37-40]

The ALJ also incorrectly found that, with regard to the arbitrator’s decision to withhold backpay and benefits from Palmer for an approximately one-year period, arbitrator “Potter explicitly imposed this penalty on Palmer not for anything relating to her union activity on February 4.” [ALJD, p. 15, ln. 8-9] Similarly, the ALJ improperly found 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] However, Palmer’s protected activity of distributing union literature and her subsequent response to Respondent’s interrogation about her protected activity are inextricably linked and intertwined. Stated differently, Palmer’s response (i.e. alleged lie) to Respondent’s coercive questioning about her protected activity is a

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<sup>26</sup> As noted above, falsification by omission is listed in Respondent’s rules as a Class III, #25 offense, and that provision was not relied on by Respondent in discharging Palmer.

natural and logical outgrowth and continuation of her protected activity and is itself protected. Thus, the arbitrator's reliance on Palmer's alleged lie to Respondent, concerning her distribution of union literature, as a basis for denying backpay and benefits, is tantamount to penalizing her for engaging in protected concerted activities in the first place.

Moreover, Palmer's alleged lying during Respondent's investigation was not the basis for her discharge and there is no rationale basis for Palmer's discharge, apart from her union activities of distributing union literature in her capacity as a Union steward. Nevertheless, Palmer's alleged act of lying about whether she distributed union literature during work time is not so egregious as to lose the protection of the Act and, thus, it was "palpably wrong" for the arbitrator to deny backpay to Palmer on that basis. In similar circumstances, the Board has held that "to defer here to the arbitrator's remedy would permit the Respondent to discipline an employee for activity found by us and the arbitrator to be protected; clearly not an 'interpretation consistent with Board policy.'" *Consolidated Freightways*, supra at 773 (1988).

In fashioning an award, the arbitrator did not consider the fact that Respondent discharged Palmer either pursuant to an overly broad no distribution rule, or because she was engaged in union activities, in violation of the Act. The denial of back pay is palpably wrong and is clearly repugnant to the Act. Although lying under oath is a serious matter, the fact that Palmer's testimony at the arbitration hearing differed from that of other witnesses, and the arbitrator discredited her, is not grounds to relieve Respondent of culpability for its violation of the Act in discharging her, or grounds to deny her backpay under the Act.

The ALJ incorrectly implied that, because the ALJ and the arbitrator found other witnesses to be more credible than Palmer and partially discredited her testimony where in conflict with the testimony of other witnesses, Palmer engaged in perjury. [ALJD, p. 15, In. 15-42] (**Exception 14**). However, it does not necessarily follow that every witness who has been discredited as to a portion of their testimony, where the record contains evidence that a fact finder determines is more credible, is legally found to have engaged in perjury. There is no

finding by either the arbitrator or the ALJ that Palmer perjured herself by willfully testifying to something she believed to be false.

Moreover, the ALJ cited case law showing that the Board may penalize employees who lie under oath on a **central issue** in agency proceedings by denying reinstatement and/or tolling their backpay from the date of their misconduct. [emphasis added] [ALJD, p. 15, ln. 32-35] However, Palmer's alleged lie here does not pertain to a central issue in the case because, regardless of when Palmer distributed the union literature, the fact remains that Respondent engaged in disparate treatment of Palmer and discharged her for engaging in union activities and for violating Respondent's overly broad no distribution rule. In addition, the ALJ erroneously implied that denial of a full remedy to Palmer, such as reinstatement, would have been permissible under Board law because she allegedly lied. This finding is at odds with the facts of this case, which show that Respondent did not rely on Palmer's alleged lies to Respondent or to the arbitrator as a basis to discharge her. The ALJ further implied that, therefore, denial of one year of backpay for Palmer is permissible because she allegedly lied. However, again this finding is not reconcilable with the facts of the case because Respondent did not rely on any alleged lies to discharge Palmer.

In summary, deferral to the arbitrator's decision is inappropriate because the unfair labor practice issues were not presented to or considered by the arbitrator and because Respondent violated Section 8(a)(1) and (3) of the Act by discharging Palmer for distributing union literature and engaging in union activity in violation of an overly broad no distribution rule. In these circumstances, the arbitrator's decision denying Palmer over 12 months of backpay is clearly repugnant to the purposes of the Act, particularly noting that the arbitrator's rationales for denying backpay were not the basis for Respondent's discharge decision, and in any event, would not justify the discharge or the denial of a full make whole remedy. Consequently, the ALJ committed reversible error by concluding that "Arbitrator Potter's award satisfies the required standards for deferral." [ALJD, p. 15, ln. 44-45]

**D. The ALJ improperly failed to find that Respondent coercively interrogated Palmer concerning her distribution of union literature. Exception 2.**

Although not alleged as an independent violation of the Act, the undisputed evidence shows that ALJ improperly failed to find that Respondent's interrogation of Palmer, during Respondent's investigation of Palmer's distribution of union literature, 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]

In *United Services Automobile Association*, the Board held that the employer unlawfully interrogated an employee about distributing flyers in the workplace and held that the employee would reasonably perceive that the employer had only one objective—to identify who had been engaged in the flyer distribution. The Board found such questioning would reasonably tend to interfere with or deter the exercise of employees' Section 7 rights. *Spartan Plastics*, 269 NLRB 546, 552 (1984). It is clear that, on February 8 and 10, Kurmaskie interrogated Palmer concerning whether she distributed the union flyers on February 4, at least in part, because he believed that she violated Respondent's overly broad no distribution policy and/or its disparately enforced no-solicitation, no-distribution policy, and/or because Respondent wanted to question Palmer in order to punish her for distributing union flyers containing communications that are protected under the Act. [TR 173-175; R Ex 6, p. 6 of 8; R Ex 7] The finding that Palmer lied in response to Respondent's interrogation tends to show that the questioning was coercive. Because the interrogation was precipitated, at least in part, by an overly broad no distribution policy, the interrogation itself, had it been alleged, would have violated Section 8(a)(1) of the Act. Although the General Counsel is not seeking a remedy for the interrogation, the arbitrator should not be permitted to seize upon Palmer's response to justify a refusal to provide her with backpay and seniority accrual. Respondent could not have lawfully relied on the fact that Palmer allegedly lied to Respondent in response to an unlawful interrogation concerning her

protected conduct of distributing union flyers. Consequently, the arbitrator's decision to deny backpay and seniority accrual to Palmer on the basis that she lied both to Respondent during its investigation of her protected activities and during the arbitration hearing is clearly repugnant to the Act.

**E. Deferral is also inappropriate under the Acting General Counsel's new proposed deferral standards. Exception 23.**

In the alternative, the Acting General Counsel urges the Board to modify its approach to post-arbitral deferral cases to give greater weight to safeguarding employees' statutory rights in Section 8(a)(3) and (1) cases. Pursuant to Section 10(a) of the Act, the Board has a statutory mandate to protect individual rights and to protect employees from discharge or other forms of discrimination in retaliation for their protected activities, and that mandate cannot be waived by private agreement or dispute resolution agreement. Although portions of the Act favor the private resolution of labor disputes through processes agreed upon through collective bargaining, the Board should not abdicate its obligation to protect individual rights whenever employees and unions agree to a grievance arbitration process.<sup>27</sup> Recent Supreme Court precedent concerning federal court jurisdiction over statutory claims that are also subject to arbitration agreements holds that courts are ousted of jurisdiction only where the arbitrator is authorized to decide the statutory issues and actually adjudicates such issues in a manner consistent with applicable statutory principles and precedent.<sup>28</sup> The Acting General Counsel

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<sup>27</sup> E.g., *Taylor v. NLRB*, 786 F.2d 1516, 1521-22 (11<sup>th</sup> Cir. 1986) ("by presuming, until proven otherwise, that all arbitration proceedings confront and decide every possible unfair labor practice issue, *Olin Corp.* gives away too much of the Board's responsibility under the NLRB"); *Banyard v. NLRB*, 505 F.2d 342, 347 (D.C. Cir. 1974) (the arbitral tribunal must have clearly decided the unfair labor practice issue on which the Board is later urged to give deference).

<sup>28</sup> *14 Penn Plaza, LLC v. Steven Pyett*, 129 S. Ct. 1456, 1469-71 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

finds this precedent and its rationale compelling in determining the appropriate degree of deference the Board should give arbitral awards.<sup>29</sup>

Accordingly, in this case the Acting General Counsel urges the adoption of the deferral standards detailed in GC Memorandum 11-05 and contends that the party urging deferral to an arbitration award or grievance settlement must demonstrate that:

(1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. Then, if the party urging deferral makes that showing, the Board should defer unless the arbitrator's award is clearly repugnant to the Act.<sup>30</sup>

Applying the proposed standards, the arbitrator's opinion failed to correctly enunciate and apply the statutory principles that have long been applied by the Board in similar factual situations. Specifically, the arbitrator did not correctly enunciate the nature of Section 7 protections, failed to address the *Felix Industries* and *Double Eagle* standards concerning the Respondent's overly broad no distribution rule and, to the extent necessary, completely neglected to consider the *Wright Line* principles applicable to dual-motive discharges. For these reasons, the arbitration award is not entitled to deference under the proposed standard. Thus, the ALJ improperly failed 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]

To be clear, however, the Acting General Counsel's analysis and conclusion that the arbitrator's decision is clearly repugnant to the purposes of the Act is consistent under both the current and proposed standards. Accordingly, the arbitrator's award is not entitled to deference, inasmuch as Respondent violated Section 8(a)(1) and (3) of the Act by discharging Palmer because she engaged in protected concerted and union activity.

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<sup>29</sup> For a comprehensive argument, see "Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases," GC Memorandum 11-05, dated January 20, 2011.

**F. The ALJ made several inadvertent errors. Exceptions 24(a) through 24(h).**

The ALJ inadvertently misspelled Ms. Palmer's first name. [ALJD, p. 2, In. 13] The proper spelling is Mishaun, as correctly reflected later in the ALJ's decision. [ALJD, p. 9, In. 19]

The ALJ incorrectly referred to Ms. Butler's first name as Natalie. [ALJD, p. 4, In. 19] However, her proper first name is Novetta, as correctly reflected later in the ALJ's decision. [ALJD, p. 7, In. 1]

The ALJ inadvertently referred to the number of the Local Union as 328. [ALJD, p. 5, In. 25] The proper Local Union number is 1328, as correctly reflected later in the ALJ's decision. [ALJD, p. 1, case caption; p. 1, In. 45; p. 7, In. 4]

The ALJ cited the corrective action (discharge) that Respondent issued to Palmer, but inadvertently stated that, "[o]n 2-4-10, during work time, Mishaun Palmer distributed material promoting or **instigation** a sickout..." [emphasis added] [ALJD, p. 9, In. 20] The correct bolded word should be "instigating." [R Ex 2]

The ALJ cited a portion of the arbitrator's decision which spoke about Respondent's investigation of Palmer's distribution of Union literature. The ALJ cited the arbitrator 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] However, the correct bolded word should be "serious." [R Ex 30 at p. 10]

The ALJ cited *American Commercial Lines*, 291 NLRB 1066, 1074–1075 (1988), while noting that, in that case, the Board found deferral to arbitration inappropriate because the remedial portion of the award was "arbitrarily limited." The ALJ then stated that, "[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**."

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<sup>30</sup> GC Memorandum 11-05 at 7.

[emphasis added] [ALJD, p. 14, In. 19-22] However, the correct bolded word should be “unremedied.”

The ALJ incorrectly referred 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]

In the Notice to Employees, the ALJ inadvertently stated “WE WILL NOT maintain policies that unlawfully restrict **your** in the exercise of the rights listed above,…” [emphasis added] [ALJD, Appendix, Notice to Employees, first “WE WILL NOT” paragraph, In. 1] The correct bolded word should be “you.”

#### **IV. CONCLUSION**

For the above reasons, Counsel for the Acting General Counsel respectfully requests that the Board grant all of the Acting General Counsel’s exceptions to the Decision of the ALJ, find and conclude that in addition to maintaining an overly broad no distribution rule as found by the ALJ, Respondent also violated Section 8(a)(1) and (3) of the Act by discharging Mishaun Palmer. Counsel for the Acting General Counsel further respectfully requests that the Board

modify the ALJ's findings of fact and conclusions of law accordingly, and issue a Board Order containing an appropriate and complete remedy for Respondent's violations of the Act.

**DATED** at Tampa, Florida this 31<sup>st</sup> day of July, 2012.

Respectfully submitted,

/s/ Rafael Aybar

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**Certificate of Service**

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

By electronic filing at [www.nlr.gov](http://www.nlr.gov) to:

Lester A. Heltzer  
Executive Secretary  
National Labor Relations Board – Room 11602  
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