

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
WASHINGTON D.C.**

SHANDS JACKSONVILLE MEDICAL CENTER, INC.	)	
	)	
Respondent,	)	
	)	
And	)	12-CA-26649
	)	
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 79, AFL-CIO,	)	
	)	
And	)	12-CA-27197
	)	
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 1328,	)	
	)	
And	)	
	)	
DELLA HIGGINBOTHAM, an Individual,	)	12-CA-26829
	)	
Charging Parties	)	

**RESPONDENT’S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO  
ADMINISTRATIVE LAW JUDGE’S DECISION**

NOW COMES Shands Jacksonville Medical Center, Inc., Respondent herein, and files its Brief in Support of Cross-Exceptions to Administrative Law Judge’s Decision <sup>1</sup> as follows:

**STATEMENT OF CASE**

This case arises out of unfair labor practice charges filed by American Federation of State, County, and Municipal Employees, Council 79 and Local 1328, (collectively the

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<sup>1</sup> Cross-Exceptions 1, 2, and 3 relate to alternative arguments raised by Respondent that were not addressed by the ALJ because he agreed with Respondent’s primary contention that the Board should defer to Arbitrator Potter’s Award. These cross-exceptions are raised solely because the Acting General Counsel has filed exceptions to the ALJ’s deferral decision. If, as Respondent contends it should, the Board agrees to defer to Arbitrator Potter’s Award, exceptions 1, 2, and 3 need not be addressed.

“Union”), alleging that Respondent violated sections 8(a)(1) and (3) of the Act in certain respects. The Acting Regional Director issued a Consolidated Complaint on November 29, 2011. Respondent filed a timely Answer, denying the material allegations of the Consolidated Complaint and asserting certain affirmative defenses. On April 18, 2012, Respondent filed an Amended Answer. This matter was heard in Jacksonville, Florida on April 22, 23, and 24, 2012 before Administrative Law Judge Ira Sandron. During the course of the hearing, the parties reached a private settlement agreement respecting charge number 12-CA-27197 (Jacqueline Cangro), which was approved by the ALJ on April 23, 2012. (Resp. Exh. 1).<sup>2</sup> The remaining charges were not settled.

On July 3, 2012, ALJ Sandron issued his Decision finding a single violation of section 8(a)(1) of the Act based on an overly broad no solicitation/distribution rule. (JD 16: 6-40). ALJ Sandron dismissed on credibility grounds an allegation that Respondent had violated section 8(a)(1) by threatening to go after an employee’s nursing license if she pursued a grievance. (JD 16: 1-4). He further dismissed the allegation that Respondent had violated sections 8(a)(3) and (1) by discharging Mishaun Palmer, finding that deferral to an arbitrator’s award that had reinstated Palmer without backpay or interim seniority accrual was warranted. (JD 13-15). On July 31, 2012, the Acting General Counsel filed exceptions to the ALJ’s decision to defer and his dismissal of the allegations regarding Palmer’s discharge, along with a supporting brief. The Acting General Counsel did not file exceptions to the judge’s dismissal of the alleged threat to employee Della Higginbotham.

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<sup>2</sup> References to the transcript are designated as “Tr.” followed by the appropriate page number(s). References to exhibits are designated either as “Resp.” or “GC” Exh., followed by the appropriate exhibit number(s). References to Judge Sandron’s Decision are designated as “JD” followed by the appropriate page and line numbers. References to the acting General Counsel’s Brief are designated as “GC Brief” followed by the appropriate page number(s).

Respondent has this day filed an Answering Brief in opposition to the Acting General Counsel's Exceptions, as well as limited cross-exceptions. Respondent now files this Brief in Support of Cross-Exceptions.

### **STATEMENT OF FACTS**

Respondent operates an acute-care hospital in Jacksonville, Florida. For many years, the Union has been recognized by Respondent as the exclusive bargaining representative of two separate bargaining units of Respondent's employees, a professional unit and a non-professional unit. Respondent and the Union were parties to a collective bargaining agreement, effective by its terms from September 10, 2009 through June 30, 2012. This agreement contained a grievance/arbitration procedure that culminated in final and binding arbitration. (Resp. Exh. 35, pp. 16-18).

#### **A. Mishaun Palmer**

Mishaun Palmer was employed as a Financial Representative within the non-professional unit represented by the Union until her termination on February 12, 2010. (Resp. Exh. 2). At the time of her termination, Palmer was employed in the Pre-Admissions Department. The incident that triggered the investigation that concluded with Palmer's termination involved Palmer's alleged distribution of a Union flyer to three co-workers in a work area during working time. The incident was investigated by Dan Kurmaskie, Director of Admissions. A timely grievance was filed over the termination of Palmer, and the grievance was processed without resolution through the contractual grievance process. (Resp. Exh. 3).

On February 25, 2010, the Union filed its unfair labor practice charge in Case No. 12-CA-26649. In material part, this charge alleged that Palmer's termination was in violation of sections 8(a)(3) and (1) of the Act. By letter dated April 23, 2010, the Regional Director

administratively deferred this charge to the contractual arbitration process under *Collyer Insulated Wire*, 192 NLRB 837 (1971). (Resp. Exh. 4). The Regional Director explained:

2. The Employer and the Union have a collective-bargaining agreement currently in effect that provides for final and binding arbitration.

3. The Employer notified this office in writing on March 23, 2010, that it is willing to process a grievance(s) concerning the above allegations in the charge, and will arbitrate the grievance(s) if necessary. The Employer has also agreed to waive any time limitations in order to ensure that the arbitrator addresses the merits of the dispute.

4. Since the above allegations in the charge appear to be covered by certain provisions of the collective-bargaining agreement, it is likely that the allegations may be resolved through the grievance/arbitration procedure.

(Resp. Exh. 4, p. 2).

The parties selected Richard H. Potter as their arbitrator, and on November 10, 2010, Respondent and the Union participated in a hearing before Arbitrator Potter at which sworn testimony was presented. A transcript of that hearing was prepared, (Resp. Exh. 5), and the Acting General Counsel concedes that the proceedings were fair and regular and that the parties agreed to be bound. (GC Brief at 32). Both parties submitted post-hearing briefs to the arbitrator. (Resp. Exhs. 28, 29).

On February 3, 2011, Arbitrator Potter issued his ten-page Award, along with a cover letter. (Resp. Exh. 30). It is this Award and Arbitrator Potter's findings that are pertinent.<sup>3</sup> In material part, Arbitrator Potter found and/or concluded the following:

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<sup>3</sup> See *Aramark Services, Inc.*, 344 NLRB 549, n. 1 (2005) (Board based analysis on arbitrator's findings of fact; "The judge incorrectly rejected the arbitrator's credibility findings and substituted his own.") The proper approach would have been to stipulate the facts based on the entire arbitration record and to conduct the applicable legal analysis based on that record. See *Cone Mills Corp. (Marie Darr)*, 298 NLRB 661 (1990) (stipulated facts). The General Counsel,

1. Arbitrator Potter discredited Palmer on the central factual dispute: whether she distributed a four-page Union flyer (Resp. Exh. 9) in a work area between the hours of 3:00 p.m. and 4:00 p.m. on Thursday February 4, 2010. Three of Palmer's co-workers (Ethel Overstreet, Sharnee Thomas, and Vivian Griffin), all Union members at the time, testified before Arbitrator Potter that Palmer did in fact distribute the flyer on that date and at that time. Palmer, however, despite pointed questioning from Arbitrator Potter noting that either the three co-workers were "lying" or Palmer was "lying," (Resp. Exh. 5, pp. 195-196) adamantly denied this allegation, while admitting only that she distributed the flyer outside the facility prior to work on the morning of February 5. On this issue, Arbitrator Potter opined:

However, at the hearing, [Palmer] did deny handing out the flyers to the three employees on the 4<sup>th</sup>. She said the flyers were in a bag at her desk and that the only thing she could think of is that someone must have come to her desk and taken the flyers when she was away. In response to questions from the Arbitrator as to why the three employees might lie about her and possibly get her fired, she replied that she thought it was because they resented the amount of time she spent on Union business. That three Union members would lie about a Steward and possibly get her fired simply because they believed she spent too much time on Union duties is beyond belief. The three seemed credible and provided testimony that appeared impartial. Indeed, although testifying for the Hospital, they provided testimony that, in part, supported the Grievant. Accepting their testimony as credible, it can only be concluded that the Grievant distributed the flyer to the three other Financial Representatives on February 4. Since no investigation was made to determine if she also distributed them to a wider audience before clocking in on the 5<sup>th</sup>, it is assumed that she did.

(Resp. Exh. 30, pp. 10-11).

2. It was "very common for employees to solicit funds for schools and church drives, sell such things as Girl Scout cookies or candy and magazines for school drives and to sell other things as well." (Resp. Exh. 30, p. 6).

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however, declined to stipulate, and the testimony that was offered was largely redundant of that which was offered in the arbitration hearing.

3. After Dan Kurmaskie became Director of Admissions, he became aware that the solicitation policy was not being followed and began to enforce it. But in doing so, he did not “send out a memo or make a general announcement that henceforth the policy would be enforced, but rather approached each individual as he became aware that they were violating the policy.” Kurmaskie “had not told [Palmer] of the change in the enforcement of the Policy, and there was no evidence that anyone else had informed her.” (Resp. Exh. 30, p. 7).

4. “An employer may begin enforcing a policy that has not been enforced, but to do so, it must make a general announcement, preferably in writing, that in the future the policy or rule will be strictly enforced. In the instant case, that announcement was not made.” (Resp. Exh. 30, p. 7).

5. Although Kurmaskie and Staifer “believed the material [Palmer] distributed was calling for employees to take action and that it called for work stoppages or strikes in violation of Article 3 of the Agreement,” this view was not shared by the employees who received the flyer. Rather, they were merely confused and/or angered by the message. Further, Respondent did not attempt to stop the distribution of the flyer outside the facility. (Resp. Exh. 30, p. 8).

6. The “what if” questions in the flyer are best interpreted “as an attempt, however inartful, of saying that the employees are essential to the Hospital” and “[i]n summary, the document does not call for a job action in violation of Article 3.” (Resp. Exh. 30, p. 8).

7. Although Article 7 of the Agreement, which requires Union officials to clock in to the Union Business cost code center, refers only to grievance handling, “from the testimony of both Hospital and Union witnesses, it is generally accepted that the Union Business cost code is for any Union activity.” (Resp. Exh. 30, p. 9).

8. Personal conversations take place in most offices, including Respondent's Admissions department. The distribution of the fliers took only "a few seconds" and no evidence was offered to show "that this incidental casual type of conversation was of the nature" that required clocking in and out of the Union Business cost center. (Resp. Exh. 30, p. 10).

9. "Perhaps the most serious charge made against [Palmer] was that of lying, both in person and in a written statement. In the days following receipt of the flyer, Kurmanskic [sic] investigated by talking to the three employees who received it and to the Grievant. Following each conversation, he asked each to provide a written statement." (Resp. Exh. 30, p. 10).

10. "In [Grievant's written statement], she states that Kurmanskic [sic] asked her to write a statement that she distributed the flyer on the 4<sup>th</sup>, and goes on to state that she distributed it on the 5<sup>th</sup> and on the 4<sup>th</sup> she was busy working on her scheduled duties. In other words, she doesn't deny that she handed out the flyers on the 4<sup>th</sup>, but simply that she handed them out on the 5<sup>th</sup>." (Resp. Exh. 30, p. 10).

11. "In concluding that she handed out the flyers to the three Financial Representatives on the 4<sup>th</sup>, it is clear that she misled Kurmanskic [sic] by omission when he questioned her as well as in her written statement and lied under oath at the hearing. Although it could be argued that the written statement isn't technically a violation of Class III, # 26 'Falsification of time attendance, payroll or other Shands Jacksonville record,' lying is a very serious offense." (Resp. Exh. 30, p. 11).

Based on these findings and conclusions, Arbitrator Potter issued the following AWARD:

The Grievance is granted in part and denied in part. The Grievant shall be returned to work, but without back pay and without receiving credit for time lost for seniority, vacation or sick leave purposes.

(Resp. Exh. 30, p. 11).

Following receipt of Arbitrator Potter's Award, by letter dated February 9, 2011, Counsel for Respondent requested certain clarification from Arbitrator Potter:

We understand from the Award that the Employer is to return Ms. Palmer to work without back pay or credit for time lost for seniority, vacation or sick leave purposes. The Employer presumed that you intended to downgrade the level of discipline issued to Ms. Palmer. However, in an effort to assure that we have not misread your Award, we would be most appreciative if you would confirm for us whether your intent was to overturn the termination and have the Employer record a lesser level of discipline. In contrast, it is the Union's position that there should be no discipline reflected in Ms. Palmer's personnel file. In addition, the parties seek clarification from you regarding Ms. Palmer's employment status for the past year; specifically, how should the Employer reflect the past year in Ms. Palmer's personnel file, as well as Ms. Palmer's date of hire?

(Resp. Exh. 31).

By letter dated February 11, 2011, Arbitrator Potter indicated that he could not respond, absent a joint request. (Resp. Exh. 32). By e-mail dated February 11, 2011, Union Counsel advised Arbitrator Potter that the parties were making a joint request for clarification. (Resp. Exh. 33). By letter dated February 11, 2011, Arbitrator Potter provided the requested clarification:

In the award dated February 3, 2011, I found that Ms. Palmer did not violate the prohibition against solicitation and distribution or the prohibition against inciting or promoting a job action or work stoppage. However, I did find she lied by omission in a written statement and in an interview with her supervisor, as well as by commission under oath at the hearing.

Although I didn't uphold the discharge, I believe returning her to work after almost a year without backpay is a severe penalty. Indeed, although it isn't explicitly a suspension, it has the same impact. I believe a designation such as "lost time as a result of discipline" correctly describes her status.

(Resp. Exh. 34).

Pursuant to Arbitrator Potter's Award, Respondent reinstated Palmer on February 21, 2011. No backpay has been paid. Palmer remained employed at the time of the unfair labor practice hearing.

**B. No-Distribution Rule**

During the relevant time period, Respondent maintained certain Employee Corrective Action Guidelines. Class II, Rule 4 of these Guidelines prohibited: "Unauthorized distribution of written or printed materials of any description." (Resp. Exh. 6, p. 8). The Acting General Counsel alleges in paragraph 5 of the Consolidated Complaint that this rule is overly broad and unlawful.

This rule, however, is not the only policy that applies to solicitation and distribution of literature. Thus, there is a specific written policy regarding "Solicitation, Distribution and Sale of Items:"

Shands Jacksonville does not allow solicitation of any kind during working time or at any time during non-working time in patient care or patient access areas of Shands Jacksonville. 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.

(Resp. Exh. 7).

In Article 3 of the collective bargaining agreement, the parties specifically agreed in detail regarding what type of solicitation/distribution activities are and are not permitted. Briefly stated, solicitation by employees is not permitted "during their working time." Distribution of literature "in a hospital work area is likewise prohibited." Further, "[t]he circulation or passing of any petition or notices or other printed material among employees during working time is prohibited." (Resp. Exh. 35, p. 8). Article 7 of the collective bargaining agreement is entitled

“Union Activity” and describes in detail how, when, and where union activity will be conducted. (Resp. Exh. 35, pp. 14-15).

### STATEMENT OF ISSUES

1. Whether, independent of its deferral policy under *Spielberg/Olin*, the Board is required to respect Arbitrator Potter’s Award and without jurisdiction to nullify or vacate it? [Cross-Exceptions 1 and 2].

2. Whether the Board should deny Mishaun Palmer any relief because she deliberately perjured herself before the Board? [Cross-Exception 3].

2. Whether the ALJ erred in finding Respondent’s no-distribution rule to be overly broad in violation of § 8(a)(1) of the Act? (Cross-Exceptions 4 and 5].

### ARGUMENT

#### **A. Independent Of *Spielberg/Olin*, The Board Is Required To Respect Arbitrator Potter’s Award And Is Without Jurisdiction To Nullify Or Vacate It.**

Assuming, *arguendo*, that deferral is for any reason deemed not appropriate under *Spielberg/Olin* (or any revision of the deferral policy that the Board might adopt), the Board nevertheless is required to respect Arbitrator Potter’s Award and is without jurisdiction to nullify or vacate it. Under this analysis, the issue is not so much one of *deferral* as it is of respect and comity. Respondent advanced this alternative argument to the ALJ, but because he agreed with Respondent that deferral was appropriate, he never addressed it.

When it defers to an arbitrator’s award, the Board does not make any finding regarding whether an unfair labor practice occurred; it simply accepts the arbitrator’s award as a collectively-bargained-for resolution of the dispute. In essence, the Board stays its hand. But that the Board may choose not to stay its hand and may enter an order of its own does not automatically mean that the arbitrator’s award is null and void or that the Board’s order trumps

the arbitrator's order in every respect. The issue becomes one of how to reconcile two ostensibly competing orders, neither of which is invalid on its face with as little damage to either as is reasonably possible. The answer to this conceptual issue turns, in Respondent's view, on the respective authority and jurisdiction of the arbitrator and the Board.

There is no question that the Board has primacy with respect to adjudicating unfair labor practice issues and that its "power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." [Section 10(a)]. On the other hand, arbitrators clearly have primacy regarding interpretation of collective bargaining agreements. Thus, "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. [29 U.S.C. § 173 (d)]. The Board's authority to interpret collective bargaining agreements is purely ancillary to its power to adjudicate unfair labor practices, and the federal courts owe no deference to the Board's interpretation of a contract. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 203 (1991). The federal courts, however, "must give[an arbitrator's] award the greatest deference imaginable—the award must be enforced so long as the arbitrator purports to be interpreting the contract rather than dispensing 'his own brand of industrial justice.'" *Utility Workers Union of America, Local 246 v. NLRB*, 39 F.3d 1210, 1216 (D.C. Cir. 1994) (quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

The federal courts have on occasion addressed the issue of Board decisions that arguably conflict with an arbitrator's decision. In *Building Materials & Construction Teamsters Local 216 v. Granite Rock Co.*, 851 F.2d 1190 (9<sup>th</sup> Cir. 1988), the court considered an employer's objection to arbitrating a particular contractual dispute on the ground that the issue had already been

decided by the Board adversely to the union. The union's contractual claim regarded an assertion that the employer had opened up an alter-ego operation without recognizing the union and without applying the existing contractual provisions. The employer thereafter filed a unit clarification petition, which resulted in a Board finding that the newly created operation was not an alter-ego and was not part of the pre-existing bargaining unit. Relying on this determination by the Board, the employer asserted in federal court that the contractual dispute was not arbitrable. The union, on the other hand, acknowledged that the Board determination was controlling on the unit determination issue, but that the issue of whether the employer was required to apply the economic provisions of the agreement to the new unit was for the arbitrator. Agreeing with the union, the court of appeals distinguished between the representational issue and the distinct contractual issue and noted that "a Board decision takes precedence over an inconsistent arbitration award only when the dispute to be arbitrated involves representational issues." *Id.* at 1195. Thus, the employer was ordered to arbitrate.

In *Eichleay Corp. v. International Assoc. of Bridge, Structural, & Ornamental Iron Workers*, 944 F.2d 1047 (3d Cir. 1991), the United States Court of Appeals for the Third Circuit confronted a similar situation, but in the context of an actual arbitration award that the employer contended was rendered unenforceable because it allegedly conflicted with a unit clarification determination by the Board. Like the Ninth Circuit in *Granite Rock*, the Third Circuit held that the Board decision prevailed only as to the part of the arbitration award that turned on the representation issue. It did not trump the arbitrator's award insofar as it dealt with contractual claims.

Against this background, it is necessary to compare Arbitrator Potter's Award to a potential Board order in this case if it were to decline to defer and were to find that Palmer's

discharge constituted an unfair labor practice. Thus, for purposes of this argument, Respondent assumes (without agreeing) that the Board would find a violation of the Act, enter a standard cease-and-desist order, require the posting of an official Board notice, and provide a reinstatement and make whole remedy. The question thus devolves to how such an order (if it were to issue) should be harmonized with Arbitrator Potter's award finding a contractual violation and ordering reinstatement, but denying backpay and interim seniority accrual because of Palmer's lying during the investigation and before Arbitrator Potter. What is immediately apparent is that certain aspects of Arbitrator Potter's award and the hypothesized Board order would be either consistent with each other or not directly in conflict:

1. Reinstatement (Both orders) ( Palmer has already been reinstated);
2. Cease and Desist order (Implicit in Arbitrator Potter's award; Explicit in Board order);
3. Notice Posting (Board order only).

What might be in conflict would be:

1. Backpay for the one-year period prior to reinstatement;
2. Interim Seniority Accrual.

If Arbitrator Potter's denial of backpay and interim seniority were truly repugnant to the Act in the sense that his award disclosed on its face that this denial of relief was based on Palmer's activities that were protected under the Act, Respondent would readily acknowledge that an ostensible Board order would effectively override this denial of relief for the simple reason that the Board is predominant when it comes to determining section 7 issues. But no remotely plausible argument can be made that Arbitrator Potter's award is repugnant in that sense. Indeed, Arbitrator Potter's denial of certain relief was based in part on conduct in the

workplace that is clearly unprotected (lying during the Respondent's internal investigation) and in part on post-discharge conduct at the arbitration hearing (perjured testimony) that is beyond the Board's jurisdiction. It is not within the Board's province to question Arbitrator Potter's determination that Palmer deliberately perjured herself before him. Nor does the Board have the authority to nullify the penalty imposed by Arbitrator Potter under the contract for such misconduct by Palmer. This was an issue on which Arbitrator Potter had exclusive jurisdiction.

Viewed in this manner, it becomes clear that any Board order finding Palmer's discharge to be an unfair labor practice must avoid rendering the penalty imposed by Arbitrator Potter a nullity. If the Board determines that deferral is not appropriate for some reason other than repugnancy to the Act,<sup>4</sup> that it should adjudicate the unfair labor practice allegation, and that a violation has been established, it is free to issue a cease and desist order, require a notice posting, and order reinstatement, but it may not grant that which Arbitrator Potter has taken away for reasons that are unrelated to any protected activity and that are within his sole judgment and discretion.<sup>5</sup> To hold otherwise would mean that "both an arbitrator's award and a conflicting Board order could be enforced simultaneously in the federal courts." *Utility Workers Union, supra*, at 1216.

**B. Palmer Deliberately Perjured Herself Before The Board And Should Be Denied All Relief.**

If, however, the Board should find a violation of the Act, a serious question remains as to the appropriate remedy. It is clear that not only did Palmer deliberately lie in the arbitration

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<sup>4</sup> For example, if the Board were to decline to defer because the statutory issue was not adequately addressed, Arbitrator Potter's contractual award would retain complete vitality.

<sup>5</sup> This is not a situation in which one tribunal grants relief that a second tribunal is without authority to grant. Arbitrator Potter did not merely fail to award backpay; he specifically denied Palmer the backpay to which she otherwise would have been entitled, and he did so for the purpose of penalizing her for misconduct unrelated to any protected activity.

hearing, but she perpetuated this perjury in the unfair labor practice proceeding. Thus, ALJ Sandron noted that he too found that Palmer was untruthful. (JD 4:4-5). Palmer's perpetuation of her lie before the Board is particularly egregious given her prior discrediting by Arbitrator Potter. Palmer had an opportunity to correct her prior testimony, but chose not to take it. She could have asserted that her memory was faulty, but she did not. Instead, she categorically repeated the same incredible story that she testified to in the arbitration proceeding.

It is well settled that the Act does not foreclose the Board from withholding a remedy to an unlawfully discharged employee if that employee perjures herself before the Board. Indeed, as the Supreme Court has recognized, “[f]alse testimony in a formal proceeding is intolerable” and “a ‘flagrant affront’ to the truth-seeking function of adversary proceedings.” *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 323 (1994). “Perjury should be severely sanctioned in appropriate cases.” *Id.* Thus, the Board would be within its statutory authority to adopt a rule precluding a perjurer “from profiting from the proceeding, or it might even have adopted a flat rule precluding reinstatement when a former employee so testifies.” *Id.* Section 10(c) of the Act grants the Board wide discretion in fashioning an appropriate remedy and explicitly authorizes it to withhold backpay if to do so will “effectuate the policies” of the Act. While current Board precedent would not adversely affect Palmer's remedy inasmuch as her perjury before the Board occurred *after* the backpay period ended, *First Transit, Inc.*, 350 NLRB 825, 829 (2007), Respondent contends that the Board should, as the Supreme Court has suggested it might do, adopt a flat rule barring an employee who perjures herself in a formal proceeding before an ALJ from “profiting from the proceeding.” *Id.* In the words of Justice Scalia, the Board now has “an opportunity to do something for the law.” *Id.* at 331 (Justice Scalia, concurring). Thus, even if the Board should find a violation of the Act, Palmer should be denied all remedial relief.

**C. Respondent Did Not Maintain An Unlawful Rule Regarding Distribution.**

Respondent contends that the ALJ erred in finding a violation of the Act based on a no-distribution rule found in Respondent's work rules. "In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Village Heritage-Livonia*, 343 NLRB 646, 646 (2004). "If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647.

Although the distribution rule set out in Class II, Rule 4, if viewed in isolation, might arguably be construed as overly broad insofar as it requires that any distribution of literature be "authorized," in context, it is clear that the reference to "unauthorized" in Rule 4 does not mean, as the ALJ found, authorization or approval by Respondent. Rather, in context, it is clear that the word "unauthorized" simply means not authorized by, or consistent with, the detailed written Solicitation Policy or the detailed provisions of the collective bargaining agreement. As set out in the Facts section of this brief, there is a formal solicitation/distribution policy that is lawful and that permits distribution of literature (without employer authorization) in non-work areas and non-patient care areas during non-work time. The collective bargaining agreement itself contains similar negotiated provisions. Given that Rule 4 does not state that the Respondent's authorization is required, there is no basis for construing the rule as anything other than a reference to the policy itself and the collective bargaining agreement. Notably, in its investigation of Palmer, Kurmaskie made no effort to determine if anyone had "authorized"

Palmer to distribute the flyer. Instead, he focused exclusively on the time and place of distribution. This further supports Respondent's interpretation. In these circumstances, Respondent contends that employees clearly understood what was and was not permitted regarding distribution of literature.

The Judge's reliance on *Teletech Holdings, Inc.*, 333 NLRB 402 (2001) is misplaced. In *Teletech*, the employees were not represented by a union. The employer maintained a lawful solicitation/distribution policy, but also published a "Welcome Booklet," which prohibited "soliciting products or distributing literature without proper authorization." The Board found this rule overly broad and presumptively unlawful, subject to the employer showing "that it communicated or applied the rule in a way that conveyed a clear intent to permit distribution of literature in nonworking areas during nonworking time." *Id.* at 403. "A clarification of an ambiguous rule or a narrowed interpretation of an overly broad rule must be communicated effectively to the employer's workers to eliminate the impact of a facially invalid rule." *Id.* In the circumstances of that case, the Board found that the employer had not carried its burden.

There is a meaningful difference, however, in the way an ordinary person would read the following two prohibitions: (1) unauthorized distribution of literature, (2) distribution of literature without proper authorization. The former rule, by placing the adjective in front of the operative act, merely creates a brief label; it does not impose any affirmative obligation on the employee to seek approval from management or limit the source of authorization, nor does it describe what would be "unauthorized." The adjective "unauthorized" could just as easily have been replaced by "improper" or "inappropriate" or "impermissible" or "prohibited" without changing the meaning. None of these adjectives describe what is unauthorized, improper, inappropriate, impermissible or prohibited. Thus, by necessity an employee reading this rule

would look to other sources; i.e., the policy itself and more importantly, the collective bargaining agreement to determine what was permitted and what was “unauthorized.” The latter rule, however, by virtue of the prepositional phrase that follows the operative act, and the inclusion of the additional word “proper,” suggests that the employee must do something concrete to obtain proper authorization. It does not merely label the activity; it implies that affirmative action of some type is necessary in order to receive “proper authorization.” An employee reading this rule could reasonably conclude that management approval was necessary.

But even if the Board views the two rules as equivalent, there is a substantial difference when there is a collective bargaining agreement in place. In such a setting, unlike a non-union environment, employees readily understand that the collective bargaining agreement overrides any inconsistent rules or policies. And because employees are presumed to be familiar with the governing collective bargaining agreement, clear notice has been given. In these circumstances, even if Rule 4 is presumptively overbroad, Respondent has carried any burden that it may have of rebutting the presumption. Respondent requests that this allegation be dismissed.

### **CONCLUSION**

Respondent requests that the Consolidated Complaint be dismissed in its entirety.

Respectfully submitted this 14<sup>th</sup> day of August 2012.

/s/ Charles P. Roberts III

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day, I served the forgoing BRIEF IN SUPPORT OF CROSS-EXCEPTIONS by electronic mail on the following parties:

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