

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

**AMERICAN FEDERATION
OF TEACHERS NEW MEXICO, AFL-CIO**

and

Case 28-CA-064412

ANDREW T. LOTRICH, an Individual

**AMERICAN FEDERATION OF TEACHERS
NEW MEXICO, AFL-CIO, AND AMERICAN
FEDERATION OF TEACHERS, JOINT EMPLOYERS**

and

Case 28-CA-074397

JAMES D. BEATY, an Individual

BRIEF IN SUPPORT OF ACTING GENERAL COUNSEL'S EXCEPTIONS

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**ACTING GENERAL COUNSEL'S BRIEF
IN SUPPORT OF EXCEPTIONS**

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel files the following Brief in Support of Exceptions to the Decision of Administrative Law Judge Margaret G. Brakebusch (ALJ) [JD(SF)-28-12] (ALJD), issued on June 22, 2012, in the above captioned cases. In the consolidated complaint herein, the Acting General Counsel (General Counsel) alleges that Respondent American Federation of Teachers, New Mexico (Respondent AFT-NM) engaged in conduct that resulted in twenty independent violations of Section 8(a)(1) of the Act and violated Section 8(a)(3) of the Act by laying off, refusing to transfer, suspending, and terminating Charging Party Andrew Lotrich (Lotrich) and, along with Respondent and joint employer American Federation of Teachers, refusing to hire Charging Party James Beaty.¹

¹ The General Counsel is not excepting to the allegation that joint employers American Federation of Teachers, New Mexico (Respondent AFT-NM) and American Federation of Teachers (Respondent AFT) unlawfully

In her decision issued on September 25, 2012, the ALJ found merit to fifteen of the twenty 8(a)(1) allegations. The ALJ concluded that none of the five 8(a)(3) allegations had merit. Through these Exceptions and Brief in Support of Exceptions, the AGC respectfully submits that the ALJ's determinations of non-merit for five of the Section 8(a)(1) allegations and three of the Section 8(a)(3) allegations are based on flawed factual findings and legal conclusions and should not be adopted.

I. BACKGROUND

As the ALJ notes in her Decision, Respondent AFT-NM is a state affiliate of the American Federation of Teachers and serves as the collective bargaining representative for about 29,000 employees in 30 bargaining units throughout the State of New Mexico. (ALJD 3:6-7) All of the exceptions presented herein relate to Respondent's conduct toward Lotrich. Lotrich's extensive union activities are summarized in the ALJD. (ALJD 3:44-4:16) Lotrich was employed as one of Respondent AFT-NM's five field representatives and was represented as an employee of Respondent AFT-NM by the International Association of Machinists & Aerospace Workers, AFL-CIO, Local Lodge 794 (Union). (ALJD 3:18-19, 28-19)

refused to hire organizer James Beaty. Therefore, for purposes of these exceptions, "Respondent" refers just to Respondent AFT-NM.

II. ARGUMENT

A. **The ALJ erred in not finding that Respondent's conduct threatened employees from engaging in Union activities and resulted in employees being subject to work rules that prohibited their Section 7 activity. [Exceptions 1-4]**

As the General Counsel's argument in support of Exceptions 1-4 involve the same factual and legal issues, these four exceptions are briefed together. In these four exceptions, the General Counsel excepts to:

1. The ALJ's finding that there is no credible evidence in support of the allegations pled in consolidated complaint paragraphs 5(b)(1) and (2). (ALJD 13:4-5)
2. The ALJ's conclusion that there is no merit to consolidated complaint paragraphs 5(b)(1) and (2). (ALJD 13:4-5.)
3. The ALJ's finding that "it is reasonable that Trujillo [AFT-NM president Christine Trujillo] might have had concerns about how Lotrich would conduct himself" in a meeting and that "it is also reasonable that she would have pulled him aside to remind him to be aware of his behavior and to encourage him to modify his behavior in keeping with the behavior modification plan." (ALJD 13:24-28)
4. The ALJ's conclusion that there is no merit to consolidated complaint paragraphs 5(b)(1), (2), (3), and (g). (ALJD 13:28-30)

As the ALJ found in her decision, Respondent AFT-NM, through its President Christine Trujillo and its Vice-President Kathy Chavez, violated Section 8(a)(1) of the Act by creating an impression of surveillance of its employees' union activities when it questioned Lotrich about his participation in a Union meeting he attended and interrogated multiple employees about Lotrich's protected activity during that meeting. (ALJD 7:16-20, 43-44) Despite President Trujillo's protestations to her subordinate Chavez that engaging in such

conduct would be unlawful, Chavez convened a meeting with Trujillo, Lotrich and Union Steward and unit employee Joe Hill to systematically interrogate and threaten Lotrich about his union activities at a closed-door employee union meeting that was held a few days earlier. Chavez in particular was incensed about Lotrich's short-lived, undeveloped and unimplemented suggestion at this meeting that a no-confidence vote be taken concerning Chavez and her position in light of Trujillo's announcement that day that she may resign. The details of Respondent AFT-NM's unlawful conduct are set forth by the ALJ in her deliberations and conclusions regarding Respondent AFT-NM's Section 8(a)(1) violations, as pled in consolidated complaint paragraphs 5(a)(1),(2),(3),(4),(5), and 5(k). (ALJD 4:20-8:17) As the ALJ also found, Chavez admitted that she was upset about Lotrich's activities and went so far as to threaten him that she would "nip it in the bud" and/or "get even" with him. (ALJD 6:34-36; 8:1-16) It is that expressed anger and intent to retaliate, the General Counsel asserts, that formed the unlawful basis for Lotrich's denied transfer request, suspension, and termination that shortly followed.

The factual circumstances underlying the allegations in consolidated complaint paragraphs 5(b)(1),(2),(3), and 5(g) arose quite soon after Chavez's brazen threat and vow of retaliation. About a week after these interrogations and threats occurred in May 2011, conduct *found to be unlawful by the ALJ*, - Trujillo called Lotrich into her office. (Tr. 151) Only Lotrich and Trujillo were present. (Tr. 151) Trujillo quietly petitioned Lotrich for his "help," pleading with Lotrich, "I need you to work on this with me. Kathy [Chavez] is giving me all kinds of grief and pressure that we need to do something with you. So will you please, please just work with me on this." (Tr. 151, 251) At that point, Trujillo produced a short, one-paragraph or so document entitled as a behavior plan for Lotrich. (GCX 21; Tr. 151-152)

The proposed “behavior plan,” as testified by Lotrich, was described by Trujillo as “stemming from your [Lotrich’s] comments to Kathy about you wanting to have that no-confidence vote” and was backdated to appear as though it had been initiated in March 2011. (Tr. 154)

After a discussion of Chavez’ motivations and actions in trying to form a “coalition” against Lotrich with other agents of Respondent AFT-NM, Lotrich reluctantly agreed to work with Trujillo on the plan, “because that was the friendship and the relationship that we had” (Tr. 153-154) Lotrich then retreated to his own work area to draft his own “behavior modification plan,” which was backdated as if it had been formulated in March 2011 to appease Chavez and then was simultaneously signed off on as having been “met.” (Tr. 154-155, 272-273) Never before had Lotrich been spoken to or a party to any behavior plan by Respondent AFT-NM. (GCX 22, 50; Tr. 154-155, 269-270)

At some point after this for-appearances-only behavior plan was simultaneously formulated, “implemented” and “fulfilled,” a brainstorming session was convened and facilitated by American Federation of Teachers (AFT) Regional Director Jennifer Kaseman at Respondent AFT-NM’s offices. (Tr. 157) Prior to this session, Trujillo pulled Lotrich aside and cautioned him by telling him, “Andy, make sure at this meeting you do not talk like Andy; they’re watching you. (Tr. 158) Trujillo added, “make sure you limit everything you say when you enter the room.” (Tr. 158) Lotrich agreed and stayed quiet in the meeting unless asked direct questions, having reached a reasonable conclusion that to do otherwise would make him vulnerable to discipline or other repercussions from Respondent AFT-NM. (Tr. 78-79, 277, 280) Moreover, for the first time, seating arrangements had been prearranged by management, with Lotrich seated at a different table than Union Steward Joe

Hill, who was seated between Respondent AFT-NM Staff Representatives John Ingram and Judy Johnston. (Tr. 157-158)

The ALJ, in her discussion of the evidence proffered by Respondent AFT-NM to support the need for the so-called behavior plan, repeatedly underscored its unpersuasiveness, finding, for example, that the alleged complaints were uncorroborated by the employees who purportedly complained about Lotrich and that the alleged complaints were reported far enough after-the-fact to belie any claim of urgency by the employee “targets.” (ALJD 11:10-38) Nevertheless, the ALJ concluded that neither Respondent AFT-NM’s sham behavior plan nor Trujillo’s coercive remarks to Lotrich about restraining his meeting participation violated the Section 8(a)(1) of the Act as alleged in consolidated complaint paragraphs 5(b)(1),(2),(3), and (g). (ALJD 12:15-13:30.)

The Board applies an objective test to determine whether an employer has violated the Act through interference, restraint, and coercion, under Section 8(a)(1) of the Act. The Board in *Double D Construction Group* explained that the test “of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.” 339 NLRB 303, 304 (2003). As discussed above, Trujillo revealed to Lotrich that Chavez was giving her all kinds of grief and pressure to do something against Lotrich in retaliation against his Union activity at the early May 2011 union meeting at which the no-confidence vote idea was briefly initiated and floated by Lotrich to other Union members. (Tr. 151, 251)² This statement is a clear threat of unspecified reprisals for his engaging in protected activities. *SKD Jonesville Division, L.P.*,

² The ALJ appears concerned that no witness could elaborate upon what a “no-confidence vote” was or would mean. This is because, as Lotrich testified, it “went nowhere” and was never discussed again. (ALJD 5:4-21.)

340 NLRB 101, 101-102 (2003). The sham behavior plan was an extension of Respondent AFT-NM's animus toward Lotrich and the ALJ's finding otherwise should be reversed.

Moreover, as discussed above, Trujillo also pulled Lotrich aside and cautioned him that during the upcoming training session, he should not talk like "Andy", or in essence like, himself and to make sure he limited everything he said during the session. (Tr. 158) This threatening directive clearly restrains and coerces an employee regarding their Section 7 activity. Specifically, Trujillo's statement to Lotrich is an overly-broad rule designed to restrict Lotrich's ability to engage in Section 7 activity at work. *Praxair Distribution, Inc.*, 357 NLRB No. 91, slip op at 15-16 (2011); *Industrial Wire Products, Inc.*, 317 NLRB 190 (1995). As such, the General Counsel respectfully submits that the ALJ erred in not finding that Respondent AFT-NM violated Section 8(a)(1) of the Act by orally promulgating such an overly-broad and discriminatory rule that prohibits and infringes upon employees from engaging in Section 7 activity.

Likewise, Trujillo warned Lotrich not to talk like himself during an early June 2011 training session because management representatives from Respondent AFT-NM and AFT were "watching him". (Tr. 158) Such a statement not only unlawfully restricts Lotrich in his ability to engage in Section 7 activity, but also creates the implication that he will face some sort of adverse action if he continues to engage in any such activity at work and/or during the training session. In fact, as briefed above, his behavior *was* restrained as a result of this threat. This is an unlawful threat of unspecified reprisal directed at Lotrich if he engaged in Union or other protected concerted activities at work. *SKD Jonesville Division, L.P.*, 340 NLRB at 101-102.

This same statement also violates Section 8(a)(1) of the Act because Respondent AFT-NM made it clear to Lotrich that he was being monitored and, in turn, conveys beyond reasonable doubt that his activities were under surveillance by management. *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999); *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 (1996). As such, the General Counsel submits the ALJ erred in not finding that Respondent AFT-NM violated Section 8(a)(1) of the Act by making an unlawful threat of unspecified reprisal to Lotrich and by creating the impression with him that his Union activities were being monitored and under surveillance.

B. The ALJ erred in not finding that Respondent’s conduct threatened employees by telling them that their engaging in Union activities was futile because Respondent AFT New Mexico accomplished a lot at the bargaining table when they did not engage in Union activities. [Exceptions 5-6]

In the General Counsel’s argument in support of Exceptions 5-6, the General Counsel excepts to:

5. The ALJ’s findings that Trujillo “was actively trying to help Lotrich to modify his behavior in various aspects of his life” and that “[i]t is reasonable that she would have tried to explain to Lotrich how his behavior affected the bargaining process.” (ALJD 15:5-7)
6. The ALJ’s conclusion that there is no merit to consolidated complaint paragraph 5(f)(2). (ALJD 15:9-10)

Respondent AFT-NM’s attempts to marginalize Lotrich’s participation in actions related to his working conditions were further exposed when Lotrich, a Union negotiating committee member, was called out-of-town for an emergency bargaining session for a Respondent AFT-NM work unit and was unable to attend one of the Union bargaining sessions with Respondent AFT-NM. (Tr. 160-161) The following morning, per his usual

routine of careful accountability to management, Lotrich updated Trujillo on what had happened with the emergency bargaining for which he had helped as a staff representative. (Tr. 160-161)

When the conversation turned to the previous night's bargaining session for the Union contract, Trujillo commented, "Andy, you know what. Last night's negotiations went really, really well. It was nice not having you in the room. We got a lot accomplished." (Tr. 160-161) Lotrich, well familiar with Trujillo's demeanor as both a subordinate and a personal friend, testified that this was not said in a jovial or joking manner. (Tr. 162) Lotrich did not respond and proceeded to perform his heavy workload for the day. (Tr. 161-162) As Lotrich testified at hearing, he clearly got the message: it would be best if he no longer attended bargaining sessions. In fact, as a direct result, he discontinued serving on the Union negotiating committee or otherwise attending bargaining sessions. (Tr. 281-282) Even with her speculative and subjective conclusion that Trujillo was "actively trying to help Lotrich," the ALJ found that this statement by Trujillo to Lotrich violated Section 8(a)(1) of the Act by restricting his union activities. However, she declined to find that it also constituted a threat as alleged in complaint paragraph 5(f)(2), namely that it also resulted in a threat of futility because Respondent informed Lotrich that Respondent AFT New Mexico accomplished a lot at the bargaining table when he did not engage in these Union activities. (ALJD 15: 5-11)

Contrary to the ALJ's finding, the General Counsel respectfully submits that Trujillo's statement not only unlawfully restricted Lotrich's activities, but it also conveyed the threatening message that Respondent AFT-NM may engage in conduct to frustrate the employees' selection of union representation. *St. Luke's Hospital*, 258 NLRB 321, 322

(1981) The record does not reveal whether the circumstances of Lotrich even being called out of town that particular night warrant skepticism. Even so, with this threat, the General Counsel submits the ALJ erred in not finding that Respondent AFT-NM violated Section 8(a)(1) of the Act by threatening Lotrich with Trujillo's unsolicited declaration that Respondent AFT-NM got a lot accomplished at the bargaining table when Lotrich wasn't there due to performing emergency out-of-town work for Respondent AFT-NM.

C. The ALJ erred in not finding that Respondent violated Section 8(a)(3) of the Act by refusing to grant Lotrich's request to transfer to another bargaining unit position. [Exceptions 7-9]

In Acting General Counsel's arguments in support of Exceptions 7-9, AGC excepts to:

7. The ALJ's finding that "although Trujillo denied his [Lotrich's] request for an immediate transfer to one of the positions that were going to be created in November, she did not deny Lotrich the opportunity to apply for those jobs." (ALJD 20:25-27)
8. The ALJ's finding that there is no evidence that Lotrich was treated any differently than other laid off organizers regarding vacant positions. (ALJD 20:30-37)
9. The ALJ's conclusion that there is no merit to consolidated complaint paragraph 6(b). (ALJD 20:38)

In her decision, the ALJ found that when Respondent AFT-NM notified Lotrich of his layoff, which is briefed fully immediately below, it did not deny him the opportunity to apply for vacant Respondent AFT-NM jobs. (ALJD 20:26-27) The ALJ further found that there was no evidence that Lotrich was treated differently than any other laid off personnel. (ALJD 20:25-38.) However, the record is conspicuously silent as to whether any other laid-off personnel even requested transfer to open State Affiliate Political Organizer (SAPO) and other organizing positions, so the basis for the ALJ's finding of non-disparate treatment is unfounded. Moreover, record evidence establishes that Lotrich stood out as a candidate for

the SAPO position. As acknowledged by the ALJ, Lotrich was an experienced lobbyist for Respondent AFT-NM, even serving as a trainer for Respondent's AFT-NM lobbyists.

(ALJD 4:3-6)

On August 17, 2011, Hill and Lotrich were called into a meeting with Trujillo and Chavez. (Tr. 197) Having received a heads-up from Hill about the probable content of the meeting (i.e., layoffs), Lotrich went into the meeting with a prepared resume and cover letter. (Tr. 198) As soon as he entered Trujillo's office, Lotrich handed the resume and letter to Trujillo and requested transfer to the open SAPO position, a position most recently held by Tiffany Fiser, who had resigned and left the position vacant. (Tr. 198, 648) At this time, Lotrich also began recording the meeting, a transcript of which is in the record.

(GCX 30-31; Tr. 181-182)

Trujillo handed Lotrich his layoff letter and Lotrich immediately began questioning her about the open SAPO position. (Tr. 198-199) Trujillo confirmed that the vacant SAPO position was a bargaining unit position. (Tr. 198-199) Trujillo concedes that Lotrich asked her at the August 15, 2011 layoff meeting to be transferred into the SAPO position, and she also concedes that in response, she immediately denied his request. (Tr. 80-81)

After Lotrich asked for transfer to the SAPO position, Trujillo denied it on the stated ground that Lotrich was "no longer an employee," even though his layoff was not effective for another month, namely September 15, 2011. (Tr. 199) When Lotrich and Hill both pointed this out, Trujillo simply responded "Denied," and refused to enter into any further discussion about the requested transfer. (Tr. 199) While Trujillo purports that the SAPO position is not a "transferable position," because AFT shares "oversight" on the position, it is undisputed that the SAPO position is a bargaining unit position in the Union

unit and that it is encompassed by the terms of the Union contract, including the transfer provisions. (GCX 12; Tr. 81, 199)

After Trujillo informed Lotrich about his layoff and asserted an economic motivation for it, she then proceeded to tell him that there would be five new positions created for Respondent AFT-NM, two management positions (program director and staff director) and three bargaining unit organizer positions. (Tr. 200) Lotrich wanted to keep working for Respondent AFT-NM and, at that point, he immediately requested transfer into one of the organizer positions. (Tr. 199-200)

It is well settled that shifting defenses is evidence of a discriminatory motive. *Taft Broadcasting Co.*, 238 NLRB 588, 589 (1978) “When an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted.” *Sound One Corp.*, 317 NLRB 854, 858 (1995) The shifting defenses proffered by Respondent AFT-NM to support its refusal to not allow Lotrich to transfer into a vacant Respondent AFT-NM bargaining unit position (i.e., SAPO or organizer) belie pretextual, unlawful motivation.

As noted above, when Lotrich made his request at the August 17 layoff meeting to transfer to an open bargaining unit position, Trujillo told him that he was no longer an employee and could not transfer. In its Answer to the Consolidated Complaint, Respondent AFT-NM and AFT state as an affirmative defense:

Both Mr. Lotrich and Mr. Beaty were not placed into the positions that they sought because they were not qualified and had substandard work performance in their previous positions.

(GCX 1 (bb), p. 6) However, at the hearing, Respondents’ counsel backtracked, clarifying on the record that Lotrich “wasn’t *not* hired to those positions because of his qualifications.” (Tr. 128 [emphasis added])

Respondent AFT-NM has attempted further argument about Lotrich's alleged lack of employee status or poor work performance as the basis for not being allowed to transfer to an open position. Such varying defenses are clearly "shifting defenses," which in and of themselves can constitute evidence of unlawful motive. See *McClendon Electrical Services, Inc.*, 340 NLRB 613, 614 (2003) ("[s]uch shifting assertions strengthen the inference that the true reason was for [protected] activity.")

Trujillo's hasty and nonsensical denial of Lotrich's transfer requests to SAPO and organizer positions for which he was more than well-suited on the patently unsupportable basis that he was "no longer an employee" (even though he was still on the payroll for another month) warrants a finding of unlawful motive by Respondent AFT-NM's refusal to transfer Lotrich into the vacant SAPO position. (Tr. 91-92) Not only does Trujillo's conclusory and unsubstantiated testimony fail to meet Respondent AFT-NM's burden of persuasion, it appears to be false and as such is evidence of pretext, and accordingly, unlawful motivation. *TCB Systems, Inc.*, 355 NLRB No. 162, slip at 3 (2010) (failure to substantiate an asserted rationale for a disputed employment action coupled with evidence undermining that rationale supports a finding of unlawful motivation.)

The Board will infer an unlawful motive where the employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive". *J.S. Troup Elec.*, 344 NLRB 1009 (2005) (citing *Montgomery Ward*, 316 NLRB 1248, 1253 (1995)); *ADS Elec. Co.*, 339 NLRB 1020, 1023 (2003) Here, combining the evidence of threats, including a very strong pledge of retaliation, and work restrictions aimed at stifling Lotrich's activities, the evidence clearly supports a finding that Respondent AFT-NM refused to consider Lotrich for a transfer to an open bargaining unit position because of his prior Union

activity and Respondent AFT-NM's animus toward that activity. As such, the General Counsel respectfully requests the Board find that the ALJ erred in not finding that Respondent violated 8(a)(3) of the Act by refusing to grant Lotrich's request to transfer to an open position in the bargaining unit.

D. The ALJ erred in not finding that Respondent violated Section 8(a)(3) of the Act by suspending and discharging Lotrich because he engaged in Union activities. [Exceptions 10-21]

As General Counsel's arguments in support of Exceptions 10-21 all involve the same underlying facts and legal arguments surrounding Lotrich's suspension and termination, they will be briefed together. Specifically, the General Counsel excepts to:

10. The ALJ's finding that Lotrich included in an expense claim \$259.99 for a grill, \$249.99 for a mattress and \$105.99 for a brisk replacement shroud. (ALJD 24:33-35)
11. The ALJ's finding that the nexus between Lotrich's protected activity and his suspension and termination is "somewhat tenuous," despite the 8(a)(1) - violative threat by Respondent AFT-NM Vice-President Kathy Chavez that she would "get even" with Lotrich because of his protected, concerted activity. (ALJD 25:35-37)
12. The ALJ's conclusion that "[i]f merit is to be found in the General Counsel's allegations that Lotrich was unlawfully suspended and terminated, a decision maker must not only conclude that Lotrich did not engage in fraudulent or deceptive conduct, but also that Respondent AFT-NM simply took action against Lotrich without a valid basis." (ALJD 26:20-23)
13. The ALJ's conclusion that "the determination of whether Lotrich engaged in conduct for which Respondent AFT-NM would have terminated him in the absence of any union activity rests heavily on a credibility analysis and specifically focuses on the credibility of Lotrich's testimony." (ALJD 26:24-26)

14. The ALJ's finding that Lotrich's testimony was "totally contradicted" by the testimony of campground operator Kathryn Casey. (ALJD 27:12-13)
15. The ALJ's finding that Lotrich's expense criteria "have no foundation." (ALJD 27:35-36)
16. The ALJ's finding that Lotrich "admitted that the first time that he told anyone that he had pre-approval for the additional expenses was in his testimony at hearing." (ALJD 28:24-26)
17. The ALJ's finding that Lotrich only "constructed a rationale as to why he could have claimed for additional expenses" after Respondent AFT-NM's decision to suspend or terminate him. (ALJD 28:41-42)
18. The ALJ's conclusion that the "overall evidence" does not reveal that Lotrich received disparate treatment for his conduct. (ALJD 29:6-7)
19. The ALJ's finding that the conduct of other employees who engaged in expense claim fraud was "significantly different" than that of Lotrich. (ALJD 29:17-18)
20. The ALJ's finding that AFT-NM demonstrated that it would have suspended and terminated Lotrich in the absence of any protected or union activity. (ALJD 29:20-22.)
21. The ALJ's conclusion that there is no merit to consolidated complaint paragraphs 6(c) and (d). (ALJD 29:22)

The General Counsel respectfully submits that the ALJ's findings to which exceptions are filed regarding Lotrich's suspension and termination, findings which are heavily couched in credibility-based language even when the evidence is substantively undisputed, are fraught with critical factual omissions and misstatements.

An extensive review of the record evidence concerning the suspension and termination of Lotrich's exceptionally productive career with Respondent AFT-NM is warranted given the

gravity of these allegations for Lotrich and for the public interest in the enforcement of the Act; the context of the suspension and termination in light of Respondent AFT-NM's extensive Section 8(a)(1) violations found meritorious by the ALJ, including *Weingarten* violations at critical investigatory meetings preceding the implementation of the adverse actions; the internal inconsistency of the ALJ's Section 8(a)(3) conclusions with her findings of fifteen Section 8(a)(1) violations, *all of which involved Lotrich*; and the end-oriented appearance of the ALJ's analysis of the Section 8(a)(3) allegations.

Friday, August 19, 2011, two days after Lotrich's layoff meeting, was a busy day for communications between Lotrich and Trujillo. That morning, Lotrich provided Trujillo, by e-mail, a 21-page series of grievances pertaining to the layoffs and reorganization of Respondent AFT-NM. (GCX 29; Tr. 206) Later that day, Lotrich hand-delivered to Trujillo a hard-copy set. (GCX 29; Tr. 206) In addition to the foregoing, on the morning of August 19, Lotrich also submitted to Trujillo cover letters, resumes and writing samples for the staff director position, the program director position and the organizer positions that had been posted by Respondent AFT-NM. (GCX 36 (a)-(f), 37-39, 51; Tr. 207, 226-229, 252)

After the submission of the grievances and the multiple job application materials, Lotrich received an e-mail from Trujillo timed at 2:05 p.m., stating that she needed to meet with him at 4 p.m. that afternoon at the Albuquerque offices. (GCX 33; Tr. 207) The e-mail also stated that Lotrich should bring a Union representative. (GCX 33; Tr. 207) Lotrich was out on approved leave that day and was not working; in fact he was responsible for parenting his two young daughters. (Tr. 208; GCX 34) Once he read the e-mail at around 3:30 p.m. that afternoon, he immediately responded in an accommodating return e-mail, telling Trujillo

that he was trying to arrange child care and would get there as soon as possible. (GCX 34; Tr. 208)

Lotrich arrived at the Respondent AFT-NM offices at about 3:50 p.m. and Trujillo arrived a few minutes later. (Tr. 208) Lotrich mentioned to Trujillo that she had stated in her 2:05 p.m. e-mail that he needed a Union representative. (Tr. 209) Lotrich explained that Steward Joe Hill was in Gallup, New Mexico and that there was “no way we’re getting in contact with him [Hill]”. (Tr. 209) Lotrich also explained that Union President Ernest “Red” Dow was also not available. (Tr. 209) Lotrich stated he would like a Union representative and he didn’t have one, posing the question to Trujillo, “What shall we do?” (Tr. 209) Trujillo’s responded by telling Lotrich, “Andy, I need to meet with you now.” (Tr. 209) Lotrich responded that he would meet with her to abide by her directive, but expressly emphasized that he was not waiving his right to representation. (Tr. 209) As the President of a 29,000-member, state-wide union, Trujillo undoubtedly fully understood Lotrich’s *Weingarten* rights, and the ramifications of her decision to plow on with the meeting. In fact, the General Counsel would submit, it can be reasonably assumed that Trujillo would know that it would be difficult if not impossible to locate a Union representative for a hastily called meeting late on a summer Friday afternoon. *Trujillo, when questioned on the stand, was unable to come up with a cogent single reason that the August 19th meeting with Lotrich was so urgent that it absolutely had to be convened at 4 p.m. on a summer Friday afternoon at a time he was on leave status and no Union representative was available.* (Tr. 747-748) Trujillo’s only explanation was that AFT National Legal Counsel Sam Lieberman in Washington, DC wanted the meeting convened for “timeliness” reasons. (Tr. 746-748) This explanation provides no answers but it

certainly raises some serious ones about the significance of the National AFT counsel's involvement in local staff travel reimbursement minutiae.

Once Lotrich and Trujillo were in an office, Trujillo's investigatory meeting, at which the ALJ found Respondent AFT-NM to have violated *Weingarten*, commenced. (ALJD 22:40-24:20) Trujillo handed Lotrich a predated letter notifying him that he was being suspended pending further investigation, and directed Lotrich to read it. (Tr. 211-212) As Lotrich was reviewing the layoff letter, Respondent AFT-NM Secretary Doris Williams came into the room. (GCX 35; Tr. 209-211) In a glaring act of omission in a case where even a campground operator drove a lengthy distance to testify about virtually undisputed campground costs, Williams was noticeably *not* called as a witness by Respondent AFT-NM to corroborate the critical testimony offered concerning the substance of this meeting.

Contrary to the ALJ's finding that Lotrich's expenses had no "criteria" and were not claimed or explained by Lotrich until after he was suspended/terminated (Exceptions 15, 16, and 17), a detailed discussion then followed concerning the reimbursement receipts submitted by Lotrich for the use of his personal camper for work purposes during the Back-to-School organizing Blitz in Socorro, New Mexico. (Tr. 211-212) The discussion included protracted questions, answers and comments about the nature of the receipts, the circumstances surrounding how they were calculated and turned in, and the parties' perceptions of the legitimacy of the receipts. (Tr. 211-212)

As Lotrich attempted to substantiate his calculations for his receipts, Williams and Trujillo both interrupted him, claiming that it was too much information and that he needed to give it to them in writing. (Tr. 212) Trujillo set September 2, 2011 as the date on which Lotrich's explanatory submission should be submitted, adding that a meeting would be

scheduled then to go over his written calculations as submitted. (Tr. 212) Prior to the close of the meeting, Lotrich requested Liz Graving's statement about his receipts and any other documentation used to form the basis of the August 19, 2011 letter. (Tr. 212) Nothing was ever provided to Lotrich in response to his request.

Reviewing the totality of circumstances on August 19, 2011, and the filing of the grievances, coupled with the multiple applications for open positions, including open bargaining unit positions, an explanation for Trujillo's sense of urgency emerges despite her inability/refusal as Respondent AFT-NM President and the initiator of the meeting to provide one during the hearing. The General Counsel asserts that Respondent AFT-NM knew very well that Lotrich was an experienced, proven and exceptionally capable candidate for the open Respondent AFT-NM positions for which applications were being solicited. The record on that is clear, even from the testimony of Respondent AFT-NM's own witnesses. To this end, if Respondent AFT-NM was going to be able to have Lotrich's layoff "stick" and get rid of him for good, it needed to come up with a reason quickly, before the interviewing process began later in August 2011. Clearly, the circumstances strongly suggest, Respondent AFT-NM perceived that waiting even until the upcoming Monday, August 22, 2011, when arrangements could have been made to have a Union representative present for the meeting, was too risky. And not to be forgotten is the context of the August 19, 2011 meeting, which followed on the heels of Lotrich's extensive grievance-filing, are Respondent AFT-NM's perception that Lotrich was too vocal; and perhaps, most significantly, and his targeting by Chavez in her mission to "get even" with him and to "nip in the bud" his Union activity.

Although during his suspension meeting, a meeting convened despite Lotrich's expressed desire for a Union representative, of which none was available, Trujillo informed

Lotrich that he could present a response to the charges on September 2, 2011. However, Lotrich was summoned to a meeting on September 1, 2011, and terminated *before he could present his response*. Attending Lotrich's September 1 termination meeting were Trujillo, Chavez, Respondent AFT-NM Legislative Vice-President Tim Crone, Lotrich and Hill. (Tr. 457) As soon as Hill and Lotrich arrived, Trujillo announced that Lotrich was being terminated by Respondent AFT-NM. (Tr. 457)

Respondent AFT-NM asserts that the sole reason for Lotrich's termination was his handling of a receipt he submitted for reimbursement for work expenses. (Tr. 82, 86) Use of a personal camper for work purposes was new territory for Respondent AFT-NM. *It is undisputed that at no prior time had any staff representative used a personal camper in lieu of a hotel for lodging which engaged in field work.* (Tr. 179-180, 458-459, 600-601) To understand the pretextual nature of Respondent AFT-NM's purported reason for Lotrich's suspension and discharge, a careful review of Lotrich's claimed camper reimbursement requests, how he calculated them, and his repeatedly deflected efforts to explain them to Respondent AFT-NM is essential to expose the pretextual flimsiness of Respondent AFT-NM's professed reliance the receipt as the motivating factor for his suspension and resulting termination. The General Counsel asserts that a careful review will compel a finding of animus-driven pretext.

Assigned to work on a back-to-school organizing blitz in Socorro, New Mexico, Lotrich, unlike the other organizers assigned to the project, was not reserved a motel room in Socorro by Respondent AFT-NM personnel who have, through Lotrich's career with Respondent AFT-NM, always done so. (Tr. 163, 171-172, 282) Lotrich, who owns a personal camper, decided to use his personal camper in Socorro. (Tr. 172) This decision

was a significant money-saver for Respondent AFT-NM, as the hotels in the Socorro area ran in the range of \$100 a night.

While the campground fee was \$26 a night, there were associated costs for work-related use of the camper, e.g., propane for power, toilet paper, and other “amenities” which would be routinely encompassed within the cost of a motel room. (GCX 28; Tr. 176-177) Contrary to the ALJ’s finding, *at no time did Lotrich include in his expense claim the large amounts for durable goods cited in Exception 10*. To the extent that “capital” expenses were factored in by Lotrich, they were prorated for the six-day time frame he had been willing to use his personal camper for Respondent AFT-NM work. Moreover, contrary to the ALJ’s finding (Exception 14), campground operator Kathryn Casey’s testimony did *not* “totally contradict” Lotrich’s testimony that he did not have a receipt for a last-minute sixth night at the campground because the office was closed on Sunday morning and payment was made through a drop box. To the contrary, Casey’s testimony actually corroborated Lotrich’s testimony that he did not have a receipt for the sixth night. (Tr. 661-662)

On multiple occasions, Lotrich discussed the use of his personal camper and/or the method by which the costs would be calculated for reimbursement with Respondent AFT-NM personnel. (Tr. 173-179) These multiple conversations, or attempted conversations, were unsuccessful, as Respondent AFT-NM management was unwilling to engage with him on the subject. The following efforts to discuss the camper expenses with management hardly reflect a profile of someone who was out to “steal” from his employer:

- raised with Matt Aber-Towns and Kathy Chavez – *before* the Socorro organizing trip even commenced. (Tr. 172)
- raised with Christine Trujillo – August 10, 2011 in Socorro, after which discussion Trujillo merely

responded to Lotrich “Just figure it out. Keep it low.” (Tr. 173-174, 304, 362-364, 682-683)

- raised with Liz Gravning – August 15, 2011 in the Respondent AFT-NM offices, when Lotrich handed to her his reimbursement paperwork, including receipts, belying Respondent AFT-NM’s claim that Gravning “initially discovered” Lotrich’s reimbursement voucher contents. (Tr. 28, 102, 175-76, 178, 290, 361-62) In fact, Gravning concedes that when Lotrich gave her the receipts for his Socorro work, he “made a point of pointing to the \$336 among and saying, I saved the union a lot of money by staying here.” (Tr. 591)
- raised with Christine Trujillo – August 15, 2011 in Mora after a meeting, at which time Lotrich reminded Trujillo of their August 10, 2011 conversation in Socorro. Trujillo responded that she was unwilling to talk about it at the time because she was tired and wanted to go home. (Tr. 179, 306, 684)
- raised with Christine Trujillo on August 17, 2011 at Lotrich’s layoff meeting, at which he referenced specific reimbursement figures and at which time Trujillo assured him, “I’ll take care of it.” (Tr. 201, 205, 289)

At no time during any of these encounters did any agent of Respondent AFT-NM object to Lotrich’s use of the camper or express any concern about it whatsoever. In fact, to the contrary, when Lotrich attempted to explain the method by which he came up with his calculations for reimbursements, he was repeatedly reassured that the reimbursement requests were being taken care of, as reflected above. (Tr. 173-179)

While Respondent AFT-NM hyperbolically and repeatedly characterized Lotrich’s modest reimbursement submissions as “stealing,” it has in fact tolerated and acknowledged overt financial misconduct by other employees with lesser, if any, disciplinary consequences. (Tr. 109) The ALJ’s finding that when other employees have been charged with expense fraud, the situations were “significantly different” (Exception 19) is simply not accurate.

Also unworthy of adoption by the Board is the ALJ's conclusion that to find Lotrich's suspension and termination unlawful, "a decision maker must not only conclude that Lotrich did not engage in fraudulent or deceptive conduct, but also that AFT-NM simply took action against Lotrich without a valid basis." (ALJD 26: 20-23, Exception 12) This is not accurate and is a fatally flawed misstatement of well-established Board law. Even if Lotrich were found to have engaged in fraud or deception (a conclusion, the General Counsel submits, is not warranted by the record), there still remains a disparate treatment analysis and an assessment of the pretextual nature of the proffered reasons for Lotrich's suspension and termination.

The ALJ, the General Counsel respectfully suggests, gives unduly short shrift to the record's disparate treatment evidence. Some of this evidence includes the following:

- Respondent AFT-MN Staff Representative Judy Johnston, *on multiple occasions*, upgraded her work-related hotel lodgings to suites despite express direction not to do so. (Tr. 110-111) In fact, Trujillo herself testified that on one occasion that Johnston even submitted reimbursement for lodging in a location *completely unrelated to work*, where she went for private business. (Tr. 111) The ALJ failed to note this latter misconduct in her Decision. Undoubtedly, the cost to Respondent AFT-Nm incurred by Johnston's deception and fraud was greater than Lotrich's calculated \$30/day add-on for camper expenses. Johnston was only reprimanded and not suspended or terminated. (Tr. 109-111, 458, 707-708)
- Respondent AFT-NM is also well-aware that John Ingram engaged in misconduct much more legitimately classifiable as "stealing" than that of Lotrich. Ingram used the Respondent AFT-NM car used for work-purposes *for a personal vacation to California* without permission. (Tr. 109, 458) He was not suspended or terminated, but only reprimanded. (Tr. 109, 458, 707) The cost to Respondent AFT-NM? Surely more than \$30/day.

- Organizer Jim Beaty was discovered to have fabricated out of thin air his own receipt in order to get reimbursed for a meal. While the ALJ posits this as merely creating a document for an expense that would have been reimbursable anyway, that is not the case. Beaty’s meal would *not* have otherwise been reimbursable under Respondent AFT-NM’s strict standards for the format required for reimbursable receipts. Beaty was not terminated, but only suspended. (GCX 20; Tr. 106-107, 111, 433-434, 458, 708-709)
- Unacknowledged by the ALJ is yet another example of disparate treatment, this one involving Joe Hill, a witness whom the ALJ enthusiastically credits (ALJD 8:10-12). Hill created an irregularly-formatted receipt from a group-incurred expense in order to secure reimbursement. (Tr. 460-461) In fact, *it was Graving herself, as Hill testified, who manipulated and altered the receipts.* (Tr. 460-461)

Contrary to Respondent AFT-NM’s past practice in handling reimbursement issues, AFT Attorney Sam Lieberman out of Washington DC, became involved in Lotrich’s case. While Graving admits that it was not Respondent AFT-NM’s practice to contact Lieberman with expense voucher issues, she testified that she “was instructed by Christine [Trujillo] through Mr. Lieberman to go ahead and look at Mr. Lotrich’s past vouchers, probably going back a couple of years” to check for inconsistencies, a search that came up *with no expense vouchers issues* other than a minor disqualified pro-rated portion of a tip on a beer that had been privately purchased by Lotrich for an otherwise reimbursable meal. (Tr. 604-606)

The General Counsel respectfully submits that the ALJ erred in not finding that there is a nexus between Lotrich’s Union activity and his suspension and termination by Respondent AFT-NM. (ALJD 25: 35-37, Exception #11) The evidence is clear that Lotrich was suspended and then discharged because he engaged in Union activities. Shortly after

participating in the May 2011 Union meeting, and after being “outed” for his comments through unlawful interrogation, surveillance, and reliance on an unlawfully broad gag rule, Lotrich was subject to additional interrogation, prohibitions of Union activity at work, and threats that reprisals were going to be taken against him. Considered with the questionable circumstances surrounding his disparately implemented discharge, a finding is warranted that Lotrich was suspended and discharged because he engaged in Union activity that infuriated Respondent AFT-NM management.

It is well-established Board law that disparate treatment is powerful evidence of unlawful motive and pretext. *North Hills Office Services, Inc.*, 344 NLRB 1083, 1099 (2005); *Mentor Automotive, Inc.*, 328 NLRB 813, 816 (1999); *New Otani Hotel & Garden*, 325 NLRB 928, fn. 2 (1998). The pretextual nature of Respondent AFT-NM’s alleged motivation for Lotrich’s suspension and termination is underscored by its piling on of after-the-fact asserted complaints about Lotrich; unreported and undisciplined sexual harassment claims; unsubstantiated reports of not getting along with other staff members; allegations that he failed to itemize receipts; accusations of profanity use; and alleged, unspecified performance problems. (See, e.g., Tr. 167-169, 247-249, 264-266, 269-270, 291)

Trujillo made it crystal clear on the first day of the ULP hearing that Lotrich’s suspension and termination were based *only* on the alleged falsification of his campground receipts. (Tr. 81-83.) Yet, contrary to Trujillo’s testimony, Respondent AFT-NM then proceeded throughout the hearing to pile on alleged misconduct for which there is no evidence of pre-termination concern and for which testamentary and documentary evidence is sparse, if not nonexistent. This kitchen-sink approach, especially toward an employee who had no discipline during his career with Respondent AFT-NM prior to this suspension, further

warrants a finding that the real motivation behind Lotrich's suspension and termination was unlawful retaliation against his Union and other protected concerted activity, specifically as it pertains to his protected speech at a Union meeting during which he expressed criticism of Respondent AFT-NM Vice President Kathy Chavez, activity which solicited overwhelming and repeated expressions of animus from Respondent AFT-NM management.

The rushed and unorthodox timeline of Lotrich's suspension and discharge also reflects unlawful motivation:

- Trujillo admits that there was no investigation between Lotrich's suspension and termination and that, in fact, the Executive Council vote was taken on both the suspension and the discharge at the same time. (Tr. 84, 105)
- AFT legal counsel out of Washington D.C. (Sam Lieberman) was uncharacteristically involved, particularly given the minor nature of the alleged misconduct, i.e., requesting reimbursement of \$56/day instead of \$26/day. As Trujillo testified, "I took my lead from the attorney," reflecting that Lotrich's termination may not have even been her idea. (Tr. 85-86)
- As briefed above, the suspension time table was inexplicably rushed, cutting off the promised time within which Lotrich could submit a rebuttal and coinciding with the time that applicants for the newly created and vacant Respondent AFT-NM positions were being interviewed.
- Trujillo was unable or unwilling, when asked, to identify any particular policy that Lotrich had violated and further conceded, as briefed above, that this was a case of first impression of a staff rep's use of a private camper as work-related lodging in lieu of the more expensive traditional motel or hotel. (Tr. 223-224)

Although the ALJ repeatedly credits Respondent AFT-NM, most notably Trujillo, the credibility of Respondents' witnesses is irredeemably impugned by repeated

mischaracterization of pivotal facts. While Trujillo denied in her NLRB affidavit during the investigation (an affidavit taken in the presence of counsel) that she had said anything like “don’t talk like Andy” to Lotrich, at the hearing, she admitted having done so. (Tr. 677, 730-731) While Trujillo admitted at the hearing that she backdated Lotrich’s “behavior plan,” in her NLRB affidavit she testified that it was finished in May 2011. (Tr. 726-727) Further, while in her affidavit she denied having done so, at the hearing Trujillo admitted that she told Lotrich that “they got a lot done” at the bargaining session when he wasn’t there. (Tr. 678) *This is sworn testimony she admitted on the stand that was not true.* (Tr. 726-727)

In summary, the evidence clearly establishes that Lotrich was discharged because he engaged in Union activities that Respondent AFT-NM did not like rather than, as purported by Respondent AFT-NM, for falsifying a receipt incurred for legitimate business expenses which Lotrich repeatedly tried to present to management. See, e.g., *Wright Line Div.*, 251 NLRB 1083, 1089 (1980), *enf’d* on other grounds, 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 461 U.S. 393 (1983); *Roadway Express*, 327 NLRB 25, 26 (1998). Lotrich was subject to threats and new rules designed to frustrate his ability to engage in protected Section 7 union activity. Lotrich was also subject to suspension and discharge for an alleged infraction that only warranted discipline (if that) to co-workers.

Discharges on the heels of union activity and evidence of disparate treatment support a finding of pretextual termination. *La Gloria Oil and Gas Co.*, 337 NLRB 1120, 1124 (2002). As such, the General Counsel submits the ALJ erred in not finding that Respondent AFT-NM violated Section 8(a)(3) of the Act by suspending and discharging Lotrich for engaging in Union and other protected concerted activities.

III. CONCLUSION

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

Dated at Phoenix, Arizona, this 23rd day of October, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION in AMERICAN FEDERATION OF TEACHERS NEW MEXICO, Cases 28-CA-064412 et al. was served by E-Gov, E-Filing, E-Mail on this 23rd day of October 2012, on the following:

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