

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

CONDITIONED AIR SYSTEMS, INC.

and

PLUMBERS AND GAS FITTERS LOCAL  
UNION NO. 5, UNITED ASSOCIATION OF  
JOURNEYMEN AND APPRENTICES OF THE  
PLUMBING AND PIPE FITTING INDUSTRY  
OF THE UNITED STATES AND CANADA,  
AFL-CIO

Case 05-CA-079299

**RESPONDENT CONDITIONED AIR SYSTEMS, INC.'S BRIEF IN SUPPORT OF  
MOTION TO REOPEN OR SUPPLEMENT THE RECORD AND RECEIVE FURTHER  
EVIDENCE**

**Statement of Facts**

On or about October 26, 2012, Arthur J. Amchan, Administrative Law Judge (“ALJ”), issued a Decision & Order in the above matter. A Revised Order was issued on January 18, 2013. Respondent filed Exceptions on February 15, 2013. On February 26, 2013, the parties agreed to participate in the National Labor Relation Board’s (“Board”) ADR Program in an effort to reach a settlement. A mediation session was scheduled on April 24, 2013. On April 26, 2013 this case was removed from the Board’s ADR Program. On May 5, 2013, Patrick J. Cullen, Acting General Counsel (“General Counsel”) requested an extension of time to file an Answering Brief and any Cross-Exceptions in response to Respondent’s Exceptions filed on February 15, 2013. On May 23, 2013, the General Counsel filed an Answering Brief.

The ALJ Decision concluded that Respondent violated and continues to violate Section 8 (a) (5) and (1) by failing and refusing to provide the Union with the information it requested on

March 22, 2012. The ALJ reached his conclusion by finding that Respondent had a contractual relationship with the Union, contending that Virginia Merrigan was an agent of Respondent and bound the Respondent to the collective bargaining agreement. The ALJ erred.

### **Standard of Review**

Under 29 C.F.R. § 102.48(d)(1), “[a] party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order,” in order to introduce additional evidence where the moving party demonstrates “the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result.” In Re Lockheed Martin Astronautics, 332 NLRB 416, 417 (2000) (citing 29 C.F.R. § 102.48(d)(1)). Respondent seeks to introduce Virginia Merrigan’s testimony on the subject of her putative agency to sign and bind Mr. Putnam to the 2008 Letter of Assent because this evidence “should have been taken at the hearing.” 29 C.F.R. § 102.48(d)(1).

Further, “29 C.F.R. § 102.48(d)(2), states that “[a]ny motion pursuant to this subsection shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board’s decision and order, except that a motion for leave to adduce additional evidence shall be promptly on discovery of such evidence.” 29 C.F.R. § 102.48(d)(2).

### **Argument**

#### *The Additional Evidence Sought to be Adduced*

Respondent seeks to adduce Virginia Merrigan’s testimony on the subject of her putative agency to sign and bind Respondent to the 2008 Letter of Assent. Upon direct examination, Ms. Merrigan’s testimony will show that she did not have actual or apparent authority to bind

Respondent to the Plumbers and Gas Fitters Local Union No. 5 (“Union”) contract with the Mechanical Contractors Association of Metropolitan Washington, Inc. (“Association”).

*Why Ms. Merrigan’s Testimony was not Presented Previously*

Ms. Merrigan’s testimony was not presented previously because Respondent did not have knowledge that she signed the 2008 Letter of Assent nor that it would be the subject of the September 6, 2012 hearing until moments before the hearing began. Respondent had requested production of the evidence to be used against him in the aforementioned hearing, but never received the 2008 Letter of Assent until the day of the hearing. As a result, Respondent did not have an opportunity to review the evidence that was about to be used against him, nor did Respondent have an opportunity to locate and produce Ms. Merrigan so that she could testify and rebut the assertion that she had actual or apparent authority to bind Respondent to the 2008 Letter of Assent.

*Why Ms. Merrigan’s Testimony Would Require a Different Result*

Ms. Merrigan’s testimony would require a different result because it would rebut the Union’s assertion, and the Administrative Law Judge’s finding, that Ms. Merrigan had actual or apparent authority to bind respondent to the 2008 Letter of Assent. In his October 26, 2012 Decision, the ALJ found that Ms. Merrigan “was clearly an agent of Respondent and thus bound Respondent to the Union’s contract with the [Association].” This finding, however, was not tied to any of the ALJ’s findings of fact, nor did the ALJ provide a legal analysis framework upon which he based his conclusion. An ALJ decision which, “fail[s] to set forth any reasoning or basis for its rulings,” is subject to remand for rehearing. John S. Barnes Corp., 197 NLRB 32 (1972).

The ALJ failed to apply the proper standard to determine whether Ms. Merrigan had proper authority to bind Respondent to the 2008 Letter of Assent. “Two conditions... must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity.” N.L.R.B. v. Local Union 1058, United Mine Workers of Am., 957 F.2d 149, 152-53 (4th Cir. 1992). “[I]t is the burden of the party who asserts that an individual has acted with apparent authority to establish the agency relationship.” In Re Pan-Oston Co., 336 NLRB 305, 306 (2001). In Local Union 1058, the court held that “the Board failed to... make the two-step analysis it requires. The Board simply concluded that the [union] signatories' status as elected officers gave them the apparent authority to file intraunion charges on behalf of their respective locals...Unless the local unions made some manifestation to the third party... that would cause him to believe that the locals had given authority to their officers to sign the charge, the apparent authority argument fails... Moreover, no signatory is identified as the officer of any entity-in other words, the principal's authority is not invoked. Moreover, even if it were, the agent cannot create his own apparent authority. Id.

Here, prong one of the conditions for “apparent authority” was not satisfied. As evidence the Union only provided the 2008 Letter of Assent signed by Ms. Merrigan, whose signature was not authenticated. ALJ Hr’g Tr. 11:6-12, Sept. 6, 2012. Further the Union’s testimony that it dealt with Ms. Merrigan does not purport apparent authority.

Q. Have you ever in your role with the Union had dealings with Conditioned Air Systems?

A. Yes.

Q. And in those dealings, had you ever dealt with Ms. Merrigan?

A. Yes, I have.

Q. Have you ever had a conversation with Mr. Putnam to the effect that Ms. Merrigan was not authorized to act on behalf of the company?

A. No, I have not.

Hr'g Tr. 11, 13-22. It is the Union's burden to establish the agency relationship, not Respondent.

Second, as in Local Union 1058, the ALJ failed to apply or even cite the second prong of the apparent authority test. No testimony was taken, and no facts were cited that tended to show that the Union relied on Ms. Merrigan's putative apparent authority to sign the 2008 Letter of Assent. In fact, the Union did not believe Ms. Merrigan had "apparent authority" because it insisted in its 2010 and 2011 letters to Respondent that it must sign successive letters of assent or their members would be pulled from work. Hr'g Tr. 30-32.

As a result, the ALJ's decision, "ignores the law of agency and applies basically a *per se* rule of apparent authority... notwithstanding the absence of any acts on the part of the principal that would create an impression of broader "apparent authority," and in disregard of whether the complaining third party knows of the limits of the agent's actual authority," and therefore the "NLRB's finding that the respondents violated the Act [was] not supported by substantial evidence." Id. The ALJ's decision fails to apply the proper standard, and fails to find that the burden of proof of establishing agency falls on the Union, and that the Union was able to overcome that burden with the respect to both prongs of the apparent authority standard. Pan-Osten Co., 336 NLRB at 306.

Upon direct examination Respondent testified that he was the majority owner of Conditioned Air Solutions and Ms. Merrigan was not included in the Articles of Incorporation. Hr'g Tr. 67, 4-20; Tr. 68, 3-20. Furthermore, that her duties were solely administrative. For example, Respondent testified on cross-examination to the following:

Q. Ms. Merrigan handled that?

A. She did the, mainly all the business transactions for the business as far as writing checks, signing checks, paying contributions to the Union.

Hr'g Tr. 64, 7-16. Like the Board in Local Union 1058, the ALJ cannot conclude that Ms. Merrigan status as Secretary/Treasurer gave her the apparent authority to act as the President and enter into contracts with the Union on behalf of Respondent. Ms. Merrigan exceeded her authority by signing the 2008 Letter of Assent. Respondent testified:

It was just brought to our attention recently from my other legal team that's working on other teams that Ms. Merrigan was not an authorized signer to be entering into an agreement with Plumbers Local 5. I have a copy on my desk of the one that I have signed for Steamfitters Local 602, and **I am the only one as president of the Company that is authorized to sign or enter into any agreement with the Company. So as far as I'm concerned, all these other documents are nonbinding because it is not a legal document signed by an official of the Company.**

Hr'g Tr. 55, 16-25. Prior to 2008, Mr. Richard Putman, President had signed all letters of assent; the Union knew he was the only person with the authority to sign letters. Again, the Union sent letters threatening Respondent if he did not sign letters of assent in 2010 and 2011. Hr'g Tr. 29-34. Mr. Putman is the only person that could bind Respondent to the 2008 Letter of Assent and the successive collective bargaining agreements.

### **Conclusion**

Had Respondent been permitted to produce Ms. Merrigan's testimony, evidence would have been introduced that would have rebutted the Union's claim that Ms. Merrigan had actual or apparent authority to bind Respondent to the 2008 Letter of Assent. Because Respondent is able to produce this additional evidence, and Respondent did not have the opportunity to produce this additional evidence at the original hearing, and because this evidence would produce a

different result due to the ALJ's erroneous and unsupported conclusion of law, this additional evidence – Ms. Merrigan's testimony - "should have been taken at the hearing," and therefore this Motion for Reopening should be granted. 29 C.F.R. § 102.48(d)(1).

Respectfully submitted,

/s/

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Date: June 18, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 19 day of June, 2013, served a copy of Respondent's Motion to Reopen or Supplement the Record and Receive Further Evidence and Brief in Support by email service upon the following:

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