UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

UNITED STATES POSTAL SERVICE

and

Case 13-CA-078058

CATHERINE BODNAR, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S MOTION TO ACCEPT LATE FILING OF EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Counsel for the General Counsel ("General Counsel"), hereby respectfully moves the National Labor Relations Board ("Board"), pursuant to Section 102.111(c) of its Rules and Regulation, to accept the late filing of its Exceptions to the Decision of the Administrative Law Judge ("Exceptions") and Brief in Support of Exceptions to the Decision of the Administrative Law Judge ("Brief in Support"), filed electronically on November 12, 2013. In support of this Motion, General Counsel states as follows:

1. On July 31, 2013, the parties to this case (Case 13-CA-078058), submitted a joint motion to the Division of Judges waiving a hearing and requesting that the Administrative Law Judge issue a decision on this matter based solely on the stipulated record.

2. On September 25, 2013, Administrative Law Judge Keltner W. Locke ("ALJ Locke") issued his Decision and Order ("ALJD"). The due date for filing of exceptions was October 23, 2013.

3. On October 1, 2013, the National Labor Relations Board closed due to a lack of appropriated funds. The agency reopened on October 17, 2013, and granted *Sua Sponte* an extension of time to file or serve documents for which the grant of an extension was permitted by law. Under the terms of the extension one day would be added to the time for filing for each day the agency was closed. As the agency's offices were closed for 16 days, 16 days were added to the original deadlines.

4. Counsel for the General Counsel mistakenly computed the date for the filing of Exceptions to be November 9, 2013. As November 9, 2013, was a Saturday, and the following

Monday was a Federal holiday and the Agency would be closed, General Counsel filed the Exceptions and Brief in support thereof on Tuesday, November 12, 2013.

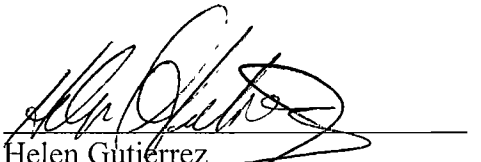
5. General Counsel learned that the Exceptions and Brief in Support thereof were filed untimely on November 14, 2013, when she was served with a letter from Associate Executive Secretary Farah Z. Qureshi which stated that the due date was November 8, 2013, and having been filed on November 12, 2013, the Exceptions and Brief in support thereof were untimely and would not be forwarded to the Board for consideration.

6. Section 102.111(c) of the Board's Rules and Regulations permit the filing of Exceptions and Briefs in Support of Exceptions within a "reasonable time after the time prescribed by these rules only upon good cause shown based on excusable neglect and when no undo prejudice would result." 29 CFR 102.111(c).

7. General Counsel's filing of its Exceptions and Brief in Support thereof the next business day after the filing deadline has not caused any prejudice nor has it resulted in any unreasonable delay in the proceedings before the Board. Counsel for General Counsel in good faith, reasonably, albeit erroneously, believed that she had correctly computed the date for the deadline for the filing of Exceptions and Supporting Brief to be November 9, 2013, and as that date fell on a Saturday, filed the Exceptions and Brief in support thereof the next business day, November 12, 2013.

WHEREFORE, in the interest of fairness and justice, Counsel for the General Counsel move the National Labor Relations Board to accept the Exceptions and Brief in Support of Exceptions it filed on November 12, 2013.

DATED at Chicago, Illinois, this 15th day of November, 2013.



Helen Gutiérrez
Counsel for the General Counsel

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
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and

Case 13-CA-078058

CATHERINE BODNAR, an Individual

HELEN GUTIERREZ'S AFFIDAVIT IN SUPPORT OF MOTION TO ACCEPT LATE FILING OF EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE

1. I am Counsel for the General Counsel of the National Labor Relations Board and I am over the age of 21 years.

2. The decision in Case 13-CA-078058 issued on September 25, 2013. Exceptions and Briefs in support thereof were due on October 23, 2013. As part of the federal government shut down, the agency was closed from October 1 through October 16, 2013 and reopened on October 17, 2013. After returning to work, I reviewed the posting titled "NLRB Reopens on October 17, 2023 – Effects of Government Shutdown on Filing Deadlines" located on the NLRB website www.NLRB.Gov. The Board had granted a 16 day extension of time to all filings. I mistakenly computed the new deadline for the filing of Exceptions and Brief in support thereof to be November 9, 2013 by adding the date to the 16 day extension of time. Operating under the mistaken belief that the deadline was Saturday, November 9, 2013, I filed the Exceptions and Brief in support thereof the nexct business day, Tuesday, November 12, 2013. I did not file them on Monday, November 11, 2013, because it was Veterans Day, a federal holiday and the agency was closed.

3. I did not become aware that I had calculated the due date in error until November 14, 2013 when I received a letter from Farah Z. Qureshi, Associate Executive Secretary of the National Labor Relations Board informing me that the correct date for filing was November 8, 2013 and that the Exceptions and Brief in Support thereof that I had filed on November 14, 2013 were untimely.

Helen Gutierrez

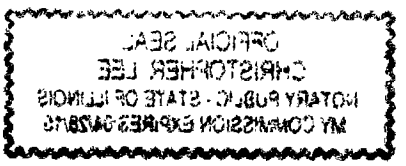
ACKNOWLEDGED and sworn before me this 15th day of November 2013, by Helen Gutierrez in Cook County, Illinois.

Notary Public

My Commission Expires:

4/28/15

OFFICIAL SEAL
CHRISTOPHER LEE
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:04/28/15


OFFICIAL SEAL
CHRISTOPHER LEE
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES 04/28/15

CERTIFICATE OF SERVICE

The undersigned Counsel for the General Counsel hereby certifies that true and correct copies of COUNSEL FOR THE GENERAL COUNSEL'S MOTION TO ACCEPT LATE FILING OF EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION has been electronically filed on November 15, 2013. Pursuant to Section 102.114, revised on January 23, 2009, true and correct copies of that document have also been served on the same date upon the following parties of record via electronic mail as set forth below:

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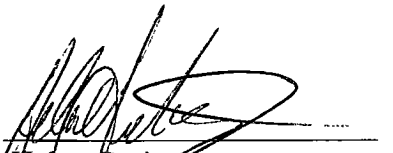

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 13

UNITED STATES POSTAL SERVICE

and **Case 13-CA-078058**

CATHERINE BODNAR, an Individual

COUNSEL FOR THE GENERAL COUNSEL's EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Board's Rules and Regulations, by the undersigned respectfully files these Exceptions to the September 25, 2013 Decision of Administrative Law Judge, Keltner W. Locke in this case[1]. Counsel for the General Counsel (General Counsel), excepts to the ALJ's decision to defer the instant case to the arbitrator's decision and dismiss the underlying complaint. (ALJD p. 8) Specifically, General Counsel excepts to the following:

1. The ALJ's finding that the phrase "is not included" has a different meaning and legal significance than the phrase "was not entitled." (ALJD p. 4)
2. The ALJ's finding that that arbitrator's award was not palpably wrong. (ALJD p. 6)

[1] In these Exceptions , the Administrative Law Judge will be referred to as the "ALJ", the National Labor Relations Board will be referred to as the "Board", the United States Postal Service will be referred to as "Respondent", and Arbitrator Karen H. Jacobs will be referred to as the "Arbitrator". Citations to the ALJ's Decision will be referred to as "ALJD" followed by the specific page(s) and line(s) referenced.

3. The ALJ's failure to consider the parties' admitted local practice of not presenting overtime eligibility during arbitration hearings and determining overtime eligibility after the arbitrator's decision issues. (ALJD p. 7)
4. The ALJ's finding that the Board should defer to the arbitrator's decision and the complaint should be dismissed. (ALJD p. 7)
5. The ALJ's failure to modify the Board's deferral standards. (ALJD p. 7)
6. The ALJ's typographical error in citing *Kvaerner Philadelphia Shipyard.* (ALJD p. 3)
7. The ALJ's conclusion of law 8 that the arbitrator's decision is not repugnant to the Act. (ALJD p. 8)
8. The ALJ's conclusion of law 9 that it is appropriate to defer the complaint to the arbitrator's decision. (ALJD 8).
9. The ALJ's Order to dismiss the Complaint. (ALJD 8).

DATED at Chicago, Illinois this 12th day of November, 2013

Submitted by:

/s/ Helen Gutierrez

Helen Gutierrez
Counsel for the General Counsel
National Labor Relations Board, Region 13
209 S. LaSalle, Suite 900
Chicago, IL 60604

CERTIFICATE OF SERVICE

The undersigned Counsel for the General Counsel hereby certifies that true and correct copies of COUNSEL FOR THE GENERAL COUNSEL's EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE have been electronically filed on November 12, 2013. Pursuant to Section 102.114, revised on January 23, 2009, true and correct copies of that document have also been served on the same date upon the following parties of record via electronic mail as set forth below:

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UNITED STATES OF AMERICA
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Case 13-CA-078058

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BRIEF OF COUNSEL FOR THE GENERAL COUNSEL IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. PROCEDURAL HISTORY

On March 22, 2012, the United States Postal Service ("Respondent") issued Catherine Bodnar, a 17 year letter carrier and union steward a Notice of Removal to terminate her employment effective April 27, 2012. Ms. Bodnar had refused to answer questions after she was denied union representation during an interview she reasonably believed could lead to disciplinary action against her. She was discharged under the guise that she had refused to participate in a postal investigation. On April 3, 2013, Ms. Bodnar filed the instant labor charge which was initially deferred to the parties' grievance arbitration procedure after she filed a grievance over her discharge on April 17, 2012. The grievance was taken to arbitration and the Arbitrator's Award ("Award") issued on November 19, 2012, finding that Respondent had no just cause to remove Ms. Bodnar from her position and ordered that she be made whole with full

back pay and benefits. The arbitrator found that although the remedy requested included overtime pay, there was no evidence that Ms. Bodnar would have been working overtime had she been working during that time and thus did not include overtime in the award.

The Regional Director determined that it would be inappropriate to defer to the award as it was repugnant to the Act because it failed to make Ms. Bodnar whole. After resuming processing of the charge, a Complaint and Notice of Hearing ("Complaint") issued on May 14, 2013. The Complaint alleged that the United States Postal Service ("Respondent") violated Section 8(a)(1) of the Act by denying Ms. Bodnar's request for union representation during an interview she reasonably believed could result in disciplinary action; by continuing with the interview after denying Ms. Bodnar's request for union representation; and by thereafter issuing a Notice of Removal because Ms. Bodnar had refused to answer questions without union representation. In its Answer to the Complaint, the Respondent admitted all of the allegations in the complaint and asserted as an affirmative defense that the charge should be deferred to the grievance and arbitration procedure and the complaint dismissed as the award was not palpably wrong or repugnant to the Act.

On July 31, 2013, the parties entered into a joint motion waiving a hearing and requesting that the Administrative Law Judge issue a decision in this matter without a hearing based solely on the stipulated record. On September 25, 2013, Administrative Law Judge Keltner W. Locke ("ALJ Locke") issued his Decision and Order ("ALJD"). ALJ Locke properly found, pursuant to the parties' stipulation, that Respondent violated Section 8(a)(1) of the Act by issuing a notice of removal terminating Ms. Bodnar employment because she had refused to answer questions in the absence of union representation. (ALJD p. 2, ln. 17-20)

The General Counsel's exceptions concern the ALJ's finding that deferral to the arbitration award is proper and the complaint should be dismissed. The ALJ dismissed the parties' stipulation that the local practice was to not present evidence of overtime eligibility during arbitration and to determine such eligibility after an arbitration decision is issued.

II. FACTS AND ARGUMENTS IN SUPPORT OF EXCEPTIONS

A. The ALJ's erred by deferring to the arbitrator's award. (Exceptions 1-4 and 7-9)

The ALJ erred by failing to find that the Arbitrator's Award was palpably wrong and repugnant to the Act. Specifically, the ALJ found that the arbitrator had found that Ms. Bodnar had done nothing wrong and that the reason that overtime had not been included in the award was based on a lack of evidence to support a conclusion that Ms. Bodnar would have worked overtime. The Judge concluded that such a determination was not palpably wrong. (ALJD p. 6, ln. 32-34). The judge recommended that the Board defer to the Arbitrator's award and the complaint be dismissed.

1. Deferral is inappropriate under Spielberg/Olin Standards.

Board law supports a finding that deferral to the Arbitrator's award which fails to make Ms. Bodnar whole is inappropriate because the award is clearly repugnant to the purposes of the Act. Under the current *Spielberg/Olin*[1] standards, the Board will defer to an arbitral award if: (1) all parties agreed to be bound by the decision of the arbitrator; (2) the proceedings appear to have been fair and regular; (3) the arbitrator adequately considered the unfair labor practice issue; and (4) the award is not clearly repugnant to the purposes and policies of the Act. An award is "clearly repugnant" if it is "palpably wrong," i.e. not susceptible to an interpretation

[1] *Spielberg Mfg. Co., 112* NLRB 1080, 1082 (1955); *Olin Corp.,* 268 NLRB 573, 574 (1984).

consistent with the Act; however, it is not necessary that the arbitration award be totally consistent with Board precedent[2], or that the arbitrator "decide a case the way the Board would have decided it"[3].

Here, there is no dispute that the arbitration proceedings were fair and regular and all parties agreed to be bound. Likewise, the contractual issue presented was factually parallel to the unfair labor practice and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. Thus the only issue under dispute is whether the Arbitrator's decision was clearly repugnant to the Act.

In the instant case, ALJ Locke struggles to comply with the Board's standard that the General Counsel bears a heavy burden to justify not deferring to an arbitrator's award. In order to find that the award was susceptible to an interpretation consistent with the Act, ALJ Locke ignored a critical stipulation of fact, and interpreted a single phrase—"is not included"—in a way that deprives the words of their usual meaning in the English language. He finds support for his decision in part by citing a decision that, like others that similarly defer to arbitrators' awards, are clearly distinguishable on its facts. Accordingly, the Board should overrule ALJ Locke and find the award repugnant to the Act.

In his award, ALJ Locke makes the centerpiece of his decision his interpretation of the phrase "is not included." (ALJD p.4 ln.21-32).[4] He "quibbles" with Counsel for the General

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[2] *Laborers Local 294* (AGC of California 287 NLRB 1107, 1111 (1988)

[3] *Aramark Services, Inc.* 344 NLRB 549, 549 (2005)

[4] In an apparent typographical error, ALJ Locke reverses his quotations at lines 28-29 of page 4 of his decision. What he credits as the phrase used by the arbitrator is actually the phrase from Counsel from the General Counsel's brief. The correct sentence should read "The phrase used by the arbitrator—'is not included'—does not necessarilty mean the same thing as 'was not entitled.'"

Counsel's contention that the arbitrator's finding that overtime is not included in her award meant that Bodnar was not entitled to overtime payment. But regardless of whether the arbitrator's or Counsel for the General Counsel's phraseology is used, the result is the same—Bodnar does not get overtime pay. It is the legal effect of the arbitrator's award that is important in this context, and the effect of that award, regardless of the precise wording she used, was to deny Bodnar overtime.

Based on his wholly speculative and unreasonable interpretation of what "is not included" *might* have meant, ALJ Locke next engages in speculative reasoning of what the parties might have done after the arbitration with regards to the question of overtime. But to do that, he has to completely ignore the parties' stipulation that "no evidence of Bodnar's overtime eligibility was presented at the arbitration hearing . . . as the local practice is to determine overtime eligibility after the arbitrator's decision issues." He finds it inappropriate to give effect to that stipulation based on an inapt analogy. ALJ Locke compares the overtime evidence to interim expense evidence available but not presented at a compliance hearing. However, the arbitration hearing in the case at bar is not the functional equivalent of a compliance hearing; rather, it is more akin to an unfair labor practice hearing on the merits of a violation. As ALJ Locke is certainly aware, Board procedures typically contemplate a bifurcated proceeding wherein parties do not present evidence concerning the remedy, such as backpay or overtime, even though it is in their possession, and are not precluded from doing so in a later compliance proceeding because it was not newly discovered. There are salutary reasons for this practice; it narrows the issues, and avoids burdening the record with evidence that may not be necessary, should the case be found to have no merit. Similarly, the parties to the arbitration herein contemplated a similar procedure, adopting a local practice to reserve issues concerning overtime

eligibility until after the arbitrator's decision. His determination to not give effect to the stipulation, (ALJD p. 7, ln 16-17) based on his faulty analogy, is clearly erroneous.

Thus, we have shown that the ALJ erred in failing to find that the arbitrator denied Bodnar overtime because the parties did not present evidence concerning overtime, where the local practice was to bifurcate proceedings and determine overtime eligibility only after the arbitration award issues. A careful reading of the case law demonstrates that such a finding should have led him to find that the arbitrator's award was repugnant to the Act.

In *Cone Mills Corp.*[5], the Board found that an award or settlement is repugnant to the Act if the grievant was solely engaged in protected activity and the award or settlement did not provide for a full remedy, including backpay. The Board reasoned that deferral to such an award would have the effect of penalizing employees for engaging in those protected activities that the arbitrator found precipitated their discharge, a result which is plainly contrary to the Act[6]. In *United Cable Television Corp.*[7], the Board found that an award is repugnant to the Act when the basis for the discharge is the employee's protected activity and the employee has not engaged in conduct that warrants the forfeiture of his Section 7 rights or justifies withholding his backpay. The Board determined that an employee engaged in protected activity forfeits the protection of Section 7 only if he engages in misconduct that is so "flagrant, violent, or extreme" as to render him unfit for further service[8].

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[5] *Cone Mills Corp.*, 268 NLRB 661 (1990)

[6] *Id.* at 667.

[7] *United Cable Television Corp.*, 299 NLRB 138 (1990)

[8] *Id.* at 142, quoting *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976)

While ALJ Locke cited *Cone Mills*, he also placed great reliance on a more recent Board decision, *Shands Jacksonville Medical Center*[9]. In that case, the Board found that an arbitrator's award which reinstated an employee without backpay, credit for time lost seniority, vacation and sick leave was not repugnant to the Act because the arbitrator had premised his denial on the grounds that the grievant had lied under oath at the arbitration hearing and to the employer during the investigation. Although one of the lies would have been protected under the Act while the other (lying under oath during the arbitration) was not, the arbitrator did not specify which lie the grievant was being punished for, the Board concluded that the arbitrator's decision could be interpreted in a way consistent with the Act and was therefore not repugnant to the Act. *Shands* is similar to other cases in which the Board has found that the denial of backpay is not repugnant when it is based on misconduct unrelated to the employee's protected activity[10].

Unlike the grievant in *Shands Jacksonville Medical Center* and similar cases, Ms. Bodnar did not engage in any conduct that would have caused her to forfeit the protections of the Act nor was she found to have engaged in any conduct that would warrant a less than make whole remedy[12]. Without stating the basis for his belief, ALJ Locke states that "it would surprise me if the arbitrator intended to deny an innocent grievant a full remedy." Yet that is precisely the effect of the arbitrator's award. Thus the award cannot be interpreted in a way consistent with the Act and thus the ALJ erred in failing to find the Arbitrator's decision repugnant to the Act.

2. The Board should modify its Deferral Standards. (Exception 5)

[9] *Shands Jacksonville Medical Center*, 359 NLRB No. 104 (2013)
[10] See, e.g., *Combustion Engineering,* 272 NLRB 215, 217 (1984)
[12] A make whole remedy is appropriate when an employee is discharged or disciplined for engaging in union or other protected activities, it restores the status quo ante, and places the employee in the position he enjoyed prior to the discriminatory conduct. *Phelps Dodge Corp, v. NLRB*, 313 U.S. 177 (1941)

The Board should modify its approach to post-arbitral case to give greater weight to safeguarding employee's statutory rights rights in Section 8(a)(1) and (3) cases. Pursuant to Section 10(a) of the Act, the Board has a statutory mandate to protect individual rights and to protect employees from discharge and other forms of discrimination in retaliation for their protected activities, and that mandate cannot be waived by private agreement or dispute resolution agreement. Although portions of the Act favor the private resolution of labor disputes through processes agreed upon through collective bargaining, the Board should not abdicate its obligation to protect individual rights whenever employees and unions agree to a grievance arbitration process.[13] Recent Supreme Court precedent concerning federal court jurisdiction over statutory claims that are also subject to arbitration agreements hold that courts are ousted of jurisdiction only where the arbitrator is authorized to decide the statutory issues and actually adjudicates such issues in a manner consistent with applicable statutory principles and precedent[14]. The General Counsel argues that this precedent and its rationale are compelling in determining the appropriate degree of deference that the Board should give arbitral awards.

Accordingly, the General Counsel asks that that Board adopt a new framework in Section 8(a)(1) and (3) post-arbitral deferral cases and require the party urging deferral to demonstrate that: (1) the contract had the statutory right incorporated in it or the parties

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

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

presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. Only if the party urging deferral makes that showing, should the Board defer to the arbitrator's award unless it is clearly repugnant to the Act.

Applying this new approach, the Board should not defer to the Arbitrator's Award because it penalized Ms. Bodnar, an innocent party, by failing to make her whole by reinstating her with backpay and benefits while denying her overtime. For this reason and also because, as discussed above, the Arbitration Award is clearly repugnant to the Act, the Award is not entitled to deference under this proposed standard.

B. The ALJ's typographical error in using the correct case cite for *Kvaerner Philadelphia Shipyard* (Exception 6)

The ALJ cited *Kvaerner Philadelphia Shipyard* as 346 NLRB 390 (1990). (ALJD p. 3) The correct cite is 347 NLRB 390.

III. CONCLUSION

Based on the foregoing, Counsel for the General Counsel respectfully requests that the Board sustain these exceptions and find that Catherine Bodnar was terminated because she refused to answer questions after being denied union representation and that the Arbitrator's award is repugnant to the Act and should not be deferred to as it failed to make Ms. Bodnar whole for Respondent's unlawful conduct.

Dated at Chicago, Illinois, This 12th day of November, 2013.

/s/ Helen Gutierrez
Helen Gutierrez

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CERTIFICATE OF SERVICE

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