UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

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| COMMUNICATIONS WORKS OF AMERICA, LOCAL 7901, AFL-CIO<br><br>Charging Party,<br><br>-and-<br><br>FUND FOR THE PUBLIC INTEREST, INC.,<br><br>Respondent. | Case No. 19-CA-094311 |

**EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO THE RECOMMENDED DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE**

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## TABLE OF CONTENTS

B. The ALJ erred as a matter of law and fact in concluding that Respondent would not have terminated Neel upon learning of his violent criminal past, because it did not have a criminal convictions inquiry in its written application or directly inquire about such convictions.

C. The ALJ erred as a matter of law and fact in concluding that the absence of a past discharge based on a recent violent criminal conviction demonstrates the Respondent would not have terminated Neel for such conviction when the situation had never before come up and the Respondent had a written policy indicating violent criminals would be disqualified from employment.

D. The ALJ erred as a matter of law and fact in failing to consider whether Neel's statements to a Portland newspaper, including maliciously false and disparaging statement that Respondent was a Ponzi scheme, warranted termination.

E. The ALJ erred as a matter of law and fact in finding that Neel's statements were not so "flagrant" as to lose protection under the Act by comparing statements by Neel regarding a non-profit employer via the Portland Mercury with statements made by terminated employees of for-profit employers via personal websites, handbills, and other forms of media with limited or no established audience.

## TABLE OF AUTHORITIES

CASE LAW



STATUTES

## STATEMENT OF THE CASE

Pursuant to a charge filed by Charging Party Communications Works of America, Local 7901, AFL-CIO ("Union") on behalf of David Neel ("Neel"), the National Labor Relations Board Regional Director issued a Complaint alleging that Neel was terminated by Respondent Fund for the Public Interest, Inc. ("Respondent") because of his protected union activities and/or concerted activities in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("the Act").

A hearing before the Honorable Margaret Brakebusch ("ALJ") concerning such charge was held on August 6-7, 2013 in Portland, Oregon. The ALJ issued her decision on October 23, 2013. The ALJ found that Respondent violated Sections 8(a)(3) and (1) of the Act by terminating Neel because he engaged in protected activity. The ALJ then went on to find that reinstatement and backpay were appropriate remedies.

Respondent hereby submits its Exceptions and Brief in Support of Exceptions to the Recommended Decision and Order of the Administrative Law Judge and respectfully requests that its exceptions be sustained by the Board.

## EXCEPTIONS

I. The Respondent did not violate Section 8(a)(3) and (1) of the Act by terminating Neel for numerous and severe violations of established workplace policies.

A. The ALJ erred as a matter of law and fact in relying on testimony by Neel, a convicted felon, regarding alleged statements by Raley to determine that Raley demonstrated animus toward Neel's union activities.

B. The ALJ erred as a matter of law and fact in determining that Respondent, through Raley, demonstrated animus toward Neel's union activities, when Raley played no role in the decision to terminate.

C. The ALJ erred as a matter of law and fact in allowing testimony and other evidence regarding events of November 2, 2012, including testimony regarding statements allegedly made by Neel regarding Raley, into the record and then relying on such evidence to find that Respondent, via Raley, demonstrated animus toward Neel's union activities.

D. The ALJ erred as a matter of law and fact in inferring that Respondent possessed anti-union animus, when relevant factors do not support such inference.

E. The ALJ erred as a matter of fact in finding that Respondent failed to consistently enforce its integrity standards, when evidence shows that Respondent enforced such standards 144 times, including seven discharges, since unionization began in 2011.

F. The ALJ erred as a matter of fact in finding that there was not a clear distinction between Neel's misconduct and the misconduct of other employees who were not terminated, when Neel previously had received eight warnings and then proceeded to violate Respondent's integrity standards eight times in a single calling shift, constituted an inconsistent application of the Policy.

II. Neel should have been disqualified from reinstatement and backpay by Respondent's post-discharge discovery that Neel was previously convicted of violent crimes and/or Neel's statements to a Portland newspaper that Respondent is a "Ponzi scheme" and he no longer believes in the non-profit work Respondent does.

A. The ALJ erred as a matter of law and fact in finding that Respondent's established workplace policy is insufficient to meet standard established in *John Cuneo*, 298 NLRB 856-857 (1990), when the policy appropriately balances overriding concerns for office safety and management against its legal obligations under applicable law.

B. The ALJ erred as a matter of law and fact in concluding that Respondent would not have terminated Neel upon learning of his violent criminal past, because it did not have a criminal convictions inquiry in its written application or directly inquire about such convictions.

C. The ALJ erred as a matter of law and fact in concluding that the absence of a past discharge based on a recent violent criminal conviction demonstrates the Respondent would not have terminated Neel for such conviction when the situation had never before come up and the Respondent had a written policy indicating violent criminals would be disqualified from employment.

D. The ALJ erred as a matter of law and fact in failing to consider whether Neel's statements to a Portland newspaper, including maliciously false and disparaging statement that Respondent was a Ponzi scheme, warranted termination.

E. The ALJ erred as a matter of law and fact in finding that Neel's statements were not so "flagrant" as to lose protection under the Act by comparing statements by Neel regarding a non-profit employer via the Portland Mercury with statements made by terminated employees of for-profit employers via personal websites, handbills, and other forms of media with limited or no established audience.

## STATEMENT OF FACTS

### I. Summary

Respondent is a non-profit organization, exempt from taxation under section 501(c)(4) of the Internal Revenue Code. IRC § 501(c)(4) (2012). Respondent's mission includes working to protect the public interest against special interests, and to support other groups with similar goals. It runs three call centers around the country that conduct fundraising and citizen outreach programs over the telephone on behalf of other non-profit organizations. Respondent's call

center-based fundraising and citizen outreach program is collectively known as the Telephone Outreach Project ("TOP").

On April 9, 2009, Respondent hired Neel as a caller for its Portland TOP office. At the time of hire, Neel received and reviewed a copy of all Respondent's policies applicable to the callers in the Portland TOP office, including a policy stating that all callers were employees at will, and a policy setting forth integrity standards to which callers are required to adhere.

In October of 2011, the callers and administrative assistants employed by the Portland TOP office voted to be represented by Union. At all relevant times from that date to present, Respondent and Union have been engaged in good faith negotiations over a collective bargaining agreement for the Portland TOP Office.

Neel violated established Respondent's policies, including integrity standards, on multiple occasions. As a consequence, Neel was subject to additional training and disciplinary action by the Portland directors. On November 27, 2011, Neel received an ultimatum from then Portland TOP Director, Referd Raley ("Raley"), and was informed that any further violations of integrity standards would result in his immediate termination. On May 3, 2012, Raley met with Neel to discuss inconsistencies in calling records which Raley believed indicated a further violation by Neel. Neel denied that he had violated the policies. Raley reminded Neel of the November 27, 2011 ultimatum, but declined to recommend termination. On August 3, 2012, Raley met with Neel again, this time to discuss a violation of the integrity standards that Raley personally observed. Neel again denied that he had violated the policies. And Raley again reminded Neel of the November 27, 2011 ultimatum, but declined to recommend termination.

During a scheduled calling shift on November 4, 2012, then Portland TOP Assistant Director, Kate Fielding ("Fielding"), personally observed Neel violate Respondent's staff

policies eight times. Based on these observations and Fielding's knowledge that Neel was already on ultimatum for previous violations, she recommended National TOP Director, Pat Wood ("Wood"), that Neel be terminated.

The recommendation was approved by Wood and, on November 6, 2012, Neel was terminated.

Following his termination, Neel agreed to be interviewed by a Portland Mercury reporter. On February 26, 2013, the reporter published an article concerning Neel's termination in which Neel was quoted saying, "I don't believe in what [Respondent does] anymore.... It's a Ponzi scheme to get money out of progressive people." On or about February 26, 2013, Respondent learned that Neel had been convicted for rape, sodomy, and sexual abuse (convictions resulting from two separate incidents occurring before his employment with Respondent, including the rape of a 15-year-old girl) and was incarcerated for eighteen months for his crimes. Neel had not informed the Portland directors of these convictions at any time during the hiring process or his subsequent employment with Respondent.

In order to avoid running afoul of certain state and federal anti-discrimination laws, Respondent did not have a blanket policy of denying employment to individuals with criminal histories. But it did have a policy of making sure that any time Respondent learned that a candidate for employment or an employee had a criminal record, that the matter was analyzed and a decision made based on a variety of factors, including the safety and well being of the other employees. In no previous case had a recent violent criminal conviction come to light, but due to safety and morale concerns, it is almost impossible that the Respondent would have hired or kept such a person employed.

**II. Respondent response to Portland callers' protected union and concerted activities**

From the beginning of the union organizing effort in the fall of 2011 to present, the Portland TOP office has been subject to the same staff policies and received the same direction, training, and treatment from the TOP National Team as the non-union TOP offices in Sacramento and Boson (Tr. 278-79, 342). At all relevant times, Respondent recognized the right of the Portland callers to engage in protected union and concerted activities.

**A. Union elections**

Prior to the union election, Respondent, through Wood, instructed the Portland directors to offer to meet with interested callers to discuss the elections. The purpose of these discussions was for the directors to explain how the election would be carried out, to encourage callers to participate in the election, and to provide an opportunity for callers to ask any other questions they might have; Portland directors were not authorized to encourage callers to vote for or against unionization (Tr. 279-80). After the election results were tallied and it was determined that Union won, Respondent contacted Union's president, Madelyn Elder, and scheduled negotiations regarding a new collective bargaining agreement (Tr. 280-81). Since that time, Respondent and Union have engaged in good-faith negotiations.

**B. Union-related activities.**

After the election, Union elected stewards from among the callers. Portland directors have consistently afforded *Weingarten* representation upon request. At times, Portland directors have allowed stewards to be present outside the *Weingarten* context to maintain a better relationship with stewards and callers (*See, e.g.*, Tr. 44).

**C. Work stoppages.**

Portland callers have engaged in multiple work stoppages. When the Portland callers call for a work stoppage, the directors consistently inform all callers present at the Portland TOP

office that they are welcome to participate, but, if they elect to do so, they must physically exit the office so that callers who wish to remain may continue to work (Tr. 157-58, 282-83). No caller was ever disciplined or threatened with discipline for participating in a work stoppage by the Portland directors, the National TOP Director, or any other employee of Respondent (*Id.*).

**D. Other concerted activities.**

Several Portland callers have been quoted in articles published by local and regional periodicals, making critical remarks about Respondent's management of the Portland TOP office, approach to negotiations, and other matters (Resp. Ex. 13; Tr. 282). Respondent has not disciplined or threatened to discipline any caller for making such remarks to the press (*Id.*). Nor have the callers been disciplined or threatened with discipline for other concerted activities, including distributing and wearing union paraphernalia (Tr. 157-59, 282-83), silent protests (Tr. 157-59, 282-83), seeking support from community leaders (Tr. 157-59, 282-83), and filing unfair labor practice charges (Tr. 283-85, 343-44).

**E. Alleged unfair labor practices.**

At the time of Neel's termination, Union had filed eleven unfair labor practice charges against Respondent – including a charge on behalf of Neel, alleging that Neel was placed on ultimatum by Respondent due to his union activities (Tr. 283). Of those eleven charges, nine were dismissed by the NLRB or withdrawn by Union – including the charge challenging Neel's ultimatum – and two were settled without prejudice or admission of wrongdoing (Tr. 284, 343-44; *see also* Tr. 32-34). Until the ALJ's decision was issued in this case, the NLRB had never found that Respondent committed an unfair labor practice nor had Respondent ever admitted to committing an unfair labor practice (Tr. 284, 343-44; *see also* 35).

**III. Neel's protected union and concerted activities**

Neel's protected union activities included acting as a bargaining unit representative during collective bargaining agreement negotiations (Tr. 31) and as a union steward (Tr. 73). Neel also engaged in certain protected concerted activities. (Tr. 157, 282). Neither Neel nor any other caller were disciplined or threatened with discipline for engaging in these activities (Tr. 158, 283; *see also* 63-65, 98).

**IV. Respondent caller staff policies**

Respondent's standard practice is to distribute Respondent's staff policies to callers upon hire (Resp. Ex. 2; Tr. 166-67). On April 7, 2009, Neel received a copy of Respondent's caller staff policies. He read the policies, asked any questions he had about those policies, and then signed an acknowledgement (Resp. Ex. 8, Tr. 166-67; *see also* 99-101).

The caller policies Neel received included a Section C, which sets forth the basic job performance requirements for the caller position:

> *Minimum performance standards, or "quotas", have been established and posted for each type of calling. Callers are required to consistently exceed these standards. Should a caller fail to average above quota she will be given a warning, and may be required to average above quota the following week in order to remain employed. Callers who receive "quota ultimatums" or miss quota may be terminated. A caller currently under a quota ultimatum is not eligible to receive a raise in wage until she has met the conditions of the ultimatum.*
>
> *Callers are also required to meet the minimum pledge return standards for each type of calling. The Directors meet with each caller regularly to review pledge return performance.*
>
> *Callers are evaluated by the Directors for their ability to represent organizations with integrity with every call. Without exception, callers must represent organizations truthfully and politely. Callers are also evaluated for their ability to maintain quality records.*
>
> *Callers may be terminated for failing to meet standards on a number of issues related to calling performance including but not limited to using the standard presentation, tracking calls correctly, treating members with respect and collecting e mail addresses.*

> *Note that all staff members are **employees-at-will**, and can be terminated without regard to whether they are meeting performance standards.*

The caller policies also include a Section F, providing detailed instructions regarding integrity standards applicable to all callers. The first paragraph of Section F describes the importance of integrity to Respondent's work:

> *We have occasionally had experiences when callers have misled our supporters on various issues, or have misrepresented the quality of their calling performance. This issue is extremely important; people expect non-profit and fundraising organizations to maintain a high level of integrity. When we fail to do so, we hurt the reputation of our groups, and all callers and canvassers. The purpose of this section is to make our integrity standards clear. You will be held to these standards at all times. Callers who fail to meet these standards may, at the Directors' discretion, be placed on a performance improvement plan or terminated without notice.*

To avoid the concerns described above, Respondent has instituted a number of standards designed to help it maintain the highest possible level of integrity (Tr.168-169, 291-95).

First, Respondent requires all callers to follow a basic script when speaking with members over the phone ("the rap"). By requiring callers to follow the rap, Respondent is able to institute uniformity in the way its client organizations and those organization's programs are described to their members. Not only does the rap allow Respondent's partner organization's to better maintain their relationships with their members, it also allows those partner organization's to avoid legal concerns that occur when callers stray from the rap (Tr. 173-75, 300-01). For example, a caller who references a presidential candidate in a call prior to a general election could well subject a client organization to fines or other actions by the Federal Election Commission or state boards of election (Tr. 172:25-173:4, 300). All new callers also receive a written policies addendum, which they are also expected to review, ask questions about, and sign (Resp. Ex. 9, Tr. 166-67; *see also* 101-103). The addendum states that failure to follow the rap "will result in termination" (Resp. Ex. 9; *see also* Tr. 101-103). In addition, callers receive

trainings throughout their employment regarding proper use of the rap (Tr. 175:3-4, 300; *see also* 43, 105, 138:4-139:13). All Portland callers are instructed to handle off-rap questions and interruptions from members politely and honestly, "but then bring it right back to our rap and continue on with the issue" (Tr. 175:3-4, 300). Directors emphasize that the entire rap is intended to be delivered verbatim but place particular importance on verbatim delivery of the portions of the rap that describe the campaign issue and close the call (Tr. 175:9-16, 300-01).

Second, after the callers deliver a rap, they are required to confirm member pledges. This confirmation process involves three separate steps (called the "triple confirm"): (1) verifying with the member the amount pledged, (2) verifying with the member the date when the pledge will be sent, and (3) verifying with the member the amount and date of the pledge together (Tr. 169-71, 295-97; *see also* 105-07, 139-40). Like the rap, the triple confirm is essential to maintaining the integrity of FPPI and its client organizations. If a member of one of Respondent's client organizations is billed for an amount other than what was intended, the relationship between that member and the client organization receiving the pledge is irreparably harmed (members may seek refunds, reduce or delay promised pledges, and/or cancel their membership altogether). Likewise, if Respondent informs a client organization that it should expect to receive a pledge of a certain amount by a certain date and that information is inaccurate, the relationship between Respondent and the client organization is irreparably harmed (client organizations experience immediate accounting problems, are unable to accurately project fundraising for budget purposes, etc.) (Tr. 169-71, 295-97). In Section F, there is a paragraph on "closing the call" which states**:**

> *The closing section of the call (after the "yes" response is received) is critical to the campaign's "return rates" because it ensures that the member has confirmed the amount of the pledge and her address, has committed to a prompt return of that pledge, and is informed of the tax deductibility of her contribution.*

After completing a call, callers are required to record the outcome of the call either as a "yes," a "no," a "maybe," or a "call back" (alternately referred to as "dispositioning" or "marking" a call). To ensure that calls are accurately recorded, Respondent repeatedly instructs callers on dispositioning throughout their employment. This instruction includes, but is not limited to, specific language in Section F in a paragraph labeled, "performance misrepresentation" (Tr. 169-71, 298-99; *see also* 110-11, 140):

> *Beginning on the first night, callers are repeatedly instructed on the differences between a "yes" and a "maybe," and between a "no" and a "callback." If a caller fails to follow these instructions, it will be assumed that she is deliberately misrepresenting the quality of her performance. The following defines the terms:*
>
> *A **"YES"** is an unqualified, specific dollar amount that a member is committing to contribute no later than three weeks after the pledge.*
>
> ***"MAYBE"** should be marked if a member is interested in contributing but does not commit to a specific amount. "MAYBE" should also be marked if a member cannot commit to returning the contribution within three weeks, or if the pledge commitment is qualified in any way.*
>
> *A **"NO"** is any member contacted who is not a "yes" or a "maybe." "No" should be marked if a member responds "no" to an appeal for money, or asks to be "called back" at a later time because he is unable to contribute now. "No" should also be marked if a member says she is duplicated on our list, or indicates to the caller that she would not be receptive to a callback attempt (e.g. the member states "I can't talk now" and hangs up). In other words, if the member behaves in a way that would make you uncomfortable calling her back, mark it as a "NO."*

Respondent policies go on to provide examples of unacceptable calling techniques:

> *The following are examples of fraudulent tactics used by callers in the past. Callers using these tactics are engaged in unacceptable behavior and may be subject to termination.*
>
> *Example #1 -- Caller marks a **"yes"** for the following conversation:*
> *Caller: "Can I count on you for $100?"*
> *Member:"Can I wait until three months from now to send it in?"*
> *Caller: "No problem. Whenever you can send it back would be fine."*
> *The result of this call should be a "no."*

*Example #2 -- Caller marks a "**yes**" for the following conversation:*

*Caller: "Can I count on you for $100?"*
*Member:"I'm not really sure what the size of the contribution will be."*
*Caller: "You can decide to increase or decrease the amount after you get the packet."*
*The result of this call should be a "maybe."*

*Example #3 -- Caller marks the following call as a "**callback.**"*

*Caller: "Can I count on you for $100?"*
*Member:"I can't do anything right now. I might be able to in a couple of months."*
*Caller: "O.K. We'll call you back later."*
*The result of this call should be a "no."*

*In general, all calls must be marked accurately at all times. Any time a caller speaks to a member the call must be marked with the results of that conversation.*

In addition to those policies included in the staff policies all callers receive and review, Respondent also maintains and enforces a set of policies regarding hiring and disciplinary practices that are distributed to directors only (because only directors have hiring and firing authority). These policies are relayed to the directors in writing, via the TOP Director Manual, and verbally, via ongoing annual trainings given by Wood and other members of the National TOP team. Among the written policies included in the TOP Director Manual is a policy instructing directors how to respond when they learn that a caller candidate or current employee has been convicted of a serious crime (G.C. Ex. 13):

> As you can imagine, employing callers with certain criminal histories could expose the Respondent and the organizations with which it works to liability as well as to unfavorable publicity. While we can't have an across-the-board rule that we will never hire or keep a person with a criminal history on staff, there are instances where we would be well within our rights, and well-advised, to not hire or terminate such a person. We have developed the following policy to ensure that criminal histories are flagged.
>
> Should it come to your attention that a caller candidate has a criminal history (beyond driving infractions), you should **not** question the candidate about the criminal history either on the phone or during an in-person interview. Rather, you

> should conduct the interview as usual, but do not offer the candidate a position until you have reviewed the candidate's application with the National TOPD.
>
> Should it come to your attention that a caller already on staff has a criminal history, please refer the matter to the National TOPD for immediate review as to whether we should continue to keep that person on staff.
>
> Please contact the National TOPD if you have questions concerning this policy.

Directors are instructed to flag criminal convictions for the National TOP Director, so that he can consider them on a case-by-case basis, based on the nature and date of the convictions (Tr. 178, 301-303). Specifically, any individual with a criminal conviction for fraud-related crimes or violent crimes are disqualified from employment with the TOP (*Id.*).

Portland TOP Directors are responsible for ensuring that all staff policies are enforced evenly and consistently. All Portland callers regularly meet with Portland TOP Directors for evaluation and feedback throughout their employment with Respondent. TOP Directors periodically monitor callers (i.e., listen to a caller during live calls) prior to regularly scheduled meetings, so that they can better assess a particular caller's performance and provide effective feedback, and at random intervals throughout a caller's employment, so that they can spot check callers' performance for quality assurance purposes (Tr. 234-36).

When directors discover that a caller is violating established workplace policies, they take appropriate action to ensure that callers understand how their actions violated the policies and receive appropriate training and feedback so that they can improve their overall performance and avoid further violations (Tr. 159-160); an exception applies when the director determines that the caller should be discharged, in which case further training is unnecessary (Tr.193-94). When violations continue to occur, directors generally take progressive disciplinary action, which involves the following three steps: (1) verbal warning, (2) ultimatum and (3) discharge

(Tr. 159-60, 285-89). Progressive disciplinary action only takes into account similar categories of violations. For example, a caller that receives an ultimatum for failing to meet performance standards will not be terminated due to a single violation of integrity standards; rather, the caller will remain on ultimatum for performance standards and be issued a warning for violating integrity standards. Directors are also authorized to proceed directly to discipline for serious or repeated violations of staff policies (*Id.*). To ensure that discipline is being meted out consistently, directors are required to seek approval from Wood and the Respondent's legal department for disciplinary actions taken against experienced callers or in those situations where a director has reason to believe a legal action is forthcoming (Tr. 285-89).

**V. Neel repeatedly violated integrity standards set forth in Respondent's staff policies**

Neel, like all Portland callers, met with directors for evaluation and feedback throughout his employment with Respondent (Resp. Exs. 4, 10, 12). To prepare for these evaluations, directors periodically monitor callers and take "monitoring records" to help them assess a particular caller's performance and provide effective feedback (Resp. Ex. 12). Directors also record their observations as well as the results of any meetings they conduct with callers in an online database called "UpperCut" (Tr. 195-6, 345). By recording notes in UpperCut, directors are able to communicate their experiences regarding a particular caller to other directors even if the director who entered the information in UpperCut is absent from the office (for current directors) or no longer employed by Respondent (for a past directors) (*Id.*). This ensures good communication and consistency among the directors and helps enable a director who observes a violation to respond in a consistent and even-handed fashion (e.g., proceed the next stage of progressive discipline) (*Id.*). On November 4, 2012, Neel's employee notes in UpperCut (Resp. Ex. 4, Tr. 202-03) included the following relevant entries:

On May 24, 2011, Neel participated in an evaluation with Raley. Raley observed that Neel was not following the rap. Raley informed Neel that this was unacceptable and that failure to follow the rap could lead to disciplinary action, up to and including termination (Tr. 202-03; *see also* 104-105). Later that day, Neel was retrained by then Portland TOP Assistant Director, Rhiannon McCracken ("McCracken"), on accurately dispositioning the results of his calls with special emphasis being placed on the difference between a "no" and a "call back" (Tr. 202-03; *see also* 107). On or around August 10, 2011, Raley observed Neel overreacting to "nos" and disrupting other callers. Raley informed Neel that overreactions were not acceptable and that if they continued he would not be able to work at the Portland TOP office.

On November 7, 2011, Raley observed that Neel incorrectly dispositioned a "no" as a "call back." Raley again communicated to Neel the importance of accurately dispositioning the result of his calls and stated that failure to do so could lead to disciplinary action, up to and including termination (Tr. 202-03).

On November 23, 2011, Raley conducted a performance evaluation with Neel. Prior to the meeting, Raley observed that Neel was not following the rap or using the triple confirm. As a result, Raley placed Neel on performance ultimatum. Raley again communicated to Neel the importance of the rap and the triple confirm. Neel confirmed that he understood the established policies and understood that he would be terminated if he did not follow them (Resp. Ex. 21, Tr. 307-08).

On May 3, 2012, Raley observed that Neel dispositioned a 12-minute call as a "call back," a disposition reserved for calls in which a member states she is too busy to speak and requests the caller to call back at a later time. Raley followed up with Neel and asked whether he had incorrectly dispositioned a "no" as a "call back." Neel confirmed that he had incorrectly

dispositioned the call but insisted it was an accident. Raley again communicated to Neel the importance of properly dispositioning calls and reminded Neel that, because he was on ultimatum, he would be terminated if he violated integrity standards again.

On May 24, 2012, another caller informed McCracken that Neel was throwing tantrums – pounding his keyboard, flipping of his computer screen – while calling and disrupting her work. McCracken warned Neel that his behavior was unacceptable.

On August 2, 2012, Raley observed Neel violate Respondent integrity standards: Neel incorrectly informing a member that he could not remove his deceased father from email and mailing lists. Neel denied that he violated integrity standards; he became angry and started yelling at Raley in the director's space (Resp. Ex. 19; *see also* 371). Raley informed Neel that this was not the first time he had observed Neel violating policies and provided the following examples: Neel informed members that they were legally required to contribute $25.00 to be a member. Neel also gave members incorrect information about a partner organization's campaign. Once again, Raley reminded Neel of his previous ultimatum and stated that he would be terminated if he continued to violate integrity standards.

On November 4, 2012, Fielding signaled the beginning of a legally required 10-minute rest break to callers by flashing the call center lights. Fielding saw that Neel was in the midst of a call when the break started. Fielding began observing Neel's call so that she could account for the time Neel was on the call and ensure that he received the full 10-minute rest break to which he was entitled. Fielding took monitoring records as she observed Neel making calls (Resp. Ex. 3). During his final call on the first shift, Fielding observed that Neel did not triple confirm a member pledge and incorrectly dispositioned the call as a "yes" rather than a "maybe" (Tr. 186-87). Based on Neel's previous issues with integrity standards, Fielding decided to continue

observing Neel's calling following the rest break. While monitoring Neel, Fielding pulled up his employee notes on UpperCut (Tr. 268) and discovered that Neel had previously been warned and placed on ultimatum for not following the rap and for failing to triple confirm and properly disposition the results of his calls (Tr. 202-03). Soon after, Fielding observed Neel repeatedly failed to follow the rap (Tr. 187-89). Specifically, Neel told members that:

> *In reference to PIRG campaign on offshore tax havens: "This is a problem taken advantage of by a lot of the big boys, including one running for President if you know who I mean."*
>
> *Following a member agreeing to give $25, but not in response to conversation with member: "There are charities, 501c3s, and then there is us, 501c4s. I'll tell you exactly what I always tell my parents: DON'T give, ya know, $200 to 501c4s. Just give $25 or ask what the minimum is and give that."*

In addition, Fielding observed Neel disposition two "nos" as "call backs" (Tr. 189-90); fail to triple confirm two additional members (Tr. 191); and incorrectly disposition a call as a "yes" (Tr. 191-92) based on the following exchange:

> *Following member confirming it was her and Neel identifying himself and the client organization on whose behalf he was calling:*
>
> > *Member: "I'm on the other line"*
> > *Neel: "Oh ok, should I send something out?"*
> > *Member: "Yea, that'd be fine."*

Fielding called Raley following the calling shift. She relayed the above observations to Raley and – based on the number and seriousness of the violations she had observed, Neel's past violations of the integrity standards, and the fact that Neel was already on ultimatum – Fielding recommended terminating Neel (Tr. 204-205). Raley supported Fielding's recommendation. Per FFPI's regular practice for discharges involving experienced callers and/or potential discrimination claims (Tr. 164, 303-10), Raley instructed Fielding to type up her observations of

Neel and email a copy to Wood, so that Wood could approve the recommended termination (Tr. 204-205; Resp. Ex. 5).

At Wood's request, the Portland directors provided Wood with a copy of Neel's disciplinary record and worked with National TOP Administrative Assistant, Christine Walsh ("Walsh"), and the Deputy National TOP Director, Chris Mullin ("Mullin"), to compile information regarding disciplinary action taken against other callers for integrity and rap violations (Resp. Ex. 22). According to Walsh and Mullin's research, 127 callers had been disciplined for failure to triple confirm and/or accurately disposition the result of their calls, twenty-seven were placed on ultimatum, and six were discharged; seventeen callers were disciplined for failure to follow the rap, three were placed on ultimatum, and one was discharged (Resp. Ex. 22; Tr. 313-14, 347-51). As far as could be determined, no caller had ever been observed discussing political candidates just two days before a national election while calling on behalf of a non-partisan non-profit or telling members *not* to donate before. Based on this information, Wood determined that Fielding's recommendation was consistent with disciplinary action taken against other Portland callers for violations of the integrity standards (Tr. 311-315).

Taking into account the number and severity of the violations Fielding personally observed on November 4, 2012; the fact that Neel had been placed on ultimatum for violations of integrity standards on November 23, 2011; the fact that Neel had been reminded that the ultimatum remained in effect on May 24, 2012 and August 3, 2012; and the fact that Fielding's recommendation was consistent with Respondent past practice, Wood approved the termination (Tr. 311-15). Wood then sent the approved recommendation to the Respondent's legal department, his direct supervisor, Ed Johnson ("Johnson"), and his supervisor's supervisor, Sam Landenwitsch ("Landenwitsch") for final approval (Tr. 315-16).

On November 6, 2012, Raley called Neel and terminated him for violations of the integrity policies (Resp. Ex. 20; *see also* 86-87). Raley informed Neel that his personal belongings would be mailed to him along with his final paycheck (*Id.*).

**VI. Neel's statements to the Portland Mercury.**

Following his termination, Neel agreed to be interviewed by a Portland Mercury reporter. The reporter published an article concerning Neel's termination on February 26, 2013 (Resp. Ex. 13). In that article, Neel was quoted saying, "I don't believe in what [Respondent] do anymore.... It's a Ponzi scheme to get money out of progressive people." (Resp. Ex. 13).

**VII. Neel's felony convictions for rape, sodomy, and sexual abuse.**

Following Neel's termination, Respondent learned that Neel had been convicted for rape, sodomy, and sexual abuse and sentenced to eighteen months in prison, stemming from two separate incidents occurring before his employment with Respondent. At the hearing, Respondent introduced certified copies of the conviction records (Resp. Exs. 15, 16; *see also* 114-15). Neel did not inform the Portland directors of these convictions during the hiring process, or at any point prior to his termination on November 6, 2012 (Tr. 222-24; *see also* 117-18). Rather, Fielding learned of Neel's convictions on or around February 26, 2013 via a series of online comments posted on a Portland Mercury article describing Neel's discharge from Respondent (Resp. Ex. 13; Tr. 222). Wood learned of the convictions on March 6, 2013 via a Portland Mercury article that specifically addressed Neel's sex crimes (Resp. Ex. 14; 323-24).

## ARGUMENT

**I. The Respondent did not violate Section 8(a)(3) and (1) of the Act by terminating Neel for numerous and severe violations of established workplace policies.**

The ALJ found that Respondent violated Sections 8(a)(1) and (3) of the Act by terminating Mr. Neel. *See* 29 USC § 158(a) (2012) ("It shall be an unfair labor practice for an

employer (1) to interfere with, restrain, or coerce employees in the exercise of the [guaranteed] rights [or] (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.”). Under the test established in *Wright Line*, 251 NLRB 1083 (1980), to demonstrate a Section 8(a)(1) and 8(a)(3) violation with respect to an adverse employment action, General Counsel bears the initial burden of showing “by a preponderance of the evidence that antiunion sentiment was a substantial or motivating factor in the challenged employer decision.” *Bridgestone Firestone S.C.*, 350 NLRB 526, 529 (2007). To do so, General Counsel must show, again by a preponderance of evidence, that: (1) the terminated employee was engaged in union activity, (2) the respondent knowledge of that activity, and (3) antiunion animus by the respondent. *Small v. Swift Transp. Co.*, 2009 U.S. Dist. LEXIS 92084 at *33 (C.D. Cal. Sept. 18, 2009) (citing *Sears, Roebuck & Co.*, 337 NLRB 443, 443 (2002)).

The ALJ found that General Counsel met its initial burden based on the following findings of law and fact: The ALJ found that Neel’s protected activities and Respondent’s knowledge of those activities were not in dispute. The ALJ credited testimony by Neel that Raley made anti-union statements. Based on that testimony, the ALJ found that Raley viewed Neel as motivating force behind Union’s support, and that Raley harbored animosity toward Neel for this influence. The ALJ found no evidence that Fielding, who made the discharge decision, or Wood, who approved the decision, or any other supervisor of Respondent made anti-union statements or harbored anti-union animus. But the ALJ found that because there was no evidence that Wood, Fielding or any other supervisor of the Respondent expressly disavowed Raley’s anti-union statements, that Raley’s statements alone were enough. This places undue importance on the isolated statements of a single supervisor who did not take independent action

against Neel. Indeed, as the ALJ found, there was no evidence that Raley conducted an investigation of Neel's misconduct, acknowledging instead that review of the record indicated that Raley's first contact with Neel after November 4, 2012 was the November 6, 2012 telephone call in which he informed Neel of his termination. The ALJ described a November 6, 2012 email from Raley to Wood in which Raley stated that Neel's termination was "one of the best staff management decision that he had ever made." But Raley's participation in the termination was essentially as a messenger, and nothing in the record supports the ALJ's conclusion that Raley played a "very central role" in the decision to terminate Neel. Because Raley's animus, if any, is irrelevant and because there is no evidence showing animus on the part of Fielding, Wood, or any other Respondent supervisor involved with the decision to terminate Neel, the ALJ erred in finding that General Counsel met its initial *Wright Line* burden.

Under the *Wright Line* test, if General Counsel is able to meet its initial burden, "the burden shifts to the employer to demonstrate that it would have made the adverse decision even had the employee not engaged in protected activity." *Int'l Union of Operating Eng'rs, Local 470* v. *NLRB*, 350 F.3d 105, 110 (D.C. Cir. 2003). "Illegal motive for an employment decision is not to be lightly inferred…. Like every finding of fact, the conclusion that an employer's conduct was motivated by anti-union animus is accepted and given credence only if supported by substantial evidence on the record as a whole." *NLRB* v. *Gulf States United Tel. Co.*, 694 F.2d 92, 95 (5th Cir. 1982) (citations omitted).

The ALJ found that Respondent failed to meet its *Wright Line* burden based on the finding that Respondent did not apply its established disciplinary practice to Neel consistently with how it was applied to others, relying on the assertion that "callers other than Neel were repeatedly counseled about violations of Respondent's policies without being discharged." On

this basis, the ALJ determined that Neel was terminated because of his union activities. And yet, the record clearly demonstrates that Respondent's integrity standards were applied consistently, that other callers had been terminated for violating them, and that the number and severity of Neel's violations distinguished them from the violations committed by callers who were warned and not terminated. The ALJ's finding that Respondent's policies were inconsistently enforced is not supported by the record. Because Respondent demonstrated by a preponderance of the evidence that its termination of Neel would have occurred in the absence of his protected activities, the ALJ erred in finding that Respondent did not meet its *Wright Line* burden.

**A. The ALJ erred as a matter of law and fact in relying on testimony by Neel, a convicted felon, regarding alleged statements by Raley to determine that Raley demonstrated animus toward Neel's union activities.**

The ALJ credited testimony by Neel that Raley made anti-union statements during private conversations with Neel. The ALJ then went on to find, based on Neel's testimony, that (i) it was "plausible" that Raley viewed Neel as motivating force behind Union's support, (ii) that Raley harbored animus toward Neel for this influence, and (iii) that Raley's alleged animus was central to the decision to terminate Neel. Such conclusion is simply not supported by the preponderance of the evidence. First, it rests solely on self-serving and uncorroborated testimony by Neel, whose character for truthfulness is suspect due to his previous felony convictions. Fed. R. Evid. § 609(a)(1)(A). Even if the Board decides to accept Neel's testimony at face value, it does not support the ALJ's conclusion that Raley viewed Neel as a motivating force behind Union's support or that Raley harbored animus toward Neel for this influence. And nothing in the record shows that statements by Raley were made on behalf of, or with authorization of, Respondent. The alleged anti-union statements by Raley amount to no more than trivial conversations or expressions of Raley's personal opinion. *See Pease Co. v. NLRB*,

666 F.2d 1044 (6th Cir. 1981) (holding that trivial and ambiguous conversations between company official and employee, including derogatory comment made about union help, does not violate Act); *Utah Copper Co. v. NLRB*, 139 F.2d 788 (10th Cir. 1943) (holding that Act does not enjoin employer from merely expressing his views in respect of labor policies or problems).

**B. The ALJ erred as a matter of law and fact in determining that Respondent, through Raley, demonstrated animus toward Neel's union activities, when Raley played no role in the decision to terminate.**

The ALJ erred as a matter of law and fact in finding that the allegations of anti-union animus on the part of Raley should be imputed to Respondent. This Board has long held that in determining whether an employer has demonstrated anti-union animus, only animus displayed by supervisors that are actually critical to Respondent's investigation or are ultimately responsible for Respondent's decision to terminate should be considered. *Gaylord Hospital*, 2013 NLRB LEXIS 466 at *76-77 (June 26, 2013) (upholding termination, despite finding that supervisor possessed anti-union animus, because "Respondent's investigation and decision-making process was not 'tainted' by [lone supervisor's] animus."); *Taylor & Gaskin*, 277 NLRB 563, 567 (1985) ("[T]he decision not to reemploy Watko was made by Swanson on behalf of Respondent, and, therefore, it is to his motivation that we must look in determining the merits of this case").

As discussed above, the evidence simply does not support the ALJ's finding that Raley played a "very central role" in Respondent's investigation of or decision to terminate Neel. The ALJ acknowledges that there is no evidence that Raley conducted an investigation of Neel's misconduct, nor does circumstantial evidence permit such an inference. It is undisputed that the only director present on November 4, 2012 was Fielding. There is no dispute that it was Fielding, not Raley, who personally monitored Neel's calling that evening. The record shows that Fielding, not Raley, drafted the monitoring records and UpperCut notes describing Neel's

repeated violation of integrity standards – records and notes which are a part of the record. The record also shows that Fielding, not Raley, reviewed Neel's personnel file and determined that Neel had been disciplined in the past for similar misconduct and was currently on ultimatum for the same. The record shows only that Raley was informed of, and supported, Fielding's recommendation to terminate, but that he did not have final authority to approve it. And it was Wood, not Raley, who made the final decision. Thus, contrary to the ALJ's findings, the preponderance of the evidence shows that Raley's role in the decision to terminate was negligible. The initial recommendation to terminate Neel was made by Fielding. And, while Raley supported Fielding's recommendation, the decision to terminate was ultimately made by Wood, Johnson, Landenwitsch, and the Respondent's legal department. Hence, it is the motivation of Wood, Johnson, Landenwitsch, and the Respondent's legal department that the Board must look to determine whether anti-union animus exists. *Gaylord Hospital*, 2013 NLRB LEXIS 466 at *76-77; *Taylor & Gaskin*, 277 NLRB at 567. But the ALJ found that there is no evidence that Fielding, Wood, or any other of Respondent's employees who took part in the investigation or decision to terminate made anti-union statements.

**C. The ALJ erred as a matter of law and fact in allowing testimony and other evidence regarding events of November 2, 2012, including testimony regarding statements allegedly made by Neel regarding Raley, into the record and then relying on such evidence to find that Respondent, via Raley, demonstrated animus toward Neel's union activities.**

The ALJ erred by relying on inadmissible testimony to make findings of law and fact. Throughout the hearing, Respondent, through counsel, objected to General Counsel's inquiries into the events of November 2, 2012, arguing that such inquiries and the responses they solicited were irrelevant to the case at hand and therefore not admissible (Tr. At 55, 57-60, 83). Fed. R. Evid. § 402 (2012). At hearing, the ALJ sustained the objection (Tr. at 83). However, in the ALJ's subsequent decision, the ALJ described in detail the very testimony to which Respondent

had objected. While the ALJ found that the testimony by Neel and other of Respondent's employees regarding the events of November 2, 2012 was not a "pivotal factor" in finding that Respondent possessed anti-union animus, it is clear that the ALJ impermissibly relied on such testimony in finding that Respondent possessed anti-union animus and in ultimately concluding that Respondent violated the Act by terminating Neel.

The events of November 2, 2012 are not relevant to the ALJ's analysis of whether Respondent unlawfully terminated Neel for engaging in protected activities under the Act, because such events do not constitute protected activities under the Act. Purely personal griping and complaining about working conditions is not concerted activity protected under the Act. *NLRB v. Deauville Hotel*, 751 F.2d 1562 (11th Cir. 1985). For complaints to be protected, they must involve or look toward group action, *NLRB v. Office Towel Supply Co.*, 201 F.2d 838 (2nd Cir. 1953), and seek achievement of common objective, *Hamilton Plastics*, 291 NLRB 529 (1988). Neel's personal attacks on Raley did not involve or look toward group action nor were they in furtherance of the achievement of a common objective; rather, they were simply personal griping not entitled to protection under the Act, and, if anything, provide a non-union-related motive for Raley to have disliked Neel.

**D. The ALJ erred as a matter of law and fact in inferring that Respondent possessed anti-union animus, when relevant factors do not support such inference.**

The ALJ erred as a matter of law and fact in finding that relevant factors supported an inference that Respondent possessed anti-union animus. The ALJ relies on *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), for the proposition that anti-union animus can be inferred by examining factors, including: (1) the employer's failure to adequately investigate alleged misconduct by the employee, *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471 (1998), (2) disparate treatment by employer of the terminated employee, *Holiday Inn East*, 281 NLRB 573,575

(1986), and (3) the timing of the employer's decision to terminate in relation to the terminated employee's protected activities, *Taylor & Gaskin*, 277 NLRB 563 fn.2 (1985). These factors simply do not support an inference of anti-union animus by Respondent.

The ALJ's decision to infer anti-union animus hinges on the fact that Neel was not provided an opportunity to respond to eight separate violations Fielding observed. While failure to allow an employee to respond to allegations of misconduct is one factor an ALJ may consider, to rely on that factor to the exclusion of others constitutes a misapplication of Board law. *See, e.g., Holiday Inn East*, 281 NLRB at 575 (whether terminated employee was given a chance to respond to allegations of misconduct as one of five factors considered in determining whether animus existed). Moreover, such emphasis is misplaced, as is clearly demonstrated by events transpiring at the hearing. There, Neel categorically denied committing any violations of integrity policies, until he was impeached by Respondent's counsel using his own sworn statement to the NLRB investigator in which he acknowledged past violations (Tr. at 109). Moreover, the ALJ's finding completely ignores the investigation Respondent undertook. Over the course of 48 hours, Respondent, through Wood, investigated the violations by: (i) reviewing the monitoring records taken by Fielding, (ii) reviewing Neel's previous disciplinary history, and (iii) compiling a log of all disciplinary action taken by directors for violations of integrity standards. In so doing, Wood credibly determined that termination was consistent with Respondent's staff policies and past practice. Before proceeding with the termination, Wood sought and received approval from Johnson, Landenwitsch, and the Respondent's legal department.

The ALJ's finding of disparate treatment is also unsupported by the record. Fielding's explanation as to why and how she monitored Neel are consistent with undisputed testimony that

directors regularly monitor callers by listening to live calls without the callers' knowledge. It is similarly undisputed that directors frequently "spot check" calls for quality assurance purposes during calling shifts. Fielding testified that she monitored Neel for approximately two hours over the course of a four hour calling shift, providing her ample opportunity to complete her other job duties.

Finally, the ALJ found that the timing of Neel's termination did not support an inference that Respondent possessed animus toward Union generally or Neel specifically.

**E. The ALJ erred as a matter of fact in finding that Respondent failed to consistently enforce its integrity standards, when evidence shows that Respondent enforced such standards 144 times, including seven discharges, since unionization began in 2011.**

The ALJ erred in finding that the Respondent had a regular disciplinary practice but failed to enforce it consistently. The ALJ found that Respondent's regular disciplinary practice consists of three steps: warning, ultimatum, and termination. While the ALJ's findings in this regard are accurate, they are also incomplete. Respondent's written policies, distributed to all employees upon hire, expressly state that employment is at will, meaning that employees can be terminated at any time for any non-discriminatory reason. Where regular disciplinary practice is implemented, Respondent determines what stage of the disciplinary practice is warranted by taking into account only violations from the same category of policies. For example, a caller that receives an ultimatum for failing to meet performance standards will not be terminated due to a single violation of integrity standards; rather, the caller will remain on ultimatum for performance standards and be issued a warning for violating integrity standards. Finally, to ensure that discipline is being meted out consistently, directors are required to seek approval from Wood and the Respondent's legal department for certain disciplinary actions. In finding that the Respondent does not consistently enforce its regular disciplinary practice, the ALJ relies

on the disciplinary histories of two employees which she describes in detail. According to the ALJ, the first employee received six warnings and an ultimatum without being terminated, and the second employee received five warnings without being placed on ultimatum or terminated. To the extent that the ALJ has identified certain deviations from the regular disciplinary practices, such deviations are consistent with Respondent's established policies. For example, of the six warnings that the first employee received, at least one was for cursing on the calling floor, a violation unrelated to integrity standards. Therefore, the disciplinary action taken would not cause the employee, who was previously disciplined for integrity standard violations, to proceed to the next step in the regular disciplinary practice. Finally, as described above, in order to ensure fair and consistent enforcement of policies, Portland directors are not authorized to terminate experienced employees without first obtaining approval from Wood and Respondent's legal department. This approval process would be meaningless if Wood and/or the legal department did not have the authority to reject directors' recommendations and approve alternative disciplinary measures.

**F. The ALJ erred as a matter of fact in finding that there was not a clear distinction between Neel's misconduct and the misconduct of other employees who were not terminated, when Neel previously had received eight warnings and then proceeded to violate Respondent's integrity standards eight times in a single calling shift, constituted an inconsistent application of the Policy.**

The record does not support the ALJ's finding that there is no distinction in Neel's conduct as compared to other employees who were repeatedly counseled and yet not discharged. The record clearly shows that Neel was counseled eight times during his employment with Respondent – more than any other employee since the unionization effort began in 2011. This distinction alone should be enough, but the character of Neel's violations was unique as well. No other caller in the history of the position had ever been observed tipping off a prospective

donor that they should give less or not give at all. And Neel's unscripted comments referencing a presidential candidate could have put the Respondent and/or its partner nonprofits in danger of violating federal tax and election laws and regulations. The ALJ's finding that Respondent's decision to terminate Neel was pretextual because Neel did not receive the same treatment as other employees completely ignores these distinctions. What distinguishes Neel's conduct from the conduct of the callers cited by the ALJ is both the number and severity of violations, as measured by the reputational and financial harm they could have had on the client organizations on whose behalf Neel was calling.

**II. Neel should have been disqualified from reinstatement and backpay by Respondent's post-discharge discovery that Neel was previously convicted of violent crimes and/or Neel's statements to a Portland newspaper that Respondent is a "Ponzi scheme" and he no longer believes in the non-profit work Respondent does.**

When an employee is unlawfully discharged, reinstatement and backpay are appropriate remedies unless the employer can show subsequent conduct, or discovery of previous conduct, that would have resulted in a lawful discharge. *Berkshire Farm Center*, 333 NLRB 367, 377 (2001); *Marshall Durbin Poultry Co*., 310 NLRB 68, 70 (1993); *John Cuneo, Inc*., 298 NLRB 856-857 (1990). If an employer establishes that an employee engaged in misconduct for which the employer would have discharged any employee, then the employee is disqualified from reinstatement and the employer's backpay obligation is tolled as of the date that the employer first acquired knowledge of the misconduct. *John Cuneo, Inc.*, 298 NLRB at 856-57 (citing *Axelson, Inc.*, 285 NLRB 862 (1987)). This standard is intended to prevent employees who engage in misconduct, including misconduct occurring before employment began, from realizing a windfall due to such misconduct. *Id.* The Board has applied this standard and disqualified employees from reinstatement and backpay where employees cheated on a pre-employment exam, *Smucker Co.*, 341 NLRB 35, 36 (2004); where an employee opened interoffice mail with

confidential documents enclosed, *Berkshire Farm Center*, 333 NLRB at 377; where an employee presented fraudulent work authorization documents prior during hiring process, *Hoffman Plastic Compounds, Inc.*, 326 NLRB 1060, 1061-62 (1998); where an employee made willful misrepresentations on application for employment, *John Cuneo, Inc*., 298 NLRB at 856-857; and, perhaps most relevant here, where an employer discovered employee's previous acts of workplace sexual misconduct following termination, *Marshall Durbin Poultry Co*., 310 NLRB at 70.

The ALJ found that Respondent failed to demonstrate that Neel's prior criminal history should disqualify him from reinstatement and backpay. There was no dispute that Neel was previously convicted of rape, sodomy, and sexual abuse or that Neel was sentenced to 18 months in prison for these violent crimes. The ALJ found that Respondent had a policy concerning the employment of individuals with criminal convictions at all relevant times. This policy, while avoiding a blanket prohibition on rejecting employees with criminal histories to comply with legal requirements, indicates that crimes of dishonesty and violence would almost always disqualify applicants or employees. And yet, inexplicably, the ALJ found that the Respondent would not have terminated Neel based on his criminal history simply because the policy required a case-by-case approach, the initial written application did not ask about criminal history, and there was no history of a termination of a violent criminal. The fact of the matter is that (to the best of its knowledge) no one with an equally violent and frightening criminal past has ever been employed by Respondent . Evidence was presented that Respondent unquestionably would not allow a violent criminal on its staff, as doing so would be intimidating and disruptive to staff and management alike. The ALJ's unsupported finding that Respondent did not view prior criminal convictions as a matter of importance puts Respondent in the untenable position of having to

employ a person that it would otherwise terminate instantly and who it fears is a threat to the safety and morale of its Portland TOP office.

Applying the Board's analysis in *Hawaii-Tribune-Herald*, 356 NLRB 63 (2011), the ALJ found that Respondent failed to demonstrate that Neel's post-termination statement to a Portland newspaper disqualifies him from reinstatement and backpay. The ALJ found that Neel was quoted in a published article saying that the Respondent's operation was a "Ponzi scheme" and that he no longer believed in the non-profit work Respondent does. The ALJ credited Neel's testimony that, at the time he made the statements, he was very angry. The ALJ further credited Neel's testimony at the time of the hearing that he did not believe Respondent was a Ponzi scheme and that he believed in Respondent's mission. The ALJ then went on to evaluate other Board decisions that considered post-termination statements by terminated employees and determined that, in comparison with such statements, Neel's statements were not so flagrant as to render Neel unfit for further service or threaten the efficiency of Respondent's operation. *Hawaii-Tribune-Herald* and other precedent relied upon by the ALJ are readily distinguishable from the present case as such precedent involved for-profit employers and/or statements published via mediums (e.g., handbills, blogs, websites) with little or no audience. In any event, the ALJ fails to appropriately take into account the damaging impact Neel's disparaging and false statements would have on Respondent's reputation. *Sprint/United Management Co.,* 339 NLRB 1012, 1018 (2003); *Veeder-Root Co.*, 237 NLRB 1175 (1978).

**A. The ALJ erred as a matter of law and fact in finding that Respondent's established workplace policy is insufficient to meet standard established in *John Cuneo,* 298 NLRB 856-857 (1990), when the policy appropriately balances overriding concerns for office safety and management against its legal obligations under applicable law.**

The ALJ erred in finding that Neel's criminal convictions did not disqualify him from reinstatement and backpay. There is no dispute that Neel was convicted of three felonies – rape,

sodomy, and sexual abuse – or that Neel served 18 months in prison for those violent crimes. However, the ALJ's description of Neel's crimes is neither complete nor accurate. To the extent that the ALJ describes the crimes underlying Neel's convictions, the ALJ does so without expressly stating what crimes Neel was convicted of. Further, the ALJ describes the crimes which resulted in such convictions by paraphrasing Neel's own self-serving testimony, rather than the descriptions provided in the certified conviction records or third-party accounts which were also made part of the record. In so doing, the ALJ significantly diminished the severity of and Neel's culpability for despicable acts including the rap of a 15-year-old girl.

The ALJ found that the Respondent's written policy concerning candidates/ employees with a record of criminal convictions does not provide an absolute bar to employing an individual with a criminal conviction but instead addresses criminal convictions on a case by case basis. Again, the ALJ's summary does not completely or accurately reflect the substance of the policy itself. In its entirety, it reads:

> As you can imagine, employing callers with certain criminal histories could expose the Respondent and the organizations with which it works to liability as well as to unfavorable publicity. While we can't have an across-the-board rule that we will never hire or keep a person with a criminal history on staff, there are instances where we would be well within our rights, and well-advised, to not hire or terminate such a person. We have developed the following policy to ensure that criminal histories are flagged.
>
> Should it come to your attention that a caller candidate has a criminal history (beyond driving infractions), you should **not** question the candidate about the criminal history either on the phone or during an in-person interview. Rather, you should conduct the interview as usual, but do not offer the candidate a position until you have reviewed the candidate's application with the National TOPD.
>
> Should it come to your attention that a caller already on staff has a criminal history, please refer the matter to the National TOPD for immediate review as to whether we should continue to keep that person on staff.
>
> Please contact the National TOPD if you have questions concerning this policy.

As the policy itself indicates, the Respondent, a Massachusetts non-profit corporation which runs citizen outreach offices nationwide, is legally prohibited from instituting an absolute bar on hiring candidates with a history of criminal convictions. State laws in the Respondent's state of incorporation and in other states where it runs TOP offices prohibit private employers from inquiring whether an applicant has been convicted of certain crimes on a written application, *see* Mass. Gen. Stat. ch. 151B §4(9 1/2) (2013) (prohibiting employers from inquiring whether an applicant has been convicted of a crime prior to interview), and/or inquiring about certain categories of convictions during the hiring process or employment, *see* Mass. Gen. Stat. ch. 151B § 4(9) (2013) (prohibiting employers from inquiring or making employment decisions based on first convictions for certain crimes or misdemeanors more than 5 years old); Cal. Lab. Code § 432.8 (2013) (prohibiting employers from making employment decision based on certain drug-related convictions). Because the Respondent operates nationwide, its general practice is to establish one generally applicable policy, rather than draft separate policies for each state. Thus, rather than showing that an employee's criminal conviction is not a "matter of importance to Respondent," as the ALJ found, the Respondent's policy shows that Respondent expended significant time and resources to develop a policy that appropriately balances the Respondent's legal obligations under applicable state laws with the Respondent's overriding concern that, by hiring individuals with a demonstrated propensity for certain crimes, it could endanger its employees, threaten the security of its members' sensitive financial information, expose the Respondent to legal liability (e.g., private lawsuits alleging negligent hiring or other torts), and/or serious management concerns (staff quitting, refusing to work certain shifts, or attend work functions due to concerns about working with a convicted felon).[1] Due to the complexity of

1 Staffing concerned here are not merely hypothetical. Since Respondent decided to offer conditional reinstatement to Neel, Portland directors have expressed serious concerns for their own safety. Directors

the laws governing inquiries into the criminal convictions of applicants and current employees, the Respondent has determined that employment decisions based on an applicant or employee's criminal convictions should be handled by staff with requisite experience and expertise to handle these concerns appropriately. Accordingly, Respondent's policy instructs TOP directors to alert the National TOP Director if the TOP director discovers that an employee has been convicted of a crime. Wood provided uncontroverted testimony that candidates or employees who have been convicted of certain categories of crimes would be disqualified from employment; these categories include convictions for crimes of dishonesty and convictions for violent crimes. Wood testified that convictions for rape, sodomy, and sexual abuse would automatically disqualify a candidate or current employee from employment with the Respondent.

**B. The ALJ erred as a matter of law and fact in concluding that Respondent would not have terminated Neel upon learning of his violent criminal past, because it did not have a criminal convictions inquiry in its written application or directly inquire about such convictions.**

The ALJ erred by finding that Respondent's failure to inquire about criminal convictions before or during employment demonstrates that criminal convictions of no importance to Respondent. The ALJ places particular weight on the fact that Respondent's written application for employment does not include an inquiry about criminal convictions. As described above, the Respondent is a Massachusetts non-profit corporation. Massachusetts state law prohibits employers from inquiring about criminal convictions on written applications. Mass. Gen. Stat. ch. 151B § 4(9 1/2) (2013). Because the Respondent operates nationwide, its general practice is

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have requested that director schedules be overhauled so that at least two directors will be present at all times Neel is working.

to establish one generally applicable application, rather than draft separate applications for each state; hence, its decision not to include an inquiry on the application provided Neel.[2]

The ALJ also finds that the fact that the Portland directors did not directly ask David about his criminal convictions during the hiring process or after employment further supports conclusion that the criminal conviction policy was of no significance to the Respondent. As described above, the Respondent's policy concerning criminal convictions specifically instructs TOP directors not to inquire about criminal convictions during the hiring process, because Massachusetts state law prohibits inquiry about many classes of criminal convictions, *see* Mass. Gen. Stat. ch. 151B § 4(9) (2013); Cal. Lab. Code § 432.8 (2013). Again, the Respondent's general preference is to establish one generally applicable enforcement strategy applicable to all call centers, particularly given the complex laws at issue. Moreover, given the limited funds available to the Respondent, it would be unduly burdensome to run background checks on every applicant and employee (where allowable under state law), particularly given the high rate of turnover among callers.

The ALJ credits testimony by Neel that "he was open with his past with his coworkers and that his disclosure included his telling Chelsea Callahan, Raley's roommate." Assuming that the ALJ's credibility determination was correct, Neel's testimony that he was "open with his past" sheds no light on the exact extent of the information he provided to other employees. Given his demonstrated willingness to contextualize his crimes while under oath and clear self interest in maintaining working relationships with his coworkers, Neel can be presumed to have provided the same self serving testimony he provided at the hearing to his coworkers. In any event, there is no dispute that Neel never shared this informed with the Portland directors.

2 Since discovery of Neel's criminal convictions, the Respondent has updated its written application for its Portland call centers to include an inquiry regarding applicants' criminal convictions.

Fielding, Wood, and Neel himself testified that Neel never directly informed any director of his criminal convictions. Even if the Board were to accept Neel's invitation to imply that Raley indirectly learned of Neel's convictions through Callahan, such implication would not affect the legal analysis here. *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993) (reversing ALJ finding that employer did not consistently enforce its sexual harassment policy based on fact that local supervisor allegedly tolerated previous on-the-job sexual misconduct by employee, because record showed that upper level managers were responsible for enforcing the policy and upper level managers had consistently done so). Because Wood, and not Raley, was effective decisionmaker with respect to the criminal conviction policy, any disparate treatment analysis must focus on Wood's knowledge of Neel's criminal convictions and any actions Wood took as a result. Wood testified that he learned of Neel's convictions for the first time after reading an article about the same that was published on March 6, 2013. Wood further testified that, had he been made aware of Neel's conviction for rape, sodomy, and sexual abuse while Neel was still employed by Respondent, he would have terminated him immediately.

**C. The ALJ erred as a matter of law and fact in concluding that the absence of a past discharge based on a recent violent criminal conviction demonstrates the Respondent would not have terminated Neel for such conviction when the situation had never before come up and the Respondent had a written policy indicating violent criminals would be disqualified from employment.**

The ALJ erred as a matter of law and fact in finding that Respondent's failure to prove evidence of past discharges based on its criminal convictions policy prevents it from meeting the legal standard announced in *John Cuneo*, 298 NLRB at 856-857. The ALJ found that, if the Respondent intended to enforce its policy against employing individuals with certain criminal convictions, that it should have a track record of having terminated other individuals for similar reasons in the past. This finding is both implausible as a matter of logic and inconsistent with

Board precedent. The validity of a written policy does not depend on whether it has ever had an opportunity to be enforced. *Hartman and Tyner, Inc.*, 2013 NLRB LEXIS 278 at *11 (April 25, 2013) ("In John Cuneo, however, the credited testimony and other evidence established not only that the employer had a policy against hiring applicants who made misstatements on their applications, but also that the employer in fact had adhered to that policy, even though the employer previously had not been confronted with a similar situation" (emphasis added)). Employers, like the Respondent, frequently establish employee policies prohibiting various forms of employee misconduct, whether such misconduct has previously occurred. At the time Neel's past convictions came to light, the Respondent had not been presented with a similar situation.[3] As the Board's analysis in *Hartman and Tyner, Inc.* shows, its policy regarding employees with criminal convictions is no less valid due to the Respondent's relative lack of experience.

**D. The ALJ erred as a matter of law and fact in failing to consider whether Neel's statements to a Portland newspaper, including maliciously false and disparaging statement that Respondent was a Ponzi scheme, warranted termination.**

The ALJ erred as a matter of law and fact in failing to consider whether Neel's statements to a Portland newspaper consisted of knowingly or maliciously false disparagement warranting termination. An individual that engages in protected/concerted activity under Section 7 of the Act may lose that protection under certain circumstances. *See* 29 USC § 157 (2012). In *NLRB v. Electrical Workers IBEW Local 1229*, 346 U.S. 464 (1953), the U.S. Supreme Court held that employee conduct involving a disparagement of an employer's product, rather than publicizing a labor dispute, is not protected. Generally speaking, "employee appeals concerning working conditions made to parties outside the immediate employer-employee relationship may be

3 In fact, the Respondent's TOP office in Boston recently terminated a caller after directors alerted Wood to the fact that the caller had been previously convicted of fraud.

protected by the Act." *Endicott Interconnect Technologies*, 345 NLRB 448, 450 (2005). However, such communications are not protected without limit, and will lose the protection of the Act if maliciously false, i.e., statements made with knowledge of their falsity or with reckless disregard for their truth or falsity." *Sprint/United Management Co.*, 339 NLRB at 1018. Such communications may also lose protection where they constitute a "public disparagement of the employer's product or [an] undermining of its reputation." *Veeder-Root Co.*, 237 NLRB at 1175. The ALJ credits Neel's testimony that he does not believe Respondent is a Ponzi scheme and that he believes in Respondent's mission. Assuming that Neel's testimony is, as the ALJ finds, credible, then it follows that Neel's statements to the Portland Mercury reporter, that the Respondent is a "Ponzi scheme" and that he no longer believes in what the Fund does, were maliciously false and intended to undermine Respondent's reputation. As such, these statements are not protected by the Act and can lawfully be the basis for a decision to terminate – a decision both Fielding and Wood testified they would have made upon learning of Neel's statements.

**E. The ALJ erred as a matter of law and fact in finding that Neel's statements were not so "flagrant" as to lose protection under the Act by comparing statements by Neel regarding a non-profit employer via the Portland Mercury with statements made by terminated employees of for-profit employers via personal websites, handbills, and other forms of media with limited or no established audience.**

The ALJ relies on the Board's decision *Hawaii-Tribune-Harold*, 356 NLRB No. 63 slip op. at 2, for the proposition that post-termination conduct must be "so flagrant as to render the employee unfit for further service or that there is a threat to the efficiency in the plant." The ALJ found that Neel's statements to the Portland Mercury do not meet this standard. In this respect, the ALJ relies heavily on the Board's decision in *Connecticut Humane Society*, 358 NLRB No. 31, slip op. at 1 fn. 2 (2012). There, the terminated employees' post-termination conduct consisted of posting statements to a "former news reporter's website" that criticized the

organization and "accused managers and board members of lying, misusing funds, abusing animals, corruption, and harassment." Based on these statements the respondent argued that the terminated employees were unfit for further service. *Id.* The Board disagreed, stating that the terminated employees' statements did not rise to the level necessary to meet this standard and disqualify the employee from reinstatement and backpay, as demonstrated by the more flagrant nature of statements the Board previously found did not meet the standard. *Id.* at 1 (citing *George A. Hormel & Co.*, 301 NLRB 47 (1991) (discharged employee handed out leaflet attacking employer's product and telling an employee that employer's product "can kill people"); *Timer*, 251 NLRB 1180, 1180 (1980) (terminated employee distributed letter accusing employer of providing "false testimony" at hearing before judge and accusing employer of "expressed and implied tyranny"); *Pincus Bros.*, 241 NLRB 805, 809 (1979) (terminated employee published an article in the "Garment Worker," a newspaper published by a "dissident" group to which employee belonged, accusing employer of being a "crook" and stealing from employees); and *Golden Day Schools*, 236 NLRB 1292, 1297 (1978) (terminated employees distributed flyer to parents of students while picketing; flyer disparaged employer's service and facilities including accusing it of serving spoiled food, having water fountains with dirty water, using unsafe buses and having children sleep on dirty cots).

These cases do not support the ALJ's finding that Neel's statements to the Portland Mercury did not meet the standard established by the Board in *Hawaii-Tribune-Herald*. The ALJ summarily concluded that Neel's statements "paled in comparison" to those made by other terminated employees. Leaving aside the fact that Ponzi schemes are illegal and the characterization of someone running one is essentially calling that person a "criminal," the critical error here is the ALJ's failure to consider not just the statements themselves but that

impact those statements had on the employer. In each of the cases cited by the ALJ, the statements made by terminated employees were communicated via mediums (personal websites, letters, handbills, and articles in a special-interest newspaper) with limited/no readership – dramatically reducing the impact of those statements on the employer. Neel, on the other hand, made his false and disparaging statements to a reporter for a major publication with a total readership of 438,000. Because the potential audience for Neel's statements is thousands of times larger than that for the statements made by other terminated employees, the cases relied upon by the ALJ are readily distinguishable.

## REQUEST FOR RELIEF

For the foregoing reasons, Respondent respectfully requests that the Board sustain these exceptions and deny enforcement of the ALJ's decision.

s/ Brent Jordheim
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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, Respondent's Exceptions in case no. 19-CA-94311 was filed electronically with the Board's e-filing system, and with Counsel for the Acting General Counsel, National Labor Relations Board, Subregion 36. Respondent's Exceptions were also filed by electronic mail with Madelyn Elder (president@cwa7901.org) Representative for the Charging Party, this 22nd day of November, 2013.

s/ Brent Jordheim

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