

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8**

**THE OHIO EDISON COMPANY, A WHOLLY  
OWNED SUBSIDIARY OF FIRSTENERGY CORP.**

**and**

**CASE 08-CA-099595**

**INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL UNION NO. 1194,  
AFL-CIO, CLC**

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**FIRSTENERGY GENERATION CORP.**

**and**

**CASE 06-CA-092312**

**INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL UNION NO. 272,  
AFL-CIO, CLC**

**FIRSTENERGY'S EXCEPTIONS TO  
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46(a) of the National Labor Relations Board's Rules and Regulations, Respondent FirstEnergy Generation Corp. ("FirstEnergy") excepts to the Decision and Order of Administrative Law Judge Mark Carissimi (the "ALJ") as follows:

1. The ALJ erred in finding Eileen McNamara emailed Chuck Cookson regarding her September 18, 2012 conversation with Herman Marshman on September 19, 2010, the day after she phoned Herman Marshman, rather than the day of their conversation. (ALJD<sup>1</sup> 6:20).

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<sup>1</sup> References to the ALJ's Decision and Order appear as (ALJD \_\_\_\_:\_\_\_\_). The first number refers to the corresponding page(s) and the latter to the corresponding line(s) of text.

2. The ALJ erred in failing to apply the five-factor test adopted by the Board in *Woonsocket Spinning Co.*, 252 NLRB 1170, 1172 (1980) and *Benchmark Industries, Inc.* 270 NLRB 22, fn. 5 (1984), which is controlling Board precedent, in determining whether the Employee Service Recognition (“ESR”) policy is a mandatory subject of bargaining; rather the ALJ attempted to analogize and/or distinguish this case from other Board cases dealing with gifts. (ALJD 10:16-24).
3. The ALJ erred in determining whether the ESR policy was a mandatory subject of bargaining by failing to give any weight to the facts that: (a) employees have to wait at least five years in order to select a gift, and therefore, have no reasonable expectation in receiving the gift and cannot honestly state that they consider the gift to be part of their overall remuneration; (b) the value of ESR gifts given to employees are uniform and of equal value at each anniversary level despite differences in each individual employees’ pay and benefits; (c) the gifts and the ESR policy applies to all 16,000 FirstEnergy employees– union, non-union, management, hourly, part-time and full-time; (d) there is no relationship between an employee’s remuneration and the value of their gift; (e) the gifts are considered non-taxable by the IRS; (f) the ESR policy was modified due to the declining financial condition of the Company; (g) Local 272 has never requested bargaining over or complained about changes made to the ESR policy since becoming the employees bargaining representative in 1978; (h) the ESR gifts were unambiguously represented to employees at all times as “gifts”; (i) no employee that testified has ever relied on the gift as part of their remuneration– in fact, Local 272’s President testified that on multiple occasions, he failed to select a gift when it was offered by the Company; and (j) the gifts in the catalogs are constantly changing and no employee knows what is

available in any catalog until they receive it; therefore, an employee has no reasonable expectation in what gift they will receive at any given time. (*Id.*).

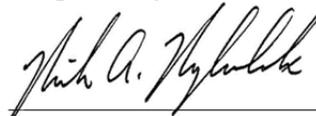
4. The ALJ erred by giving an unwarranted amount of weight to and basing his entire decision on the ESR policy's tenuous and remote link to seniority/length of service. (ALJD 10:14-24).
5. The ALJ erred in failing to consider employee expectations in determining whether FirstEnergy's ESR policy is a mandatory subject of bargaining. (ALJD 10:16-24).
6. The ALJ erred in considering only the employment related factors highlighted in *North American Pipe Corp.*, 347 NLRB 836, 839 (2006), to determine whether the ESR policy is a mandatory subject of bargaining. (ALJD 9:18-24).
7. The ALJ erred in finding "*Conval-Ohio* and *Longhorn Machine Works* . . . are consistent with the rationale utilized by the Board in later cases in determining whether a matter . . . is a mandatory subject of bargaining or a gift[.]" (ALJD 9:10-14, 10:16-22).
8. The ALJ erred in holding "that Respondent's employee service recognition policy constitutes a mandatory subject of bargaining[.]" (ALJD 10:21-22).
9. The ALJ erred in holding that "Marshman's statements to McNamara objecting to the change in the employee service recognition policy, that he was going to file a charge over the issue and that he was 'coming to Akron on this one' constituted a request to bargain over Respondent FirstEnergy Generation's announced change to the policy." (ALJD 13:21-24). It is undisputed that Marshman never requested to bargain from when the proposed changes were announced on September 18, 2012, until they were implemented on January 1, 2013. Further, the record indicates that Marshman never came to Akron or spoke further with any FirstEnergy representative about the proposed changes.

10. The ALJ erred in concluding “the statements [Marshman] made to [McNamara] leave little doubt . . . that he conveyed to her that he was interested in bargaining about the change to the employee service recognition policy.” (ALJD 13: 39-41).
11. The ALJ erred in concluding “McNamara’s September 19 email reflects an understanding that Marshman was requesting bargaining as it indicates that she felt he was serious about coming to Akron to discuss the change to the policy.” (ALJD 13:41-43). To the contrary Ms. McNamara believed Marshman was just complaining.
12. The ALJ erred in concluding “that any doubt that the employer had regarding Local 272’s desire to bargain over the announced change to the employee service recognition policy should have been removed by the language contained in the charge filed by Local 272.” (ALJD 14:7-10).
13. The ALJ erred in concluding “the statements of Marshman on September 18 indicated a desire to further discuss the implementation of the changes to the employee service recognition policy.” (ALJD 14:20-21).
14. The ALJ erred in holding that FirstEnergy did not meet the burden of proving Local 272 waived its right to request bargaining over the ESR policy based on the parties’ past practices. (ALJD 15:1-5).
15. The ALJ erred in concluding “the change of the length of time to obtain a service award from 5 to 10 years is different in nature from prior changes to the plan. Most of the prior changes involved administrative matters involving the operation of the policy.” (ALJD 12-14).
16. The ALJ erred in holding that past changes to the ESR policy could not serve as the basis of a past practice waiver because they were different in nature than the most recent

change from gifting every five years to every ten years when, in fact, they were not. (ALJD 15:14-17).

17. The ALJ erred in concluding that inclusion of part-time employees under the ESR policy was “[t]he most significant change” and “too remote in time.” (ALJD 15:19-20).
18. The ALJ erred in concluding that the Charging Party Unions were not notified of historic changes to the ESR policy. (ALJD 15:20-21).
19. The ALJ erred in holding that “FirstEnergy Generation violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with Local 272 prior to implementing the change in the employee service recognition policy.” (ALJD 15:23-25, 16:38-41).

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Exceptions to the Decision of the Administrative Law Judge has been filed with the NLRB via the e-file system and served upon the following via U.S. Mail, regular delivery, postage prepaid:

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This 14th day of March 2014.

  
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