

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

PAE APPLIED TECHNOLOGIES, LLC

and

Case 28-CA-170331

**SECURITY POLICE ASSOCIATION
OF NEVADA**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS**

Respectfully submitted,

**Nathan Higley
Counsel for the General Counsel
National Labor Relations Board, Region 28
300 Las Vegas Boulevard South, Suite 2-901
Las Vegas, NV 89101
Telephone: (702) 820-7467
Facsimile: (702) 388-6248
Email: nathan.highley@nlrb.gov**

TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION	1
II. STATEMENT OF BACKGROUND FACTS	1
III. RESPONDENT’S EXCEPTIONS	5
A. The ALJ’s Determination That Respondent Violated Poulos’ Weingarten Rights by Refusing His Choice of Representative Should Not Be Overturned	5
1. <i>Respondent’s Exceptions</i>	5
2. <i>Facts</i>	7
3. <i>Authority</i>	8
4. <i>Argument</i>	10
B. The ALJ’s Determination That Respondent Violated Poulos’ <i>Weingarten</i> Rights by Restricting the Actions of His Union Representatives Should Not Be Overturned	12
1. <i>Respondent’s Exceptions</i>	12
2. <i>Facts</i>	13
3. <i>Authority</i>	15
4. <i>Argument</i>	16
C. The ALJ’s Determinations Regarding Respondent’s Interrogation of Poulos Should Not Be Overturned	17
1. <i>Respondent’s Interrogation Exceptions</i>	17
2. <i>Facts</i>	18
3. <i>Authority</i>	19
4. <i>Argument</i>	20
D. The ALJ’s Determination That Respondent’s Discipline Was Unlawful Should Not Be Overturned	21
1. <i>Exceptions</i>	21
2. <i>Facts</i>	25
3. <i>Authority</i>	28
4. <i>Argument</i>	30
E. The ALJ’s Determinations Regarding Respondent’s Unlawful Rule Should Not Be Overturned	33
1. <i>Rule Exceptions</i>	33
2. <i>Facts</i>	34
3. <i>Authority</i>	35
4. <i>Argument</i>	35

F.	The ALJ’s Determination That Respondent Unlawfully Refused to Honor the Union’s Information Request Should Not Be Overturned	37
	1. <i>Respondent’s Information Request Exceptions</i>	37
	2. <i>Facts</i>	38
	3. <i>Authority</i>	41
	4. <i>Argument</i>	42
G.	The ALJ’s Conclusions and Recommended Remedy, Order, and Notice Posting Are Proper	44
	1. <i>Respondent’s I Exceptions to the ALJ’s Recommended Remedy Order</i>	44
	2. <i>Authority</i>	45
	3. <i>Argument</i>	45
IV.	CONCLUSION	46

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<i>Aero-Motive Manufacturing Co.</i> , 195 NLRB 790, 792 (1972)	41
<i>Amersig Graphics, Inc.</i> , 334 NLRB 880, 885 (2001)	41
<i>Anheuser-Busch, Inc.</i> , 337 NLRB 3 (2001), <i>enfd.</i> 338 F.3d 267 (4th Cir. 2003), cert. denied 541 U.S. 973 (2004)	9
<i>Atlantic Steel Co.</i> , 245 NLRB 814, 816 (1979)	22, 23, 29
<i>Barnard College</i> , 340 NLRB 934, 935 (2003)	9, 16
<i>Bourne v. NLRB</i> , 332 F.2d 47, 48 (2d Cir. 1964)	19
<i>Burnup & Sims</i> , 256 NLRB 965 (1981)	22, 31, 33
<i>Capitol EMI</i> , 311 NLRB 997 (1993)	30, 33
<i>Consolidated Casinos Corp.</i> , 266 NLRB 988 (1983)	6
<i>Consolidated Diesel Co.</i> , 332 NLRB 1019, 1020 (2000)	20
<i>Consolidation Coal</i> , 307 NLRB 976, 978 (1992)	9
<i>Chromalloy Gas Turbine Co.</i> , 331 NLRB 858, 863 (2000) <i>enfd.</i> 262 F.3d 184, 190 (2d Cir. 2001)	28
<i>Crittendon Hospital</i> , 343 NLRB 717, 720 (2004)	41
<i>Detroit Newspaper Agency</i> , 317 NLRB 1071 (1995)	41
<i>Dews Construction Corp.</i> , 231 NLRB 182, n. 4 (1977), <i>enfd.</i> mem. 578 F. 2d 1374 (3d Cir. 1978)	30
<i>Disneyland Park</i> , 350 NLRB 1256, 1258 (2007)	42
<i>Double Eagle Hotel & Casino</i> , 341 NLRB 112, 123 (2004)	25, 29
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556, 565 (1978)	29, 35
<i>Electrical Workers Local 236</i> , 339 NLRB 1199 (2003)	9
<i>Fresenius USA Mfg., Inc.</i> , 362 NLRB No. 130, slip op. at 1 (2015)	20
<i>GHR Energy Corp.</i> , 294 NLRB 1011 (1989)	9
<i>Greenwood Trucking, Inc.</i> , 283 NLRB 789 (1987)	29, 35
<i>Health Care & Retirement Corp. of America</i> , 306 NLRB 63, 65 (1992)	28
<i>Kinder-Care Learning Centers</i> , 299 NLRB 1171 (1990)	24, 29, 35
<i>Lafayette Park Hotel</i> , 326 NLRB 824 (1998), <i>enfd.</i> 203 F.3d 52 (D.C. Cir. 1999)	35
<i>Lockheed Martin Astronautics</i> , 330 NLRB 422 (2000)	13, 16
<i>Lutheran Heritage Village-Livonia</i> , 343 NLRB 646 (2004)	35
<i>McLean Hospital</i> , 264 NLRB 459 (1982)	9
<i>Media General Operations, Inc. v. NLRB</i> , 560 F.3d 181 (4th Cir. 2009)	29
<i>Montgomery Ward & Co.</i> , 269 N.L.R.B. 904, 911 (1984)	6
<i>NLRB v. Acme Industrial Co.</i> , 385 U.S. 432 (1967)	41
<i>NLRB v. J. Weingarten</i> , 420 U.S. 251, 256-257 (1975)	9
<i>Norton Audubon Hospital</i> , 338 NLRB 320, 320-321 (2002)	19
<i>Pacific Gas & Electric Co.</i> , 253 NLRB 1143 (1981)	9

<i>Pennco, Inc.</i> , 212 NLRB 677 (1974)	41
<i>Plaza Auto Center, Inc.</i> , 360 NLRB No. 117, slip op. at 7 (2014)	30
<i>Postal Service</i> , 303 NLRB 463, 467 (1991)	16
<i>Public Service Company of New Mexico</i> , 360 NLRB No. 45 (2014)	6, 10
<i>Quality Building Contractors</i> , 342 NLRB 429, 431 (2004)	41
<i>Richmond Health Care</i> , 332 NLRB 1304, 1305 fn. 1 (2000)	42
<i>Rossmore House</i> , 269 NLRB 1176, 1177 (2003)	19
<i>Samaritan Medical Center</i> , 319 NLRB 392, 398 (1995)	41
<i>Southwestern Bell Telephone Company</i> , 251 NLRB 612, 613 (1980)	16
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951)	20
<i>Stanford Hotel</i> , 344 NLRB 558, 564 (2005)	30
<i>Tampa Tribune</i> , 351 NLRB 20 1324, 1326 fn. 14 (2007)	29
<i>Texaco, Inc.</i> , 251 NLRB 633, 636 (1980)	10, 16, 35
<i>Thor Power Tool Company</i> , 148 NLRB 1379, 1386 (1964)	30
<i>Tradesmen International, Inc.</i> , 341 NLRB 399 (2007)	30
<i>United Parcel Service of America</i> , 362 NLRB No. 22, slip op. at 3 (Feb. 26, 2015)	42
<i>Washington Fruit & Produce Co.</i> , 343 NLRB 1215, 1237 (2004)	29
<i>Washoe Medical Center</i> , 348 NLRB 361, 361 (2006)	16
<i>Weingarten</i> , 275 NLRB 604, 609 (1985)	9
<i>Whittaker Corp.</i> , 289 NLRB 933, 934 (1988)	28

I. INTRODUCTION

By its Brief in Support of its Exceptions (Brief), PAE Applied Technologies, LLC (Respondent) urges the Board to overturn the well-reasoned rulings of Administrative Law Judge Amita Baman Tracy (the ALJ). The ALJ's determinations are firmly rooted in the record. Each ruling is accompanied by sound reasoning and thorough analysis of Board law. This case does present a matter of first impression concerning the extent of *Weingarten* rights. In that matter, the ALJ's decision (the Decision) represents a rational extension of long-standing Board law. The Board should reject Respondent's exceptions *in toto* and affirm the Decision.

II. STATEMENT OF BACKGROUND¹ FACTS

Although Respondent's Brief offers a summary of facts, citations to the record are made in summary fashion. In multiple instances, Brief sets forth facts that are not contained in the record. For these reasons, Counsel for the General Counsel (CGC) presents a separate summary of facts. The summaries of fact presented in CGC's brief are drawn from Respondent's witnesses' testimony or admitted exhibits, except where otherwise indicated. In all instances where facts are drawn from CGC witness testimony, the particular fact will be prefaced by identifying the witness who offered the testimony.

Respondent is a government contractor, who provides, among other things, physical security for the United States Air Force (the Air Force).² Tr. 28, 48, 94, 204.³ This work is performed under a contract for "range support services" (RSS). Tr. 24, 203. The RSS contract has been in place since at least 2002. Tr. 24, 55. As part of these services, security officers are

¹ Additional statements of fact are provided below prior to discussion of the Exceptions to which the facts correspond.

² Throughout the record, witnesses referred to the "customer" or the "government." Testimony established that the terms referred to the United States Air Force. For the sake of consistency, CGC's brief will use the term "Air Force."

³ References to the Transcript are Tr. ___, showing page or pages. GCX ___ refers to General Counsel's Exhibits. RX 1 refers to Respondent's Exhibit.

stationed at military facilities. Tr. 28, 204. There are over eight locations where these security officers perform work. Tr. 28; see also Tr. 31, 204. Although Respondent's main office is in North Las Vegas, some of these work locations are hours away from Las Vegas, by car. Tr. 29, 39.

The Air Force designates certain employees to interface with Respondent at each of its locations. Tr. 30. One such employee is Raymond Allen (Allen).⁴ Tr. 31. Allen is a Director of Security Forces for the Air Force. Tr. 48. Allen has no authority to direct Respondent's employees' work. Tr. 47. He has no authority to issue them discipline. Tr. 41. However, Allen has authority to revoke security officers' authority to carry weapons. Tr. 48. Carrying a weapon is essential to security officers' performance of their duties. Tr. 48. Without the authority to carry a weapon, security officers cannot perform work for Respondent. Tr. 48.

Respondent's security officers are represented by the Charging Party, Security Police Association of Nevada (the Union). Tr. 26. Respondent and the Union are signatory to a collective bargaining agreement (CBA). Tr. 26; see GCX 2. John Poulos (Poulos) is the Union president. Tr. 27. Since Poulos took office as Union president, the Union has filed an increased number of charges with the Board. Tr. 215; see RX 1, page 10. Respondent has cited Poulos' decision to file Board charges as "ridiculous" and has pointed out that "ever since [Poulos] has been president [] we have had nothing but problems with him..." RX 1, page 10.

Thomas Fisco (Fisco) worked as a Security Major for Respondent. Tr. 31, 93. He was responsible for ensuring that Respondent's contract with the Air Force was fulfilled. Tr. 93. Around February 8, Fisco called Poulos. Tr. 95, 96. He informed Poulos that the Air Force had revoked the authority to carry arms from two bargaining unit members. Tr. 96. Fisco called

⁴ Similarly, Craig Farnham (Farnham) is an employee of the Air Force and is also a Director of Security Forces. Tr. 30; 48.

Poulos because Poulos is the Union president. Tr. 96. Poulos testified that, prior to that conversation, he did not know who from the Air Force was involved in the unit members' suspension. Tr. 107.

On February 16, 2016,⁵ Poulos was scheduled to attend training at a location approximately 25 feet from Fisco's office. Tr. 94, 95. Poulos came to Fisco's office. Tr. 94. At the time, Fisco was having a personal conversation with Allen. Tr. 98.

Fisco claims⁶ that Poulos entered the office and set his bag down – at which point his back was to Allen – then began to address Allen.⁷ Tr. 98. According to Fisco, Poulos told Allen that he wished to discuss further the “situation from last week on the two individuals with the DUI and with the weapons taken away from them.” Tr. 97. Fisco testified that Allen replied that the matter had already been discussed fully by phone the past week when Poulos called Allen. Tr. 98. Fisco stated that Poulos told Allen that he could not intervene in the Union's CBA. Tr. 97. He later added that Poulos told Allen that he did not, “as a GS-13, have the power or rank” to do what he did. Tr. 99. Allen became agitated and offended⁸ and raised his voice. Tr. 96, 99. Allen stated that he had the necessary authority. Tr. 99. At this point, Fisco said nothing. Tr. 99. According to Fisco, Poulos stated two or three times that Allen did not have authority. Tr. 99. At that point, Fisco told Poulos to go to training. Tr. 99. He said it a second time five seconds later and another time five seconds after that. Tr. 99. Fisco stated that Steve Matthews (Matthews), Poulos' immediate supervisor, appeared. Tr. 97. According to Fisco, Poulos left when Matthews told Poulos that the training was being held for him. Tr. 100. Fisco stated that

⁵ All further dates are in 2016, unless otherwise noted.

⁶ The ALJ discredited Fisco's testimony, but because Respondent's Exceptions – although no argument is made – put the ALJ's credibility determinations at issue, CGC sets forth Fisco's testimony here.

⁷ Fisco explained that this is what Allen's statement meant when it stated that Poulos “turned to” him. Tr. 98; see GCX 3.

⁸ Allen included his GS-13 rank in his signature on his unclassified statement. See GCX 3.

Allen was still in the room when Poulos left. Tr. 100. According to Fisco, Allen said, “I can’t believe this guy,” then left.⁹ Tr. 100. Fisco claims that Poulos did not attempt to speak with him at any point during the incident. Tr. 94, 95. Fisco said nothing to Poulos except to tell him to go to the scheduled training. Tr. 94. He could not recall Farnham being present at any point. Tr. 97. Fisco did not discuss the incident with Allen afterward. Tr. 100.

Poulos presented a different version of events. He testified that he went to Fisco’s office¹⁰ to address language Respondent had included in the suspension forms of two bargaining unit members. Tr. 103-104. The members had been suspended pursuant to do-not-arm letters issued by Allen and Farnham, but Respondent’s suspension forms cited a number of policy violations. Tr. 105. Poulos wished to discover why Respondent did not simply cite the do-not-arm letters as the reason for suspension. Tr. 105. He was concerned that this practice might become a troubling precedent. Tr. 162. He was not aware that Allen would be in Fisco’s office at the time he entered. Tr. 104. After entering Fisco’s office, Poulos raised the issue with Fisco, but Allen interrupted before Fisco responded. Tr. 105-106. Allen asserted his authority to issue the do-not-arm letters and later claimed to have authority to get involved with the CBA. Tr. 106. Poulos informed him that he did not.¹¹ Tr. 106. At some point, Allen lost his temper; he raised his voice and reasserted his authority. Tr. 108. Poulos did not raise his voice. Tr. 109. Poulos acknowledged that Fisco told him to go to training, but he remained in the office to resolve the issue because he was concerned about the pending time constraints in which the Union may file a grievance. Tr. 109. Poulos admitted that he left after the third time Fisco gave the instruction.

⁹ In his written statement, dated February 17, Fisco stated that Allen and Poulos “exited my office at the same time.” RX 1, page 2.

¹⁰ Poulos testified that he went to the office about ten minutes prior to the scheduled start of his training. Tr. 132. The interaction took six to seven minutes. Tr. 135.

¹¹ Poulos admitted that the Air Force has authority to issue do-not-arm letters, and he never challenged Allen’s authority to do so. Tr. 161.

Tr. 110. On his way to training, Poulos was met by Farnham, who explained the reason why he and Allen issued do-not-arm letters. Tr. 110.

James Costello (Costello) works as a Security Manager for Respondent. Tr. 23. He has held that position since 2002. Tr. 24. He is responsible for the physical security branch of Respondent's operations. Tr. 207. He answers to Respondent's Program Manager, Dennis Dresbach (Dresbach). Tr. 25, 206. Robert Williams (Williams) works as Respondent's Human Resource and Labor Relations Manager. Tr. 54. He has held that position since January 2015 and has worked under the RSS contract since 2002. Tr. 55. As part of his duties, he is responsible for handling labor issues and has authority to negotiate agreements on Respondent's behalf. Tr. 55.

III. RESPONDENT'S EXCEPTIONS

A. The ALJ's Determination That Respondent Violated Poulos' *Weingarten* Rights by Refusing His Choice of Representative Should Not Be Overturned

1. Respondent's Exceptions

Exception 3: The ALJ's finding that "Costello, Williams and Rutledge knew that Ring was counsel for the Union, and not Poulos' personal attorney." [ALJD at p. 7]

Exception 9: The ALJ's conclusion that "Poulos requested Ring as his union representative, and Respondent's multiple denials of his requests violates Section 8(a)(1)." [ALJD at p. 15]

Exception 10: The ALJ's conclusion that "Ring, who was designated by the Union as Poulos' representative, is an agent of the Union, and is considered a union representative." [ALJD at p. 15]

Exception 11: The ALJ's erroneous reliance on Costello, Williams and Rutledge's knowledge that Ring was union legal counsel in her conclusion that Ring was a union representative for purposes of *Weingarten*. [ALJD at p. 15]

Exception 12: The ALJ's conclusion that the "[t]he right to a *Weingarten* representative is a right to a representative who is an agent of the labor organization which serves as the exclusive representative of the employees." [ALJD at p. 15]

Exception 13: The ALJ's efforts to distinguish the Board's decision in *Consolidated Casinos Corp.*, 266 NLRB 988 (1983). [ALJD at p. 15]

Exception 14: The ALJ's conclusion that "the Union designated Ring to represent Poulos during the *Weingarten* meeting." [ALJD at p. 16]

Exception 15: The ALJ's failure to rely on, or distinguish, the Board's holding in *Montgomery Ward & Co.*, 269 N.L.R.B. 904, 911 (1984). [ALJD at p. 16]

Exception 16: The ALJ's erroneous reliance on the Board's decision in *Public Service Company of New Mexico*, 360 NLRB No. 45 (2014) for the conclusion that an outside union attorney was "an agent of the Union." [ALJD at p. 16]

Exception 17: The ALJ's finding that "Ring, as an agent of the Union, was available and appeared at the February 19 meeting" and that Respondent "continually denied Poulos' right to the representative of his choice." [ALJD at p. 16]

Exception 18: The ALJ's conclusion that "Respondent violated Section 8(a)(1) of the Act on February 18, 19, 22, and 24 by denying Poulos his union representative of choice." [ALJD at p. 16]

Exception 24: The ALJ's conclusion that "Respondent violated Section 8(a)(1) of the Act when on February 18, 19, 22 and 24, it denied Poulos the right to be represented by an available representative of his own choosing." [ALJD at p. 17]

2. *Facts*

Poulos called Costello on February 18. Tr. 34. Costello stated that Respondent needed a statement from Poulos about the February 16 incident. Tr. 35. Poulos informed Costello that his interaction with Allen was protected activity. Tr. 35; see also GCX 6(b). Costello told Poulos to bring a Union representative with him. Tr. 35. Poulos asked if he was subject to discipline. Tr. 35. According to Costello, he did not inform Poulos that he would be subject to discipline.¹² Tr. 35. Poulos replied that he would bring Nathan Ring (Ring) with him as his representative. Tr. 34, 35. Ring is counsel for the Union. Tr. 5, 58.

Poulos testified that Costello advised Poulos to bring a Union representative, and when Poulos asked whether he might be subject to discipline, Costello stated that he might. Tr. 113. Poulos testified that he then advised Costello that Respondent was requiring him to answer for his protected activity and stated that Union counsel would accompany him to the interview. Tr. 113-114. According to Poulos, Costello stated that counsel would not be permitted to act in that capacity. Tr. 115; see GCX 6(b).

The interview was scheduled for February 19, at Respondent's main office in North Las Vegas. Tr. 37-38, 39. The purpose of the interview was to obtain a statement from Poulos regarding Allen's complaint. Tr. 59, 82. On that date, Poulos came to the interview accompanied by Ring. Tr. 38, 58, 82. Costello saw the two arrive and met them at the door. Tr.

¹² When CGC asked how Costello responded, Costello first provided a non-responsive answer, then claimed that he had not told Poulos he might be subject to discipline. Tr. 35. He explained, however, that there would be a "conclusion" for any employee required to provide a statement. Tr. 35. He then explained that by "conclusion," he meant that Respondent would determine whether to discipline the employee. Tr. 36.

38. Costello informed Poulos that it was not appropriate to have Ring present. Tr. 38. He stated that Poulos could have any member of the Union present but not counsel. Tr. 38, 39, 60-61; see GCX 6(b)-(c). Williams then approached Poulos and also told him that Ring could not be present during the interview. Tr. 39, 58-59, 60-61, 82-83; see GCX 6(b)-(c). The interview was rescheduled for February 24. Tr. 39.

On February 22, Poulos renewed his request via e-mail to Williams to have Union counsel act as his *Weingarten* representative. See GCX 7(e)-(f). Williams responded, urging Poulos to obtain a representative and arrange to meet with Respondent Security Specialist James Rutledge (Rutledge). See GCX 7(e), Tr. 36, 81. Poulos replied and reiterated that he was designating Union counsel as his representative. See GCX 7(d). Williams then provided a list of individuals from which Poulos could select his Union representative. Tr. 66; see GCX 7(c)-(d).¹³ This list was based on a list of Union officers provided by the Union.¹⁴ Tr. 67; see GCX 7(c). According to Williams, Article 36 of the CBA stands for the rule that only appropriate persons may be used as Union representatives.¹⁵ Tr. 67-68. Williams considers individuals covered by the CBA as appropriate. Tr. 68. Eventually, Poulos replied that he “begrudgingly” agreed to attend the meeting with Joshua Lujan (Lujan) as his representative. GCX 7(b), GCX 8.

3. *Authority*

Section 7 of the Act gives employees the right to “to bargain collectively through representatives of their own choosing.”¹⁶ Pursuant to Section 7, employees are entitled, on

¹³ GCX 8 was attached to Poulos’ message on GCX 7(a). Tr. 77.

¹⁴ Article 16 of the CBA states that the Union will periodically provide Respondent with a list of Union officers. Tr. 66. Prior to February 22, the Union had most recently provided a list of Union officers on October 1, 2015. Tr. 67.

¹⁵ Poulos testified that the act of providing a list of Union officers to Respondent also serves to advise Respondent of which employees might carry out Union business and be afforded the legal protection to which they are entitled. Tr. 144-145, 158.

¹⁶ Similarly, Section 8(b)(1)(B) of the Act makes it unlawful for a union to restrain an employer in the selection of its representative for the purpose of adjusting grievances.

request, to have a representative present during interviews which the employee reasonably believes might lead to discipline. *NLRB v. J. Weingarten*, 420 U.S. 251, 256-257 (1975).

“The selection of an employee’s representative belongs to an employee and the union, in the absence of extenuating circumstances.” *Barnard College*, 340 NLRB 934, 935 (2003) (citing *Anheuser-Busch, Inc.*, 337 NLRB 3 (2001), *enfd.* 338 F.3d 267 (4th Cir. 2003), *cert. denied* 541 U.S. 973 (2004); *Pacific Gas & Electric Co.*, 253 NLRB 1143 (1981)). Generally, the *Weingarten* right to representation includes a right to choose a specific union representative if that representative is available. See, e.g., *Anheuser-Busch, Inc.*, 337 NLRB at 8-9. An employer violates the Act by denying employees their choice of available representative and insisting that another union representative represent the employee. See *Consolidation Coal*, 307 NLRB 976, 978 (1992); *GHR Energy Corp.*, 294 NLRB 1011 (1989) (finding a violation of the Act where the employer denied an employee his choice of representative, who was from the international union and present, and forcing the employee to proceed with another representative). The Board has not definitively ruled on whether a union official may select union counsel as a *Weingarten* representative.¹⁷ An employer may regulate the role of the *Weingarten* representative, but only to the extent necessary to ensure that the interview does not become a collective-bargaining or adversarial confrontation. *Texaco, Inc.*, 251 NLRB 633, 636 (1980).

¹⁷ The ALJ in *TCC Center Cos* found that the employee in question was not engaged in concerted activity, but was seeking personal assistance from a private attorney and ruled that the employee did not have such a right under *Weingarten*. 275 NLRB 604, 609 (1985) citing *McClean Hospital*, 264 NLRB 459 (1982). The ALJ noted that the Board sustained the decision in *McClean* without discussing the issue. Similarly, *TCC* was upheld without comment. The Board cited *TCC*’s use of the phrase “personal and private assistance” in its decision in *Electrical Workers Local 236*, 339 NLRB 1199 (2003). However, the Board’s analysis in that case discussed whether unorganized employees have a Section 7 right to request non-employees as *Weingarten* representatives.

4. *Argument*

In its Brief, Respondent points out that the principal matter of contention is whether Ring, as Union counsel, qualified as a *Weingarten* representative. Though acknowledging a lack of definitive Board law on this question, Respondent argues that the ALJ's reliance on *Public Service Company of New Mexico*, 360 NLRB No. 45 (2014) is misplaced. Respondent avers that Ring's involvement was improper because investigatory interviews are informal and have the purpose of allowing an employer to quickly obtain information about employee misconduct. Respondent argues that allowing legal counsel to serve as a Union representative would obligate employers to have counsel present, which would increase the cost of the interviews and thereby deter employers from conducting them. Finally, Respondent argues that the ALJ's standard is unworkable because it would put the onus on employers' supervisors to determine whether the attorney present represents the Union or the individual under investigation. Respondent does not contend that Poulos' *Weingarten* rights did not attach, that Ring was not Union counsel, or that Ring was not ready and available to serve as a representative for the scheduled interview.

In ruling that Respondent violated Section 8(a)(1) of the Act each time it denied Poulos the right to have Ring act as his *Weingarten* representative, the ALJ found that Respondent was aware that Ring was not Poulos' personal attorney because Poulos introduced Ring as Union counsel in written correspondence and in person. There is no evidence that Ring was being employed to take legal action or that Respondent suspected he might. As the ALJ explained, although the Board has ruled that a personal attorney is not an appropriate *Weingarten* representative, the Board has generally declined to limit an employee's selection. Here, Poulos serves a dual role as Union president and employee. Just as a rank-and-file Union member might seek a shop steward as a representative, or a shop steward a business agent, the Union's president

sought an individual with greater expertise. Arguably, there was no one in the Union more capable than Poulos to provide representation. Just as attorneys commonly seek legal counsel when made the subject of legal proceedings, Poulos' choice to seek representation superior to his own was a logical choice.

In addition, Respondent's actions demonstrate why having counsel present made sense. At hearing, Respondent justified its refusal to provide Poulos with a copy of Allen's classified complaint (see Section F below) – in part – because Poulos was the subject of the investigation, Poulos' position as Union president notwithstanding. Presumably, Respondent might ordinarily provide information requested in behalf of an employee to a Union official. Here, there was no higher official. In this manner, Poulos was deprived of the rights and recourse available to other employees.

Respondent's argument that allowing unions' legal counsel to serve as *Weingarten* representatives would unduly burden the investigatory interview mechanism is unfounded. The question of whether an attorney is retained by the Union or the individual may be resolved even by a layperson with one question. It is not unheard of for employers to have some legal representative present during significant investigatory interviews, though the employment of legal counsel can be expensive. Expense is one reason it is unlikely that it will become commonplace for union counsel to act as a *Weingarten* representative. More significant is the fact that most employees do not have authority – in contrast to Poulos – to employ, direct, or even contact union counsel. Furthermore, employees still face the requirement that the representative requested be available. Therefore, this extension of Board law is already limited in a practical sense. Finally, the ALJ's ruling does not change Board law allowing employers to

limit the activity of a *Weingarten* representative in order to prevent the investigatory interview from becoming a bargaining session or an adversarial proceeding.

Regarding Williams' instruction that Poulos limit his choice of representative to a list of Union officers, the ALJ pointed out that the collective-bargaining agreement (CBA) between the Union and Respondent contains no provision limiting who could serve as a representative during an investigatory interview. Although it is apparent that Poulos wished to have Lujan act as his *Weingarten* representative as an alternative to Ring, the fact that Lujan's name was on the list Williams supplied is mere happenstance. The fact that Poulos' alternative choice was not affected does not change the unlawful nature of Williams' limitation of Poulos' choice. To hold otherwise would allow employers to limit employees' choice of *Weingarten* representatives to only those individuals with whom the employer prefers to deal. Given that a *Weingarten* representative is intended to represent the interests of the investigated employee, it is clear why such employer-imposed limitations are impermissible.

All other claims made in the Exceptions above are amply supported by the Decision, including the authority and portions of the record cited thereto. Without argument by the Respondent, there is nothing to which CGC may respond.

CGC respectfully requests that the Board dismiss Exceptions 3, 9-18 and 24.

B. The ALJ's Determination That Respondent Violated Poulos' *Weingarten* Rights by Restricting the Actions of His Union Representatives Should Not Be Overturned

1. Respondent's Exceptions

Exception 5: The ALJ's decision to discredit Rutledge's testimony that he permitted the union to ask questions during the February 24th meeting and to clarify the questions and to credit the testimony of Lujan on that subject. [ALJD at p. 10, fn. 19]

Exception 19: The ALJ's finding that "although Rutledge initially permitted a few questions, he then told all the participants that he would not allow any further discussion and all questions needed to come through him." [ALJD at p. 16]

Exception 20: The ALJ's conclusion that Respondent unlawfully limited Poulos' union representatives' participation during the meeting. [ALJD at pp. 16-17]

Exception 21: The ALJ's finding that "Rutledge stifled Lujan and Campbell's ability to represent Poulos immediately from the start of the meeting." [ALJD at p. 16]

Exception 22: The ALJ's finding that "Rutledge precluded Poulos from consulting with his representatives about his statement, and they could not ask any clarifying questions during the question-and-answer session." [ALJD at p. 16]

Exception 23: The ALJ's reliance on the Board's decision in *Lockheed Martin Astronautics*, 330 NLRB 422 (2000) in concluding that Respondent violated Section 8(a)(1) by Rutledge's conduct during the February 24, 2016 investigatory meeting. [ALJD at p. 17]

Exception 25: The ALJ's conclusion that "Respondent violated Section 8(a)(1) of the Act when Rutledge required Poulos' union representative to remain silent during certain portions of the investigatory interview thereby depriving Poulos of useful representation." [ALJD at p. 17]

2. *Facts*

Rutledge worked for 24 years in the Air Force's security forces. Tr. 188. In that capacity, he conducted investigations. Tr. 188. The Air Force provides a directive to guide its investigations. Tr. 189. This Air Force security regulation affords forms and instructions on how investigators should obtain statements. Tr. 200. These instructions make no mention of the

National Labor Relations Act. Tr. 201. Rutledge followed these Air Force instructions in conducting his investigation of Poulos.¹⁸ Tr. 200.

As stated above, Poulos eventually designated Lujan as his representative. GCX 7(b), GCX 8. Lujan and Timothy Campbell (Campbell) work as security officers for Respondent. Tr. 64-65. They are also Union vice presidents. Tr. 65. Rutledge, Williams, Poulos, Lujan, and Campbell were present at the February 24 meeting.¹⁹ Tr. 83, 192. The purpose of the interview was to investigate Poulos with regard to Allen's complaint. Tr. 62-63. Respondent's intent was to obtain statement from Poulos and to allow Rutledge to ask questions. Tr. 65. The purpose of obtaining a statement from Poulos was to get "his side of the story." Tr. 66.

The February 24 interview took place at Respondent's main office. Tr. 192. At this meeting, Rutledge told Poulos that the Air Force had lodged a complaint against him. Tr. 193. Rutledge told Poulos that the first thing he needed was Poulos' written statement. Tr. 73, 193. Rutledge intended to obtain the statement first and then base his questions, which he would ask later, on that statement. Tr. 84.

Rutledge²⁰ asked for the statement, and the representatives from the Union asked questions in return. Tr. 85, 193. During a discussion of the complaint underlying the investigation, Rutledge told Union representatives to stop talking. Tr. 84, 193, 195. He stated that all questions should be directed to him. Tr. 85. He also stated that there could be no

¹⁸ Respondent's contract with the Air Force instructs Respondent to refer to Air Force documents. Tr. 201. The CBA contains no such instruction. Tr. 202.

¹⁹ In addition, Anthony Marvez (Marvez) and Latonya (Latonya) Williams/Coleman were present. Tr. 83, 192. Marvez is Respondent's Contract Program Security Officer. Tr. 6. Latonya works in Respondent's human resources department. Tr. 84. She was identified as Latonya Williams by Rutledge. Tr. 83. She was identified as Latonya Coleman by Poulos. Tr. 123.

²⁰ The ALJ discredited Rutledge and credited Lujan. However, Rutledge's version of events is presented here because Respondent has put the ALJ's credibility determinations at issue in its Exceptions (although, no argument was made in support of those specific exceptions).

questions while Poulos was writing his statement. Tr. 85. Rutledge did not want questions to influence Poulos' statement. Tr. 194. Poulos then provided a written statement. Tr. 87, 195.

Lujan presented a different version of events. According to Lujan's credited testimony, Rutledge informed them that they were not permitted to speak during the investigation. Tr. 166-167, 178-179. Rutledge repeated this prohibition prior to the question-and-answer portion of the interview (below). Tr. 170. Lujan was only permitted to ask questions after the interview was over. Tr. 174.

As Poulos wrote his statement, Campbell requested permission to ask a question. Tr. 85, 193. Rutledge asked if Campbell's question pertained to the investigation. Tr. 85, 193. When Campbell stated that it did, Rutledge said that Campbell was not permitted to ask the question in front of Poulos. Tr. 85, 193. Rutledge similarly instructed Lujan to cease speaking during the interview. Tr. 167-168.

After Poulos wrote his statement, the parties took a break. Tr. 86, 196. Rutledge read Poulos' statement, then selected questions to ask Poulos. Tr. 84, 196. Rutledge based his questions on Poulos' statement, the unclassified version of Allen's complaint, and an e-mail from Fisco. Tr. 90. Rutledge then asked Poulos a number of written questions. Tr. 74, 197. Poulos provided written answers. Tr. 75, 89, 198; see GCX 9. Rutledge read the questions and answers out loud. Tr. 75, 89-90, 197, 198. At the conclusion of the question-and-answer session, Lujan asked what would happen next. Tr. 91, 199. Rutledge stated that he needed to complete a report. Tr. 91, 199.

3. *Authority*

Employees' *Weingarten* rights include not only the presence but the participation of a representative. *Postal Service*, 303 NLRB 463, 467 (1991). The role of a representative during

an investigatory interview is to provide assistance and counsel to the employee being interrogated. *Southwestern Bell Telephone Company*, 251 NLRB 612, 613 (1980).

An employer may regulate the role of the *Weingarten* representative, but only to the extent necessary to ensure that the interview does not become a collective-bargaining or adversarial confrontation. *Texaco, Inc.*, 251 NLRB 633, 636 (1980). An employer who requires a representative to be silent during an interview unlawfully limits the role of the representative to that of an observer rather than a participant. *Id.* The union representative is entitled to not only attend the meeting but also to provide advice and actively participate. *Washoe Medical Center*, 348 NLRB 361, 361 (2006); *Barnard College*, 340 NLRB 934, 935 (2003).

4. *Argument*

In its Brief, Respondent argues that because Union representatives were permitted to ask questions and consult with Poulos at some point during the investigatory interview, Poulos received representation sufficient to satisfy the requirements of Board law. Respondent avers that the ALJ's reliance on *Lockheed Martin Astronautics*, 330 NLRB 422 (2000) was misplaced. Finally, Respondent argues that because the ALJ did not discredit all of Rutledge's testimony and because Respondent only sought Poulos' side of the story, the restrictions it placed on the Union representatives' actions were permissible under 5th Circuit case law.

The ALJ credited the testimony of Lujan and found that Union representatives were permitted to ask a few questions at the beginning of the meeting, to consult with Poulos during a break, and to ask additional questions after Rutledge conducted the question-and-answer portion of his investigation, which came at the end of the interview. At all other times, the Union representatives were prohibited from speaking.

Respondent does not deny that Rutledge did prohibit the Union representatives from speaking with Poulos and speaking in general at certain points in the interview. Respondent contends that it was appropriate to silence the Union representatives because they might unduly influence Poulos' written statement and his responses to Rutledge's questions. CGC does not contend that the possibility of a witness's statement being unduly influenced is a legitimate matter of concern. However, Respondent presented no evidence that the Union representatives attempted to do so. This general concern cannot justify a blanket prohibition on legally protected participation in investigatory interviews. Respondent's actions here are of special concern because it prohibited Union participation at the two points during the interview when Union participation would have been most helpful. It was during those periods that Respondent obtained information it would use to justify its discipline of Poulos. Although Lujan and Campbell were permitted to speak at some points during the interview, by silencing them at the most crucial points, Respondent effectively denied Poulos Union representation.

All other claims made in the Exceptions above are amply supported by the Decision, including the authority and portions of the record cited thereto. Without argument by the Respondent, there is nothing to which CGC may respond.

CGC respectfully requests that the Board dismiss Exceptions 5 and 19-25.

C. The ALJ's Determinations Regarding Respondent's Interrogation of Poulos Should Not Be Overturned

1. Respondent's Interrogation Exceptions

Exception 4: The ALJ's finding that at the start of the February 24, 2016 meeting, "Poulos informed Rutledge that he was engaged in protected activity when he spoke to Allen on February 16." [ALJD at p. 8]

Exception 50: The ALJ's conclusion that, "under the totality of the circumstances, Respondent unlawfully interrogated Poulos." [ALJD at p. 22]

Exception 51: The ALJ's statement that "Poulos' conduct during the February 16 meeting was union activity which was protected under the Act." [ALJD at p. 22]

Exception 52: The ALJ's statement that, "[s]imply because Allen complained that Poulos' conduct during the meeting was 'bullying' and 'insubordination' does not permit Respondent to stymie Poulos' Section 7 rights to represent his constituents." [ALJD at p. 22]

Exception 53: The ALJ's conclusion that "Respondent violated Section 8(a)(1) of the Act when Rutledge interrogated Poulos on February 24." [ALJD at p. 22]

2. *Facts*

Rutledge works as a Security Specialist for Respondent. Tr. 36, 81. He has worked under the RSS contract since 2002. Tr. 81. Costello appointed Rutledge to conduct an inquiry. Tr. 33, 189. Respondent instructed Rutledge to obtain Poulos' "side of the story" with regard to the February 16 incident referenced in Allen's complaint. Tr. 62-63, 66, 189. Respondent's intent was to obtain a statement from Poulos and to allow Rutledge to ask questions. Tr. 65. Respondent also tasked Rutledge with forming a report and presenting it to Costello. Tr. 190.

In the same February 24 interview discussed above, Rutledge told Poulos that the Air Force had lodged a complaint against him. Tr. 193. Rutledge requested that Poulos provide a statement. Tr. 195. Poulos testified that he informed Rutledge that he was acting in his role as Union president on February 16 and had no information to provide in that regard. Tr. 119-120. He informed Rutledge that if Respondent wished to learn of his activities in his role as Union president, Respondent was free to make an information request. Tr. 120. Respondent then took a break. Tr. 120. Lujan's testimony supports Poulos' in this regard. See Tr. 169.

Eventually, Poulos agreed to provide a statement after informing Rutledge that he was speaking “as Union and not as” an employee. Tr. 86. He then provided a written statement. Tr. 87, 195. After Poulos wrote his statement, the parties took a break. Tr. 86, 196. Rutledge read Poulos’ statement and drafted questions to ask Poulos. Tr. 84, 196. Rutledge based his questions on Poulos’ statement, the unclassified version of Allen’s complaint, and an e-mail from Fisco. Tr. 90. When the parties returned, Rutledge stated that he would ask questions. Tr. 86, 197.

Rutledge asked Poulos a number of written questions. Tr. 74, 197. Poulos provided written answers. Tr. 75, 89, 198; see GCX 9. Rutledge asked, among other things, who was present during the February 16 incident, and he requested that Poulos provide details regarding what was said. See GCX 9.

3. Authority

In *Rossmore House*, 269 NLRB 1176, 1177 (2003), the Board set forth its test for determining if employer interrogation of its employees about their union activities violates Section 8(a)(1) of the Act. The Board’s test considers the totality of the circumstances in deciding whether the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Id.* In making this determination the Board considers the so-called *Bourne*²¹ factors; including the background, the nature of the information sought, the identity of the questioner, the place and method of the interrogation, and whether the employee is an open and active union supporter. *Norton Audubon Hospital*, 338 NLRB 320, 320-321 (2002).

Although the Board has recognized that employers have a legitimate business interest in investigating facially valid complaints of employee misconduct, that right is not unlimited. See *Fresenius USA Mfg., Inc.*, 362 NLRB No. 130, slip op. at 1 (2015) (investigation of alleged

²¹ *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

employee harassment). Where it is apparent from an initial investigation that the employee engaged in activity protected by the Act, the employer may not disregard that fact and forge ahead with the investigation as a precursor to potential discipline. See *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) (employer's initial investigation of harassment charges was permissible but once initial investigation showed that alleged misconduct was protected by the Act, it was unlawful to continue the investigation).

4. *Argument*

In its Brief, Respondent argues that the ALJ's analysis was improper. Relying on *Fresenius USA Mfg.*, 358 NLRB 1261 (2012), Respondent urges that it was permitted to inquire into Poulos' behavior because its inquiries were not directed at Poulos' protected activity and because Respondent had received a customer complaint about the interaction being investigated.²²

The ALJ noted that Poulos informed Rutledge from the outset of the meeting that he was engaged in union activity on February 16. The ALJ found that Poulos was correct; he was engaged in union activity by asking Allen about his involvement with the suspension of two bargaining unit members. The ALJ pointed out that Respondent had already determined that it would discipline Poulos for what transpired on February 16. Even so, and despite the fact that Fisco was a witness to the entire conversation, Respondent determined that it would require Poulos to provide an account of the event.

Given that a member of Respondent's management was present during the incident, it is unknown what information Respondent hoped to obtain by questioning Poulos. Rutledge had

²² Respondent also argues in summary fashion that the ALJ's credibility determinations were erroneous. It offers no support for this argument. The Board's established policy is to not overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence demonstrates that the ALJ is incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

possession of accounts from Allen and Fisco prior to the interrogating Poulos. Both should have alerted him to all of the facts of the incident and, more importantly, that Poulos was engaged in protected activity. If Rutledge was not aware that he would be inquiring into protected activity before the meeting, he was put on notice at the outset of the meeting when Poulos explicitly informed him so.

Regarding Respondent's claimed justification, the existence of a customer complaint does not give an employer license to ignore the protected nature of a union representative's activity. Respondent's argument that it did not directly inquire about Poulos' union activity is nonsensical. The conversation complained of was protected under the Act; Respondent could not inquire into the alleged misconduct without inquiring about the protected conversation since they are one and the same. Whatever Respondent's true reasons for conducting the inquiry, it acted at its peril and crossed the line by requiring Poulos to account for actions he took in his role as Union president.

CGC respectfully requests that the Board dismiss Exceptions 4 and 50-53.

D. The ALJ's Determination That Respondent's Discipline Was Unlawful Should Not Be Overturned

1. Exceptions

Exception 2: The ALJ's finding that "Fisco told Poulos to contact Farnham or Allen for further details." [ALJD at p. 4, fn 9]

Exception 6: The ALJ's decision to not credit the testimony of Thomas Fisco regarding the February 16, 2016 conversation with John Poulos and Raymond Allen. [ALJD at p. 13]

Exception 7: The ALJ's decision to credit Poulos' February 24, 2016 written statement regarding the February 16, 2016 while specifically discrediting his testimony regarding the incident. [ALJD at p. 13]

Exception 8: The ALJ's decision to credit Poulos' testimony that he did not tell Raymond Allen "that a GS-13 should keep his nose out of this." [ALJD at p. 13]

Exception 26: The ALJ's rejection of the *Wright Line* analysis and her application of the analytical framework from *Burnup & Sims*, 256 NLRB 965 (1981). [ALJD at p. 17]

Exception 27: The ALJ's conclusion that "Poulos' [*sic*] clearly engaged in union activity on February 16, 2016 which was known by PAE. " [ALJD at p. 18]

Exception 28: The ALJ's finding that Poulos was engaging in protected conduct during his interaction with Allen on February 16, 2016. [ALJD at p. 18]

Exception 29: The ALJ's conclusion that "[t]he record is clear that Respondent violated Section 8(a)(3) and (1) when issuing Poulos a final written warning for his conduct on February 16." [ALJD at p. 18]

Exception 30: The ALJ's conclusion that "Respondent mistakenly believed Poulos engaged in misconduct." [ALJD at p. 18]

Exception 31: The ALJ's application of the *Atlantic Steel* factors to the credited evidence in this case. [ALJD at pp. 18-19]

Exception 32: The ALJ's conclusion that "Poulos' conduct at the February 16 meeting was not so opprobrious as to cause him to lose the protections of the Act." [ALJD at p. 18]

Exception 33: The ALJ's application of the first *Atlantic Steel* factor – the place of discussion. [ALJD at pp. 18-19]

Exception 34: The ALJ's application of the second *Atlantic Steel* factor – the subject matter of the discussion. [ALJD at p. 19]

Exception 35: The ALJ's application of the third *Atlantic Steel* factor – the nature of the employee's conduct. [ALJD at p. 19]

Exception 36: The ALJ's conclusion that "[a]t worst, Poulos' statement can be seen as nondeferential to Allen but does not weigh in favor of Poulos losing the protection of the Act." [ALJD at p. 19]

Exception 37: The ALJ's finding that "as the Union President, Poulos' conduct was well within the bounds of conduct which has been sanctioned by the Board." [ALJD at p. 19]

Exception 38: The ALJ's conclusion that she did not find Poulos' conduct and alleged statement to be insubordinate contrary to Respondent's assertion. [ALJD at p. 19]

Exception 39: The ALJ's conclusion that the balance of the *Atlantic Steel* factors support a finding that Poulos' conduct during the February 16 meeting was protected and did not lose the protection of the Act. [ALJD at p. 19]

Exception 40: The ALJ's finding that, even under *Atlantic Steel*, "Respondent's disciplinary action of Poulos for engaging in that conduct was unlawful." [ALJD at p. 19]

Exception 41: The ALJ's conclusion that the conduct "which Respondent attributes to the issuance of the final written warning to Poulos for insubordination was protected conduct." [ALJD at p. 19]

Exception 42: The ALJ's finding that the General Counsel met his initial burden under the *Wright Line* test. [ALJD at p. 19]

Exception 43: The ALJ's finding that Poulos engaged in protected and concerted activity. [ALJD at p. 19]

Exception 44: The ALJ's finding that Poulos' union activity was a motivating factor in Respondent's decision to discipline him. [ALJD at p. 20]

Exception 45: The ALJ's reliance on Rob Williams' February 10 memorandum as evidence of an unlawful animus. [ALJD at p. 20]

Exception 46: The ALJ's statement that the "timing of events is also suspect" and her rationale for this statement. [ALJD at p. 20]

Exception 47: The ALJ's finding that, despite no evidence in the record that Williams' February 10 memorandum was considered by the Disciplinary Review Board ("DRB") and the credited testimony of Dresbach that the DRB did not discuss the memorandum, that it played a role in the decision to issue the final written warning to Poulos. [ALJD at p. 20]

Exception 48: The ALJ's finding that Respondent offered "shifting explanations" for its decision to discipline Poulos and that those "shifting explanations" indicate that PAE had some sort of unlawful animus. [ALJD at p. 20]

Exception 49: The ALJ's conclusion that "Respondent violated Section 8(a)(3) and (1) when it issued Poulos a final written warning for his conduct on February 16." [ALJD at p. 21]

Exception 58: The ALJ's statement that Poulos was unlawfully disciplined for engaging in union activity. [ALJD at p. 24]

Exception 59: The ALJ's reliance on the Board's decision in *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990) and her failure to distinguish this case from *Kinder-Care* on the basis that the evidence presented at the Hearing demonstrated that the customer *asked* for the rule and PAE received the Corrective Action Request from the U.S. Air Force. [ALJD at p. 24]

Exception 60: The ALJ's finding that "Respondent's discipline of Poulos, in part for contacting the Customer thereby violating this rule, is a violation of the Act as the rule is found to be unlawful." The General Counsel had not asserted any such theory under *Double Eagle Hotel & Casino*, 341 NLRB 112, 123 (2004).

Exception 66: The ALJ's statement that the classified complaint was "shared with PAE management which led to their decision to unlawfully discipline Poulos." [ALJD at p. 25]

Exception 69: The ALJ's finding that "[c]ertainly, Allen's classified complaint, not the unclassified complaint, led to Poulos' discipline." [ALJD at p. 25]

2. Facts

After the February 16 incident, Fisco informed Costello and Poulos' lieutenant of what happened, and stated they needed to talk to Poulos. Tr. 100. On February 17, Allen informed Costello in person about the incident. Tr. 31, 32. Fisco also reported it to Costello. Tr. 45, 100. No one else informed Costello about the incident. Tr. 46.

Regarding the incident, Costello believed that Allen was standing in the doorway to Fisco's office at the time Poulos entered. Tr. 46. Costello first stated that he believed Poulos did not speak with Fisco during the incident. Tr. 46. When confronted with Allen's statement in GCX 3 that Poulos "turned to" Allen, Costello admitted that it might indicate that Poulos was speaking with Fisco at some point. Tr. 46.

Initially, Allen sent a classified e-mail regarding the February 16 incident. Tr. 37. This e-mail was classified as top secret. Tr. 65. Allen then sent an unclassified e-mail, dated February 17.²³ Tr. 37, 71, 90; see GCX 3. This e-mail was first sent to the Functional Area Chief, who oversees Respondent's contract with the Air Force. Tr. 42. Costello requested that Allen send him a copy. Tr. 42. Lastly, Allen provided a written statement. Tr. 37. These three documents are all that constitute Allen's complaint. Tr. 36-37.

Costello was concerned that Poulos had contacted Allen. Tr. 44. Indeed, Costello identified this as *the* allegation against Poulos.²⁴ Tr. 37. In Respondent's view, Poulos should

²³ Williams stated that Costello requested that Allen write an unclassified version of the complaint so that it could be provided to Poulos. Tr. 71-72.

²⁴ This concern is reflected in RX 1, page 8, in a statement apparently made by Costello. In that February 22 statement, Costello states that several months prior, he instructed Poulos "not to have any union contact with the" Air Force. *Id.* According to his statement, Costello told Poulos that he could contact "Steve Votaw, Tony Marvez or me *and no one else.*" *Id.* (emphasis added).

have contacted Costello or Fisco, rather than Allen or any other Air Force employee, with his concerns over suspended bargaining unit members. Tr. 44-45; see RX, pages 14-15. Fisco likewise stated that Poulos' contacting an Air Force employee was a matter of concern. Tr. 100-101. Fisco explained that security officers should direct any issues to a lieutenant. Tr. 101. Fisco stated that he would address matters with the Air Force or refer the issue to Costello. Tr. 101.

Costello claimed that Allen is not permitted to interview Respondent's employees. Tr. 44. When asked about GCX 3's use of the word "coworkers," Costello first explained that it referred to Fisco and himself. Tr. 43-44. When CGC pointed out that, according to the document, Allen and Farnham²⁵ "conducted interviews with PAE leadership and coworkers," Costello was unable to explain why the term was used. Tr. 44. He later added that Allen had interviewed Respondent's lieutenants, who act as flight chiefs and supervisors for the two suspended employees. Tr. 44.

For the past four years, Dresbach has been Respondent's Program Manager for the RSS program. Tr. 203. In that role, he has a general management responsibility of ensuring that Respondent meets its performance standard. Tr. 205. Dresbach is the main contact for the Air Force. Tr. 206. On February 17, Fisco, Williams, Costello, and Dresbach discussed the February 16 incident via conference call. Tr. 32. Costello stated that on that call, they "determined that some type of discipline was necessary."²⁶ Tr. 32. However, they deemed it necessary to first obtain a statement from Poulos. Tr. 33.

²⁵ The statement's mention of "Craig" refers to Farnham. Tr. 43.

²⁶ Costello later amended his answer, stating that they had determined that discipline was "probably" necessary. Tr. 34. He stated that they would not have enough information to determine if discipline was necessary until after they obtained a statement from Poulos. Tr. 34.

Costello first brought the issue with Poulos to Dresbach's attention. Tr. 208. The final decision to issue discipline to Poulos was made by a discipline review board. Tr. 41, 207. The board convened via conference call. Tr. 41-42. The call included Thomas Rothwell, Respondent's Vice President of Labor Relations; Dean Smith; Respondent's counsel; Dresbach's supervisor, Phil Gardner; Dresbach; Costello; Williams; and Fisco. Tr. 41, 207, 219. Williams assembled a packet of documents in preparation for the board meeting. Tr. 214; see RX 1. Dresbach received RX 1 at some time prior to March 18 and prior to deciding to discipline Poulos. Tr. 210. He reviewed all of the documents before making his decision. Tr. 211. Costello made the initial recommendation that Respondent discipline Poulos. Tr. 214. Dresbach approved. Tr. 211.

Ultimately, Respondent decided to issue discipline to Poulos for two reasons: (1) Poulos' behavior toward Allen was viewed as condescending and Allen was offended and (2) Poulos had approached Allen. Tr. 45, 47, 212. There were no other reasons for the discipline. Tr. 47. Dresbach could not recall any discussion of whether Poulos' interaction with Allen was protected activity. Tr. 217-218.

Respondent issued Poulos a final written warning on March 24. Tr. 48; see Tr.50 and GCX 4. The final warning states that the discipline was issued because Poulos questioned Allen on February 16 and challenged Allen's authority. GCX 4(a). The discipline characterizes Poulos' behavior as "improper and disrespectful" and points out that Respondent received a complaint. GCX 4(a). The discipline goes on to state that the February 16 incident had a "negative impact" on Respondent and posed the "potential negative grading of [Respondent's] performance." GCX 4(a). The document cites no other reasons for the discipline but warns that Poulos must refrain from contacting the Air Force regarding "violations, outcomes,

determinations, interpretations, or grievances, which involve the [CBA]” and instructs Poulos to address concerns with the CBA with Respondent. GCX 4(a)-(b).

Prior to this, Poulos had no discipline on his record. Tr. 48. According to Dresbach, Respondent decided to issue Poulos a *final* written warning – as opposed to, for example, a written warning – because Costello represented that he had told Poulos in the past that he should not contact the Air Force regarding employment matters, but should bring them to Costello. Tr. 212.²⁷

3. Authority

The Board has stated that when determining whether employees are engaged in concerted activities, “a certain degree of leeway is allowed in terms of the manner in which [employees] conduct themselves.” *Health Care & Retirement Corp. of America*, 306 NLRB 63, 65 (1992). The Board has consistently found that employees are engaged in concerted activity when a single employee protests other employees’ terms and conditions of employment. See, e.g., *Chromalloy Gas Turbine Co.*, 331 NLRB 858, 863 (2000) *enfd.* 262 F.3d 184, 190 (2d Cir. 2001); *Whittaker Corp.*, 289 NLRB 933, 934 (1988).

Employees are protected under the mutual aid or protection clause of Section 7 when they seek to improve conditions even through channels outside the employee-employer relationship. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). In *Greenwood Trucking, Inc.*, 283 NLRB 789 (1987), the Board found that an employee’s communication with customers about working conditions to be protected activity. In *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990),

²⁷ Respondent’s Brief makes frequent mention of the Corrective Action Request (CAR). Costello claimed that a final written warning was issued because Respondent received the CAR. Tr. 50, 51. According to Costello, the CAR was “the driver for the Board that was held to determine discipline.” Tr. 51. The CAR did not recommend discipline and did not require that any specific action be taken. Tr. 216. RX 1 makes no mention of the corrective action. Dresbach testified that the CAR played no part in Respondent’s decision to discipline Poulos. Tr. 218. In addition, it appears that Respondent had suffered no substantive adverse consequence at the time the discipline was issued, as the final written warning mentions a “*potential* negative grading of the [Respondent’s] performance.” GCX 4(a) (emphasis added)

the Board ruled that employees have a statutory right to communicate employment-related complaints to persons and entities other than their employer. *Id.* at 1172. In that case, the rule at issue did not, on its face, prohibit employees from approaching outsiders with their complaints; rather, employees were required to first report complaints to the employer. *Id.*

Discharge or discipline pursuant to an unlawful rule is unlawful. See *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004). In addition, an employer commits a violation by enhancing discipline in response to union or protected activity. *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1237 (2004).

Where allegedly insubordinate conduct arises from protected activity, the Board does not consider such conduct as a separate and independent basis for discipline. See *Tampa Tribune*, 351 NLRB 20 1324, 1326 fn. 14 (2007), *enf. denied* on other rounds sub nom. *Media General Operations, Inc. v. NLRB*, 560 F.3d 181 (4th Cir. 2009). An employee who is engaged in concerted protected activity can lose the protection of the Act. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). Whether the employee has crossed the line depends on four factors: (1) the place of the discussion (2) the subject matter of the discussion (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Id.* The Board conducts a balancing test of the four factors, with no single factor governing, to determine whether the particular circumstances of the case cause the employee to lose the protection of the Act. *Plaza Auto Center, Inc.*, 360 NLRB No. 117, slip op. at 7 (2014).

Board law recognizes that the language of the workplace is not the language of polite society. *Stanford Hotel*, 344 NLRB 558, 564 (2005). Thus, employees do not lose the protection of the Act due to a moment of “animal exuberance.” *Thor Power Tool Company*, 148 NLRB 1379, 1386 (1964). The Board ruled in *Plaza Auto Center* that an employee did not lose

the protection of the Act when, in the context of protected activity and with a raised voice, he called his supervisor a “fucking crook” and an “asshole.” This was despite the fact that the Board found the employee’s behavior insubordinate. *Id* at 6.

In *Capitol EMI*, 311 NLRB 997 (1993), the Board ruled that an employer may be held liable for the unlawful discharge of an employee at another employer’s direction where: (1) it knew or should have known that the other employer acted against the employee for unlawful reasons; and (2) it “acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it.” *Id* at 1000. This test is applicable in any case where an employer seeks the discharge or discipline of another employer’s employees. *Cf. Dews Construction Corp.*, 231 NLRB 182, n. 4 (1977), *enfd mem.* 578 F. 2d 1374 (3d Cir. 1978). In *Tradesmen International, Inc.*, 341 NLRB 399 (2007), the Board evaluated the adequacy of the employer’s protests against its customer’s directive to discharge the employer’s employee and found the employer liable for failing to make sufficient protests.

4. *Argument*

In its Brief, Respondent argues that there is no evidence that Respondent’s decision to discipline Poulos was based on Poulos’ protected activity, rather, it was based on the manner in which Poulos interacted with Allen. Respondent argues that the ALJ should have reached a different conclusion in analyzing the facts under *Burnup & Sims, Inc.*, 256 NLRB 965 (1981). In support of its view, Respondent argues that Poulos was not engaged in union activity and that if Poulos were engaged in Union activity, his behavior would fall outside the protection of the Act under *Atlantic Steel*, 245 NLRB 814 (1979) because: 1) Poulos’ conversation was overheard by others. 2) Poulos was punished for offending Allen, not for discussing Union matters. 3) Poulos

questioned Allen's authority, which was offensive to Allen.²⁸ Respondent also takes exception to the ALJ's decision to find that Poulos' discipline was unlawful because it was issued pursuant to an unlawful rule because this allegation is not made in CGC's complaint (Complaint).

Although the ALJ did not base her decision on an analysis under *Wright Line* and Respondent does not argue that she should have, Respondent argues no violation would be found under such an analysis. In support of its argument, Respondent asserts that Poulos' action was not protected and there is no evidence that Respondent bore any animus toward union activity or that any alleged protected action was a motivating factor for the discipline. Respondent points out that Poulos had been Union president for over a year before he was disciplined. Taking exception to the ALJ's finding that the timing of the discipline was circumstantial evidence of Respondent's animus, Respondent argues that even though Respondent did not issue discipline to Poulos until a month after his conversation, it had determined long before, when it received Allen's complaint, that it would issue Poulos some sort of discipline.

The ALJ correctly determined that Poulos was engaged in union activity. Respondent argues that Poulos' conversation with Allen could not have been union activity, apparently because the bargaining unit members who were suspended had already been reinstated. This argument assumes that the Union's only interest is the members' reinstatement. On the contrary, Poulos testified that he was concerned with the wording in Respondent's suspension forms, which seemed to describe company violations beyond what Poulos understood to be the actual cause for suspension. Furthermore, there are matters of common concern to unions that are not resolved by mere reinstatement; such as backpay and disciplinary history. The reinstatement of

²⁸ With regard to the fourth *Atlantic Steel* factor – whether the outburst was provoked by the employer's unfair labor practice – no party contends that an unfair labor practice was at issue at the time of Poulos' conversation.

the employees did not remove their suspension from the realm of Union concern. Poulos' conversation with Allen was union activity.

Respondent's argument reveals a failure to recognize that under Board law, the protected nature of the February 16 conversation between Poulos and Allen is inseparable from the comments that Respondent claims as the basis for its discipline. Respondent cannot, as it has attempted, parse out words of the conversation and lawfully issue discipline for them in isolation. The conversation was protected under the Act, and the only question is whether Poulos' did anything during that conversation to lose the Act's protection.

With regard to the *Atlantic Steel* factors, Respondent's argument that others overheard Poulos' conversation with Allen ignores the fact that the individuals identified were other of Respondent's supervisors or personnel of the Air Force. There is some evidence that other employees knew that the conversation occurred, but it is unclear how these employees learned of the conversation or, if they did overhear the conversation, whether it was Poulos or Allen they heard speaking. The second factor has already been addressed in that the topic of conversation was a Union concern; there is no evidence that Poulos spoke with Allen on any subject other than the unit members' suspension. Regarding the third factor, Poulos' "outburst" was far from the kind the Board has deemed sufficient to forfeit the protection of the Act. The ALJ allowed that Poulos may have raised his voice, but even if the Board were to reverse the ALJ's decision to discredit Fisco regarding the content of Poulos' statement, the worst that can be said is that Poulos questioned Allen's authority and told him to "keep his nose out of this." This is a far cry from profanity, threats, or physical contact. Respondent points out that Allen was offended, but

it is an objective view of the speaker's actions – not the depth of the recipient's offense – that factor into the Board's analysis.²⁹

Finally, although Respondent states correctly that the Complaint³⁰ does not explicitly allege that Poulos was disciplined pursuant to an unlawful rule, the Complaint does allege that the rule in question as unlawful. During hearing, CGC learned through documents produced by Respondent that the rule was purportedly communicated several weeks prior to Poulos' discipline and was only released in written form on the day of the discipline. Dresbach testified that Poulos' acting contrary to this instruction by Costello was why Respondent issued a *final* written warning to Poulos. CGC argued in its brief to the ALJ that the discipline was unlawful, at least to the extent that it was enhanced, because it was issued pursuant to the unlawful rule. See CGC's brief to the ALJ, pages 32 and 34.³¹

CGC respectfully requests that the Board dismiss Exceptions 2, 6-8, 26-49, 58-60, 66 and 69.

E. The ALJ's Determinations Regarding Respondent's Unlawful Rule Should Not Be Overturned

1. Rule Exceptions

Exception 54: The ALJ's finding that, on February 24, 2016, "when Rutledge set forth the rule of when union representatives may speak during the investigatory meeting, Respondent set forth an overly restrictive rule which infringes upon the employees' Section 7 rights of requesting union representatives' assistance and counsel during an investigatory meeting."

[ALJD at p. 23]

²⁹ Respondent's Brief contains extensive discussion of the CAR. However, as noted, the CAR did not request that Respondent discipline Poulos. Had the CAR done so, Respondent would have been obligated to protest such a request pursuant to *Capitol EMI*.

³⁰ The Complaint refers to the Complaint and Notice of Hearing dated May 9, 2016.

³¹ The ALJ correctly analyzed the allegation under *Burnup & Sims*. Given that Respondent does not argue that analysis is appropriate under *Wright Line*, it is unnecessary to treat Respondent's argument in that regard.

Exception 55: The ALJ's conclusion that "Respondent violated Section 8(a)(1) when Rutledge orally promulgated the rule on February 24 on when union representatives may provide assistance and counsel during an investigatory meeting." [ALJD at p. 23]

Exception 56: The ALJ's finding that "Respondent's rule relegated Poulos' union representatives as mere observers which contradicts the purpose of *Weingarten* rights of employees." [ALJD at p. 23]

Exception 57: The ALJ's conclusion that Respondent also violated Section 8(a)(1) of the Act when it promulgated the March 24, 2016 rule in response to union activity. [ALJD at p. 23]

Exception 61: The ALJ's conclusion the March 24 rule "reasonably tends to inhibit union officers from bringing work-related matters to entities other than Respondent which restrains the union officers' role in protecting employees' Section 7 rights." [ALJD at p. 24]

Exception 62: The ALJ's conclusion that "Respondent violated Section 8(a)(1) of the Act when it implemented the March 24 rule."

2. *Facts*

On March 24, Costello delivered a written rule to Poulos, Lujan, and Campbell. Tr. 48. This rule prohibits Union officers from contacting the Air Force. Tr. 48, 49; see GCX 5. GCX 5, dated March 24, reiterates the instruction given to Poulos in his final written warning (see GCX 4) by instructing Union officers to refrain from contacting the Air Force "on any matters that involves (sic) concerns with employees regarding violations, outcomes, determinations, interpretations or grievances that involve the CBA..." GCX 5. The rule goes on to state that: "Any issues or concerns regarding the CBA are to be brought to the proper member of the chain of command of the Company." GCX 5. This rule was also e-mailed to all Union officers and

stewards. Tr. 49. These officers and stewards were required to print, sign, and return the document to Respondent. Tr. 50.

3. Authority

A rule or policy violates Section 8(a)(1) if it can reasonably be read by employees to chill their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). It is unlawful for an employer to require a *Weingarten* representative to be silent during an investigatory interview. *Texaco, Inc.*, 251 NLRB 633, 636 (1980).

Employees are protected under the mutual aid or protection clause of Section 7 when they seek to improve conditions even through channels outside the employee-employer relationship. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). In *Greenwood Trucking, Inc.*, 283 NLRB 789 (1987), the Board found that an employee's communication with customers about working conditions to be protected activity. In *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990), the Board ruled that employees have a statutory right to communicate employment-related complaints to persons and entities other than their employer. *Id.* at 1172. In that case, the rule did not, on its face, prohibit employees from approaching outsiders with their complaints; rather, employees were required to first report complaints to the employer. *Id.*

4. Argument

In its Brief, Respondent argues that its March 24 written rule³² is not unlawful for two reasons. First, the rule does not prohibit employees from discussing working terms and conditions of employment with each other or with other third parties or from participating in

³² Respondent makes no argument regarding the ALJ's finding that the rule orally-promulgated by Rutledge during the February 24 meeting was unlawful. All other claims made in the Exceptions above are amply supported by the Decision, including the authority and portions of the record cited thereto. Without argument by the Respondent, there is nothing to which CGC may respond.

proceedings available through government agencies. Second, the rule was not promulgated in response to protected activity. Respondent seeks to distinguish the facts here from those in *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990) because in *Kinder-Care*, there was no customer complaint.

As the ALJ found, the plain wording of the rule prohibits Union officials from discussing various matters of concern with the Air Force. The fact that the Air Force had authority to affect employees' working terms and conditions is made clear by the fact that Air Force action had resulted in the suspension of two bargaining unit employees. It is clear why the Union might wish to contact the Air Force. Disallowing the Union from such communication directly inhibits the Union's ability to achieve resolutions to matters of Union concern. Further, Board law entitles the Union to take such action. The fact that the rule permits the Union to speak with employees or other third parties does not excuse this unlawful restriction.

Likewise, the rule's allowance that employees may still participate in Board and other government agency proceedings is insufficient. The protection of the Act is not limited to action taken through the Board. Indeed, it is the policy of the Board to encourage parties to collective-bargaining agreements to achieve resolution without resorting to litigation through the Board's process. Again, this rule seeks to cut off one of the Union's avenues to represent its members and to resolve disputes.

Even ignoring the plain language of the rule, the ALJ noted the coincidence that the rule was released together with Poulos' discipline. Costello allegedly communicated the rule to Poulos several weeks before the written version was released, but it was not until after Poulos' conversation with Allen that Respondent chose to release a written version and require the signature of the Union's officers. The ALJ also explained that although the rule does not

explicitly state that Union officers would be disciplined for discussing Union matters with the Air Force, the fact that Respondent disciplined Poulos for doing so demonstrates that it would. Finally, with regard to Respondent's continued reliance on the fact that Allen complained about Poulos' conversation, customer complaints do not excuse unlawful rules.

CGC respectfully requests that the Board dismiss Exceptions 54-57 and 61-62.

F. The ALJ's Determination That Respondent Unlawfully Refused to Honor the Union's Information Request Should Not Be Overturned

1. Respondent's Information Request Exceptions

Exception 1: The ALJ's finding that "[t]he security officers have top secret security clearance." [ALJD at p. 3]

Exception 63: The ALJ's conclusion that "Allen's classified complaint prompted Respondent's investigation and subsequent discipline of Poulos" and, therefore, the "classified complaint is relevant and necessary for the Union in its role of representing Poulos." [ALJD at p. 25]

Exception 64: The ALJ's rejection of Respondent's defense that PAE satisfied its obligation to furnish relevant information when it provided the Union with a copy of an unclassified version of Allen's complaint about Poulos. [ALJD at p. 25]

Exception 65: The ALJ's attempt to analogize this case involving a document designated as classified by the U.S. Government with a case involving confidentiality concerns. [ALJD at p. 25]

Exception 67: The ALJ's reference to, and reliance on, the fact that Poulos and his union representatives "hold security clearances which allow them to see top secret documents in secured areas in certain buildings" in her decision to conclude that PAE violated Sections 8(a)(1) and (a)(5). [ALJD at p. 25]

Exception 68: The ALJ's conclusion that "Respondent, who has a bargaining relationship with the Union, failed to bargain with the Union on a suitable accommodation." [ALJD at p. 25]

Exception 70: The ALJ's conclusion that, "[b]y failing to bargain with the Union on an accommodation, Respondent violated Section 8(a)(5) and (1) of the Act." [ALJD at p. 25]

2. *Facts*

Regarding the phone conversation on February 18, Poulos testified that he asked Costello what allegations the complaint made, and he requested that Costello send him a copy. Tr. 112-113. Costello refused. Tr. 113. When CGC asked Costello whether Poulos inquired after the allegations against him, Costello responded that he believed Poulos had already been notified of the allegation. Tr. 37. When CGC asked whether Costello had notified him, Costello replied that "[b]y that time, he had all the information." Tr. 37. In the same sentence, he admitted that he did not know how "much [information] we had provided immediately and how much came subsequent." Tr. 37. He appeared to claim that by February 18, Poulos had a copy of Allen's e-mail. See Tr. 36. He then admitted that he could not recall when Poulos made his information request or when Respondent provided information. Tr. 36. Costello claimed, however, that eventually, Respondent provided Poulos a copy of "the original e-mail and the statement." Tr. 36.

On February 22, Poulos wrote an e-mail to Williams stating that he had requested a copy of Allen's complaint. Tr. 61; see GCX 6(b)-(c). Williams admits Poulos had made this request, but he could not recall the date. Tr. 61. Poulos renewed his request in his February 22 e-mail. See GCX 6(c). In his first response, Williams simply told Poulos to schedule the investigation and made no reference to the request for information. Tr. 62; see GCX 7(e). Poulos made the request a third time. See GCX 7(b). Williams refused. See GCX 7(b). Williams testified that

Respondent is not obligated to provide information prior to investigatory interviews. Tr. 68; see GCX 7(b). He stated that Respondent's obligation depends on who is to be interviewed and to whom the information requested would be presented. Tr. 68. Williams claimed two bases for refusing to furnish the information requested by the Union: (1) because the information requested was classified³³ and (2) the information requested would have been presented to Poulos, who was the individual to be interviewed.³⁴ Tr. 68. With regard to this second justification, Respondent was concerned that allowing Poulos to view Allen's complaint would "skew" the investigatory interview. Tr. 69. Respondent was concerned that Poulos would not provide correct information. Tr. 69. He claimed that whether knowing the specifics of an allegation would be helpful "depended." Tr. 69. When CGC asked whether these details might help Poulos provide his side of the story, Williams stated that Poulos "knew what he was responding to." Tr. 69. Williams acknowledged that Poulos did not know the specific allegations against him.³⁵ Tr. 69. He acknowledged that Poulos did not know contents of Allen's complaint, which was what Respondent sought to withhold. Tr. 70. Williams later stated that Poulos did know the specifics of the allegations against him because James Rutledge (Rutledge) explained them during February 24 meeting. Tr. 70.

Lujan and Campbell both have top secret security clearances. Tr. 65. Poulos testified that he too has a clearance to view classified documents. Tr. 149; see also Tr. 168.

³³ Williams acknowledged that he made no mention in his written correspondence with Poulos that Respondent would not provide a copy of the complaint because it was classified. Tr. 69; see GCX 7(b). He claims he did not mention this reason because it was not necessary. Tr. 69. Poulos testified that he was not aware that the complaint was classified until the February 24 meeting. Tr. 151.

³⁴ Respondent will not provide information to the person who is to be interviewed. Tr. 78. Williams stated, however, that Respondent might not have provided information to Poulos even if Poulos had been defending another Union member. Tr. 78.

³⁵ CGC asked Williams if he believed "it would be helpful for somebody who is being interviewed to know what the specific allegations are against them?" Tr. 69. Williams responded that Poulos "knew that, [he] just didn't know the specifics of the allegation." Tr. 69.

During the February 24 meeting, Poulos requested a copy of the complaint against him. Tr. 87. Rutledge refused to provide it.³⁶ Tr. 87. According to Marvez, Poulos has access to a space in which he can view classified documents. Tr. 157. According to Rutledge, Lujan and Campbell also asked for a copy of the complaint.³⁷ Tr. 193. Rutledge, Williams, and Marvez all told the Union representatives that they could not see a copy of the complaint. Tr. 193.

According to Poulos, Lujan asked for a copy of the complaint and when Rutledge responded that it was classified, Lujan verified that the level of classification fell within their clearance, and he renewed his request. Tr. 122, 150. Rutledge responded that they could not show them the classified complaint in that room. Tr. 122. When Lujan asked to go to a place where they could see it, Williams responded that they did not have time. Tr. 123, 154. According to Poulos, the room to in which he could have viewed the classified document was near enough that it would not have required travel. Tr. 157-158. Lujan's testimony supports Poulos' in this regard. See Tr. 168-169.

Williams could not say whether Respondent ever allowed the Union to see the classified complaint. Tr. 71. He could not say whether Respondent ever provided a copy of the unclassified complaint, GCX 3. Tr. 72. Williams could not recall whether anything in the classified complaint differed from the content of the unclassified. Tr. 72.

Poulos testified that he had never seen GCX 3. Tr. 118. According to Poulos, the only document Respondent delivered was a single, unclassified statement dated March 23. Tr. 118, 154.

³⁶ Like Williams, Rutledge did not believe it was appropriate for Poulos to view the complaint against him before drafting his statement. Tr. 87. Rutledge believed that Poulos might respond to Allen's complaint instead of providing a statement. Tr. 88. According to Rutledge, there was no benefit to be gained in allowing Poulos' to see the complaint since he could provide his own account from memory. Tr. 88.

³⁷ Rutledge later testified that Lujan never asked to see a copy of the classified complaint, and never asked to go to a secure area in order to do so. Tr. 199-200. At some point, Poulos repeated his request to see the complaint. Tr. 194. Rutledge again denied the request. Tr. 195.

3. Authority

In order to comply with its duties under Section 8(a)(5) an employer must provide information that is potentially relevant and of use to the union in its performance of its duties as collective-bargaining representative. *Detroit Newspaper Agency*, 317 NLRB 1071 (1995) citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967) (discussing whether an employer has an obligation to furnish information to allow a union to decide whether to process a grievance). There need only be a “probability that the desired information [is] relevant and that it would be of use to the union in carrying out its statutory duties and responsibilities.” *NLRB v. Acme Industrial Co.* at 437. Generally, information pertaining to employees within a bargaining unit is presumptively relevant. *Quality Building Contractors*, 342 NLRB 429, 431 (2004). An employer objecting that requested information need not be produced bears the burden of proof. *Crittendon Hospital*, 343 NLRB 717, 720 (2004).

An employer is obligated to furnish any information properly requested by a union as promptly as practical. *Aero-Motive Manufacturing Co.*, 195 NLRB 790, 792 (1972). An unreasonable delay in furnishing information is as much a violation as an outright refusal. *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2001). In determining whether an employer’s response to an information request was unlawfully delayed, the Board considers the totality of the circumstances, including the “complexity and extent of information sought, its availability and the difficulty in retrieving the information.” *Samaritan Medical Center*, 319 NLRB 392, 398 (1995). In *Pennco, Inc.*, 212 NLRB 677 (1974), the Board found that an employer violated the Act when it took no action to respond to the union’s information request for over a month, and then responded only to furnish incomplete information.

The Board's standard for determining which information requests must be honored is a liberal discovery-type standard. *United Parcel Service of America*, 362 NLRB No. 22, slip op. at 3 (Feb. 26, 2015). Potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. *Richmond Health Care*, 332 NLRB 1304, 1305 fn. 1 (2000). To demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the non-unit information, or (2) that the relevance of the information should have been apparent to the Respondent under the circumstances. *Disneyland Park*, 350 NLRB 1256, 1258 (2007).

4. *Argument*

In its Exceptions, Respondent argues that the ALJ erred in her finding because it did not match the allegation made in the Complaint in this matter. Respondent points out that the document the Union requested was classified, and that Respondent fulfilled its duty to furnish the document when it requested that the Air Force declassify the document and, when the Air Force refused, Respondent furnished a second, unclassified version. Respondent also argues that it effectively provided the information that the Union sought when Rutledge conducted his investigatory interview – i.e. the questions Rutledge directed at Poulos revealed what the allegations were against him. Finally, Respondent argues that the issue is moot – presumably because Respondent has issued discipline over the matter.

While true that the wording in the ALJ's Decision does not exactly match the allegation in the Complaint, it is not an allegation raised *sua sponte*. It is apparent that the ALJ, recognizing the undisputed record evidence that Allen's complaint was classified, worded her Decision in a manner that would not be read as obligating Respondent to run afoul of government-imposed security regulations. That is, although Respondent cannot produce the

information requested in a normal manner, the record established that Respondent had the means to furnish it. Contrary to Respondent's claim in its Exceptions, the record definitively established that: (1) Poulos, Lujan, and Campbell have top secret security clearance. (2) Allen's complaint was classified as top secret. (3) Respondent has a room wherein it could make Allen's classified complaint available to the Poulos, Lujan, and Campbell for viewing. This is the accommodation to which the ALJ referred and over which Respondent was obligated to bargain under these special circumstances. Respondent's argument that the Air Force refused to declassify the document ignores the possibility of this accommodation, an accommodation that Lujan specifically requested during the February 24 meeting. Respondent seems to argue that because it could not comply with the Union's exactly as it was worded by providing a copy of the document, Respondent was excused from efforts to comply at all.

Respondent argues that the Union received the unclassified complaint prior to receiving discipline. That assertion, denied by Poulos, has support only in loose claims by Respondent witnesses that Poulos had all the information at some point. No witness could state definitively what documents were provided to the Union or when, and there is no documentary evidence in the record to this effect. Respondent argues that the unclassified complaint contains no significant difference from the classified version. That assertion has no support in the record. That issue is at the heart of concern here; the Union has not been provided an opportunity to verify what differences exist between the Allen's original complaint and the other two documents, which he drafted later at Respondent's behest.

The ALJ pointed out that at no point prior to the February 24 meeting did Respondent assert that it could not produce Allen's complaint because it was classified. Respondent's expressed view at hearing was that it is not obligated to provide information pertinent to an

investigation prior to investigatory interviews. Respondent's claim in its Brief is that the issue is now moot because discipline has issued. Combined, Respondent's position would create a small window for when a Union is entitled to information. They are also contrary to Board law, and the reason is simple; lacking information on the basis for Respondent's discipline, the Union is less able to represent its members in disciplinary matters.

Finally, Respondent's assertion that Rutledge effectively fulfilled the Union's information request via the information he sought during the February 24 investigatory interview falls short of the Union's request and the Board's requirement. When a union requests a document, the employer does not fulfill the request by hinting through interrogation at the contents of the document.

All other claims made in the Exceptions above are amply supported by the Decision, including the authority and portions of the record cited thereto. Without additional argument, there is nothing to which CGC may respond.

CGC respectfully requests that the Board dismiss Exceptions 1, 63-65, 67-68 and 70.

G. The ALJ's Conclusions and Recommended Remedy, Order, and Notice Posting Are Proper

1. Respondent's Exceptions to the ALJ's Recommended Remedy Order

Exception 71: The ALJ's conclusions of law finding that Respondent violated Sections 8(a)(1), (3) and (5) of the Act. [ALJD at pp. 26-27, Conclusions of Law Nos. 3, 4, 5, 6, 7, and 8]

Exception 72: To the extent that the ALJ erred in her findings and conclusions of law regarding Respondent's violations, the remedies recommended by the ALJ against Respondent, including, but not limited to, the requirement that Respondent expunge Poulos' March 24, 2016 final written warning and take other affirmative action, such as the posting of a notice. [ALJD at p. 27]

Exception 73: The ALJ's recommended order to the extent it requires Respondent to take action that is based on the ALJ's erroneous findings and conclusions of law, as more fully set forth in the Exceptions above and the Respondent's Brief in support of these Exceptions. [ALJD at pp. 27-29]

Exception 74: The ALJ's proposed notice to the extent the language of the notice is based on the ALJ's erroneous findings and conclusions of law, as more fully set forth in the Exceptions above and the Respondent's Brief in support of these Exceptions.

2. *Authority*

Section 102.46(c) of the Rules and Regulations of the National Labor Relations Board states in relevant part:

Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

...(3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

3. *Argument*

The Brief makes no reference to these Exceptions, and it contains no argument in support of them. Given that the Exceptions deal with the ALJ's remedy and order, it is reasonable to assume that Respondent expects that these Exceptions should be considered in connection with the Exceptions taken to the ALJ's findings with respect to the allegations underlying the remedy and order. Otherwise, Respondent makes no argument that the ALJ's order and remedy are improper on their face. Without argument that the remedy and order themselves are improper in some manner, and in the absence of the Board's finding that the allegations underlying the remedy and order are improper, CGC respectfully requests the Board dismiss Exceptions 71 through 74.

IV. CONCLUSION

The ALJ's Decision is comprised of proper credibility determinations, thorough reasoning based on the record as a whole, and correct interpretation and application of Board law. Respondent has not shown why any applicable Board precedent or any aspect of the Decision should be overruled. Respondent's Exceptions should be dismissed entirely.

Dated at Las Vegas, Nevada, this 27 day of January 2017.

Respectfully submitted,

/s/ Nathan A. Higley

Nathan A. Higley
Counsel for the General Counsel
National Labor Relations Board
Region 28 – Las Vegas Resident Office
300 Las Vegas Boulevard South, Suite 2-901
Las Vegas, NV 89101
Telephone: (702) 820-7467
Facsimile: (702) 388-6248
E-Mail: nathan.higley@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that the **COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS** in **PAE APPLIED TECHNOLOGIES, LLC** was served via E-Gov, E-Filing, and electronic mail, on this 27 day of January 2017, on the following:

Via E-Gov, E-Filing:

Gary W. Shinnars, Executive Secretary
National Labor Relations Board
Office of the Executive Secretary
1015 Half Street SE – Room 5011
Washington, DC 20570

Via Electronic Mail:

Jeffrey W. Toppel, Attorney at Law
Jackson Lewis, PC
2398 East Camelback Road, Suite 1060
Phoenix, AZ 85016-9009
E-Mail: toppelj@jacksonlewis.com

Nathan R. Ring, Attorney at Law
The Urban Law Firm
4270 South Decatur Boulevard, Suite A9
Las Vegas, NV 89103-6801
E-Mail: nring@theurbanlawfirm.com

/s/ Dawn M. Moore

Dawn M. Moore
Administrative Assistant
National Labor Relations Board
Region 28 - Las Vegas Resident Office
Foley Federal Building
300 Las Vegas Boulevard South, Suite 2-901
Las Vegas, Nevada 89101
Telephone: (702) 820-7466
Facsimile: (702) 388-6248
E-Mail: Dawn.Moore@nlrb.gov