NOT YET SCHEDULED FOR ORAL ARGUMENT
No. 16-1328 & 16-1396

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

PENNSYLVANIA STATE CORRECTIONS OFFICERS ASSOCIATION
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF PETITIONER/CROSS RESPONDENT PENNSYLVANIA STATE CORRECTIONS OFFICERS ASSOCIATION

Edward R. Noonan (D.C. Bar No. 55792)
Michael McAuliffe Miller (D.C. Bar No. 60250)
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
(717) 237-7182
enoonan@eckertseamans.com
mmiller@eckertseamans.com

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Petitioner/Cross-Respondent, Pennsylvania State Corrections Officers Association, certifies to the following:

(A) Parties, Intervenors, and Amici. The parties who appeared below before the National Labor Relations Board, Region 4, were the Pennsylvania State Corrections Officers Association ("PSCOA") as Respondent, and Business Agents Representing State Union Employees Association ("BARSUEA") as the Charging Party. The parties here in this Court are Petitioner PSCOA and Respondent the National Labor Relations Board ("NLRB").

(B) Rulings Under Review. The rulings under review in this case are the Supplemental Decision and Order of the NLRB in Cases 04-CA-037648, 04-CA-037649, and 04-CA-037652 on August 26, 2016 and reported at 364 NLRB No. 108. Review of the NLRB's Supplemental Decision and Order in Cases 04-CA-037648, 04-CA-037649, and 04-CA-037652 includes review of (1) the Supplemental Decision of Administrative Law Judge Robert A. Giannasi issued on May 23, 2014 in the underlying proceeding; (2) the NLRB's Decision and Order in the unfair labor practice case on March 23, 2012 and reported at 358 NLRB No. 108; and (3) the Administrative Law Judge's Decision in the unfair labor practice case on March 17, 2011. The rulings under review will be included in the Joint Appendix.

(C) Related Cases. PSCOA is unaware of any related case involving substantially the same parties and the same or similar issues.

/s/ Michael McAuliffe Miller_____
April 21, 2017 Michael McAuliffe Miller, D.C. Bar No. 60250

STATEMENT OF INTENT TO UTILIZE DEFERRED JOINT APPENDIX

Pursuant to Federal Rule of Appellate Procedure 30(c) and Circuit Rule 30(c), counsel for the parties have consulted and have mutually agreed to utilize a deferred joint appendix in this case.

AMENDED RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for Petitioner, Pennsylvania State Corrections Officers Association ("PSCOA") makes the following disclosure: The PSCOA is an unincorporated Pennsylvania association that has no parent company. No publicly held corporation has a 10% or greater ownership in PSCOA.

/s/ Michael McAuliffe Miller_____
Michael McAuliffe Miller, D.C. Bar No. 60250
April 21, 2017

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GLOSSARY OF ABBREVIATIONS

Administrative Law Judge ("ALJ")

Administrative Procedures Act ("APA")

Business Agents Representing State Union Employees Association ("BARSUEA" or "Union")

National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq*. ("NLRA" or "Act")

National Labor Relations Board ("Board" or "NLRB")

Pennsylvania State Correctional Officers Association ("PSCOA" or "Employer")

Pennsylvania State Association of Correctional Officers and Business Agents Representing State Union Employees Association, 358 NLRB 108 (No. 19) (March 23, 2012) ("PSCOA I")

Pennsylvania State Association of Correctional Officers and Business Agents Representing State Union Employees Association, ALJ's Supplemental Decision and Order, (May 23, 2014) ("PSCOA II")

Pennsylvania State Corrections Officers Association *and* Business Agents Representing State Union Employees Association, 364 NLRB No. 108 (August 26, 2016) [Decision on Review] ("PSCOA III")

INTRODUCTION

The issue in this compliance case is the amount of backpay owed as a result of PSCOA's failure to bargain with the Union over the effects of its lawful decision to discharge five employees. On March 23, 2012, PSCOA was ordered to engage in effects bargaining, and it did so.

In effects bargaining, PSCOA offered two weeks severance pay (without deductions for interim earnings) to these five employees. An impasse in bargaining was reached on April 11, 2012, 14 days after bargaining commenced on March 28, 2012, which also happened to equal the 2-week minimum backpay period under the *Transmarine* remedy.

Thereafter, on May 23, 2014, ALJ Giannasi issued a Supplemental Decision determining that the April 11 impasse was not valid and finding that the back pay period ran until September 28, 2012 – some 26 weeks later. The ALJ further found that one discrimanatee, Bill Parke, failed to mitigate the back pay obligation by not returning to his employment with the Commonwealth of Pennsylvania.

On review, the Board majority affirmed in part and reversed in part in its Supplemental Decision and Order on August 26, 2016. Ignoring the parties mutual declaration of impasse, the Board majority affirmed the ALJ's finding that the backpay period for Respondent's effects bargaining violation ran for 26 weeks,

from March 28 to September 28, 2012, by improperly judging the substantive proposals during effects *bargaining* and then imposing a penalty on PSCOA.

The Board majority also reversed the ALJ's finding that Parke failed to mitigate his damages. It did so by failing to recognize, as the ALJ did, that Parke, at all times, remained a correctional officer who was expected to return to that position when his temporary appointment with PSCOA concluded.

On the other hand, dissenting Member Miscimarra, correctly stated that PSCOA should only owe the affected employees 2-weeks backpay consistent with the limited *Transmarine* remedy. He recognized that PSCOA complied with the order to engage in effects bargaining and had even offered the required two weeks' backpay, which ended in a stipulated, lawful impasse 14 days after it commenced.

JURISDICTION

On September 20, 2016, PSCOA filed a timely petition for review of the Board's August 26, 2016 Supplemental Decision and Order (including the underlying decisions and orders). On November 14, 2016, the Board cross-petitioned for enforcement. This Court has jurisdiction pursuant to 29 U.S.C. § 160(e)-(f).

ISSUES PRESENTED

1. Whether the NLRB's remedy is manifestly contrary to the statute because:

a. it imposes substantive terms on parties in bargaining contrary to Section 8(d) of the National Labor Relations Act;

b. it exceeds the scope of the Board's remedial powers under Section 10(c) of the Act.

2. Whether the NLRB's decision is arbitrary and capricious because:

a. it conflates the remedies ordered (e.g., that Petitioner engage in effects-bargaining and provide a limited backpay remedy consistent with Transmarine) with the substance of Petitioner's effects-bargaining proposal;

b. it wrongly determined that Petitioner's effects-bargaining proposal was an effort to negotiate or renegotiate the Transmarine backpay remedy;

c. it wrongly determined that the April 11 impasse was unlawful;

d. it formulated a backpay obligation that exceeds the Board's authority and is contrary to longstanding principles and obligations under Transmarine;

e. it erred in applying the established law to the facts of the case.

3. Whether the NRLB's findings of fact are not supported by substantial evidence on the record considered as a whole because:

a. the record evidence establishes that Petitioner complied with the Judge's March 17, 2011 effects-bargaining order;

b. the record evidence establishes that Petitioner and the General Counsel stipulated that an impasse was reached on April 11, the impasse was lawful, and good faith bargaining was engaged in;

c. the Board misinterpreted Petitioner's severance pay proposal and bargaining negotiations;

d. the Board's finding that Petitioner attempted only to negotiate downward the Board-ordered backpay remedy is negated by the facts of record.

4. Whether the Board's determination that former employee Bill Parke did not fail to mitigate his damages and the position former employee Bill Parke declined was not substantially equivalent under the circumstances is arbitrary, capricious, contrary to the law and the statute and whether the findings of fact supporting the Board's determination are not supported by substantial evidence on the record considered as a whole.

STATUTES INVOLVED

Relevant statutory provisions are set forth in the addendum to the brief.

STATEMENT OF THE CASE

The Pennsylvania State Correctional Officers Association ("PSCOA") is an unincorporated Pennsylvania association with an office in Harrisburg, Pennsylvania. Pennsylvania State Association of Correctional Officers and Business Agents Representing State Union Employees Association, 358 NLRB 108 (No. 19) at 110 (March 23, 2012) ("PSCOA I"; JA.23.[*]). PSCOA represents unionized employees who are members of bargaining units within the Commonwealth of Pennsylvania including correctional officers employed in the Commonwealth of Pennsylvania's statewide prison system. (JA.23.)

Since June 2001, PSCOA has represented some 11,000 correctional officers at 28 facilities in Pennsylvania's prison system. (JA.23.) PSCOA is led by a 13-member Executive Board, including a President and other officers, and it operates under a written constitution that sets forth the responsibilities and duties of its officers and governing executive board. (JA.23.)

In order to discharge its duty to represented employees, PSCOA acts through business agents it employs. Those business agents are drawn from the ranks of the Commonwealth's correctional officers. When a correctional officer is selected as a business agent, they are provided a limited period of leave from their

[*] "JA" refers to the joint appendix.

Commonwealth correctional officer position and permitted to work for PSCOA during that leave period. (JA.81-82.) A correctional officer who is selected as a business agent is not guaranteed tenure in his position as a business agent with PSCOA. (JA.81-82.) As such, a correctional officer who is selected as a business agent is automatically reinstated to the correctional officer position with the Commonwealth when his appointment as a PSCOA business agent ends if he chooses to return to Commonwealth employment. (JA.81-82.)

A. The Creation Of The Business Agents Representing State Union Employees Association ("BARSUEA").

On June 25, 2010, a nascent union, the Business Agents Representing State Union Employees Association ("BARSUEA") filed an election petition with the Board's regional office in Philadelphia seeking to represent PSCOA's roughly 20 business agents and staff employees. (JA.24.) On July 1, 2010, PSCOA and BARSUEA entered into a stipulated election agreement, approved by the Region, setting an election for July 12, 2010, in the following unit:

> All full-time and regular part-time business agents and support staff employed by the Respondent, excluding all other employees, guards and supervisors.

(JA.24.)

The election was held as scheduled and BARSUEA won. (JA.24.) On July 21, 2010, the Board certified BARSUEA as the official bargaining representative of PSCOA's employees. (JA.24.)

Between the election and the Board's certification, former President Donald McNany, on behalf of PSCOA, and Claimant Shawn Hood, on behalf of BARSUEA, engaged in three negotiating sessions. (JA.24.) At the last session, on July 19, McNany and Hood signed the agreement, which had a 5-year term and contained new and generous severance benefits as well as other benefits (the "July 19th Agreement"). (JA.24.)

B. PSCOA's Decision To Discharge The Claimants.

Jason Bloom, who was re-elected to PSCOA's Executive Board on the Pinto slate as Western Regional Vice-President in June 2010, sent a letter to all 13 business agents of PSCOA asking each of them to submit a letter of interest to be considered for a continued employment as a business agent by the end of the day on July 20, 2010. (JA.24.) The letter stated that those who were not interested in remaining as business agents should return PSCOA's property in their possession whereas those who wanted to remain would be scheduled for interviews. (JA.24.)

As a result of that selection process, Claimants in the instant action, Lee Dyches, Shawn Hood, Patricia Hurd, John Miller and Bill Parke, all received letters dated August 20, 2010, directing them to return to their original positions at the state correctional institutions where they had been assigned in order to resume their Commonwealth employment. It was undisputed that the Parties agreed that

work as correctional officers was available to those individuals at their original state correctional institutions.

C. Bill Parke Does Not Return To The Correctional Facility From Which He Came.

All of the Claimants in this matter save for one, Bill Parke, returned to the correctional officer positions that they held before they were appointed to the position of business agents for PSCOA. Instead of returning to his previous position, Mr. Parke chose to retire from the Commonwealth and PSCOA in August 2010, immediately after he was told to report to work at his former correctional facility.

Mr. Parke was hired by PSCOA as Assistant Grievance Manager and served in that capacity from May 2002 through August 2010. (JA.71.) Prior to his hiring by PSCOA, Mr. Parke served as a Correctional Officer II from 1996 through 2002 at the State Correctional Facility located at Houtzdale, Clearfield County, Pennsylvania ("SCI-Houtzdale"). (JA.73.) When Mr. Parke was hired by PSCOA as Assistant Grievance Manager, he decided to move from Houtzdale, Clearfield County, and rent a house in Mechanicsburg, Cumberland County, which was closer to PSCOA headquarters. (JA.73-74.)

Mr. Parke admitted that his appointment with PSCOA was not a tenured appointment and that he had no continued expectation of employment with PSCOA. (JA.81-82.) Mr. Parke agreed that he knew when he took the PSCOA

position in 2002 that he could be separated from PSCOA and returned to his original correctional facility, SCI-Houtzdale. (JA.82.)

Mr. Parke admitted—as did the General Counsel—that he possessed the right to return to his Correctional Officer II position at SCI-Houtzdale when he received the August 20, 2010 letter directing him to return to his original state correctional institutions to resume his employment there. (JA.84, 86.) In addition, Mr. Parke admitted that he knew he also had the right to ask for a transfer from SCI-Houtzdale to SCI-Camp Hill, which was a correctional facility which was much closer to his rented home in Mechanicsburg, Pennsylvania. (JA.83-84.) Mr. Parke never sought a transfer. (JA.84.)

Mr. Parke instead chose to retire from the Commonwealth and from PSCOA in August of 2010 after he received the letter directing him to return to his original state correctional institution to resume his employment there. (JA.85.) Following his decision to retire from the Commonwealth and from PSCOA in August of 2010, Mr. Parke worked at a nursing home, the Bridges at Bent Creek, from August to November 2010. (JA.85.) He was out of work for about 3 ½ weeks because of a medical condition and was shifted to another position at the Bridges at Bent Creek until April of 2011. (JA.85.) Following April 2011, Mr. Parke was hired by the Holy Spirit Health System. (JA.85.)

D. BARSUEA Challenges The Business Agents' Discharge.

On August 23, 2010, BARSUEA filed grievances with PSCOA alleging that it had violated the July 19 collective bargaining agreement by "terminating employees without just cause," failing to pay them "the negotiated severance and unused leave," and failing to bid the vacant positions. (JA.25.) On August 27, 2010, PSCOA, through its lawyer, sent BARSUEA a letter in response to the grievances. (JA.25.) The letter stated that PSCOA's Executive Board had just recently learned of the existence of BARSUEA and its July 19 collective bargaining agreement. (JA.25.) The letter also stated that the agreement was void because McNany had no authority to sign the agreement on behalf of PSCOA since he had been voted out of office and the agreement had not been approved by PSCOA's Executive Board, as required by PSCOA's Constitution. (JA.25.)

On January 3, 2011, PSCOA entered into a new collective bargaining agreement with BARSUEA. (JA.25.) That agreement, which ran for a term of 1 year and dispensed with the lucrative severance and other benefits in the July 19 agreement, was signed by President Pinto and a representative of BARSUEA. (JA.25.) Unlike the July 19 agreement, the new agreement was approved by PSCOA's Executive Board. (JA.25.)

E. A Decertification Petition Is Filed With Region Four.

In January 2012, following the decision of the ALJ but before the Board's Decision and Order, a petition to decertify BARSUEA was filed with Region 4 by Shawn Smith, a member of BARSUEA. (See JA.99; JA.215.) The petition averred that BARSUEA had 18 members and the petition contained 11 signatures which is in excess of the 30% required to bring the petition before the Board for processing. (JA.99, 215.)

The Region declined to process the petition but instead issued a letter to Mr. Smith indicating that the Region would wait for a decision by the Board on the issue of whether or not the July 19 collective bargaining agreement was valid. (See JA.219-20.) If the July 19 collective bargaining agreement was valid, the Board reasoned, then its validity would act as a bar to an election for the following three years. (See JA.219-20.) The Region told Mr. Smith that it was "dismissing the petition, subject to reinstatement, if appropriate, upon conclusion of the unfair labor practice proceedings." (See JA.219.)

Fourteen days after the Board's letter, the unfair labor practice proceedings *did* conclude when the Board issued a Decision and Order on March 23, 2012, which found that the July 19 Agreement was void. Despite that specific finding, the Region never reinstated the petition for decertification although a determination of whether or not BARSUEA still retained sufficient support in

January 2012 would have made a material difference to the issue of whether PSCOA had a duty to bargain over the impact of dismissing the Claimants.

F. The Board Voids BARSUEA's Agreement And Orders PSCOA To Bargain Over Effects.

Following a hearing, both the ALJ and the Board found that the July 19 Agreement was void and that PSCOA did not violate the Act when it made the decision not to retain Claimants Hood, Hurd, Miller and Parke as business agents.

The Board, however, did affirm the ALJ's finding that PSCOA violated Sections 8(a)(5) and (1) by failing to bargain over the effects of the decision to discharge the business agents. (See JA21-28.) In the words of the ALJ's decision:

> Although Respondent need not bargain over the decision to discharge the business agents, it is required to bargain over its effects. I understand that the business agents returned to their former jobs as corrections officers. Their losses thus may be minimal. But there may be severance pay and other accrued, but unpaid, benefits, such as vacation or sick pay, that could be involved in effects bargaining. Any severance pay due the business agents in this case would be subject to the bargaining process and Respondent is not required to agree to anything, provided it bargains in good faith to impasse on the issue. Moreover, the typical remedy for effects bargaining, under the Board's order in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), sets a floor of 2 weeks backpay, a not unreasonable severance package, in view of the bargaining violation I have found.

(JA.27-28.)

The ALJ's decision of March 17, 2011 was affirmed by the Board in a Decision and Order issued on March 23, 2012 which, in pertinent part, ordered PSCOA to "on request, bargain with the Union with respect to the effects of its

decision to discharge Business Agents Lee Dyches, Shawn Hood, Patricia Hurd, John Miller, and Bill Parke." (JA.21.) (emphasis added).

G. PSCOA And BARSUEA Bargain To Impasse.

Consistent with the Board's Decision and Order, on April 4, 2012, representatives of PSCOA contacted Larry Sonnie, President of BARSUEA, to request that PSCOA and BARSUEA engage in bargaining over the effects of PSCOA's decision to discharge Business Agents Dyches, Hood, Hurd, Miller, and Parke. (JA.48.) A meeting was held on April 4, 2012 between Mr. Sonnie for BARSUEA and Todd Eagan, Bob Stewart and Jason Bloom for PSCOA. (JA.48-49.)

At that meeting, following a discussion of the discharges of Business Agents Dyches, Hood, Hurd, Miller, and Parke, PSCOA made an offer of severance as follows:

> A payment equal to two weeks' salary offset by a payment already made to the discharged Business Agents during a week (August 22, 2010 through August 28, 2010) for which they were already paid after the date of their removal on August 20, 2010.
>
> The remaining week of salary would be offset additionally by those amounts that Dyches, Hood, Hurd and Miller were already reimbursed for mileage which was, in the view of the PSCOA, fraudulent.

(JA.49-58, 222-23.)

There is little dispute as to what was said at the April 4, 2012 meeting. Mr. Sonnie provided an Affidavit which set forth his version of what happened at the

April 4, 2012 meeting. (JA.51-53.) PSCOA also sent a letter dated April 4, 2012 to Sonnie, detailing PSCOA's offer. (JA.222-23.) In addition, at the hearing in this matter, a memo to file authored by Mr. Eagen from PSCOA was introduced as (JA.213-14), which detailed what happened at the April 4, 2012 meeting. There is little substantial difference between those written accounts and the testimony regarding what occurred.

Mr. Sonnie did not accept PSCOA's offer at the April 4, 2012 meeting because he wanted to speak to the discharged business agents to get their reaction. (JA.54.) Mr. Sonnie attempted to reach out to the discharged business agents to get their reaction but could not get them to return his phone calls. (JA.55.) PSCOA's Vice President, Larry Blackwell, was able to make contact with one of the business agents and was able to formulate a counteroffer based on what that agent told him. (JA.55, 68.)

BARSUEA Vice President Lawrence Blackwell mailed a formal counteroffer on April 10, 2012, to PSCOA. (JA.224.) In his letter, Mr. Blackwell demanded the following:

Hood:	2 weeks' severance pay, 70 days' vacation, $ 1,088 unpaid phone bill and last 6 week of mileage which was not received.
Dyches	2 weeks' severance pay and all unused leave paid back
Hurd:	2 weeks' severance pay and all unused leave paid back
Miller:	2 weeks' severance pay and all unused leave paid back

Parke 2 weeks' severance pay and all unused leave paid back (JA.224.)

By letter to Blackwell dated April 11, 2012, PSCOA rejected the counteroffer and declared impasse. (JA.225-26.) Both Mr. Sonnie and Mr. Blackwell testified at hearing that they specifically agreed that the parties were at impasse on April 11, 2012. (JA.65, 69-70.) The parties stipulated below that PSCOA and the Union reached impasse on April 11, 2012. (JA.251-53, at ¶ 9.) They both believed that there was no point in further bargaining. (JA.65.) After April 11, 2012, neither the BARSUEA President nor any member of its Executive Committee contacted PSCOA to engage in further bargaining over the effects of the discharges of Dyches, Hood, Hurd, Miller, and Parke. (JA.65, 70; JA.251-53, at ¶¶ 10-11.)

Thereafter, on May 23, 2014, ALJ Giannasi issued a Supplemental Decision finding the April 11 impasse was not valid and the back pay period ran until September 28, 2012. Pennsylvania State Association of Correctional Officers and Business Agents Representing State Union Employees Association, ALJ's Supplemental Decision and Order, (May 23, 2014) ("PSCOA II"; JA.254-60). The ALJ, however, found that Parke failed to mitigate the back pay obligation by not returning to his employment with the Commonwealth of Pennsylvania. (JA.254-60.)

The Board issued its Supplemental Decision and Order on August 26, 2016. Members Pearce and Hirozowa affirmed in part and reversed in part. Pennsylvania State Corrections Officers Association *and* Business Agents Representing State Union Employees Association, 364 NLRB No. 108, at 11 (August 26, 2016) ("PSCOA III"; JA.298-310). Member Miscimarra dissented in part.

The Board majority affirmed the ALJ's finding that the backpay period for Respondent's effects bargaining violation ran for 26 weeks, from March 28 to September 28, 2012. (JA.299.) The Board majority reversed the ALJ's finding that Parke failed to mitigate his damages. (JA.299.)

Member Miscimarra, on the other hand, would have found that the backpay period ran from March 28 to April 11, when, as stipulated, bargaining reached an impasse. (JA.304.) Dissenting Member Miscimarra provided that "consistent with the Board's 'limited backpay' award and *Transmarine*, the Respondent owe[d] the affected employees 14 days' backpay, which also happens to equal the 2-week minimum backpay period." (JA.304.)

SUMMARY OF ARGUMENT

After the Board found that PSCOA failed to engage in effects bargaining with an employee union, PSCOA was ordered to (i) engage in effects bargaining, and (ii) give affected employees limited backpay consistent with *Transmarine*. The record demonstrates that PSCOA complied with that order: 1) effects

bargaining commenced in a timely manner; 2) PSCOA offered two weeks' salary without deductions for interim earnings as severance pay (which exceeded the minimum *Transmarine* requirement); 3) the Parties reached a lawful impasse (to which the Union, the General Counsel, and the PSCOA stipulated) after which PSCOA advised it would implement its proposal.

On appeal, a majority of the Board declared that the impasse to which the Union, the General Counsel and the PSCOA all stipulated was unlawful and—by fiat—improperly extended PSCOA's *Transmarine* backpay obligation from 2 weeks to 26 weeks. As noted by dissenting Member Miscimarra, the Board's action was mistaken as it was only appropriate for the Board to require PSCOA to provide backpay to the affected employees for a period of 14 days, or 2 weeks.

While the PSCOA was unquestionably required to engage in effects bargaining (and it did), the Board has never possessed any power under the Act to dictate what terms, if any, must be offered in effects bargaining. PSCOA was not required to offer *anything in effects bargaining*. It did, however, and–in fact–its offer exceeded the minimum requirement of *Transmarine*. Here, the Board's plainly expressed disagreement with the substance of PSCOA's effects bargaining proposals formed the basis of the Board's improper decision here which violates the restrictions placed upon the Board by the Act.

The Board imposed this unlawful penalty by improperly evaluating the substance of PSCOA's proposal in violation of Section 8(d) of the Act. The Board majority exceeded the settled limits on its powers and punished PSCOA for simply taking a position that the Board—acting in PSCOA's shoes—would not have taken. In fact, the sole criticism levied by the Board related to the *substance* of PSCOA's severance pay proposal.

The Board, however, cannot penalize parties because it disagrees with its substantive bargaining proposals. This is what happened instantly as the Board ignored the stipulated fact that the parties had lawfully stipulated impasse and improperly extended impasse for an additional 24 weeks, despite the record facts.

Specifically, the Board criticized PSCOA's severance pay proposal as an attempt to negotiate or renegotiate the *Transmarine* limited backpay remedy. First, PSCOA could not have bargained away the *Transmarine* remedy because it was imposed by the Board. Second, PSCOA never made an offer of less than what *Transmarine* required. The Board's conclusions to the contrary were arbitrary, capricious, and manifestly contrary to the statute as well as not supported by the evidence.

As such, the result the Board imposed here is a remedy that was contrary to Section 8(d) of the Act, which precludes the Board from imposing substantive terms on parties in bargaining, and that exceeds the scope of the Board's remedial

powers under Section 10(c) of the Act, which precludes the Board from imposing penalties on parties because the Board disapproves of the parties' lawful proposals.

In addition, the Board erroneously reversed the ALJ's finding that discriminatee Parke failed to mitigate the back pay obligation by not returning to his employment with the Commonwealth of Pennsylvania. The record was abundantly clear that Parke had work available to him as a correctional officer, the position that he, at all times, retained. The Board erroneously shoehorned this case into the traditional mitigation framework which was inapplicable here where Parke never left his position, he was merely appointed—temporarily—to a position with additional duties. The Board's decision that Parke did not fail to mitigate by declining to return to his correctional officer job was arbitrary, capricious, contrary to the law and the statute and not supported by substantial evidence.

STANDING

Pennsylvania State Corrections Officers Association has standing because it was a respondent in the Board proceedings and was aggrieved by the orders under review.

STANDARD OF REVIEW

NLRB decisions are reviewed under the "arbitrary and capricious" standard of the APA, 5 U.S.C. § 706(2). W&M Props. of Conn., Inc. v. NLRB, 514 F.3d 1341, 1348 (D.C. Cir. 2008). If the NLRB "fail[s] to apply the proper legal

standard," its order thus "will not survive review." Titanium Metals Corp. v. NLRB, 392 F.3d 439, 446 (D.C. Cir. 2004).

With respect to the Board's factual determinations, they will not be enforced if not supported by "substantial evidence." Where the record evidence "is in conflict, the substantial evidence test requires the Board to take account of contradictory evidence, and to explain why it rejected evidence that is contrary to its findings. Carpenters & Millwrights, Local Union 2471 v. NLRB, 481 F.3d 804, 809 (D.C. Cir. 2007) (quotation omitted).

ARGUMENT

1. The NLRB's remedy under *Transmarine* is arbitrary, capricious, and manifestly contrary to the statute and must be overruled.

As correctly stated in dissent by Member Miscimarra, the Board majority "devised a remedy that conflates two separate things: (i) the *Transmarine* backpay *remedy*, which the Board controls, and (ii) Board-ordered effects *bargaining*, the substance of which the parties control." (JA. 303) (Member Miscimarra, dissenting in part). The Board, however, cannot penalize parties because it disagrees with its substantive bargaining proposals.

Here, the Board ignored the stipulated fact that the parties had reached impasse and improperly extended impasse for an additional 24 weeks *de hors* the record facts. As such, the result the Board imposed here "is a remedy that is contrary to Section 8(d) of the Act, which precludes the Board from imposing

substantive terms on parties in bargaining, and that exceeds the scope of the Board's remedial powers under Section 10(c) of the Act, which precludes the Board from imposing penalties on parties because the Board disapproves of the parties' lawful proposals." (JA.303.)

It is well settled that the backpay remedy for an "effects bargaining" violation is a limited one. Under *Transmarine*, a party that failed to engage in "effects bargaining" is ordered to do two things: (i) to "bargain over the effects" of the underlying lawful decision; and (ii) to give affected employees "limited backpay" for a period ending when effects bargaining results in "agreement" or a "bona fide impasse" (whichever comes first), provided that the backpay shall be no less than what "employees would have earned for a 2-week period." Transmarine Navigation Corp., 170 NLRB 389, 390 (1968). The *Transmarine* limited backpay award is "designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent." Id. The Board ignores the fact that PSCOA offered to pay two weeks' severance and had never declined to pay the *Transmarine* remedy of 2-weeks.

A. The Board's remedy is an impermissible intrusion into the substantive aspects of bargaining.

The Board's powers regarding effects bargaining are strictly limited. It has long been recognized that the Board is prohibited from dictating the substance of bargaining. In 1947, Congress took measures to ensure the Board did not sit in judgment regarding the parties' substantive proposals in bargaining due to fear "that the Board had 'gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make." National Labor Relations Board v. Insurance Agents' International Union, AFL-CIO, 361 U.S. 477, 486 (1960) (citation omitted); see also H.K. Porter Co. v. National Labor Relations Board, 397 U.S. 99, 105 (1970). Because Congress never intended the Board be able to "exercise its powers to arbitrate the parties' substantive solutions of the issues in their bargaining, a check on this apprehended trend was provided by writing the good-faith test of bargaining into [Section] 8(d) of the Act."[1] Insurance Agents, 361 U.S. at 486.

[1] Specifically, Section 8(d) of the Act provides that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d).

Since that time, the Supreme Court has explained that "the Board may not, either directly or indirectly, compel concessions *or otherwise sit in judgment upon the substantive terms of collective bargaining agreements*." H.K. Porter Co., 397 U.S. at 106 (citing National Labor Relations Board v. American Nat. Ins. Co., 343 U.S. 395, 404 (1952)) (emphasis added). Indeed, Section 8(d) "was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements." Insurance Agents, 361 U.S. at 487 (citing Am. Nat'l Ins. Co., 343 U.S. at 404). Rather, "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solutions of their differences." Id. at 488.

Yet, despite these well settled limits on the Board's power, the Board majority plainly exceeded these settled limits in this case by disapproving of the substantive bargaining position taken by PSCOA. The Board, in effect, punished PSCOA for simply taking a position in effects bargaining that the Board majority would not have taken. Specifically, the Board majority opined that PSCOA "never made a proposal that met its effects-bargaining obligation," because it insisted "to impasse on its offer of 2 weeks' backpay with 1 week's pay deducted because it had already been paid to the discriminatees and with the remaining 1 week's pay treated as a credit in future lawsuits." (JA.300-01.) The Board majority reaches

this conclusion despite recognizing that PSCOA "offered the Union 2 week' backpay without deductions for interim earnings." (JA.299.)

In doing so, the Board majority makes much of language contained in bargaining notes wherein counsel makes passing reference to "a review of the *two week backpay remedy the Administrative Law Judge suggested* in this matter." (JA.299) (emphasis in original). The Board, however, conveniently:

> (1) makes no reference to the ALJ's order below which does, in fact, suggest that the *Transmarine* "floor of 2 weeks backpay [is] not [an] unreasonable severance package[] in view of the bargaining violation I have found," (JA.28);
>
> (2) ignores material language from those notes demonstrating that PSCOA "would not seek reimbursement for the one week backpay amount in any subsequent civil action," (JA.214); and
>
> (3) fails to cite the actual offer letter, which contains no such language that PSCOA was operating under the impression that the *Transmarine* remedy was a mere "suggestion," and, instead, points out on two separate occasions interim earnings will not be deducted (as would have been permitted under *Transmarine*), (JA.222-23.)

What is clear is that the Board's "sole criticism levied … relates to the *substance* of [PSCOA]'s severance pay proposal." (JA.304) (Member Miscimarra, dissenting in part) (emphasis in original). The Board, however, was not permitted to dictate the *substance* of the PSCOA's severance pay proposal, and, as such, no analysis, criticism, or consideration of PSCOA's substantive bargaining proposal in the Board majority's opinion was appropriate.

As explained by Member Miscimarra, the Board's remedial powers do not include a power to dictate any substantive term of an agreement:

> It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, *leaving the results of the contest to the bargaining strengths of the parties* … The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. *One of these fundamental policies is freedom of contract*. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the *fundamental premise on which the Act is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.*

(JA.304) (Member Miscimarra, dissenting in part) (quoting H.K. Porter, 397 U.S. at 107-08). Here, the Board's remedy was a direct result of the Board improperly "setting itself up as the judge of what concessions an employer must make," Insurance Agents, 361 U.S. at 486, and was an impermissible attempt to impose substantive terms on the parties in bargaining contrary to Section 8(d) of the Act.

Instead, as recognized by Member Miscimarra, the administrative judge required PSCOA to engage in effects bargaining, and PSCOA complied with that order. (JA.303) (Member Miscimarra, dissenting in part). Bargaining commenced in a timely manner and PSCOA formulated a lawful severance pay proposal in

effects bargaining.[2] "Severance pay (including details regarding amount, timing of payment, and potential deductions or offsets) is a mandatory subject of bargaining, about which both the employer and union may insist to impasse." (JA.303) (Member Miscimarra, dissenting in part) (citing Champion International Corp., 339 NLRB 672, 688 (2003); Your Host, Inc., 315 NLRB 295 (1994); Waddell Engineering Co., 305 NLRB 279 (1991)). In bargaining, there was never any claim that PSCOA failed to bargain in good faith. (JA.304) (Member Miscimarra, dissenting in part).

Specifically, the judge issued his recommended decision and order on March 17, 2011, which was affirmed on March 23, 2012. Under *Transmarine*, the backpay period commenced running five days later on March 28, 2012.

> Under *Transmarine*, the "limited backpay" period ends when the parties reach an agreement or impasse, whichever occurs first, with the further caveat that Board-ordered backpay will not be less than 2 weeks' pay. [PSCOA] and the Union commenced bargaining on April 4[, 2012]. And the General Counsel and [PSCOA] stipulated that "[o]n April 11[, 2012], PSCOA and [the Union] reached an impasse in bargaining."

(JA.304) (Member Miscimarra, dissenting in part). Since 14 days passed between March 28, 2012 and April 11, 2012, PSCOA "owes the affected employees 14

[2] "One aspect of that proposal was that 1 week's severance pay would be held back pending resolution of a dispute between [PSCOA] and the discharged employees concerning mileage reimbursements the employees might be required to repay to [PSCOA]." (JA.303) (Member Miscimarra, dissenting in part).

days' backpay, which also happens to equal the 2-week minimum backpay period." (JA.304.)

Two fundamental points undercut the Board's conclusion that PSCOA instead owed the employees 26 weeks' backpay. First, the parties', including the General Counsel, **stipulated** that impasse had been reached on April 11, 2012. (JA.251-53, at ¶9). As pointed out by Member Miscimarra, the parties, and specifically the General Counsel, "must have understood the legal effect of that stipulation under *Transmarine*, i.e., that the backpay period terminated on April 11." (JA.305) (Member Miscimarra, dissenting in part) (emphasis added). Second, there was never any claims raised by any party, including the Board, that PSCOA failed to bargain in good faith. (JA.304; JA.251-53, at ¶ 11).

Given the fact that there exists no disputed facts and there is no basis for an issue in controversy, the only way the Board could reach its conclusion that the impasse was unlawful was by judging the substantive proposals made by PSCOA in violation of Section 8(d). Such an impermissible intrusion into the substantive aspects of bargaining cannot be permitted to stand.

B. The Board's remedy confuses the remedies the judge ordered with the substance of PSCOA's effects-bargaining proposal.

As explained by Member Miscimarra, the Board majority "confuse[d] the *remedies* the judge ordered here (that [PSCOA] engage in effects bargaining and provide a limited backpay remedy consistent with *Transmarine*, supra) with the

substance of the [PSCOA]'s effects-bargaining *proposal* regarding severance pay (include amounts, deductions, and an offset pending resolution of a dispute over mileage reimbursements)." (JA.304) (Member Miscimarra, dissenting in part). PSCOA was not required to offer *anything* in effects bargaining so long as it bargained in good faith. It did, however, and–in fact–its offer exceeded the minimum requirement of *Transmarine*. (JA.306) (Member Miscimarra, dissenting in part); (JA.222-23.). Nevertheless, when impasse was reached 14 days after bargaining began, the *remedy* ordered required PSCOA to pay the employees 2-weeks under *Transmarine*.

The Board's authority with respect to *Transmarine* was limited to ensuring that backpay was properly awarded, <u>irrespective of the parties' substantive proposals during negotiations</u>. Dissenting Member Miscimarra properly explained that the Board majority's position "is based on the false premise that Board-ordered *backpay* under *Transmarine* enters into Board-ordered effects *bargaining* and limits the substantive proposals that may be put forward by either party." (JA.305) (Member Miscimarra, dissenting in part).

> These two components of a *Transmarine* remedy are clearly distinct. One component is the requirement that the parties engage in effects bargaining, as to which Section 8(d) prohibits the Board from dictating substantive terms or proposals. The other component is the *Transmarine* "limited backpay" remedy, which is *not* subject to negotiation between the parties but rather is

> imposed by the Board, and which is separate from the parties' substantive proposals in effects bargaining.

(JA.305.)

The Board majority's conclusion that "[p]ermitting a party to bargain to impasse about *Transmarine* backpay would defeat the purpose of the remedy," is both wrong and misguided.[3] The purpose of the remedy is to ensure "the parties' bargaining position is not entirely devoid of economic consequences for the Respondent." Transmarine, 170 NLRB at 390. This purpose is achieved no matter what the parties' bargaining position is during negotiations. Until the parties either reach an agreement or impasse, the backpay award continues to increase (see example set forth by majority on page 3, footnote 7). Nothing about the parties' substantive bargaining position can change this result and it is not disputed that the parties cannot modify the *Transmarine* award by agreement.

Thus, PSCOA could not have bargained away the *Transmarine* remedy because it was imposed by the Board – whether the Board thought PSCOA attempted to do so through its substantive proposals during bargaining is wholly

[3] Indeed, the Board's conclusion that PSCOA's proposal was an effort to negotiate or renegotiate the *Transmarine* backpay remedy could not have been made without an improper consideration of the substance of the proposal, which the Board is prohibited from lawfully dictating.

irrelevant. There was no risk whatsoever that PSCOA could bargain away the limited backpay remedy.[4]

A requirement to engage in effects bargaining does not include a requirement to make any particular proposal or to agree to any particular proposal. Therefore, "contrary to [the Board majority]'s conclusion that the *Transmarine* remedy required [PSCOA], *in effects bargaining*, to offer the Union a minimum of 2 weeks' pay, the Board lacks the authority to impose *any* minimum requirement regarding the substance of a party's bargaining proposals." (JA.305.) (Member Miscimarra, dissenting in part); see also Insurance Agents, 361 U.S. at 488 ("Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences.").

Moreover, nothing in *Transmarine* "preclude[s] a party from including in its offer proposals such as those formulated by [PSCOA], including a proposal to defer a portion of severance pay based on amounts that [PSCOA] believed it was entitled to recover from the discharged employees." (JA.305) (Member Miscimarra, dissenting in part). Indeed, "[t]hese issues are grist for the mill of

[4] "The Board remains responsible for enforcement of the *Transmarine* backpay remedy, regardless of whether or not one party or the other may have believed the remedy could itself be the subject of effects bargaining, so there is no risk that bargaining could have compromised the minimum backpay period prescribed in the effects-bargaining order." (JA.305) (Member Miscimarra, dissenting in part).

lawful effects bargaining, and they are especially appropriate subjects when the employer, the union and affected employees may wish to resolve all financial issues that exist in relation to lawful terminations of the employment relationships, like those at issue in the instant case." (JA.305.)

All that the Union had to do in this case in order to seek more severance pay or contest PSCOA's position was merely to continue bargaining instead of agreeing that impasse had been reached. Moreover, "the Union was free to reject [PSCOA's] offer—which it did, making a counteroffer—and [PSCOA] never took the position that the [*Transmarine* award] placed a 2-weeks' *ceiling* on the amount of severance pay it could be required to furnish under any agreement reached in good-faith effects bargaining." (JA.305, at n.9.) There was nothing unlawful regarding PSCOA's proposals,[5] and, in fact, there was no question that bargaining

[5] The Board's reliance on Sawyer of Napa, The State Journal, and Teamsters, Local 705 to determine the impasse was unlawful must fail for the reasons set forth by Member Miscimarra in dissent. (JA.306-07, at n.13.) With respect to Sawyer of Napa, "the employer's misconception affected *the bargaining itself*, which Congress entrusted to the Board's oversight." (JA.306-07, at n.13.) However, PSCOA never took the position that *Transmarine* set a *maximum* of 2 weeks' pay, and, indeed, its proposal to the Union offered more than the minimum requirement because it proposed providing severance pay without deductions for interim earnings. With respect to The State Journal, the facts and holding, which established that an employer's backpay obligation is not discharged by making payment to an employee's wife, has no application to this case. With respect Teamsters, Local 705, the Board disallowed the union's claimed offset for union dues owed by the discriminatee, whose discharge the union had secured in violation of Section 8(b)(1)(A) and (2). "Here, in contrast, the issue is whether [PSCOA] bargained to a valid impasse in effects bargaining …." (JA.306-07, at n.13.)

took place consistent with the judge's order, and it was never alleged that PSCOA failed to bargain in good faith. (See JA.304-05.)

"[T]here is no 'correct' or 'incorrect' position in bargaining under the Act." Sawyer of Napa, Inc., 321 NLRB 151 (1996) (Member Cohen, dissenting in part). "In collective bargaining, including Board-ordered effects bargaining, parties are free to advance whatever position they wish, subject to narrow limitations not at issue in the instant case."[6] (JA.305) (Member Miscimarra, dissenting in part); see also Sawyer of Napa, supra ("The Board cannot dictate to a party the 'correct' position to be taken in bargaining.")

While the Board, as a remedy, was entitled to impose a minimum award of 2 week's backpay, the Board was not free to judge the party's position in bargaining itself. The Board majority imposed "a backpay remedy—far in excess of that contemplated by *Transmarine*—based on their disapproval of the substance of [PSCOA]'s effects-bargaining proposals, and contrary to the parties' stipulation that an impasse over those proposals had been reached in bargaining." (JA.307, at

[6] Like Insurance Agents, the Board's approach here "involves an intrusion into the substantive aspects of the bargaining process …." Insurance Agents, 361 U.S. at 490; (see also JA.306) (Member Miscimarra, dissenting in part) ("[T]he Board's finding that the parties' effects bargaining was deficient requires that they pass on the substance of [PSCOA]'s proposals, which is precluded under Section 8(d) of the Act.").

n.13.) The Board's remedy is therefore arbitrary, capricious and contrary to the statute and must be overturned.

C. The backpay award here is a fine that exceeds the Board's remedial authority under Section 10(c) of the Act.

Section 10(c) of the Act authorizes the Board, when it has found an employer guilty of an unfair labor practice, to require an employer "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement or employees with or without back pay, as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). This authority to order affirmative action, however, "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may chose …." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235 (1938). "The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations …." Id. at 236.

Here, the Board majority arbitrarily tacked 24 weeks onto the two-week *Transmarine* backpay remedy. This was done by the Board *sua sponte*. Moreover, the Board did so by arbitrarily selecting a date that had no meaningful tie to the bargaining process and despite the fact that the Union made no attempt whatsoever to engage in the bargaining process beyond the declared impasse. In fact, during the bargaining process the affected members of the Union would not even return the Union's calls regarding PSOCA's offer. (JA.308.)

Yet, despite the Union's apparent lack of concern regarding further bargaining, the ALJ declared that neither side returned to the bargaining table after April 11 "because [PSOCA] poisoned the well by insisting on improper conditions that caused impasse." (JA.309.) This conclusion was unsupported by the record evidence of fact because, as explained by Member Miscimarra, "the Union opposed [PSCOA]'s setoff proposal on its merits, not on the basis that [it] was inconsistent with *Transmarine*." (JA.306) (Member Miscimarra, dissenting in part). Even further, the ALJ in ordering effects bargaining, had opined that 2 weeks backpay was sufficient in the light of the bargaining violation:

> I understand the business agents returned to their former jobs as corrections officers. Their losses thus may be minimal….. Any severance pay due to the business agents in this case would be subject to the bargaining process and Respondent is not required to agree to anything, provided it bargains in good faith to impasse on the issue. Moreover, the typical remedy for effects bargaining, under the Board's order in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), **sets a floor of 2 weeks backpay, a not unreasonable severance package, in view of the bargaining violation I have found**.

(JA.28) (emphasis added).

Thus, the ALJ recognized that there was no significant violation here and opined that the 2 week floor would be a reasonable severance package under the circumstances. PSCOA, in good faith, offered a severance pay proposal that included the two week floor **plus** it offered not to deduct interim earnings. The

Union rejected the offer and made a counter-proposal after which a lawful impasse was reached. There is simply no basis for extending the backpay period beyond the date of stipulated impasse.

Moreover, a petition to decertify the Union had been filed on January 26, 2012 – this Petition was dismissed and delayed through no fault of PSCOA, and PSCOA engaged in bargaining, in good faith, with the Union in an attempt to resolve this matter despite the decertification petition. (JA.48-49, 219-20.) Despite the Board's failure to decertify and the Union's disinterest in further bargaining, the Board dragged out the backpay period for an additional 24 weeks. Indeed, taken to its illogical conclusion, had the Union not been declared "defunct" by the Board, the backpay award could have continued through at least the date of the Board's Supplemental Decision and Order – imposing a penalty on PSCOA for potentially years.

Effectively, the Board has imposed a fine on PSCOA because it disagreed with its substantive proposal. (See JA.306) (Member Miscimarra, dissenting in part) (The Board "majority's backpay award, spanning an additional 24 weeks, is effectively a fine."). "Not only is such a penalty proscribed by Section 8(d)—since it results from the Board's disapproval of the *substance* of [PSCOA]'s lawful effects-bargaining proposals—it is also improper because nonremedial penalties have long been held to exceed the scope of the Board's remedial authority under

Section 10(c) of the Act. (JA.306); see, e.g., Consolidated Edison Co., 305 U.S. at 235-236.

Extending PSCOA's backpay obligation after the stipulated impasse date serves no other purpose than to punish and fine PSCOA in direct contravention to Section 8(d) and 10(c) of the Act. The Board majority's position in this case effectuates a substantial shift in precedent on effects bargaining remedies in violation of the Act and should not be permitted to stand.

2. The NLRB's findings of fact are not supported by substantial evidence on the record as a whole.

The Board majority's conclusion must be overturned because its findings of fact are not supported by substantial evidence for reasons set forth in the above sections. Specifically, the record evidence establishes that (1) PSCOA complied with the Judge's March 17, 2011 effects-bargaining order; (2) PSCOA and the General Counsel stipulated that a lawful impasse was reached; (3) there was never any allegation that PSCOA engaged in bad faith during bargaining; (4) PSCOA made a lawful severance pay proposal during effects bargaining; and (5) PSCOA never attempted to negotiate downward the Board-ordered backpay remedy.

As explained above, PSCOA's severance pay proposal in effects bargaining differed from the Board's *Transmarine* backpay order in two respects. First, PSCOA's effects-bargaining proposal offered "two weeks pay *without deductions for interim earnings*." (JA.306.) Second, PSCOA's offer was made a time when

"nobody knew or could have known when bargaining might result in agreement or impasse" while "the *Transmarine* backpay order provided for an *indefinite* amount of backpay …." (JA.306.) Thus, the Board majority's conclusion that PSCOA merely attempted to negotiate downward the Board-ordered backpay remedy is not supported by substantial evidence on the record as a whole. Further, it is directly contradicted by the General Counsel's stipulation that PSCOA and the Union reached an impasse in effects bargaining. (See JA.306.)

In addition, the Union plainly did not view PSCOA's proposal as an attempt to negotiate down the Board-ordered remedy. After receiving PSCOA's offer, the Union formulated a counterproposal, rejecting PSCOA's setoff proposal on the merits not because it was inconsistent with *Transmarine*. (JA.306) (Member Miscimarra, dissenting in part). Therefore, "the Union understood that PSCOA's effects-bargaining proposals were separate and independent from the Board-imposed *Transmarine* "limited backpay" award." (JA.306.)

Instead, PSCOA complied the effects bargaining order and negotiated to a lawful, stipulated impasse in good faith. The Board's findings to the contrary must be reversed.

3. The ALJ correctly found that Claimant Bill Parke failed to mitigate his damages since he made a choice not to return to the correctional officer position.

The record is abundantly clear that Claimant Bill Parke had work available to him as a correctional officer. As such, Mr. Parke's failure to accept reinstatement to that position necessarily constituted a willful failure to seek reinstatement/equivalent work which should toll any make whole remedy.

The Board majority erroneously determined that the corrections officer position had "differed in pay, working conditions, and job duties," by failing to recognize that Parke never left the corrections officer position, which, as both parties agreed, remained his job, despite his temporary assignment to the Assistant Grievance Manger position. (JA.302.)

"Longstanding remedial principles establish that backpay is not available to a discriminatee who has failed to seek interim employment and thus incurred a willful loss of earnings." St. George Warehouse, 351 NLRB 961, 963 (2007). Thus, "[a] discriminatee must make reasonable efforts during the backpay period to seek and hold interim employment. This is known as the discriminatee's obligation to mitigate. A discriminatee is not due backpay for any period within the backpay period during which it is determined that he or she failed to make a reasonable effort to mitigate[.]" Id. (quoting, NLRB CASE HANDLING MANUAL (PART THREE) Compliance Section 10558.1).

To assert, as a defense to backpay liability, a Respondent can meet its burden of proof by presenting evidence that, during the backpay period, there were sources of actual or potential employment that the claimant failed to explore, and must show if, where, and when the discriminatee would have been hired had they applied. McLoughlin Mfg. Corp., 219 NLRB 920, 922 (1975); Isaac & Vinson Security Services, 208 NLRB 47, 52 (1973); Champa Linen Service Co., 222 NLRB 940, 942 (1976).

A discriminatee, depending on his or her circumstances, is required to seek substantially equivalent work, at least initially. For example, in Mastro Plastics Corp., 136 NLRB 347 (1962), the Board held in the case of employee Pasculli, that her backpay was cut off because she only sought part-time employment and therefore did not put herself in a labor market comparable to that of Mastro. In EDP Medical Computer Systems, 304 NLRB 627, 636 (1991), the Board denied a backpay claim on the grounds that the discriminatee did not make an adequate search for similar, or at least similarly paid work. See also Knickerbocker Plastic Co., 132 NLRB 1209 (1961) (in relation to a discriminatee named Anthony Pavani); NHE/Freeway, Inc., 218 NLRB 259 (1975) (Employee's complete failure, aside from her one early approach to a health facility, to pursue employment as a nurse's aide was in essence a willful loss of earnings standing between her and her right to back pay.). Moreover, a good-faith offer of reinstatement, whether

received by the employee or not, tolls backpay. Knickerbocker Plastic Co., 132 NLRB 1209 (1961); The Rollash Corporation, 133 NLRB 464 (1961).

Mr. Parke admitted that his appointment with PSCOA was not a tenured appointment and that he had no continued expectation of employment with PSCOA. (JA.81-82.) Mr. Parke agreed that he knew when he took the PSCOA position in 2002 that he could be separated from PSCOA and returned to his original correctional facility, SCI-Houtzdale. (JA.82.)

Mr. Parke admitted—as has the General Counsel—that he possessed the right to be reinstated to his Correctional Officer II position at SCI-Houtzdale when he received the August 20, 2010 letter directing him to return to his original state correctional institutions to resume his employment there. (JA.45.) In addition, Mr. Parke admitted that he knew he also had the right to ask for a transfer from SCI-Houtzdale to SCI-Camp Hill, which was a correctional facility which was much closer to his rented home in Mechanicsburg, Pennsylvania. (JA.83-84.) Mr. Parke never sought a transfer. (JA.84.) Mr. Parke instead chose to retire from the Commonwealth and from PSCOA in August of 2010 after he received the letter directing him to return to his original state correctional institutions to resume his employment there. (JA.85.)

The Office of the General Counsel and the Board attempt to shoehorn this case into the traditional mitigation framework by comparing the grievance

manager position that Mr. Parke held with the PSCOA and the position of correctional officer to which he was required to return once his appointment was over. (See JA.302.) That framework is inapplicable here because Mr. Parke never left his position as correctional officer, he was merely appointed—temporarily—to a position with additional duties. (See JA.259; JA.44-59.) The ALJ properly recognized this distinction because Parke's corrections officer job "was intrinsically intertwined with his position with [PSCOA]." (JA.309.)

The comparison of two jobs is inapposite here, where everyone acknowledges that Mr. Parke remained a correctional officer and was always expected to return to that position. (JA.64.) In fact, as Union President Larry Sonnie admitted during his testimony, Business Agents assigned to PSCOA from their correctional officer positions continue to accrue vacation from the Commonwealth of Pennsylvania's Department of Corrections while they are serving as appointed Business Agents. (JA.44-59, 64; see JA.259.) As such, they remain correctional officers at all times because they continue to accrue benefits as correctional officers. Further, there is no basis for Mr. Parke to "decline" a position as a correctional officer as the General Counsel suggests because he *retained* that job during his appointment as a business agent. (See JA.259; JA.44-59.)

Below, the General Counsel pointed to the fact that Mr. Parke adopted two special needs children but did not explain why he did not return to his waiting position with the Commonwealth. The General Counsel also suggested that the decision of the Commonwealth of Pennsylvania not to grant Mr. Parke an eight week leave of absence was a reason justifying Mr. Parke's refusal to return to the correctional officer position was a justification. (JA.83.) The Board majority found both positions persuasive. (JA.301.) However, the decision of the Commonwealth of Pennsylvania not to grant an eight week leave of absence is not chargeable to PSCOA as they are not the same employer.

The fundamental distinction that the Board and the Office of the General Counsel failed to recognize is that the Business Agents' temporary appointment to the position of business agent from the position of correctional officer *never* meant that the Business Agents had *left* their correctional officer positions. They were always correctional officers and were expected to return to that position. As stated by the ALJ:

> Parke was simply on leave of absence from his former position. Indeed, part of his compensation from [PSCOA] was paid by the Commonwealth. He also accrued pension and leave credits from the Commonwealth during his employment with [PSCOA]. And he had an absolute right to return to his former position after his leave of absence was over. To overlook these ties to his former position in determining the mitigation issue would provide Parke with a windfall he does not deserve.

(JA.310.)

In this case, where Mr. Parke chose not to return—when he quit—he incurred a willful loss of earnings. Because actions have consequences, Mr. Parke's decision necessarily reduced his *Transmarine* backpay earnings and the ALJ was correct in so doing.

The fact is that Mr. Parke had available to him a higher paying correctional officer position to which he would have been reinstated had he applied. On this basis alone, PSCOA has provided sufficient evidence that Mr. Parke's voluntary decision to eschew reinstatement tolled his eligibility for a backpay remedy. In the alternative, Mr. Parke's decision to leave the Commonwealth for a different position was a voluntary decision and constituted a willful loss of earnings.[7] As such, the backpay award sought by the Region in the Compliance specification with reference to Mr. Parke was properly modified by the ALJ, and the Board's decision to the contrary was arbitrary, capricious, contrary to the law and the statute and not supported by substantial evidence.

[7] Certainly, when one measures the comparative wages of the Claimants that accepted reinstatement with the Commonwealth and the lower wages Mr. Parke earned, Mr. Parke should not gain a benefit for refusing reinstatement.

CONCLUSION

Based on the foregoing reasons, Pennsylvania State Corrections Officers Association petition for review should be granted; the Board's application for enforcement should be denied; and the Board's order should be vacated. Under *Transmarine*, PSCOA owed the affected employees 2-weeks pay. In the alternative, Parke's failed to mitigate his backpay obligation as found by the ALJ.

Respectfully submitted,

/s/ Michael McAuliffe Miller
Edward R. Noonan (D.C. Bar No. 55792)
Michael McAuliffe Miller (D.C. Bar No. 60250)
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
(717) 237-7182

April 21, 2017

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME, LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This Petitioner's Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and word limit of Fed.R.App. P. 27(d)(2).

__X___The brief contains 9750 words, excluding parts of the brief contemplated by Federal Rule of Appellate procedure (32)(a)(7)(B)(iii)

_____ The brief uses a monospaced typeface and contains lines of text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

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/s/ Michael McAuliffe Miller

Michael McAuliffe Miller (D.C. Bar No. 60250)

Attorney for Petitioner

Dated: April 21, 2017

CERTIFICATE OF SERVICE

I, Michael McAuliffe Miller, counsel for petitioner and a member of the Bar of this Court, certify that on April 21, 2017, I caused a copy of the attached Final Brief of Petitioner/Cross-Respondent Pennsylvania State Corrections Officers Association to be filed with the Clerk through the Court's electronic filing system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Linda Dreeben
Robert J. Englehart
Micah Jost
Appellate and Supreme Court Litigation Branch
Division of Enforcement Litigation
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

Dated: April 21, 2017

/s/ Michael McAuliffe Miller
Michael McAuliffe Miller, Esquire

STATUTORY ADDENDUM

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29 U.S.C. § 158. Unfair labor practices

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(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party

to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

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29 U.S.C. § 160. Prevention of unfair labor practices

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(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

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