

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

COLORADO SYMPHONY ASSOCIATION

and

Case Nos. 27-CA-195026

**DENVER MUSICIAN'S ASSOCIATION,
LOCAL 20-623, AMERICAN FEDERATION
OF MUSICIANS**

RESPONDENT COLORADO SYMPHONY'S STATEMENT OF EXCEPTIONS

Patrick R. Scully
SHERMAN & HOWARD L.L.C.
633 Seventeenth Street, Suite 3000
Denver, Colorado 80202

Beth Ann Lennon
SHERMAN & HOWARD L.L.C.
633 Seventeenth Street, Suite 3000
Denver, Colorado 80202

Respondent Colorado Symphony Association (“CSA” or “Respondent”) by and through its attorneys, Sherman and Howard L.L.C., pursuant to National Labor Relations Board (“NLRB” or “Board”) Rules and Regulations § 102.46, hereby takes the following exceptions to Administrative Law Judge Jeffery D. Wedekind’s Decision, Conclusions, Remedy, and Recommended Order (“Decision”):¹

1. The Administrative Law Judge’s failure to find that Article XVI of the collective bargaining agreement (“CBA”) contains an express limitation on the Union’s involvement in individual, over-scale negotiations. 2 ALJD 1-16.
2. The Administrative Law Judge’s failure to find that Article XVI provides “[n]othing in this Agreement . . . shall be construed to abridge or limit the right of each individual musician to negotiate with the CSA. . .” Ex. J-1, Art. XVI. 2 ALJD 1-16.
3. The Administrative Law Judge’s finding that Article XVI “does not expressly prohibit the Union from assisting a musician with his/her individual negotiations.” 2 ALJD 14-15.
4. The Administrative Law Judge’s failure to find that the Union has no right to file a grievance over individual negotiations conducted pursuant to Article XVI. 2 ALJD 26-29.
5. The Administrative Law Judge’s finding that Ms. Ferguson hired an attorney to “assist with negotiations.” 3 ALJD 5-6.
6. The Administrative Law Judge’s failure to find that Ms. Ferguson hired an attorney to pursue claims of gender discrimination and related claims against CSA. 3 ALJD 5-6.

¹ Citations in this Statement of Exceptions will be as follows: “Tr. __:__” to indicate the hearing transcript’s page and line numbers; “R. Ex. __” to indicate Respondent’s exhibits; “GC __” to indicate Counsel for the General Counsel’s exhibits; “U. Ex.” to indicate the Union’s exhibits; “Jt. Ex. __” to indicate joint exhibits; and “__ ALJD __” to indicate the page (preceding ALJD) and line numbers (following ALJD) of the decision of the Administrative Law Judge.

7. The Administrative Law Judge's implicit, unsubstantiated finding that Ms. Ferguson's disrespect of a conductor was "related" to her claims of discrimination. 3 ALJD 16-26.
8. The Administrative Law Judge's failure to find that Ms. Ferguson instigated the request for information to further her claims of discrimination against CSA. 3 ALJD 28-41; Tr. 59: 14-15; Tr. 71: 4-7.
9. The Administrative Law Judge's failure to find that Ms. Ferguson coordinated the request for information with the filing of her EEOC Charge. 3 ALJD 37-38; 5 ALJD 16-18.
10. The Administrative Law Judge's failure to find that the information request sought the exact contracts Ms. Ferguson's attorney claimed would demonstrate discrimination. 3 ALJD 37-41.
11. The Administrative Law Judge's finding that Ms. Ferguson filed her EEOC charge "without the assistance of her personal attorney or the Union." 5 ALJD 16-18.
12. The Administrative Law Judge's finding that the Union articulated any relevant basis for obtaining the requested over-scale contracts. 5 ALJD 34-40.
13. The Administrative Law Judge's failure to find that the Orchestra Committee is, in fact, the agent of the Union for all administration of the CBA. 5 ALJD 43-46.
14. The Administrative Law Judge's failure to find that statements of the Orchestra Committee within the scope of agency to be admissions of the Union. 6 ALJD 1-2.
15. The Administrative Law Judge's failure to find that the Union informed the CSA that it did not want the individual contracts provided to the Union. 6 ALJD 1-2.
16. The Administrative Law Judge's failure to find that Ms. Ferguson admitted in her amended EEOC charge that the Union sought the requested contracts to further her claims of discrimination. 6 ALJD 4-12.

17. The Administrative Law Judge's failure to find that Ms. Ferguson provided a sworn statement to the EEOC that the Union sought the requested contracts to further her claims of discrimination. 6 ALJD 4-12.
18. The Administrative Law Judge's finding that overscale wages are as a matter of law "presumptively relevant" information. 6 ALJD 21-25.
19. The Administrative Law Judge's finding that the Union requested overscale wages, as opposed to the individual over-scale contracts of musicians. 6 ALJD 21-25.
20. The Administrative Law Judge's failure to distinguish between overscale wages and the requested over-scale contracts. 6 ALJD 21-25.
21. The Administrative Law Judge's finding that CSA did not rebut any presumption of relevance with the record evidence that the contracts were sought solely for the purpose of Ms. Ferguson's litigation. 7 ALJD 8-13.
22. The Administrative Law Judge's failure to find that the Union was required to demonstrate the relevance of the requested individual contracts. 7 ALJD 8-13.
23. The Administrative Law Judge's unsubstantiated, implicit finding that the Union was investigating sex discrimination at CSA. 7 ALJD 15-18.
24. The Administrative Law Judge's failure to find that the Union never informed CSA it was investigating sex discrimination. 7 ALJD 15-18.
25. The Administrative Law Judge's unsubstantiated finding that the Union's information request was related to ongoing negotiations. 8 ALJD 10-12.
26. The Administrative Law Judge's pure speculation that "the Union could have proposed that a nondiscrimination provision be included in the new agreement." 8 ALJD 14-15.

27. The Administrative Law Judge's failure to find that the Union had not proposed any anti-discrimination language. 8 ALJD 14-15.
28. The Administrative Law Judge's finding that the information request was relevant to the Union's alleged proposals of nondiscrimination language. 8 ALJD 14-15.
29. The Administrative Law Judge's sua sponte finding that the Union could have filed a grievance on the un-proposed, non-existent anti-discrimination article. 8 ALJD 16-17.
30. The Administrative Law Judge's conclusion that there was insufficient evidence that the information was sought to assist Ferguson in her EEOC case/litigation. 8 ALJD 19-21.
31. The Administrative Law Judge's failure to find that the information request was solely for the purpose of assisting Ms. Ferguson in her claims of discrimination.
32. The Administrative Law Judge's failure to find that the request for information was an improper attempt to obtain discovery in support of Ms. Ferguson's discrimination claims.
33. The Administrative Law Judge's failure to find that the Union through its conduct and statements confirmed that the only purpose for the information request was to assist Ms. Ferguson in her pursuit of claims of discrimination. 8 ALJD 19-31.
34. The Administrative Law Judge's failure to conclude that that Ms. Ferguson admitted on the face of her EEOC charge that the information request was made to further her claims of discrimination.
35. The Administrative Law Judge's finding that "at most" the information "might also be used" to support her litigation against the CSA. 8 ALJD 33-35.
36. The Administrative Law Judge's sua sponte finding that Ms. Ferguson "already had" some of the requested information. 8 ALJD 33-35.

37. The Administrative Law Judge's conclusion that CSA had failed to rebut any presumption of relevance. 8 ALJD 35-41.
38. The Administrative Law Judge's failure to find the information request was a "discovery device" under the relevant case law. 9 ALJD 13-22.
39. The Administrative Law Judge's conclusion "the Union never asserted that the overscale wage [sic] contracts were being requested for an EEOC charge." 9 ALJD 19-20.
40. The Administrative Law Judge's conclusion that the "overscale wage [sic] contracts were presumptively relevant." 9 ALJD 20-21.
41. The Administrative Law Judge's conclusion that "the Union had no burden to show their specific or precise relevance." 9 ALJD 21-22.
42. The Administrative Law Judge's conclusion that the CSA's other arguments lack merit. 9 ALJD 31.
43. The Administrative Law Judge's conclusion that the Union's failure to disclaim a particular argument for relevance is the same as articulating the particular argument for relevance. 9 ALJD 35-36.
44. The Administrative Law Judge's conclusion that the Union's January 9 response "cannot reasonably be construed as an admission that the requested information had no relevance to the parties ongoing negotiations." 10 ALJD 5-7.
45. The Administrative Law Judge's conclusion that the Union did not admit on May 15th that it did not seek the information for the purposes of negotiation. 10 ALJD 9-23.
46. The Administrative Law Judge's failure to find that on May 15 the Union admitted it sought the information solely to further Ms. Ferguson's claims of discrimination. 10 ALJD 9-23.

47. The Administrative Law Judge's unsubstantiated conclusion that the Union on May 15 articulated that it sought the information to further make "antidiscrimination proposals" at the table. 10 ALJD 9-23.
48. The Administrative Law Judge's unsubstantiated conclusion that the Union did not make antidiscrimination proposals because it did not have the over-scale contracts. 10 ALJD 25-33.
49. The Administrative Law Judge's failure to find that any Union argument regarding purported inequity was pure speculation. 10 ALJD 25-33.
50. The Administrative Law Judge's failure to find the individual bargaining authorized in Article XVI to be permissive subject of bargaining. 10 ALJD 35-37; 11 ALJD 1-8.
51. The Administrative Law Judge's failure to find that the Union sought information concerning a permissive subject of bargaining. 11 ALJD 10.
52. The Administrative Law Judge's unsubstantiated conclusion that the Union was entitled to information concerning a permissive subject because it had a pending grievance on the matter. 10 ALJD 10-26.
53. The Administrative Law Judge's failure to find that the Union contractually waived any right to be involved in individual over-scale bargaining. 11 ALJD 28-39.
54. The Administrative Law Judge's failure to find that the Union waived by practice any right to be involved in individual over-scale bargaining. 12 ALJD 4-19.
55. The Administrative Law Judge's failure to credit the Union's admission that the over-scale contracts are confidential. 12 ALJD 21-29.
56. The Administrative Law Judge's finding that CSA interaction with the Orchestra Committee was not a sufficient accommodation under the relevant authority. 12 ALJD 29-34.

55. The Administrative Law Judge's failure to credit the Union's admission that the over-scale contracts are confidential. 12 ALJD 21-29.
56. The Administrative Law Judge's finding that CSA interaction with the Orchestra Committee was not a sufficient accommodation under the relevant authority. 12 ALJD 29-34.
57. The Administrative Law Judge's failure to consider CSA's argument that the Union's attempt to enter individual over-scale negotiations is an unlawful attempt to modify the CBA. 12 ALJD 36-38.
58. The Administrative Law Judge's failure to consider CSA's argument that requiring production of the over-scale contracts will affect a modification of the CBA and is thus beyond the authority of the National Labor Relations Board.
59. The Administrative Law Judge's conclusion that the CSA failure to provide the Union requested individual over-scale contracts violated Section 8(a)(5) and 8(a)(1) of the Act, as alleged.
60. The Administrative Law Judge's Recommended Order and Remedy in the instant matter. 13 ALJD 1-35; 14 ALJD 1-3.

Respectfully submitted this 18th day of December, 2017.



Patrick R. Scully
Beth Ann Lennon
SHERMAN & HOWARD L.L.C.
633 17th Street, Suite 3000
Denver, CO 80202
Telephone: (303) 297-2900

Attorneys for Respondent

