

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

UNITED STATES POSTAL SERVICE

Respondent

Case 12-CA-207188

and

ANN DOLAN

Charging Party

RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. STATEMENT OF THE CASE

This case was heard in Tampa, Florida before the Honorable Administrative Law Judge Michael Rosas on May 21, 2018 and May 29 through 30, 2018. Ann Dolan filed the charge in Case 12-CA-207188 on September 28, 2017. (GC Exh. 1(a)). On December 29, 2017, the Regional Director for Region 12 issued a Complaint and Notice of Hearing on behalf of the General Counsel. (GC Exh. (d)).

This brief explains why the General Counsel has failed to meet its burden of proof regarding the alleged 8(a)(1) and (3) termination and how General Counsel failed to properly amend the charge to correspond with the allegations in the Complaint. As this brief will show, an examination of the record demonstrates that Respondent lawfully terminated Ann Dolan for legitimate business reasons, and the complaint should, therefore, be dismissed.

II. STATEMENT OF FACTS

Ann Dolan worked off and on for the Postal Service since 1998, mostly recently as a postal support employee at the Ybor Processing and Distribution Center (P&DC) from

August 17, 2017 to September 7, 2017. During her previous employment with the Postal Service, she worked for mostly short time periods at various offices. There were long breaks from employment with the Postal Service, including one from about September 2007 to Christmas 2012 and another from about February 2013 to about November 2016. Notably, she was previously terminated by the Postal Service in about February 2013 when she was working as a carrier and damaged her postal vehicle. (Tr. 73-74).

Dolan was eventually rehired as a postal support employee in about November 2016 and was laid off in January 2017. She then returned as a postal support employee in August 2017, this time at the Ybor P&DC. (Tr. 74). As a postal support employee, she was required to be a flexible clerical employee who would move to any given area in operations directed by the supervisor of distribution operations. If the postal operations needed a postal support employee, like Ms. Dolan, to work in the manual area, that employee would be directed to work in the manual area. Likewise, if the postal operations required the work of a postal support employee on the automated parcel and bundle sorters (APBSs), then Ms. Dolan could be sent to work on the APBSs. (Tr. 32).

When she started at the Ybor P&DC in August 2017, she began a 90-day probationary period. (Tr. 165). Because she was a probationary employee, the Postal Service progressive system of discipline did not apply to her. (Tr. 184). As such, she could be terminated for absences and tardies and for performance issues without the requirement of an official discussion, letter of warning, suspension or investigative interview. (Tr. 34, 184, 191, 196).

Dolan was terminated on September 7, 2017 for unsatisfactory work performance and failure to follow instructions. (GC Exh. 14, Tr. 37, 168). With regard to her failure to

follow instructions, acting supervisor of distribution operations Robyn Flick explained that when Dolan was given instructions for a job assignment, Dolan would say she did not feel like doing that job. (Tr. 37). Dolan would also be found outside of her assigned work area. (Tr.164). Before her termination, Flick did have a discussion with Dolan during which she told Dolan she needed to follow instructions when she was given a job assignment. (Tr. 50-51). The final instance of Dolan's failure to follow instructions was on September 7, when she was instructed to work on the APBS machine for the duration of the night. (Tr. 37-38). Rather than catch up the machine as instructed, Dolan went on her break and never returned to complete her work on the APBS machine. The section of the machine she was working on clearly needed staffing when she walked away to take her break, but she nevertheless decided not to return to that section. (Tr. 61, 136-137). No supervisor or manager told her she could choose not to return to her assigned task after her break. (Tr. 147). It is undisputed she was assigned that evening to provide relief on the APBS machine. (Tr. 107). When PSEs are tasked with providing relief, the supervisor – in this case, Regina Johnson - decides what specific assignments on a machine should be given to the PSE, and the supervisor determines when the need for relief on that machine is diminished based on the volume of mail. (Tr. 136, 183). That final instance of Dolan's failure to follow instructions was documented in a September 7, 2017 email from supervisor Regina Johnson to Manager of Distribution Operations (MDO) Jeremy Wray. (GC Exh. 15; Tr. 167, 194).

Flick made the decision to terminate Dolan based on her direct observations of Dolan's work performance and input from Regina Johnson about similar issues she was having with Dolan – including the incident memorialized in the September 7, 2017 email

(Tr. 153) - , and MDO Jeremy Wray concurred with that decision. (Tr. 59,165-166, 167-168). During Flick's testimony, Flick further explained the basis for each of the unsatisfactory ratings she gave Dolan on the employee evaluation form she presented to Dolan at the time of her termination. With regard to work quantity, Flick explained Dolan was unproductive when she would respond to work assignments by saying she did not feel like doing the work. Regarding work quality, Flick stated that Dolan's work would have to be redone and mail would have to be rerun when Dolan did not do her sweep on the SPB machine. Further, with respect to dependability, Dolan was not a dependable employee who could work independently because Flick would have to supervise her and make sure Dolan was completing her assigned tasks. In terms of work relations, Dolan failed to cooperate well with co-workers, including her supervisors, by repeatedly refusing to follow instructions and complete assignments. Regarding work methods, Dolan received an unacceptable rating because even though her job as a postal support employee was to work where she was needed in the postal operation, she refused to go where she was assigned. Additionally, as demonstrated by the incident involving Dolan on the APBS machine on September 7, she did not handle equipment in an appropriate manner and let the mail go to the residue, and as a consequence, mail had to be reworked. With regard to personal conduct, Dolan failed to demonstrate flexibility in moving from one task to another, as needed in the postal operation. (Tr. 55-57).

During the termination of Ann Dolan in the supervisors' office, Robyn Flick read over the evaluation form aloud and informed Dolan that she was not going to be retained by the Postal Service. (Tr. 59). Supervisor Regina Johnson was present as a witness while Flick went over the evaluation form with Dolan and informed Dolan of her

termination decision. Manager of Distribution Operations Jeremy Wray was present at a cubicle at the back of the office when the termination took place. (Tr. 58-59). Flick and Johnson did not ask any questions of Dolan during the meeting. (Tr. 170). After Flick informed Dolan that she was being terminated, Dolan asked for a union steward. (Tr. 60, 142). Flick responded by explaining that one was not available and that Dolan was welcome to call one after the termination meeting. (Tr. 60, 142). Jeremy Wray and Regina Johnson did not say anything during the termination. (Tr. 170). Flick asked for Dolan's badge and timecard, but Dolan initially did not want to return them and argued the termination was unfair. (Tr. 60). Flick and Johnson escorted Dolan out through the women's locker room shortly after Flick informed Dolan of the termination decision. (Tr. 60, 142, 169). The entire meeting with Dolan lasted approximately five minutes. (Tr. 142,170).

III. Credibility

Respondent will now analyze the credibility of the testimony of the witnesses. The analysis will show that Counsel for the General Counsel frequently suggested desired responses with leading questions and that the General Counsel's only witness – Ann Dolan - demonstrated internal inconsistencies in her testimony and acknowledged that she had an unreliable memory for dates and names. As a result, General Counsel's witness should not be credited unless corroborated by a Respondent witness. In contrast, the analysis will show the testimony of Respondent's witnesses were internally and externally consistent and should be credited.

A. Testimony of General Counsel's Witness Was Unreliable and Internally Inconsistent

Counsel for the General Counsel asked Dolan leading questions during General Counsel's direct case. (Tr. 89, 90, 98, 99, 101, 103, 104, 106, 109, 115, 119, 121, 126). For example, when questioning Dolan about the meaning of the term "end tour," Counsel for the General Counsel articulated the definition for the witness, asking: "So does end tour mean you're not going to be paid for the rest of your hours worked?" (Tr. 106). General Counsel's leading questions were not limited to collateral matters and were often used to elicit testimony relating to principal issues in dispute. When Counsel for the General Counsel asked Dolan about an alleged incident in which she missed a punch in her clock rings, he continuously asked leading questions and clearly guided her to desired responses. (Tr. 105-107). For instance, when Dolan was testifying about what she did after she filled out a Form 1260 to correct her time punch, Counsel for the General Counsel blatantly asked, "And who did you talk to?", even though Dolan had not indicated at all at that point whether she had talked to anyone else about the missed time punch. (Tr. 107). Then, when transitioning to the subject of cross-craft work with yet another leading question, Counsel for the General Counsel went on to ask Dolan, "Did anybody else complain about having to complete mail handler craft work?", even though Dolan had not testified at all at that point that she had even informed – much less complained to – management (or anyone else for that matter) about any cross-craft concerns. (Tr. 109). In yet another instance, Counsel for the General Counsel leaped to another leading question: "Was the first feedback you received the evaluation that you were given on September 7th?", to which Dolan merely answered, "That is correct." (Tr. 126). Leading on direct testimony detracts from the probative value of the testimony. *El Paso Natural Gas Co.*, 193 NLRB 333, 345 (1971). Dolan's testimony should, therefore, be discredited

in part because her testimony was elicited through leading questions. *T.M.I.*, 306 NLRB 499, 503-504 (1992).

Further, Ann Dolan's testimony was internally inconsistent on several points. When asked on direct examination whether she had been given any indication prior to the September 7 evaluation that she needed to improve in *any* area, she unequivocally said, "No." (Tr. 126). However, Dolan herself testified about occasions when she was told by management that she clocked in at the wrong time and another instance when a supervisor informed her she failed to clock in after lunch. (Tr. 92, 104). Secondly, Dolan's account of the termination meeting is not coherent. She testified that during her termination, Draven Leto came in the office, and she asked him in front of supervisors Flick and Johnson whether he had told Dolan to stay at the SPB machine. According to her testimony, Leto responded and said, "[N]o relief only", but Flick and Johnson did not hear it; and Dolan asked Leto to repeat it "because . . . [Flick and Johnson] were busy." (Tr. 124). If Draven Leto had indeed come in the middle of the termination meeting and said something in response to Dolan's question, what else would Flick and Johnson have been busy with in the middle of a termination meeting where they were informing Dolan of the termination decision? There is no evidence that Flick and Johnson were distracted by any other tasks or conversations at the time, so that account is not cogent. As another example, Dolan's account of Manager Jeremy Wray's alleged statement at the termination lacks coherence. Dolan herself admitted she never requested to see a union steward from Wray. (Tr. 128). She never testified about any conversations or encounters with Wray prior to these alleged statements being made at the termination. Further, there is no testimony or other evidence demonstrating how Wray would have had any direct or

indirect knowledge of her requests to see a union steward or any other union activity for that matter. (Tr. 170-171). Wray was not at all familiar with the grievance worksheet she allegedly filled out, and Dolan herself acknowledged she did not know what happened with her grievance worksheet; it is not clear whether it was even filed or processed through the Postal Service's grievance/arbitration procedure. (Tr. 127, 182). Also, if Dolan had already been informed by this point of Flick's decision to terminate Dolan, it is difficult to believe that Wray – who was not the decision-maker of the termination – suddenly would make the alleged statement that Dolan contacted a steward on a daily basis and had been trouble since day one. The undisputed fact that Wray was at his desk at the back of the office and was not in the cubicle with Dolan, Flick and Johnson during the termination further discounts Dolan's account. (Tr. 59, 168-169).

Dolan's unreliability as a witness is further evidenced by her faulty memory with dates, times, and names, a fact which she readily acknowledged. (Tr. 74, 76, 90, 92, 93, 96, 97, 103, 115). In fact, for a substantial part of her testimony, Dolan had been referring to Regina Johnson as Angela and conflated the two names. (Tr. 93).

Notably, there was no corroboration of Dolan's testimony from bargaining unit employees or from union representatives, including the steward named Reggie whom she allegedly talked to on a number of occasions. Such a lack of corroboration is particularly significant and suspect in a case like this, where the Complaint alleges the termination was motivated not only by union activity but also protected concerted activity.

Based on the frequency of leading questions during Dolan's direct examination, the internal inconsistency of her testimony, her unreliable memory, and the lack of corroboration of her testimony, Dolan's testimony should be discredited, except where it

is an admission against interest or consistent with testimony of credited witnesses or with documentary evidence. *Upper Great Lake Pilots*, 311 NLRB 131, 131 fn. 2 (1993).

B. Respondent's Witnesses Testified Credibly

The testimony of the three management witnesses is internally consistent, consistent with documentary evidence and consistent with the testimony of one another. Moreover, the testimony of the Wray, Flick and Johnson is more reliable because they have had a longer time at and are more familiar with Respondent's practices at the Ybor P&DC.

Robyn Flick articulated the rationale behind each of the ratings she gave Dolan on her evaluation, giving the example not only of the incident memorialized in Regina Johnson's September 7 email but also offering instances where she directly observed Dolan's work performance. (Tr. 55-57). She also explained how she recalled having an informal discussion with Dolan where she had warned her prior to her termination that Dolan needed to go do her job assignments as instructed. (Tr. 50-51). Her account of the termination meeting was corroborated by Regina Johnson and Jeremy Wray. (Tr. 141-142, 168-170).

Without looking at General Counsel's Exhibit 15, Regina Johnson testified in detail about the incident documented in her September 7 email. (Tr. 136-138). She testified step-by-step about what she observed when she supervised Dolan on the APBS machine and how she concluded that Dolan never came back to the machine from her break. (Tr. 136-137). Although Johnson initially testified that she only informed Wray of the APBS incident before she drafted and sent the September 7 email, she clarified on redirect that

she also informed Flick and Wray together of the incident – which was also corroborated by Wray’s testimony. (Tr. 153, 167-168, 199).

Wray gave a clear, detailed and articulate account of the events of the evening of September 6 and early morning of September 7. He was able to recall the order of events and the names of reporting supervisors without hesitation. (Tr. 162-170). On cross-examination, despite Counsel for the General Counsel’s multiple attempts to manipulate his testimony regarding the progressive system of discipline, Wray consistently responded that the Postal Service policy is that the progressive system of discipline does not apply to probationary employees. (Tr. 186, 188, 189, 190, 191).

Therefore, the management witnesses’ testimony should be credited.

IV. Legal Analysis

The Complaint alleges Respondent discharged Ann Dolan because she “joined and assisted the Union *and* engaged in concerted activities, and to discourage employees from engaging in these activities.” (emphasis added) (GC Exh. 1(d)). Thus, the General Counsel is alleging that both union activity and protected concerted activity were motivating factors in Dolan’s termination. In order to prove a violation of Section 8(a)(1) and (3) as alleged, the General Counsel must first persuasively establish that the evidence of the following factors leads to the conclusion that the employee’s alleged protected activity was a motivating factor in the employer’s decision – (1) whether the employee was engaged in protected activity; (2) whether the employer had knowledge of that activity before taking the action against the employee; (3) whether the employer had demonstrated animus toward such activity; and (4) whether there is a causal connection between the employee’s protected activity and the employer’s action. *Wright Line*, 251

NLRB 1083 (1980). If the General Counsel provides sufficient evidence of this, the burden shifts to the employer to demonstrate that its actions would have been the same even in the absence of the protected conduct. A close examination of these four factors demonstrates that the General Counsel has failed to meet its burden of proof under *Wright Line*.

A. Dolan Was Only Engaged in Limited Union Activity

With regard to the first factor, while there is some evidence of Dolan asking to speak with a steward from Flick and Johnson, her union activity is fairly limited and routine in nature. Flick and Johnson readily acknowledged that Dolan asked to speak with a steward on a number of occasions, but, as Johnson testified, this type of request is common from employees, and there is an established procedure in place for accommodating these requests, including when stewards are not readily available. (Tr. 60, 143-144). As a probationary employee who did not serve as a union steward or any other union representative, Dolan's union activity is essentially limited to these commonplace requests to see a steward.

While Dolan testified that she filled out a grievance worksheet on about August 25, 2017 at the Ybor P&DC, she admitted that she did not know what happened with the worksheet. (Tr. 127). There is no evidence the grievance was ever filed or submitted to management.

With respect to any other protected activity, the evidence fails to show Dolan engaged in any protected concerted activity, as alleged in the Complaint. Under *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and *Meyers II*, 281 NLRB 882 (1986), the elements of "concerted activity" and "for mutual aid or protection" are separate and

indispensable, and both must be established in order to show a violation of Section 8(a)(1) of the Act. When Dolan testified about trying to clock in at 10:00 PM on August 18, 2017, she stated there was another person who was told to clock in at that time. She testified she spoke briefly with this unnamed person about how they had allegedly been told to report to work at that time. (Tr. 90-91). There was no further evidence introduced about this alleged similarly situated individual and whether Dolan or the other individual did anything more, together or individually, about the issue. Therefore, that instance does not constitute concerted activity because “[i]ndividual employee concern, even if openly manifested by several employees on an individual basis, is not sufficient evidence to prove concert of action.” *Meyers I*, at 498. In another part of Dolan’s testimony, she testified there were several occasions when employee breaks were being taken too early or too late. (Tr. 100). Although she alleges she “discussed it with a union person” and that “career people complained about it”, there is no evidence that she and any other employee “joined forces” to address the issue or that by any of her activity, she “intended to enlist the support of other employees.” *Meyers II*, at 886-887. Similarly, when Dolan testified about how she missed a punch in her clock rings and then asked supervisor Michael Spanos to provide her a copy of her own clock rings to check them for accuracy, she was only acting out of an individual employee concern, not expressing a group concern for the purposes of mutual aid or protection. (Tr. 104-107). Lastly, when Dolan testified that she, in addition to about four other employees, were tasked with completing mail handler work allegedly outside the scope of their craft, there was no evidence that these employees had any discussions about the issue or otherwise identified a group concern with the object of initiating, inducing or preparing for group action. (Tr. 109-111).

See *Yuker Construction Co.*, 335 NLRB 1072 (2001). The alleged act of Dolan mentioning one of the lady's names to a union person is insufficient to establish protected concerted activity; further, there is no evidence she mentioned the name or a common concern to management. (Tr.109-110). When Dolan went on to testify that she told Draven Leto that the work she was completing was "not what my doctor signed me off on", it was clear she was advancing her own cause and was speaking from only her perspective. (Tr. 110-111).

B. Management Acknowledged Dolan's Limited and Commonplace Union Activity But Had No Knowledge of Any Protected Concerted Activity

As discussed above, Flick and Johnson openly acknowledged that Dolan asked to see a steward on certain occasions. Wray, on the other hand, did not have knowledge of this limited union activity, besides perhaps overhearing Dolan's request to see a steward after Flick had informed her of her termination decision on September 7. There is no evidence that anyone ever reported to Wray any instances of Dolan asking to see a steward. (Tr. 171). While Dolan alleged she filled out a grievance worksheet in the parking lot on about August 25, there is no evidence management had any knowledge of the worksheet even being filled out by or on behalf of Dolan. (Tr. 182). Dolan herself conceded she had no idea whether the grievance was filed or ever presented to management. (Tr. 127). Dolan also testified she alluded to possibly filing a grievance in a pre-employment email to human resources employee Vicki Plummer. (Tr. 87-88; GC Exh. 18). However, it is undisputed this email would have been sent prior to her being employed at the Ybor P&DC and clearly did not affect or deter her employment there. Also, there is no evidence in the record that Plummer – or the other individuals who were copied, including Marisol Ongrady and Dana Cowgill – are Section 2(11) supervisors or

Section 2(11) agents under the Act. Moreover, when questioned, Flick unequivocally testified that she did not even know who Vicki Plummer was; and, there is no evidence that Dolan's August 11 email was ever forwarded to Flick or any of Dolan's other supervisors or managers. (Tr. 33). So, Flick, the decision-maker in Dolan's termination, had no knowledge of Dolan's email about possibly filing a grievance.

With regard to knowledge of any other alleged protected activity, as discussed above, Counsel for the General Counsel attempted to introduce testimony from Dolan that would support the protected concerted activity allegation; but, as examined above, the testimony failed to show any of her activity was concerted. Further, there is no evidence that management had any knowledge about her alleged brief conversations, referenced above, with isolated individuals about clocking in, employee breaks, or cross-craft work. Also, with respect to Dolan's testimony that she told Draven Leto that the work she was completing "[wa]s not what my doctor signed me off on", even if that was found to constitute protected concerted activity, it does not establish employer knowledge. (Tr. 111). Employer knowledge cannot be imputed from that alleged encounter because Draven Leto was never established in the record as a Section 2(11) supervisor or 2(13) agent. His alleged 2(11) and 2(13) status in the Complaint was denied in Respondent's Answer. (GC Exh. 1(f)). Moreover, Counsel for the General Counsel failed to introduce evidence showing that Leto has authority to engage in Section 2(11) activities and that he exercised that authority using "independent judgment" and "in the interest of the employer," as defined in *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994) and further clarified in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). The burden of proof for supervisory status is on the Counsel for the General Counsel, as the party

asserting it. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). Additionally, there is no evidence that Leto ever talked to any manager or supervisor about this alleged encounter with Dolan. And, the record is clear Draven Leto was not involved in the decision to terminate Dolan. (Tr. 184-185).

C. Management Had No Animus Toward Dolan's Union Activity and Readily Facilitated Her Requests for Stewards

Even according to Dolan's own testimony, management accommodated her requests to see union stewards. When Dolan testified she asked supervisor Curtis Lewis to see a steward about her clock rings, she acknowledged that he gave her permission, and she immediately went and spoke with a union person. (Tr. 107-108). And, management also gave her a copy of the clock rings she requested the same day so that she could check them for accuracy. (Tr. 108). Dolan also acknowledged that on August 25, she was granted permission by management to speak with two union representatives at two different times during the shift. (Tr. 96-97). When Dolan testified she informed supervisor Regina Johnson that she had talked to the union about having to take lunch early, Dolan stated Johnson simply responded that Jeremy Wray wanted employees to take lunch early and that she was just following orders. (Tr. 101-102). Even crediting Dolan's testimony, Johnson did not demonstrate any animus in her reaction to Dolan's union activity.

Furthermore, supervisor Regina Johnson testified openly about how she would handle Dolan's requests to see a steward just like she would handle a similar request from any other employee. Johnson would get a steward for Dolan as soon as possible if one was available, and if one was not available, she would provide her a Form 4051, which would allow Dolan to see a steward within two hours if one was available. If a

steward was still not available within the two hours, then Dolan would see a steward the next day or on the next shift. (Tr. 143-144). Johnson would never ask Dolan why she wanted to speak with a steward. (Tr. 144).

During Dolan's termination meeting, management again did not demonstrate any animus toward Dolan's request to see a steward after she had been informed of the termination decision. According to Flick's corroborated testimony, Flick simply responded that one was not available at that time and that Dolan was welcome to speak with a steward after the termination meeting. (Tr. 60, 142). Because this was a meeting held solely to inform Dolan of a previously made termination decision, *Weingarten* did not apply, and Flick responded appropriately and without animus when she stated she could speak with a steward after the meeting. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975); *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979).

As discussed earlier, the statement Dolan alleged manager Jeremy Wray made after the termination lacks merit and is implausible. Dolan never made any requests to see a steward from Wray, so it is improbable that Wray would comment on her requests to see a steward, must less say anything about the frequency of such requests. Also, Wray's location in the back of the office in his own cubicle adds to the improbability of this statement. (Tr. 168-169). Lastly, the fact that he was not the decision maker of Dolan's termination makes it even more unlikely that he would have intervened in the termination and made such a statement.

D. There is No Causal Connection Between Dolan's Termination and Her Limited Union Activity

The record fails to show that Dolan's termination was motivated by her limited and routine union activity or by her alleged and unsubstantiated protected concerted activity. Instead, the evidence clearly demonstrates she was terminated because of her failure to follow instructions and unsatisfactory performance. (R.Exh.1). Dolan alleged her union activity began before she even started working at Ybor P&DC, as proffered by her August 11 email to Vicki Plummer. (GC Exh. 18). She then testified about occasions after her hire date when she requested to see union stewards, all of which were granted. There is nothing in even Dolan's alleged timeline of protected activity that would suggest suspicious timing of Dolan's protected activity vis-à-vis her termination.

Furthermore, there is evidence in the record of other employees who have been terminated for failure to follow instructions, including not staying in assigned work areas as Dolan failed to do on September 7. (GC Exh. 2b). Counsel for the General Counsel may try to point to other employee evaluations in the record in an effort to suggest disparate treatment. For example, he may try to point to the employee evaluation form of Tierra Cheatham to argue that Cheatham was given the opportunity to improve her work performance and not Dolan. (GC Exh. 2c). However, Cheatham never had all "unacceptable" (U) ratings during any of her 30-day periodic reports. And, there was no evidence introduced about Cheatham's particular work experience or work performance that might have easily distinguished her from Dolan. Thus, any argument that Cheatham's employee evaluation is evidence of disparate treatment is mere conjecture. Counsel for the General Counsel may also try to argue that the written request for Dolan's termination – specifically, her Form 278E (GC Exh. 14) – was incomplete and unaccompanied by sufficient documentation. Yet, there is evidence of other employees'

Form 278Es that contain a similar amount of information. For example, the Form 278E for employee Ian Hancock includes the same extent of completed information and does not reference any attachments. (GC Exh. 3). In the case of Dolan, Regina Johnson's email about Dolan's work performance was intended as attached supporting documentation for her Form 278E. (GC Exh. 15, Tr. 46). Other Form 278Es or issued discipline (like GC Exhs. 5 through 10(a)) that may be proffered by Counsel for the General Counsel may not be valid comparators because they may not concern probationary employees, like Dolan; as the record clearly showed, the progressive system of discipline does not apply to probationary employees. (Tr. 188).

E. Respondent Would Have Terminated Dolan, Even In the Absence of Any Protected Activity

Even if, for the sake of argument, Counsel for the General Counsel could meet its burden to present sufficient evidence through the latter four factors to demonstrate a causal connection, Respondent would still have terminated Dolan, even in the absence of any protected activity. As demonstrated by the testimony of management witnesses, the decision to terminate Dolan was based on her failure to complete assigned tasks as directly observed by Robyn Flick and as reflected in the events memorialized by Regina Johnson's September 7 email. This failure to follow instructions resulted in unsatisfactory work performance. None of the instances of Dolan's failure to follow instructions involve – or are even tangentially related to – Dolan's limited union activity or her alleged and unsubstantiated protected concerted activity. Dolan's requests to see a union steward occurred on separate occasions from her cited failure to follow instructions. Even absent her limited union activity, Dolan still would have been terminated because she was a probationary employee who failed to follow instructions. This failure to follow instructions

affected all material aspects of her work performance as a PSE, including her work quantity, work quality, dependability, work relations, work methods, and personal conduct. (Tr. 55-57). Since she was a probationary employee, the progressive system of discipline did not apply to her, and she could be terminated for performance issues without conducting or issuing an official discussion, a letter of warning, suspension or investigative interview. (Tr. 191, 196).

V. CONCLUSION

Respondent urges the Judge to dismiss the complaint, as Counsel for the General Counsel has failed to meet its burden of proof with respect to the alleged union activity and protected concerted activity under *Wright Line*. Counsel for the General Counsel has failed to show that either – much less both – were motivating factors in Ann Dolan’s termination, as alleged in the Complaint. Further, Counsel for the General Counsel improperly alleged protected concerted activity in the Complaint, despite the fact that the initial Board charge did not allege protected concerted activity and the charge was never amended; the lack of any amendment to the charge creates a due process challenge. Based on the foregoing, the complaint should be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Respondent's Brief to the Administrative Law Judge has been served this 5th day of July 2018, upon each of the following:

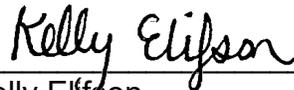
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