

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

SPECTRUM JUVENILE JUSTICE SERVICES

Respondent

and

Case 07-CA-155494

TAMIKA KELLEY, an Individual

Charging Party Kelley

and

Case 07-CA-160938

COUNCIL 25, MICHIGAN AMERICAN
FEDERATION OF STATE, COUNTY, AND
MUNICIPAL EMPLOYEES (AFSCME), AFL-CIO

Charging Party AFSCME

and

Case 07-CA-174758

INTERNATIONAL UNION, SECURITY, POLICE
AND FIRE PROFESSIONALS OF AMERICA
(SPFPA)

Charging Party SPFPA

and

Case 07-CA-175342

LOCAL 120, INTERNATIONAL UNION,
SECURITY, POLICE AND FIRE
PROFESSIONALS OF AMERICA
(SPFPA)

Charging Party Local 120

**BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

TABLE OF CONTENTS

I. INTRODUCTION..... 1

A. PARTIES AND JURISDICTION..... 1

B. OVERVIEW AND STATEMENT OF THE CASE 1

II. ISSUES PRESENTED..... 4

III. OVERVIEW OF THE FACILITIES AND JOB DUTIES OF YOUTH WORKERS AND SECURITY WORKERS..... 6

IV. STANDARD OF PROOF.....10

Section 8(a)(3) Violations.....10

V. FACTS AND ARGUMENT..... 11

A. (1) THE ALJ ERRED IN CONCLUDING THAT NEELY WAS TERMINATED IN VIOLATION OF SECTION 8(a)(1) OF THE ACT 11

(2) NEELY WAS TERMINATED FOR VIOLATING THE STAFF-TO-RATIO POLICY, YOUTH SUPERVISION RULE, AND PROHIBITED CONDUCT POLICY #2 AND #6..... 11

(3) THE ALJ MADE ERRONEOUS CREDIBILITY DETERMINATIONS 11

(4) THERE WAS NO NEXUS BETWEEN NEELY’S ALLEGED CONCERTED PROTECTED ACTIVITY AND HIS DISCHARGE..... 11

(5) RESPONDENT WOULD HAVE TERMINATED NEELY REGARDLESS OF PROTECTED ACTIVITY 11

i. Staff-to-Resident Ratio Policy and Youth Supervision Rule 12

ii. Prohibited Conduct Policy #2 and #6..... 13

iii. The incident involving Neely..... 14

iv. The ALJ’s erroneous credibility determinations..... 18

v. There is no causal nexus between Neely’s putative concerted protected activity and his discharge 24

vi.	Respondent would have terminated Neely regardless of protected activity.....	24
vii.	The ALJ's finding is an impermissible second-guessing of SJJ's application of its policies.....	26
B.	(1) THE ALJ ERRED IN CONCLUDING THAT SIMPSON WAS TERMINATED IN VIOLATION OF THE ACT	27
	(2) SIMPSON WAS TERMINATED FOR WALKING OFF A MANDATED SHIFT FOR THE SECOND TIME IN VIOLATION OF RESPONDENT'S PROHIBITED CONDUCT POLICY #13.....	27
	(3) THE ALJ MADE ERRONEOUS CREDIBILITY DETERMINATIONS	27
	(4) THERE WAS NO NEXUS BETWEEN SIMPSON'S ALLEGED CONCERTED PROTECTED ACTIVITY AND HIS DISCHARGE.....	27
	(5) RESPONDENT HAD LEGITIMATE REASONS FOR TERMINATING SIMPSON AND WOULD HAVE DISCHARGED HIM REGARDLESS OF ANY PURPORTED PROTECTED ACTIVITY	27
C.	THE ALJ ERRED IN CONCLUDING THE RESPONDENT IMPLEMENTED A "NEW" POLICY OF MANDATING CONTINGENT WORKERS AFTER THE UNION ELECTION. JENKINS WAS PROPERLY TERMINATED FOR WALKING OFF MANDATORY OVERTIME FOR THE SECOND TIME IN VIOLATION OF RESPONDENT'S PROHIBITED CONDUCT POLICY #8 AND #13	34
D.	THE RESPONDENT DID NOT IMPLEMENT A NEW POLICY OF NOT ALLOWING BREAKS BETWEEN SCHEDULED AND MANDATED SHIFTS.....	39
E.	KELLEY RECEIVED A WRITTEN WARNING ON SEPTEMBER 24, 2015, BECAUSE SHE DID NOT CALL-IN ON EACH DAY OF ABSENCE AS REQUIRED BY THE RESPONDENT'S POLICY	43
F.	FERNANDEZ DID NOT ENGAGE IN SURVEILLANCE OF EMPLOYEES ENGAGED IN THE RALLY	47
	i. TESTIMONY OF GENERAL COUNSEL'S WITNESSES.....	48
	ii. THE COMPLAINT DOES NOT ALLEGE THAT FERNANDEZ SURVEILLED EMPLOYEES IN ANY WAY OTHER THAN BY STANDING IN THE PARKING LOT. FERNANDEZ DID NOT ENGAGE IN OTHER SURVEILLANCE.....	52
G.	THE ALJ ERRED IN FINDING THAT DIX INTERROGATED EMPLOYEES ABOUT THE WRITTEN COMPLAINT ABOUT WORKING CONDITIONS	55

H. THE ALJ ERRED IN FINDING DIX TOLD EMPLOYEES THAT THEIR NAMES WERE "ADDED TO A LIST" AND THAT HE THREATENED EMPLOYEES FOR EXERCISE OF CONCERTED PROTECTED ACTIVITY.....	59
I. THE ALJ ERRED IN FINDING THE ALLEGATIONS AGAINST CRAWFORD AMOUNT TO IMPROPER INTERROGATION AS DEFINED BY THE ACT	61
J. THE ALJ ERRED IN FINDING THAT BURTON ILLEGALLY INTERROGATED SIMPSON	62
K. THE ALJ ERRED IN FINDING THAT THE RESPONDENT ISSUED DISCIPLINE TO KELLEY, COCKRAN OR SINGLETON-GREEN BECAUSE OF THEIR PARTICIPATION IN CONCERTED PROTECTED ACTIVITY	63
L. THE ALJ ERRED IN FINDING SHERROD THREATENED EMPLOYEES WITH DISCHARGE BECAUSE OF THEIR CONCERTED ACTIVITIES.....	65
M. THE ALJ'S FINDINGS IN REGARD TO THE COMPANY'S DUTY TO BARGAIN IS MOOT	66
IV. <u>CONCLUSION</u>	67

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Am. Gardens Mgmt., Co.</i> , 338 NLRB 644, 645 (2002)	10
<i>Am. Ship Bldg. Co. v. NLRB</i> , 380 U.S. 300, 311 (1965)	10
<i>Arrow Automotive Industries</i> , 258 NLRB 860 (1981).....	48
<i>Cellco Partnership v. NLRB</i> , 2018 WL 3028842 (DC Cir. 2018).....	16, 27
<i>Children’s Services International Inc.</i> , 347 NLRB 67, 68 (2006).....	56
<i>Dieckbrader Express</i> , 168 NLRB 867 (1967)	58, 63
<i>Evergreen America</i> , 348 NLRB 178, 200, 204	56
<i>Farm Fresh Co., Target One, LLC & United Food & Commercial Workers Union, Local No. 99, AFL-CIO</i> , 361 NLRB No. 83 (Oct. 30, 2014)	48, 51
<i>Faurecia Exhaust Sys., Inc.</i> , 353 NLRB 382 (2008)	24
<i>Five Cap, Inc. v. NLRB</i> , 294 F.3d 768, 77 (6 th Cir. 2002)	10
<i>Grill Concepts, Inc. d/b/a the Daily Grill & Unite Here, Local 11</i> , 364 NLRB No. 36 (2016).....	49
<i>Ichikoh Mfg., Inc.</i> , 312 NLRB 1022, 1025 (1993)	27
<i>International Baking Co.</i> , 348 NLRB 1133, 1135 (2006)	57
<i>Masland Indus.</i> , 311 NLRB 184, 197 (1993)	24
<i>Naomi Knitting Plant</i> , 328 NLRB 1279, 1281 (1999)	10
<i>NLRB v. Container Corp. of America</i> , 649 F.2d 1213 (6 th Cir. 1981).....	22, 23, 60
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575, 617 (1969).....	56
<i>NLRB v. Jones & Laughlin Steel Corp.</i> , 301 U.S. 1, 45-46 (1937)	27, 30
<i>NLRB v. O.A. Fuller Super Markets, Inc.</i> , 374 F.2d 197, 2000 (5 th Cir. 1967).....	10
<i>Pacific Custom Materials, Inc.</i> , 327 NLRB No. 23, *23 (1998)	57
<i>Park N Fly, Inc. & Int’l Bhd. of Teamsters, Local 120</i> , 349 NLRB 132, 141 (2007)	56
<i>Poly-American, Inc. v. NLRB</i> , 260 F.3d 465, 488-89 (5 th Cir. 2001).....	10
<i>Rogers Electric Co.</i> , 346 NLRB 508, 509-510 (2006).....	57
<i>Ronin Shipbuilding, Inc</i> , 330 NLRB 464, 465 (2000)	24
<i>Sam’s Club v. NLRB</i> , 141 F.3d 653, 658 (6 th Cir. 1998)	23, 60
<i>Sears, Roebuck & Co.</i> , 305 NLRB 193 (1991)	56
<i>Temp Masters, Inc.</i> , 344 NLRB 176 (2005).....	58, 63
<i>Toma Metals, Inc.</i> , 342 NLRB 787 (2004)	58, 63
<i>Trailmobile Trailer, LLC</i> , 343 NLRB 95 (2004).....	56
<i>Transportation Mgt. Corp.</i> , 462 UW 393, 401 (1983)	11
<i>USC Univ. Hosp.</i> , 358 NLRB No. 132 slip op. at 30 (2012)	24
<i>Vulcan Basement Waterproofing v. NLRB</i> , 219 F.3d 677 (7 th Cir. 2000).....	10
<i>World Fashion Inc.</i> , 320 NLRB 922, 926 (1996).....	24
<i>Wright Line</i> , 251 NLRB 1083, <i>enfd.</i> 662 F.2d 899 (1 st Cir. 1981)	10

I. INTRODUCTION

A. PARTIES AND JURISDICTION

Charging Party Tamika Kelley (“Kelley”) is a Youth Worker employed by Respondent, Spectrum Juvenile Justice Services (“SJJS” or “Respondent”).

Charging Parties Council 25, Michigan American Federation of State, County, and Municipal Employees, AFL-CIO (“AFSCME”) and International Union, Security, Police and Fire Professionals of America (“SPFPA”) are labor organizations within the meaning of Section 2(5) of the National Labor Relations Act (“NLRA” or “Act”). (JT 1).¹

SJJS is a Michigan corporation that operates two maximum security correctional facilities (jails) in Highland Park, Michigan. One is located at 330 Glendale (“Calumet”) and the other at 1961 Lincoln (“Lincoln”). SJJS stipulated that in conducting its operations during the calendar year ending December 31, 2015, it purchased and received at its Highland Park facilities goods valued in excess of \$50,000 directly from points outside the State of Michigan. (JT 1).

B. OVERVIEW AND STATEMENT OF THE CASE

The direct supervision of the juveniles in residence at SJJS is the responsibility of youth workers (“YW”). The security of the SJJS facilities (ingress, egress, monitoring of fencing, etc.) is the responsibility of security workers. (TR- 543-544). On July 2, 2015, Human Resources Administrator, James Wiser (“Wiser”), found a “To Whom It May Concern” letter in his mailbox in the administrative offices of the Calumet facility. That letter set forth anonymous complaints allegedly on behalf of Calumet employees

¹ Joint Exhibits are designated as “JT” followed by the number as taken into the record, General Counsel’s Exhibits are designated as “GC” followed by the number as taken into the record, and Respondent’s Exhibits are designated as “RESP” followed by the letter assigned as taken into the record.

complaining about their working conditions. (GC 2). He emailed a copy to the Executive Director, Melissa Fernandez (“Fernandez”), and the Vice President of Human Resources and Training, Donald Fields (“Fields”). Fernandez shared it with the Facility Center Directors Oliver Cooper (“Cooper”) and Kirpheous Stewart (“Stewart”). (TR- 597). The To Whom It May Concern letter was not shared by them with any other SJJIS supervisor or manager. (TR- 598)²

On July 6, 2015, thirty one SJJIS YWs and security workers called-off work and engaged in what they mostly referred to as a “rally.”³ (TR- 599). According to the testimony of General Counsel’s witnesses, they were joined by other SJJIS employees who were not scheduled to work that day. They estimate that there were approximately 40 participants.⁴ During the rally, some of the employees had picket signs complaining about their employment at SJJIS.

On or about August 7, 2015, AFSCME filed a Petition to represent the YWs and Security Workers at SJJIS (the “Unit”). It withdrew its Petition on August 18, 2015.

From August 18, 2015 through February 11, 2016, SJJIS had no knowledge that its employees were engaged in protected concerted activities or had any interest in being organized by a union. On February 11, 2016, SPFPA filed a Petition to represent the Unit.

To SJJIS’s knowledge, no Unit employee ever wore a hat, button, or other clothing identifying themselves as a union supporter; identified themselves as a union supporter or organizer; openly advocated for unionization; spoke positively about unionization; passed

² Kelley testified that she placed a copy of the letter in every supervisor, manager, and administrator’s office in the Lincoln Center facility; and Simpson testified that he did the same in the Calumet Center facility. But, *the only* copy received by SJJIS was the one found and then emailed by Wiser. (TR-595-598).

³ Some called it a picket and others a rally.

⁴ See Argument F(i) for General Counsel’s witnesses’ estimates.

out literature for or recruited for any union. And, no testimony in the record suggests that SJJS knew the identity of any employee who was instrumental in the unions' organizing efforts.

On March 3, 2016, in Case 07-RC-169521, a representation election was conducted among the Unit. On March 10, 2016, SJJS filed an Objection to Election because administrative errors of Board employees destroyed the "laboratory conditions required for a fair and free election."⁵ 07-RC-169521. On March 24, 2016, the Board's Regional Director overruled SJJS's Objection to Election and certified SPFPA as the exclusive collective bargaining representative of the Unit. On April 5, 2016, SJJS filed a Request for Board Review of the Regional Director's Post-Election Decision. 07-RC-169521. When SJJS failed to bargain with SPFPA, it filed an unfair labor practice charge ("ULP") with the Board on July 19, 2016. (07-CA-180451). That case was pending before the Sixth Circuit Court of Appeals while proofs on this Consolidated Complaint was heard by the Administrative Law Judge.⁶ Allegations of ULPs for failure to bargain in this case are redundant of those in the Sixth Circuit.⁷

The Charge in case 07-CA-155494 was filed by Tamika Kelley ("Kelley") on July 7, 2015, and was amended four times. The Charge in case 07-CA-1160938 was filed by AFSCME on September 28, 2015 and was amended once. The Charge in case 07-CA-174758 was filed by SPFPA on April 22, 2016. The Charge in case 07-CA-175342 was filed

⁵ Before the election, the Board's agents divided the list of eligible voters provided by Spectrum into two lists, one for each facility. In doing so, the Board omitted 35 eligible voters from the lists. The mistakes by the Board caused substantial confusion and consternation among not only among the employees who were omitted from the lists, but also other employees who witnessed the seeming disenfranchisement. SJJS maintains that because of the Board's mistakes, it is probable that some employees believed that Spectrum purposely left them off the lists, and as a result, voted for the Union based on its apparent snub.

⁶ Sixth Circuit Court of Appeals Case No. 17-1098.

⁷ The Sixth Circuit issued an Order granting the Board's petition for enforcement on November 27, 2017. On April 9, 2018 Respondent received a request to bargain from SPFPA. Bargaining began on May 8, 2018.

by SPFPA on April 29, 2016 and was amended on three occasions. Those cases were consolidated and an Order Consolidating Cases and Consolidated Complaint (“Complaint”) was issued on August 31, 2016.

Hearing on the allegations of the Consolidated Complaint took place before Administrative Law Judge Thomas M. Randazzo (“ALJ”), on March 27, 2017 – March 30, 2017 (“hearing”). The ALJ issued his Decision on October 11, 2017.

II. ISSUES PRESENTED

Respondent admits that it previously refused to bargain with the SPFPA because it believes that it was not properly certified as the collective bargaining representative of the Unit. However, as set out in the previous section of this Brief, SJJS recognizes SPFPA as the representative of its employees and is now engaged in collective bargaining with the Union.

The remaining issues are whether the General Counsel proved that:

- A. On about August 26, 2015, SJJS discharged employee Alfred Neely (“Neely”) because he participated in picketing on or about July 6, 2015 or because he concertedly complained about working conditions in early July, 2015, or to discourage employees from engaging in concerted activities [Complaint ¶ 10, 19(b)(1), 19(c)];
- B. On about September 22, 2015, SJJS terminated employee Lamont Simpson (“Simpson”) because he participated in picketing on or about July 6, 2015 or because he concertedly complained about working conditions in early July, 2015, or to discourage employees from engaging in concerted activities [Complaint ¶ 10, 19(b)(2), 19(c)];
- C. On about September 24 and October 10, 2015, SJJS issued a write-up to Kelley because she assisted AFSCME, engaged in concerted activities, and to discourage employees from engaging in concerted activities. [Complaint ¶ 20(a)(b)];
- D. On about July 7, 2015, SJJS suspended employees Kelley, Sherman Cochran (“Cochran”) and Delaine Singleton-Green (“Singleton-Green”) because they participated in picketing on or about July 6, 2015 or because they concertedly complained about working conditions in early July, 2015, or to

discourage employees from engaging in concerted activities [Complaint ¶ 10, 19(a), 19(c)];

- E. On about July 3, 2015, Security Supervisor Damon Dix (“Dix”) interrogated employees about “a writing ... regarding the wages, hours, and working conditions for employees [Complaint ¶ 10(a), 11];
- F. On about July 9, 2015, Dix told employees that their names were added to a list of employees that SJJS observed engaging in the rally and created an impression of surveillance. [Complaint ¶ 10(b), 14(a)];
- G. On about July 9, 2015, Dix threatened employees for engaging the rally. [Complaint ¶ 10(b), 14(b)];
- H. On about July 9, 2015, Dix told employees that the picketing was monitored and created an impression of surveillance. [Complaint ¶ 10(b), 15(a)];
- I. On about July 9, 2015, Dix threatened employees with discharge for engaging in the rally. [Complaint ¶ 10(b), 15(b)];
- J. On about July 5, 2015, Shift Supervisor Cornelius Burton (“Burton”) interrogated employees about “picketing” at SJJS. [Complaint ¶ 10(b), 12];
- K. On about July 6, 2015, Fernandez, while in the parking lot of the Calumet facility surveilled employees engaging in the rally and took notes of the participants. [Complaint ¶ 13];
- L. On about July 7 and July 10, 2015, Facility Manager Leroy Sherrod (“Sherrod”) threatened employees with discharge because of their participation in the rally. [Complaint ¶ 16, 10(b)];
- M. In early September, 2015, Facility Manager James Crawford (“Crawford”) interrogated employees about their union sympathies and activities. [Complaint ¶ 17];
- N. At the “end” of March, 2016, Sherrod told employees in the Calumet facility that they could no longer take breaks between scheduled and mandated shifts because they voted to be represented by the SPFPA. [Complaint ¶ 18];
- O. In about March, 2016, SJJS eliminated breaks between scheduled and mandated shifts because employees assisted SPFPA, engaged in concerted protected activities, and to discourage employees from engaging in concerted protected activities. [Complaint ¶ 21(a), 22];
- P. In about April, 2016, SJJS began requiring contingent employees to work mandated shifts because employees assisted SPFPA, engaged in concerted

protected activities, and to discourage employees from engaging in concerted protected activities. [Complaint ¶ 21(b), 22];

- Q. SJJS eliminated breaks between scheduled and mandated shifts and began requiring contingent employees to work mandated shifts without prior notice to SPFPA and without affording SPFPA an opportunity to bargain about these mandatory subjects of bargaining. [Complaint ¶ 23, 24]
- R. On or about June 1, 2016, contingent employee Quiana Jenkins (“Jenkins”) was terminated for refusing to work mandated shifts; and, since the employer implemented a practice of mandating contingent workers without providing notice to or allowing the SPFPA to bargain about this mandatory subject of bargaining Jenkins was discharge in violation of the Act.
- S. On or about July 7, 2015 and July 10, 2015, Respondent, by its agent Sherrod, threatened employees with discharge because of their concerted activities. [Complaint ¶ 16(a), 16(b)].

The allegations made by the Charging Parties and the General Counsel are not supported by the evidence presented during the hearing. Instead, what was established in the hearing is that a few disgruntled employees, who were discharged or disciplined for legitimate business reasons were willing to lie under oath; down play their culpability in jeopardizing the security/safety of SJJS’s residents, staff and others; and retaliated for legitimate discipline using these proceedings as their vehicle.

III. OVERVIEW OF THE FACILITIES AND JOB DUTIES OF YOUTH WORKERS AND SECURITY WORKERS

Each maximum security prison operated by SJJS house convicted youth⁸ between the ages of 12 and 19. (TR- 540-541). The youth have been convicted of Class I felonies (murder, rape, arson, carjacking, assault with intent to do great bodily harm, etc.). (TR- 537).

⁸ Inmates are at times referred to as "youth" or "residents."

Both prison facility is approximately 58,000 square feet, has 80 inmate beds and is surrounded by a 16 foot perimeter fence. (TR-540-541). The interior of each prison facility consists of 8-"pods."⁹ Each pod has 10 cells, a classroom, a "day room" (for relaxation) and a behavior management room. (TR- 546-550, 581)(RX 4). Each pod is separated from other parts of the prison by electronic locks. (TR- 547) (RX 44).

Each facility has a "sally port" which is a fenced cage into which vans dropping off youth enter the prison facility prior to opening of the van doors. (TR- 556-557). Once admitted to the prison, the youth if not locked into their cells are under constant supervision. (TR- 571). This is known as the "line-of-sight" rule; and there is never an exception to it. Line of sight means being in direct view of the youth with the ability to be in direct contact so that the YW is able to intervene if there is an emergency situation. (TR- 571-572. Line of sight through a window or other barrier is insufficient. The YW must be able to immediately physically manage an inmate that is harming himself or others. The YW must to protect the safety and security of the other inmates, visitors, teachers and other staff, as well as the security of the facility, no inmate is ever out of the "line of sight" of the YWs who are assigned to him. (TR- 571-572)¹⁰.

When a youth must leave his pod, for any reason, he must be escorted. Normally, a YW will be the escort, but on some rare occasions another staff person may do so. (TR- 574). While being transported, the security workers in the security office monitor the transport by camera. (TR- 578). Along the way, and at any time a YW (or any other staff person) travels through the hallways connecting the pods, the YW or other staff triggers voice boxes at each of the secured, electronically monitored and released, locked doors.

⁹ RX 4 is a schematic of the Calumet facility.

¹⁰ Most of the youth are males. SJJIS does house some female offenders.

The staff person must identify him/herself be visually identified by the supervisor or security worker in the security office, and if there is no problem, the door is released and the staff person is allowed to continue through the hallway. (TR- 548, 578)(RX 13). Each youth's cell has a state of the art, highest security steel door. (TR- 315).

The staffing ratio for YWs to incarcerated youth during waking hour is always a minimum of 2 YWs for each 11 inmates. (TR- 640)(RX 13). This ratio is mandated by the State's Licensing body. (RX 13). The ratio of YW's to youth may increase¹¹ but in never decreases. (TR- 640).¹² The reason for the ratio is to protect the security and safety of the inmates, staff, and facility. (TR- 570-571). Each day of every youth's stay at SJJS is regulated by rules. They are told when to get up, when to brush their teeth, when to shower, when to go to school (in the pod), when to eat, when they can have recreation time, etc. (TR- 312-313). It is the YWs who monitor each inmate to make sure that they follow each rule. (TR- 570-571). The YWs break up fights if necessary and put youth in their cells for noncompliant behavior. (TR- 576). The YWs are responsible for making sure that each inmate is in his cell at lockdown. After the inmates have been locked down, the ratio of YWs to inmates goes to 1 to 11. (TR- 640). However, at no time, is the cell of any inmate opened after lockdown unless the YW has notified a Supervisor of the need to open the cell, and the Supervisor has come to the pod to back-up the YW in case of trouble. (TR- 580). The YWs also lockdown inmates who fail to follow rules, become disruptive in the classrooms, etc. (TR- 580).

¹¹ For example, when a YW brings a youth to the pod for the first time, or returns an youth who has been at the medical facility, there would be a 3 to 10 ratio until the delivering YW leaves the pod. If a YW needs to take a break during his shift, or needs to leave the pod for any reason whatsoever, a relief YW is sent to cover for him or if no relief YW is available, a Supervisor will relieve the YW.

¹² There are other staff in the facility, but they do not affect the 2 to 11 minimum ratio. Supervisors, and security personnel are not responsible for the constant supervision and monitoring of the inmates.

As opposed to the YW who are responsible for the safety and security of the incarcerated youth, security workers monitor the facility itself (sally port, windows, perimeter, fencing, egress, ingress, entrances), and monitor the electronic doors throughout the facility. (TR- 543-544).

All YWs carry radios that are used to communicate with the command center if the YW needs backup in dealing with a violent disturbance or for any other reason needs to contact a supervisor or the security staff. (TR- 576).

YWs are responsible for knowing the location of all inmates within their areas at all times. (TR- 570-571). They perform "counts" of the inmates continually each day (at least 32 times) (TR- 574) (RX 13). YWs monitor when they go to the recreation area; when they are visited by physicians, attorneys, or other visitors; and when they are fed. (TR- 312-313) (RX 13). YWs monitor the inmates while they attend school in the pod for the safety and security of the inmates and teachers. (TR- 312-313).

YWs escort inmates to various locations within the facilities, such as the gymnasium, library, and cafeterias. When moving more than one inmate at a time, the inmates are required to move in "transport mode" which is taught to them by the YWs. In transport, inmates are required to be in single file, arms crossed, no "gang" signs, no fingers showing. Inmates "count-off" when passing through each door. (TR- 578). The inmates are never permitted to move about the facility without an escort. (RX 13).

In general, YWs are responsible for the supervision and control of the inmates as well as the safety of the inmates and staff. (TR- 570). Their first responsibility is to supervise, direct and provide security, safety and welfare to the youths as required by the State of Michigan laws. (TR- 570)(RX 13).

IV. STANDARD OF PROOF

Section 8(a)(3) Violations

To prove a violation of Section 8(a)(3), General Counsel must establish that the employee engaged in protected concerted activity; the employer knew of the employee's protected activity; the employer harbored animus toward those activities; and there was a causal connection between the employer's animus and its discharge decision. *Five Cap, Inc. v NLRB*, 294 F.3d 768, 77 (6th Cir. 2002); *Vulcan Basement Waterproofing v. NLRB*, 219 F.3d 677 (7th Cir. 2000); *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); *Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083, *enfd.* 662 F.2d 899 (1st Cir. 1981) (explaining general counsel was obligated to show by a preponderance of the evidence that the employee's protected conduct was a substantial or motivating factor in the employer's adverse action), *cert. denied* 455 U.S. 989 (1982); *Am. Gardens Mgmt., Co.*, 338 NLRB 644, 645 (2002) (holding that a motivational link or nexus must be shown connecting the protected activity with the adverse employment action); *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 311(1965) (noting the long-established principle "that a finding of a violation under this section [Section 8(a)(2)] will normally turn on the employer's motivation.").

The evidence must also support a "reasonable inference of causal connection between the employer's anti-union motivation and the employee's discharge." *Poly-American, Inc. v. NLRB*, 260 F.3d 465, 488-89 (5th Cir. 2001) (citing *NLRB v. O.A. Fuller Super Markets, Inc.*, 374 F.2d 197, 2000 (5th Cir. 1967)).

If the Board meets this burden, it establishes a *prima facie* case of discriminatory discharge, and the company must come forward with evidence showing that the employee

would have been discharged even absent the protected activity. See *Transportation Mgt. Corp.*, 462 UW 393, 401 (1983).

V. FACTS AND ARGUMENT

- A. (1) THE ALJ ERRED IN CONCLUDING THAT NEELY WAS TERMINATED IN VIOLATION OF SECTION 8(a)(1) OF THE ACT**
- (2) NEELY WAS TERMINATED FOR VIOLATING THE STAFF-TO-RATIO POLICY, YOUTH SUPERVISION RULE, AND PROHIBITED CONDUCT POLICY #2 AND #6**
- (3) THE ALJ MADE ERRONEOUS CREDIBILITY DETERMINATIONS**
- (4) THERE WAS NO NEXUS BETWEEN NEELY'S ALLEGED CONCERTED PROTECTED ACTIVITY AND HIS DISCHARGE**
- (5) RESPONDENT WOULD HAVE TERMINATED NEELY REGARDLESS OF PROTECTED ACTIVITY.**

The ALJ's determination that Neely was discharged because he participated in the rally on July 6, 2015 is not supported by the evidence produced at hearing and is in error. (Decision, p. 36). Rather, Neely was terminated for: (1) violating rules set forth in the SJJS Personnel Handbook (Prohibited Conduct #2 (client neglect) and Prohibited Conduct #6 (creating unsafe conditions)) and (2) violating State Licensing Rule 4127 (Staff-to-Resident Ratio and Youth Supervision Rule). (RX 13). His violations endangered the welfare and safety of the residents, the teacher in the pod, as well as himself; and, if discovered his conduct jeopardized the State of Michigan License necessary for SJJS to operate.¹³ Respondent established that Neely would have been discharged even in the absence of his alleged protected activities. There was no causal connection between the alleged conduct

¹³ The out-of-ratio discovery could be caused by any number of events: a licensing walk-through, a complaint made by a teacher, parent, or staff; an incident occurring while the pod was out of ratio; a recipient rights complaint, etc.

and his discharge and the ALJ improperly found that the General Counsel established that his discharge violated 8(a)(1).

The ALJ disregarded the Respondent's policies, the Licensing body's rules, and even the admission of violations by the two employees involved. Further, he improperly substituted his business judgment for that of the employer.

i. Staff-to-Resident Ratio Policy and Youth Supervision Rule

The Calumet and Lincoln facilities are licensed by the State of Michigan. (TR- 540-541). In order to stay in operation, the facilities must comply with regulations and rules developed and policed by the State Department of Licensing and Regulatory Affairs. Licensing Rule 4127 provides the Staff-to-Resident Ratio and Youth Supervision Rules that must be in place and enforced in the facilities. (RX 13). The Ratio Rule states that "in order to provide the best care and welfare of the residents, at all times, the ratio of direct care workers to residents, during normal working hours, shall be no less than one worker to ten residents. The normal staffing pattern will be **two workers to eleven residents.**" (RX 13 p. 13). Other relevant portions of State Licensing Rule 4127, Youth Supervision, require that:

1. Staff should know the exact number of residents assigned to their unit and be able to recognize them on sight.
2. **Staff shall maintain within continuous "line of sight supervision" when youth are outside of their rooms. Line-of-Sight Supervision is defined as "Coordinating all activities of the residents, under your supervision so that visible contact is maintained and the actions of the residents are under observation at all times".**
3. **When more than one staff member is present in an area, staff should position themselves in the best way to view the youth in their direct care and all youth in the area.**

4. Staff shall continuously know number of youth in their care and regular head counts of youth under their supervision.
5. If a resident leaves a worker's unit or activity area, for any reason, this fact must be communicated to supervision and all appropriate staff.

10. **Staff shall not engage in activities other than those directly related to their official duties.** The reading of materials other than those directly related to job performance is not permitted. Use of computers for personal (non-work related) activities is not permitted.

21. **Staff shall accompany the youth they supervise into the classroom and support the Teacher and/or Teacher's Aide in delivery of the course instruction unless specifically directed to do otherwise by their supervisor. Staff shall remain alert and set a positive behavior example for the youth.**
22. **Staff shall monitor their youth closely to assess the need to employ de-escalation and/or agency's therapeutic crises intervention model.**

26. Staff shall maintain supervision of their youth until direct supervision and control of the youth, has been accepted by another staff member. Staff may not depart their assigned post until properly relieved.
35. **All staff escorting/supervising youth shall remain with their youth until supervision and another staff member has accepted control of the youth.**

46. **Staff shall coordinate with supervisory staff so that youth to staff coverage ratios (minimum of 2 staff supervising the 10 or 11 youth assigned to a pod) to the youth is not violated.**
47. Staff may not leave an area for breaks or the end of shift duty until properly relieved.

ii. **Prohibited Conduct policy #2 and #6**

Also, Respondents' Personnel Handbook contains a list of prohibited conduct that, if engaged in, will result in disciplinary action. (RX 13 p. 19-20). The prohibited conduct, which are relevant to Neely's termination, include: (a) client abuse or neglect and (b) creating or contributing to unsanitary or unsafe conditions, or failing to abide by safety rules and policies. (RX 13 p. 19-20). Neely was aware of these policies and procedures, as he signed (1) the Resident Procedures Acknowledgement Form, (2) the Staff Policies & Procedures Acknowledgement Form, and (3) the Personnel Policies & Procedures Manual Receipt. (RX 13 p. 24-26). Further, there is a copy of the SJJIS policies and procedures in each pod and the control room for each pod. (TR-562)

iii. The incident involving Neely

During the morning of August 18, 2015, Fernandez, and Campus Security Manager Keith Leslie ("Leslie") conducted a "walkthrough" of the Calumet facility to investigate the condition of the entire building as it related to areas that needing painting. (RX 13 p. 6). The pod in which Neely worked was not singled out for review. As Leslie and Fernandez entered the rear door of the control room to Pod 6, they encountered YW Jamar Marcus ("Marcus") on the telephone, slumped down so as not to be visible through the window into the pod, feet up, facing away from the pod.¹⁴ (TR- 630-631, 806-809). Fernandez was shocked to see Marcus in the control room because the inmates in the pod were released from their cells and because she knew at that time of the morning the YWs assigned to the pod were supposed to be providing security for the teacher and inmates in the classroom within the pod.¹⁵ Since Marcus was in the control room and not in the pod or its interior classroom, the YWs assigned to that pod were violating the staff-to-resident ratio. (TR-

¹⁴ Respondent Exhibit #44 show the pod control room and the classroom where Marcus was located.

¹⁵ Licensing Rule 4127, No. 21.

631). Fernandez asked Marcus “where are the kids?” and she immediately walked into and through the pod and classroom. She asked the other YW assigned to the pod “what’s your count?” (TR- 632). Neely was the other YW and responded that his count was eleven -- which means he was in violation of the staff-to-resident ratio policy. It is undisputed that Marcus left the pod with the knowledge of Neely. (RX 13). It is also undisputed that Marcus’s abandonment of his position extended for over five minutes and that he had left the pod nine times that date before he was caught with is feet up, on the phone. (RX 13; TR- 631-635). When discovered, Marcus was behind a locked door, with no line of sight to the residents and no ability to immediately respond to violence.. (TR 346, 632, 640) (RX 44). The actions of both YWs jeopardized the safety of the teacher, Neely, and the inmates themselves.¹⁶ (TR- 631). Neely had a responsibility to report the break in ratio to his shift supervisor. (RX 13). The SJS Employee Ethics rule requires all employees to report all infractions immediately and report any observed policy violations. (RX 13, p. 8, 21).

The ALJ whitewashed the culpability of Neely for the ratio violation by foisting all blame on Marcus who, reportedly, told Neely that he was leaving the pod to get a sweater. It is undisputed that Neely knew that he was out of ratio when the other YW left. It is also undisputed that Neely was trained on ratio, rules and licensing requirements. Finally it is undisputed that Neely was trained to call for support if he was out of ratio. (TR- 570, 577-578).

The ALJ’s exoneration of Neely is improper and clearly indicative of a misconception that Neely’s conduct did not endanger himself, the female teacher dependent upon the protection of the YWs, and the residents themselves. He unabashedly substituted his

¹⁶ The residents are dangerous convicted felons and have been known to attack YWs and others. As recently as July of 2015, a YW was assaulted by a resident in Pod 3. (TR- 77; TR 249).

business judgment for that of SJJS – an action that has been repeatedly held to be improper¹⁷ - and applied his business judgment as to the need for direct control of inmates in a maximum security prison for that of SJJS and State Licensing requirements.

The ALJ states that “the record is devoid of evidence showing that Neely could have, or should have, seen what Marcus was doing in the control room, or been aware that Marcus was not retrieving the clothing as he said he would. Thus, Neely could not be expected to call for support from supervision and report Marcus’ violation, when in fact he could not have seen that Marcus was engaging in that conduct.” (Decision, p. 35).

The fact that Neely could not see Marcus is exactly the point. If Neely could not see Marcus then Marcus could not have direct line of sight of or maintain physical control of violent youth the ratio and youth supervision rules were violated. Neely did not need to know what Marcus was doing out of the pod. All he had to know – and what he admittedly did know – was that Marcus disappeared and he was a lone YW, out of ratio, with 11 violent felons for over five minutes.

After finding Neely with 11 residents and Marcus hidden away in the control room, Fernandez radioed Marcus’ and Neely’s supervisor, Brigiette Richard (“Richard”); Manager Sherrod; and Manager Sonya Jackson and had them meet her in the administration office. She asked them if either Neely or Marcus had radioed them to report a ratio problem and/or to request coverage for them in the pod. When their response was “no,” Fernandez contacted Human Resources and informed them that she would be starting an investigation as to what had transpired. (TR- 635) (RX 13). Human Resource Vice President, Donald Fields, and Human Resource Administrator James Wiser, assisted in the internal

¹⁷ See, *Cellco P’ship v. Nat’l Labor Relations Bd.*, 2018 WL 3028842 (D.C. Cir. June 19, 2018).

investigation. (TR- 750, TR- 788-789) (RX 13). Marcus and Neely were suspended pending review. (TR- 635)(RX 13).

The investigation (which included review of video footage of the pod) confirmed that Neely was in the classroom with 11 residents, with no other YW, for over 5 minutes. (RX 13) (TR- 636). The investigation also confirmed that there had been over 9 calls placed to persons outside the facility on the control room's telephone since 7:00 a.m. (TR- 635) (RX13). The investigation substantiated that the YWs violated the staff-to-resident ratio and youth supervision policies; that Neely failed to report the ratio breach to supervision; and that Marcus failed to obtain clearance from supervision to abandon the shift and make a personal phone call. (TR- 638-642) (RX 13).¹⁸

Further, the investigation confirmed that Marcus attempted to get his shift supervisor, Richards, to lie for him. (TR- 818-820). Richards testified that Neely radioed her to ask her what extension she was at. (TR- 817). However, when Richard answered the phone, she realized it was Marcus on the line and he asked her to tell Fernandez that she "cleared" him to call his mother because his aunt died. (TR- 817-818). However, this would have been a lie because Marcus never called her asking for relief. (TR- 820). Marcus' attempt to get his supervisor to lie for him is proof that he knew he violated the staff-to-resident ratio policy. In fact, Marcus acknowledged that when he left the Pod, it was out of ratio. (RX 13, Statement of Marcus). Both Marcus and Neely were terminated, following the recommendation of the internal investigation.

¹⁸ During the hearing, General Counsel attempted to assert that the teacher in the classroom was part of the ratio count. This is simply not the case. See testimony of Fernandez, Stewart and Cooper (TR- 605; TR- 774; TR- 761-762). Also, during the investigation, neither Marcus or Neely claimed that the pod was not out of ratio. Instead, Marcus admitted it and apologized for what he did (see his statement in RX13), and Neely just said that he was not the one that left the pod. While this is true, it does not relieve him from the obligation to make sure there is proper ratio, to call for support from supervision, and to report the violation. (RX13). The ALJ did not find that the teacher was a part of the ratio.

Neely was trained annually on his obligation to report out of ratio incidents. (TR- 638). That obligation is in Respondents' Human Resources Personnel Handbook, Respondents' policies and procedures, and State of Michigan licensing rules. (TR- 640- 642). Further, this was a second offense for Neely. In November 2014, he received a three-day suspension for failing to provide proper supervision for youth on his pod. On that occasion, Mr. Neely left his assigned post without proper relief, leaving youth unattended (RX 13), and he was warned that further violations of SJJIS policies and procedures "will result in disciplinary action which includes a status change and or including termination of employment." (TR- 750)(RX 13, p. 23). Neely's previous violation was given consideration in the decision to terminate him. (TR- 750).

SJJIS had no basis to know whether Neely engaged in any protected activity. Theoretically, he was one of approximately forty employees who participated in the rally on July 6 – nearly two months before his discharge on August 26. Even assuming that someone did know, any *putative* protected conduct did not play any role whatsoever in the decision to terminate his employment after his second violation of ratio rules. His conduct jeopardized the safety and welfare of himself, the teacher assigned to his pod, and to the residents. That is why he was terminated. There is no motivational link connecting any alleged protected activity and Neely's termination. Neely was terminated for violating Respondent's policy and procedures, including but not limited to the Staff-to-Resident Ratio policy, infractions which were, after investigation, substantiated and confirmed by Wisner and Fields. (TR- 750, 789).

iv. The ALJ'S erroneous credibility determinations

Mr. Neely claimed that he was one of the employees who participated in a rally on July 6, 2015.¹⁹ (TR- 326). The ALJ credited the testimony of all General Counsel witnesses and discredited every SJJIS witness with boiler plate rubric of credibility findings even in light of internal inconsistencies of General Counsel’s witnesses, the unchallenged business records of SJJIS, and blatant believability of the testimony.

At the hearing General Counsel witnesses YWs Lamont Simpson and Neely testified that on July 9, 2015 Security Supervisor Damien Dix told them that during the rally Fernandez was in the security office using the perimeter cameras to “zoom” on the rally and that she created a list of every employee that was at the rally. (TR-139-140, 331-332). Like Neely, Simpson has a economic motive to lie. Like Neely, he claims that he was discharged in violation of the Act and is seeking backpay.

Neely testified that Dix told him that his name was on the list and to “watch his back.” No witness testified that Fernandez was in the security office that day, and the business records created by security officers confirmed that she was not. (RX 6) (TR-332) Fernandez never entered the security office on the day of the rally.²⁰ While Steven Johnson (a Supervisor who had been terminated for illegally locking down inmates) testified that he walked through the security office and noticed that security workers had cameras that were aimed toward the entrance to the facility, security workers are not supervisors; and, their job is to monitor the exterior of the building, entrances, exits, and grounds for security purposes.²¹ They maintain a log of all supervision and officers in the control room and when they arrive and leave the facility. (RX 6; TR- 543, 547-548). Fernandez never created

¹⁹ The ALJ found that approximately 40 employees participated in the rally. (Decision p, 14)

²⁰ See argument F(ii).

²¹ Security workers are part of the bargaining unit represented by SPFPA.

a list of employees who were participating in the rally.²² Dix denies telling Simpson and/or Neely that “upper management” or Fernandez was upset about the rally, zooming on the rally participants, and/or making a list of names. (TR- 829-830). Even assuming Dix made the comment about the “list,” all disciplines made by SJJS were for legitimate business reasons and would have occurred regardless of any putative protected activity.

Neely and Simpson, and only Neely and Simpson, allege that Dix told them about the alleged surveillance by Fernandez. Neely’s testimony was untrustworthy in all respects. He spun the whopper of Fernandez’s supposed surveillance of the rally from the driveway.²³ Neely’s story about Fernandez coming out of the building with a “yellow pad” and writing down the names of the rally participants from approximately 40 feet away is preposterous and uncorroborated by any of the other 40 or more rally participants.²⁴ In addition, Neely and Simpson’s testimony is internally inconsistent. Simpson testified to speaking with Dix alone in Pod 3, in contradiction to the testimony of Neely who said he was there at the time and it was Christopher Wilson that spoke to them, not Dix. TR- 121, 321-322. Further Simpson testified that Dix buzzed him in to an Administrative office at a time of day that Dix has never worked. (See argument B).

General Counsel witness Kelley testified that she saw supervisors Childs, Johnson, Cottingham, Dix, and Ferrell “going to work,” “driving by,” entering the building through the rally port, and/or “letting Fernandez in.” (TR- 258). She did not testify that any supervisor

²² See argument F(i) and F(ii). In fact, she never left the building while the rally was on going, and when she arrived for work, the rally was either not on-going, or she did not see the employees participating in the rally because she turned into the facility before arriving at the area at which the rally participants had parked their cars and where the rally was either getting ready to start or on-going. According to General Counsel’s witnesses, the cars and participants were on the residential street between the entrance to Calumet and Hamilton. (TR- 601) It is uncontroverted that Fernandez turned her vehicle into the facility before reaching the stretch of Glendale where the rally was taking place. (TR- 601).

²³ See argument F(i).

²⁴ *Id.*

interacted with, photographed, or took notes of any participants. (TR- 257-259). Kelley testified that she arrived at approximately 8:00 or 9:00 a.m. and that she remained at the rally until approximately 5:00 p.m. (TR- 255, 257).

Marcus, Ruth Crosby (“Crosby”), and Ralphael McQueen (“McQueen”) testified that they only saw supervisors “driving by”. (TR- 390, 481-483, 518-519). None of them testified that any supervisor interacted with, photographed, or took notes of any participants. Marcus testified that he was at that rally from approximately 7:00 a.m. to 10:00 a.m., Crosby from 8:30 a.m. to 4:00 p.m., and McQueen, from 5:45 a.m. to 3:00 p.m. (TR- 389; TR- 478-480; TR- 513, 522). They testified there were approximately 15 to 25 participants in the rally. (TR- 480; TR- 521).

Of all the participants in the rally, only one, Neely, testified that supervisors came out of the Calumet facility to watch the protest.²⁵ And, he is the only witness who testified that Fernandez walked from the front door of the Calumet facility to within 40-50 feet from rally participants. Neely claims that Fernandez stood out there for about 10 minutes with pad of paper in hand, making notes while observing the participants. And, that Fernandez was so open and obvious that participants in the rally were hiding behind their cars and hiding their faces. (TR- 327- 329).

Neely perjured himself when he testified about Fernandez’s alleged surveillance of the rally. It is simply unbelievable and inconceivable that only Neely saw Fernandez – even though it was allegedly broad daylight, she was only 40-50 feet away from the participants and they were running for cover and hiding behind their cars. It is also unbelievable that

²⁵ Neely testified that Fernandez, Stewart, Burton, Cottingham and Dix came out of the facility to watch the protesters. (TR-326-327) The General Counsel has not alleged surveillance by any supervisor other than Fernandez.

Fernandez did what Neely accuses her of, and yet no one snapped a picture of her with their mobile devices, no one else saw her taking notes, and no one – except Neely – saw her come out of the building and walk up the approximately 350 foot entranceway to where the rally was taking place²⁶ and stand there for 10 minutes making notes.

Neely’s testimony that Dix told him that Fernandez was in the control room “zooming in” with cameras on the picketers, or that Fernandez has his name on a list is also incredible, not supported by any one who does not have a pecuniary interest in the outcome, and is contrary to contemporaneous notes of occupants of the control room – the security logs which are maintained by security officers (members of the putative bargaining unit.) (RX 6).

What is more, both Neely and Simpson are looking to be rewarded with back pay for making their bogus allegations of discriminatory discharge. Because their testimony is contradicted by each other,²⁷ because Simpson lied about being let into the administration by Dix, and Neely lied about Fernandez surveilling the rally, and also because they are seeking an economic reward their credibility is inherently suspect. *See, N.L.R.B. v*

²⁶ Respondent’s Exhibit #22 is a bird’s eye picture (“map”) of the Calumet facility. Neely claims that Fernandez left the building by the front door. Assuming that his testimony is true (which it is not), Fernandez must then have walked out the sidewalk that leads to the entrance drive, and then through the parking lot or up the drive way to the westernmost point of the rally. This is marked by a “I” on Exhibit #22. Most of General Counsel’s witnesses testified that the rally took place between the “I” and “H” on Exhibit #22. Crosby testified that the “picketing” never went across the access road (“I”) to the Calumet facility. Instead, the participants were between the access road (“I” on the map) and then east toward Hamilton Road (toward “H” on the map.) The participants in the rally never picketed across the entrance to the Calumet facility. Instead, they were in front of residences along Glendale Road (marked “H” on the map)(TR- 491-492). Raphael McQueen testified that the rally participants never crossed the access road to the Calumet facility. Rather, the participants “stood” around holding signs from about 10 feet east of the Calumet access road (“I”) and then east approximately 50 feet toward Hamilton Road and “H” on the map.(TR- 528-529) Atwater testified that the rally was on Glendale (marked “F,” “I,” and “H” on the map) in front of the parking lot (marked “B” on the map). So, on Glendale, east of the entrance road to the facility. (TR– 81). Sherman Cochran and Stephen Johnson testified that the rally was on the “side street” in front of the Calumet building, on Glendale (marked “I” and “H” on Exhibit #22)(TR- 189; TR- 377).

²⁷ See argument I.

Container Corp. of America, 649 F.2d 1213 (6th Cir. 1981) (“The uncorroborated testimony of an interested charging party does not amount to substantial evidence of an unfair labor practice,” *Sam’s Club v. NLRB*, 141 F.3d 653, 658 (6th Cir. 1998) (“[U]ncorroborated and self-serving statements of a party who stands to benefit from an award of back pay may, standing alone, constitute substantial evidence where such testimony is reasonably deemed to be credible and trustworthy, and where it is not undermined by evidence to the contrary.”). Here, only Neely supports Simpson, and vice versa. Further, Neely’s testimony that six supervisors and managers left the facility to watch the protesters is contradicted by the security logs (RX 6) and was not supported by any of the other participants in the rally. Their testimony is thus biased and untrustworthy. What is more, no other witness testified that Dix warned *them* about surveillance and a “list.”

The ALJ ignored the inconsistencies between the testimony of Simpson and Neely. He embraced the unbelievable fiction spun by Neely that Fernandez came out of the building and stood within feet of the rallying employees and only Neely saw her, and dismissed with boiler plate rubric all Respondents witnesses and Exhibits. His finding that Neely “testified in a truthful and consistent manner, and that he was a very credible witness” (JD-85-17) is belied by the testimony and Exhibits. Neely’s testimony in regard to Fernandez strains credulity. His testimony that six managers came out of the facility to watch the rally is contradicted by all other General Counsel witnesses and the security logs maintained by members of the bargaining unit (RX 6). The ALJ also ignored the pecuniary interest that Neely has in the outcome of this litigation.

Exposing the ALJ’s results-oriented findings, he also found that “the credible record evidence further reveals that Fernandez was watching the picketing on the monitors,

identified the employees such as Neely [and presumably the other 39] who were engaged in such action, and recorded their names on ‘hit lists.’” (Decision, p. 33). Not only is there *no* evidence (not even one witness) to support these propositions, there is no Complaint allegation that Fernandez used monitors to surveil participants of the rally.

v. There is no causal nexus between Neely’s putative concerted protected activity and his discharge

As for the discharge of Neely on August 29, 2015, no nexus can be found, because any protected activity is remote in time from any of the discharge.²⁸ *See USC Univ. Hosp.*, 358 NLRB No. 132, slip op. at 30 (2012). Neely alleges that he participated in the rally on July 6, 2015. He was terminated nearly 8 weeks later, on August 29, 2015. The Board has found timing alone to be insufficient to support a *prima facie* case of discrimination, even where the protected conduct is close in time to the adverse employment action. In *Ronin Shipbuilding, Inc.* the Board reversed the finding of the ALJ to dismiss alleged violations of Section 8(a)(3) for the termination of an employee *only three weeks* after a Union lost an representation election, while an election objection was pending. 330 NLRB 464, 465 (2000). The basis for the discharge was the employee’s persistent tardiness and absences from work over the previous two years, with only a written warning in his file. *Id.* Here, there was more than 8 weeks between the rally and the discharge and therefore no causal nexus. The ALJ erred in not dismissing the 8(a)(1) allegation concerning Neely.

vi. Respondent would have terminated Neely regardless of protected activity.

²⁸ The Board often considers the timing of the adverse action in relation to the employee’s protected activity to be critical in identifying employer motivation. *See, e.g. Faurecia Exhaust Sys., Inc.*, 353 NLRB 382 (2008) (finding the timing of a promulgated policy limiting employee posting *on the same day* as a union began distributing flyers to be insufficient for establishing an inference of anti-union motivation). Thus, it works against the General Counsel’s case where there is “no unusual, or extreme, or sensitive union or protected concerted activity engaged in [by the employee] at or near the time of the discipline question.” *USC Univ. Hosp.*, 358 NLRB no. 132, slip op. at 30 (2012) (citing *Masland Indus.*, 311 NLRB 184, 197 (1993); and *World Fashion Inc.*, 320 NLRB 922, 926 (1996).

The ALJ should have found that Respondent rebutted any *prima facie* case established by the General Counsel. First, there were rules of which Neely was aware. Second, he was treated the same as other employees (including Marcus) and the General Counsel adduced no evidence of disparate treatment. Third, the Respondent submitted uncontroverted evidence that Neely was out of ratio without calling for supervision or notifying his supervisor **for over 5 minutes**. (RX 13, p. 7; TR- 636). Five minutes in a maximum security jail with violent felons is a lifetime; and, it could have resulted in loss of life or severe injury. As noted by the ALJ in the Decision, only about a month prior to the rally a YW was attacked and severely injured by the residents. (Decision, p. 4). Video of the incident “clearly shows Youth Worker Neely in the classroom on pod 6 with 11 residents while Youth Worker Marcus is out of line of sight, behind two closed doors in a separate area (pod control room). There was no coverage or Supervisor notified.” (RX 13, p. 1). The ALJ posits that Neely was not responsible for Marcus’s actions, asserting that since Neely could not see Marcus to know what he was doing, he could not have called for support. He asserts that “Neely had no way of knowing that Marcus was engaged in such proscribed conduct.” (Decision, p. 35) The ALJ misses the mark with this analysis. Neely knew he was a lone YW in a pod with 11 violent felons for over 5 minutes. It did not matter that Marcus did not tell him he was going to make a telephone call. Neely knew he was out of ratio. He was trained that this cannot be allow to happen. He did not radio for backup. He did not radio security, his supervisor or Marcus. *Neely* was in violation of the Licensing Rule, the staff to resident ratio rule, and the Youth Supervision Policies.

The August 18, 2015 incident was the second time that Neely violated the Licensing Rule, the staff to resident ratio rule, and the Youth Supervision Policies. (TR- 750). On

November 20, 2014, Neely received a three-day suspension for “failing to provide proper supervision for youth on pod 2; he departed his assigned post without proper relief, leaving youth unattended.” (TR- 696, 750; RX 13, p. 22-23) At that time, Neely was warned that “further violations of these policies & procedures will result in disciplinary action which includes a status change and or including termination of employment.” *Id.* The ALJ did not even mention the fact that Neely’s discharge was preceded by like earlier conduct and a warning that he would be discharged or suffer a “status change” for subsequent like conduct.

Neely also claims that on the same day that he was suspended pending investigation, he talked to Respondent’s Vice President of Human Resources, Fields, and told him his version of the story. Supposedly, Fields said he did not understand how Neely did anything wrong. Even if this statement was made by Fields, it was only based on what Neely said. After review of the entire investigation file, Fields and Wisner (the Human Resource Business Partner) determined that all of the allegations against Neely were substantiated and approved of his discharge. (Tr. 750, 788-790). The ALJ’s conclusion that Fields did not approve the decision to discharge because Fields may have told Neely that “he did not understand how Neely did anything wrong” (Decision, p. 34) *before* the completion of the investigation and review of all the materials is misguided. (Decision, p. 34). Fields clearly testified that he “approved” the decision to discharge after review of all the materials and that there was sufficient basis to justify termination. (TR- 789-790).

vii. The ALJ’s finding is an impermissible second-guessing of SJJ’s application of its policies.

After being warned in November, 2014, that further violation of Company policies, procedures or rules would result in a status change or termination, on August 18, 2015,

Neely failed to report that he was out of ratio and seek back-up as called for in SJJS's Youth Supervision Rule. Neely had already been suspended for three days. He had to expect that, if he was caught in an out-of-ratio circumstance, which jeopardized the safety of himself, the residents, and the female contract teacher in the pod, he would be terminated for this infraction. He certainly was properly warned, a factor the Board considers in these cases. See *Ichikoh Mfg., Inc.*, 312 NLRB 1022, 1025 (1993)(no discriminatory discharge in absence of evidence that other employees defied rules and were not discharged). The Supreme Court has long held that it is the employer's right to discharge employees "when that right is exercised for other reasons than intimidation or coercion." See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937). Thus, SJJS is entitled to apply its policies and practice in a consistent, non-discriminatory manner. The ALJ's finding a violation here is tantamount to substituting his business judgment for SJJS's, something that both Supreme Court and Board precedent disallow. See *Cellco Partnership, supra*.

- B. (1) THE ALJ ERRED IN CONCLUDING THAT SIMPSON WAS TERMINATED IN VIOLATION OF THE ACT**
- (2) SIMPSON WAS TERMINATED FOR WALKING OFF A MANDATED SHIFT FOR THE SECOND TIME IN VIOLATION OF RESPONDENT'S PROHIBITED CONDUCT POLICY #13**
- (3) THE ALJ MADE ERRONEOUS CREDIBILITY DETERMINATIONS**
- (4) THERE WAS NO NEXUS BETWEEN SIMPSON'S ALLEGED CONCERTED PROTECTED ACTIVITY AND HIS DISCHARGE**
- (5) RESPONDENT HAD LEGITIMATE REASONS FOR TERMINATING SIMPSON AND WOULD HAVE DISCHARGED HIM REGARDLESS OF ANY PURPORTED PROTECTED ACTIVITY.**

The ALJ's determination that Simpson was discharged because he participated in the rally on July 6, 2015 or other concerted protected activity is not supported by the evidence produced at hearing and is in error. (Decision, p. 40)

Instead, SJJS established that it terminated Simpson on September 18, 2015 (78 days after the rally) for leaving his job during working hours without permission of his supervisor -- or abandonment of shift. (RX 10, p. 7). His conduct violated SJJS's Prohibited Conduct Policy #13. (RX 10, p. 7). Thus, Simpson's termination was motivated by legitimate business reasons. Further, there was no causal connection between the termination and his putative involvement in concerted protected activities -- as his discharge was eleven weeks after his putative involvement in concerted protected activity and followed a previous warning about refusal to work mandated shifts. Yet, even if General Counsel met its *prima facie* burden, SJJS demonstrated that the same action would have taken place even in the absence of the protected conduct.

Simpson was a YW. (RX 11, p. 5)(TR- 178). It is undisputed that SJJS had a policy to mandate YWs when it was short-staffed, in order to comply with the staffing requirements and ratios of direct care workers (YWs) to residents as required by State of Michigan licensing rules. Further, Simpson was fully aware of the mandating procedure. (TR- 149-150) (RX 30, 31). Simpson signed the Staff Policies & Procedures Acknowledgement Form, which provides that he "fully understands" the Mandating Procedure. (RX 10, p. 5); (TR- 149-150). In fact, Simpson was previously disciplined for walking off a mandated shift without supervisory approval on May 7, 2015. (RX 10, p. 1). At that time, Simpson was advised that he violated Section VII: Personal Conduct, which provides that "an employee may be required to work at unscheduled times on short notice due to consumer or

program needs.” (RX 10, p. 1). Simpson was also advised that he violated Prohibited Conduct #13, “leaving the job during working hours without permission or abandonment of shift.” (RX 10, p. 1). Simpson received a two-day suspension for his decision to abandon his job on May 7. This suspension and warning occurred three months prior to the rally. Simpson was also warned that any further violation of company or program policies, procedures or rules may lead to further disciplinary action including termination of employment. (RX 10, p. 1-2). Further, Simpson acknowledged that the disciplinary report was discussed with him. (RX 10, p. 1).

The evidence at hearing established that over the years prior to the rally, SJJIS suspended employees for walking off mandated shifts. (TR- 714-717) (RX 11). The number of hours of suspension (“DLO”) varied given the supervisor imposing the discipline: 16 hour DLO for Benjamin Gillery (3/20/11)(RX 11, p. 1), 24 hour DLO for Linda Boone (2/6/12)(RX 11, p. 2), 24 hour DLO for Darnell Brewer (8/19/12)(RX 11, p. 3), 8 hour DLO for Demetrius Hutson, Jr. (3/24/15)(RX 11, p. 4), 16 hour DLO for Lamont Simpson (5/7/15)(RX 11, p. 4) and 16 hour DLO Lisa Gholston (5/12/15) (RX11, p. 6). The DLOs without pay were issued for walking off mandated shifts with no previous violations. (TR- 714-717) (RX 11). The evidence submitted also showed that after the rally, SJJIS continued to suspend employees for walking off mandated shifts.

Respondent’s Exhibit #12 (RX 12) is 60-pages long and consists solely of disciplinary action records of employees that refused or walked off mandation from the date of the rally through date of hearing. (TR- 717). Exhibit #12 shows that Marshawn Mackie (RX 12, p. 14)(1/29/16), Linda Boone (RX 12, p. 51) , Adrienne Miller (RX 12, p. 54) (3/22/17) and Quiana Jenkins (RX 12, p. 24)(6/2/16) were all terminated for walking off

mandation in violation of Prohibited Conduct #13. (RX 12). And, General Counsel provided no evidence or testimony to support a proposition that SJJS knew of Mackie's, Boone's, Miller's or Jenkins' participation in concerted protected activities. Thus, General Counsel did not establish that Simpson was treated dissimilarly than other comparable employees.

Mr. Simpson's refusal to work mandation on September 18, 2015 resulted in his termination due to a second infraction on May 7, 2015. (TR- 713, 716). The ALJ improperly substituted his belief that SJJS should have arranged a schedule to accommodate Simpson's other job and not assigned him mandation. This was not the ALJ's decision to make and it was improper and contrary to NLRB and Supreme Court dictates.

i. The ALJ's finding is an impermissible second-guessing of Respondent's application of its policies.

The Supreme Court has long held that it is the employer's right to discharge employees "when that right is exercised for other reasons than intimidation or coercion." *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S., 45-46 (1937). Thus, Simpson was warned on May 7, 2015 (RX 10, p. 1) that any future violation could subject him to termination. The ALJ substituted his business judgment for Respondents, something that both Supreme Court and Board would reject. The ALJ was clear and obvious about the fact he did not like SJJS's rules and policies. Nonetheless, SJJS has a maximum security jail to run, and circumstances sometime required it to mandate employees. When, in exigent circumstances, mandation is called for, a refusal – like Simpson's – jeopardizes the ability of SJJS to properly staff its pods and provide for the security of other employees and inmates.

The ALJ all but said directly that SJJS *must* give Simpson an accommodation to work another job (where there was no evidence that exceptions were made for other

employees). (Decision, p. 39) The ALJ did not say why the other job should not make an accommodation to Simpson's work at SJJS. The ALJ also concluded that since Simpson *asked* for an accommodation, then he had one. The ALJ asserts that when asked for an accommodation Simpson's supervisors said that they "would see what he could do." (Decision, p. 36) From there the ALJ catapults to a conclusion that Simpson should have been excused from mandation because he had to work elsewhere and he had to pick up his child. The General Counsel did not establish that other employees who are mandated were excused from working mandation if they had other employment obligations or child care issues.²⁹ But, this is an excuse that the ALJ felt, in his operation of the jail, should have excused Simpson's refusal to work. (Decision, p. 39).

The ALJ also erred in concluding that "Simpson's earlier infraction where he received a 2-day suspension for failing to work a mandated shift on May 7, 2015, was not considered in his discharge. (Decision, p. 36) This erroneous conclusion is directly contrary to the testimony of Wiser, HR Business Partner. (TR- 713, 750). Wiser testified that Supervisor Antonio Cottingham (Cottingham") requested the termination of Simpson after he walked off mandation the second time. *Id.*

Since the ALJ erroneously found that Simpson did not have a earlier infraction that was considered in the decision to terminate, his finding that employees who only had one infraction were Simpson's comparable employees is also erroneous.³⁰

²⁹ Danielle Boatwright, testified that she refused mandation in September 2014 because of child care issues and this did not excuse her from mandation. She received a 5 day disciplinary layoff. TR 469-70.

³⁰ The ALJ sets forth six employees who refused mandation once and were not discharged as employees supposedly comparable to Simpson. (Decision, p. 39) This conclusion is erroneous as these employees are not similarly situated to Simpson.

The ALJ also erroneously found that the General Counsel established that other employees who were similar to Simpson (in that they refused two mandations) and who were similar in all other relevant respects and yet not discharged. The ALJ first points to Jason Pritchett (“Pritchett”). Pritchett was not similarly situated to Simpson because Pritchett had discussed his inability to work and believed that he had been excused by Director Cooper. (GC Exh. 49) The ALJ next points to Marshawn Mackie (“Mackie”), who refused mandated shift on December 2, 2015. His write up, GC Exh. 37, showed that he had previous **attendance issues** (September 7 and 24, 2015; Tr. 751). Mackie’s second refusal to work mandation was on January 27, 2016. (See, RX 12, p. 12-14). He was discharged for that refusal. (RX 12, p. 14). It was well-established during the course of the hearing that attendance violations were not treated the same as refusals of mandation. See, e.g. TR-719-720. The ALJ infers that if an employee refuses mandation and also has attendance issues, they should be treated as though they had two mandation refusals. (Decision, p. 40) There is no evidence in the record to support a conclusion that this is SJJS’s practice. Once again, this is the ALJ’s error in determining what *he* believes should be the policy and/or procedure of SJJS and then judging SJJS’s conduct against his desired policies. Lastly, the ALJ points to Darnesha Coy (“Coy”) who refused mandation on June 25, 2016 (RX 12, p. 39) and October 21, 2016 (RX 41). Coy’s supervisors were not the same on June 25 and October 21, 2016. When processing Coy’s October 2016 violation, Coy’s then-supervisor missed the fact that she had a prior violation. On Coy’s Disciplinary Action form for the October infraction the supervisor indicated “N/A” following the instruction to “List the dates and disciplinary and corrective actions for the same violation.” (RX 41)(TR- 739-741).

There is no credible evidence in the record that establishes that SJJS knew that Simpson engaged in protected activities and/or that he supported unionization efforts. But, assuming that it did, he was treated in a manner consistent with SJJS's treatment of other employees who walked-off mandation.

Thus, Simpson (1) was aware of the Mandating Procedure policy; (2) was disciplined previously for "walking out" on mandation; and (3) was warned that further violations may lead to termination. He nonetheless chose to "walk out" on mandation again on September 18, 2015 without receiving permission from his supervisor. (RX 10, p. 7).

Respondent had no reason to suspect that Simpson played any role in setting up the rally (if he did) or that he prepared, distributed or otherwise had any input into the To Whom It May Concern letter that was found in Human Resources on July 2, 2015. His testimony that he distributed the memo and was buzzed into the Administrative offices by Supervisor Dix at about 5:30 a.m. is a fabrication. Dix has *always* worked the 7:00 am to 3:00 p.m. or 3:00 p.m. to 11:00 p.m. shift, and he has *never* been in the facility at 5:30 a.m. (TR - 827). He never worked the midnight shift. (TR - 827). Once again the ALJ absolved General Counsel's witness of lying about Dix letting him into the administrative office by ignoring the fact that Dix testified that he was never in the facility at 5:30 a.m. and coupling that with a conclusion that perhaps Simpson was "mistaken" about the time. This is yet another example that the ALJ ignored all evidence establishing that General Counsel's witnesses were untruthful. Given the other reasons to discredit the testimony of Simpson - his pecuniary interest in the outcome of this litigation, and the inconsistency of his version of a purported meeting with Dix and Simpson, he is simply incredible.

Thus, General Counsel is not able to make a prima facie showing sufficient to show that Simpson's *alleged* protected conduct was a "motivating factor" in SJJS's decision to discharge him. But, even *assuming* the General Counsel was able to make a prima facie showing sufficient to show that Simpson's protected conduct was a "motivating factor" in the employer's decision to discharge him, Respondent has established that it had a legitimate, nondiscriminatory reason for his termination and that SJJS has a practice of terminating employees who refuse mandation a second time. Simpson's conduct of walking off mandation puts SJJS at risk of violating State of Michigan Licensing rules, is unfair to other employees who must work in his absence, and could result in Respondent's losing of its license in the event ratio rules are not maintained.

Simpson was terminated for a legitimate business reason unrelated to any putative concerted protected activity and there is no causal nexus between the alleged concerted actions and his discharge. The ALJ erred in finding he was discharged in violation of 8(a)(a).

C. THE ALJ ERRED IN CONCLUDING THE RESPONDENT IMPLEMENTED A "NEW" POLICY OF MANDATING CONTINGENT WORKERS AFTER THE UNION ELECTION. JENKINS WAS PROPERLY TERMINATED FOR WALKING OFF MANDATORY OVERTIME FOR THE SECOND TIME IN VIOLATION OF RESPONDENT'S PROHIBITED CONDUCT POLICY #8 AND #13

The ALJ found that on or about June 1, 2016, contingent employee Jenkins was terminated for refusing to work mandatory overtime; and, since the employer implemented the practice of mandating contingent workers without providing notice to or allowing the SPFPA to bargain with Respondent, that Jenkins' discharge was in violation Section 8(a)(1)(5) of the Act. The ALJ also found that the change in policy was motivated by unlawful considerations and was a violation of 8(a)(3) (Decision, p. 52, 55).

Through its business records, its witnesses, and General Counsel's witness Hionel Black, Respondent proved its practice to mandate overtime to contingents prior to the representation election. (RX 17). Therefore, the ALJ erred in finding a violation of Sections 8(a)(1)(3) and (5) of the Act.

According to all witnesses who testified on the issue, overtime is either voluntary or mandatory. (TR- 90-91). When an employee is "mandated," the Company is requiring the employee to stay over because another employee has called off. "Mandation is when staff have to stay an additional shift." (TR- 215). It is clear from the testimony and Respondent's business records that SJJS mandated contingent workers prior to the union election in March 2016.

Fernandez, Cooper and Stewart testified that Respondent has never had a policy of excluding contingent employees from mandation. (TR- 652, 758-759, 771-771, 780). While contingent employees are allowed to pick the days of the week on which they work, once they are on-site, they are "fair game" and can be mandated just like full-time employees. (TR-758). Further, General Counsel's witness, Hionel Black confirmed that SJJS mandated contingents prior to the union election. (TR 445-447) Additionally, the testimony of Fernandez, Cooper and Stewart was supported by business records of SJJS that clearly demonstrates the mandation of contingent employees prior March of 2016. (TR 722-729)(RX 17).

In his decision, the ALJ admits that the business records of Respondent confirm that contingent workers were "mandated" prior to the union election. However, the ALJ rejects the business records because he conflates "mandated" with "volunteers" and misconstrues the testimony of James Wiser, Respondent's Human Resources Administrator. All

testimony of witnesses on the subject confirms that employees volunteer to work overtime or they are mandated to work overtime. There is no support in the record for a conclusion that employees volunteer to be mandated. Yet, this is the non sequitur relied on by the ALJ to disregard the pre-election business records of the Respondent which clearly show that contingent employees were “mandated.” In conflating the concepts of voluntariness with mandation, the ALJ reached an untenable conclusion that contingents who were “mandated” might have volunteered to work the overtime. If an employee is “mandated” they are forced to work overtime. See testimony of Clarence Atwater and Quiana Jenkins (TR- 78; 216) See also definition of “mandate:”

- an authoritative command; especially: a formal order from a superior court or official to an inferior one. Merriam-Webster Online Dictionary <https://www.merriam-webster.com/dictionary/mandate>. (9 July 2018).
- to make something necessary, esp. as a rule: The law mandated a minimum six year sentence for violent crimes. Cambridge Online Dictionary <https://dictionary.cambridge.org/us/dictionary/english/mandate>. (9 July 2018).

A volunteer to work overtime is a *volunteer* and is not forced to work. The Board should reject the ALJ’s incongruous finding:

The Respondent’s argument that its records show some contingent employees worked mandated overtime shifts before the election in March 2016 constitutes evidence that [a policy against mandation of contingents] did not exist, is not entitled to any weight. I find no merit in that contention because the record establishes that contingent employees have always been able to voluntarily work overtime hours and shifts, and they have done so. However, they could not be required to do so by the Respondent. Those records referenced by Respondent do not establish that those contingent employees who worked mandated overtime shifts were actually forced to work them, and instead they could have voluntarily worked them. TR-51-52.

The business records of the Respondent show that contingent employees were “mandated.” A defined, well-known term meaning the employee was forced to work overtime. The records did not show that the employees volunteered for overtime.

The ALJ follows-up on his conflating of volunteerism and mandate by misrepresenting the testimony of Wisner. According to the ALJ, Wisner acknowledged that the “contingent employees could have volunteered to work those mandated shifts, which was not noted on those documents.” The testimony that the ALJ relies upon is at TR-737-38 and addresses how a *volunteer* would be indicated on business records:

Q. Okay. Thank You. Turning your attention, sir, to R—what’s been marked as Respondent’s Exhibit 17. Do you have that in front of you, sir?

A. Yes.

Q. Now, with regard to all of these documents, how would it be noted on these documents that a contingent employee *volunteered* to work a mandated shift. How would it be noted on these documents?

A. It wouldn’t be noted on a status change. If the supervisor did it properly, it would be on the timecards.

Q. Okay.

A. Under the raw notes. They put a note in. They’re suppose to put a note.

Q. Okay. If the supervisor didn’t do it properly –

ALJ RANDAZZO: I’m sorry, I don’t – I’m sorry. *I don’t see anything about voluntarily.* Am I –

WITNESS: There isn’t one on this page.

WITNESS: So, the supervisor should indicate that on their time card, putting a note in. They didn’t in this case ...

ALJ: Okay, okay.

WITNESS: -- but that's how they would do it.

Contrary to the ALJ's misstatement, Mr. Wisner did not testify that the contingent employees who the records indicate were "mandated" might have volunteered. He testified that if the contingent employee "volunteered" it would be noted on the time card.

Respondent's Exhibit 17 was not a record of volunteers, it was a record of *mandation*.

Respondent's Exhibit 17 confirmed that the following contingent employees were mandated prior to the union election: Brock Agnew (2/2/15), Anthony Coleman, (10/23/15; 12/04/15; 12/26/15), Sabrina Crawford (9/17/15; 9/22/15; 10/20/15), Kalaundra Hall (12/23/15), Eric Hunter (5/11/15); and Malikan Lattimore (10/22/15). Employees who testified that "they were told" there was a policy against mandation of contingent employees were either purposely testifying untruthfully or they were simply misinformed. In either event, SJS did not implement a new policy of requiring contingent employees to work mandation and it submitted unchallenged hard business records to establish that fact. (TR- 722-729).

Furthermore, SJS's mandation policies (RX 30, 31) do not differentiate between full-time and contingent employees. The Overtime Replacement Procedure Policy dated February 1, 2016 provides that "[a]ll Youth Workers" are placed on the on-call worker schedule" ... "These Staff members will be assigned to be on-call only on days they are already scheduled to work." Further the policy provides that "[s]hould you be requested to report to work by a Supervisor (or Senior Staff member), failure to do so will be an act of insubordination subject to discipline." *Id.* Further, the earlier version of the rule, the Overtime Replacement Procedure, dated November of 2007, also provided that all YWs are

subject to mandation: “The on-call worker schedule will be composed of all youth workers. These Staff members will be assigned to be on-call only on days they are already scheduled to work” “all staff members are on 24 hours call.” (RX 31, p. 6-7)

Quiana Jenkins, a contingent YW, was mandated to work a shift on May 6, 2016, and refused to work. She was given a written reprimand. The discipline document warned her that further violation of SJJS policies, procedure, or rules may lead to further disciplinary action. (TR- 650-651)(RX 18, p. 1). Jenkins’ refusal to work the mandated shift violated SJJS’s policies and procedures on Insubordination (failure or refusal to obey instructions of supervisory staff) and leaving the job during work hours without permission or abandonment of shift. (RX 18, p. 1).

Later that month, on May 26, 2016, Jenkins met with Fernandez and Sherrod. During that meeting, Jenkins was warned that if she walked off another mandated shift she would be terminated. (TR- 651). The next day, on May 27, 2016, Jenkins refused to work mandatory overtime and left the job during working hours without receiving permission of her supervisor. (RX 18, p. 4). She was terminated effective May 27, 2016. (RX 12).

The ALJ erred in concluding that SJJS violated Sections 8(a)(1)(3) and (5) of the Act because the policy of mandating contingents pre-dated the representation election. Further, SJJS has consistently disciplined employees who “walk-off” or refuse mandation and its termination of Jenkins was consistent with those policies. (*See* Argument B).

D. THE RESPONDENT DID NOT IMPLEMENT A NEW POLICY OF NOT ALLOWING BREAKS BETWEEN SCHEDULED AND MANDATED SHIFTS

The ALJ erred in finding that Respondent had a pre-election policy of allowing employees who were mandated to work overtime to take a break at the conclusion of the employees’ regular shift. The ALJ also erred in concluding that Respondent implemented a

policy disallowing breaks in retaliation for employee support of the Union. (Decision, p 46, 49) Lastly, since there was no new policy, the Respondent had no obligation to negotiate with the Union.³¹

SJJS never had a policy of allowing employees to take a break between scheduled and mandated shifts. (TR- 772). Instead, employees who felt the need to take a “break” would call their Supervisor and ask for relief. (TR- 772-773, 821-822). Once relieved, the mandated employee could take a short absence from the Pod while the Supervisor stepped-in to provide the ratio coverage to the youth. (TR- 772-773, 822).

The ALJ erroneously concluded that the General Counsel established that, prior to the representation election, SJJS had a policy providing for breaks – i.e., allowing employees to leave their pods, without relief, and without securing coverage sufficient to meet the staff to resident ratio. To the contrary, SJJS established that no such policy existed. Specifically, Respondent showed that in August of 2014 (11 months prior to the rally and 19 months prior to the representation election) the Respondent specifically rejected a request to implement a new policy of allowing breaks.

In August of 2014, the question of whether employees must have breaks between regular and mandated shifts was discussed in a “town hall” meeting. (TR- 590).³² During the August 2014 meeting, an employee told Fernandez that State law required SJJS to provide a break to employees between a regular and mandated shift. (TR- 591). Since SJJS did not provide that type of break to its mandated employees (or any scheduled breaks to any of its staff), Fernandez contacted Human Resource Administrator Wisner, by email, to

³¹ The parties are currently bargaining for an initial contract. See footnote 7.

³² Town hall meetings occur occasionally so that SJJS leadership and staff can exchange information, voice concerns, and address other issues. (TR- 590).

determine whether Michigan law required SJJS to provide breaks. (TR- 591-592).

Fernandez's email states:

Hi James,
There is a new upraising starting at Calumet (Mr. Rodney Barrett) where staff are saying they are entitled an hour break if they get mandated "according to the State of Michigan".

Please enlighten me as this is NOT our practice and frankly not feasible.

* * *

Hi Melissa,
This is a misconception There are no requirements for breaks, meal or rest periods for employees 18 years of age or older no matter the number of hours they work. (RX 8)

Since SJJS did not have employees under the age of 18, Wiser told Fernandez that SJJS did not need to change its established policy of not allowing breaks. The ALJ ignored the existence of the unchallenged business record (email exchange) between Fernandez and Wiser insofar as it confirmed SJJS's pre-election policy concerning breaks. Furthermore, he did not address the fact that if supervisors were allowing employees breaks, as testified to at hearing, the breaks would violate licensing rules. Violations of licensing rules could result in SJJS losing its license and it would be out of business. (TR- 568). If the employees left their pods after their scheduled shift without relief they would be in violation of State licensing rules on Lockdowns and Ratios. (RX 24, RX 23, TR- 579- 581). The State licensing rules provide firm restrictions as to when and how youth may be locked-down. The licensing rules do not allow employees to lock-down residents or leave them unsupervised so that the staff assigned to them can take a break. (RX 24; TR- 579- 581; TR- 760

Further, while ex-supervisors (Johnson and Black who were terminated for misconduct and who admitted hostility toward SJJS) testified that they allowed breaks, any

supervisor allowing such breaks would be subject to discipline. (TR- 760) It is axiomatic that a supervisor or manager who violates a Company's rules does not thereby create Company policy. The Company policy is as stated by Fernandez in the 2014 email: A break "is NOT our practice and frankly not feasible." (RX 8).

Once SJJS determined that it was not required to change its policies in order to give scheduled and mandated shifts (in August 2014), Fernandez reiterated to SJJS Facility Directors that no breaks are allowed between scheduled and mandated shifts. (TR- 594; TR- 759). In turn, Facility Director, Oliver Cooper reinforced it with supervisors and managers. (TR- 759). It was Fernandez's understanding that this policy was communicated to the youth workers and other staff, as she was told by her supervisors, managers and directors that this policy was being enforced. (TR- 708-709).

Facility Center Director Cooper confirmed that he met with Fernandez shortly after the August 2014 town hall meeting to discuss the employee's claim that SJJS was violating Michigan law by not allowing breaks between regular and mandated shifts. (TR- 759). Cooper testified that he remembers being confused about the issue of scheduled breaks even being raised because breaks were never a part of Respondents' policy. (TR- 759). Cooper testified that Fernandez made it clear to him and others that there was to be no breaks scheduled between regular and mandated shifts. (TR- 759). Cooper relayed this information to his staff during Thursday management meetings, and expected the information to be shared with employees. (TR- 759-760). Cooper also testified that if a manager did allow a break between regular and mandated shifts, that they were violating Respondents' policy and could be disciplined (TR- 760); and, further that it would be a

violation of the State of Michigan licensing rules and Respondents' policy to lock down residents in order for employees to take breaks. (TR- 760).

Facility Center Director Stewart also testified that it would be a violation of the State of Michigan licensing rules and Respondents' policy to lock down a resident in his cell in order for a YW to take a break. (TR- 772). Stewart, who has been with SJJS for 11 years, also testified that he was unaware of any time or situation when YWs were given a break between regular and mandated shifts. (TR- 772). He also testified that he never heard an "announcement" over the radio that provided YWs a "break" (and thereby allowing them to leave their pods and lock-down the youth). (TR- 781-782).

Since Respondent has never had a policy allowing employees to take a break between a scheduled and mandated shift, the ALJ's conclusion that the policy was changed in retaliation for the employees having elected the SPFPA as its bargaining representative is erroneous. Thus, ALJ improperly found violations of Sections 8(a)(1)(3)(5) in regard to Respondent's maintenance of its no break policy and improperly ordered Respondent to "reinstate a policy/practice of providing breaks between employees' scheduled and mandated overtime shifts." The remedy ordered requires the Respondent to violate State Licensing rules and could result in revocation of SJJS's license and force closure of all SJJS operations.

E. KELLY RECEIVED A WRITTEN WARNING ON SEPTEMBER 24, 2015, BECAUSE SHE DID NOT CALL-IN ON EACH DAY OF ABSENCE AS REQUIRED BY THE RESPONDENT'S POLICY.

General Counsel alleges that Respondent issued a "write-up" to Kelley on September 24, 2015 because Kelley assisted the AFSCME, engaged in concerted activities, and to discourage employees from engaging in these activities. (Complaint ¶ 20(a) and (b)). The

ALJ determined that General Counsel did not put forth evidence sufficient to establish that SJJS knew of Kelley's assistance to the Union. However, he concluded that it had knowledge of her participation in other undefined concerted protected activities and that SJJS issued a written warning to deter such activities. Even if SJJS had knowledge of Kelley's concerted protected activities prior to her write-up on September 24, 2015, General Counsel did not establish that Respondent acted for a proscribed purpose. Respondent had a legitimate, nondiscriminatory reason for the write-up and would have taken the same action even in the absence of the *alleged* protected conduct. Respondent established that the warning was given consistent with its legitimate business practice of disciplining employees who fail to follow its call-in procedure. The ALJ erred in concluding that the write-up was given to Kelley for the purpose of discouraging concerted activities in violation of Section 8(a)(1) of the Act.

First, let's be clear. On September 24, 2015, 80 days after the rally, Kelley received a written warning – not a suspension, not a demotion, but a written warning. (GC Exh. 16, 18; RX14, p. 30). She received the warning because she admittedly failed to call off on each day of a two day absence (September 22 and 23). Kelley admits that she called in only once. (TR- 299). Pursuant to SJJS's Time and Attendance Policy, employees are required to call in on each day of absence:

Whenever an employee is going to be absent more than one day, they must contact their immediate supervisor each day, unless verification justifying the absence has been received and approved. (RX14, p. 36).

Testimony at the hearing was consistent -- employees are required to call-in on each day of absence. (TR- 624 (Fernandez); TR- 719-720 (Wiser)). Even General Counsel's witness Ruth Crosby confirmed the policy:

- Q. So you also testified about the rule on – in regard to call-ins, and you have to call in 3 hours before your shift?
- A. Yes.
- Q. Every day that you're going to miss?
- A. Yes.

(TR- 495).

Further, business records of SJJIS show that it has a routinely and consistently disciplined employees for improper call-offs. (TR- 718-720). Respondents' Exhibit #16 contains records of disciplinary actions for improper call-offs for the period of March 13, 2014 to May 28, 2015. (TR- 719)(RX 16). Through those records, in addition to the testimony of Fernandez, Wisner, and Crosby, Respondent established, without question, that Respondent issued disciplinary actions for improper call-offs to employees on 98 occasions from March 2014 to May 28, 2015. (RX 16; TR- 719-720). Like Kelley, these employees were disciplined because the manner in which they called-off was not according to policy. (TR- 720).

Kelley grieved the September 24, 2015 written warning. The grievance worked its way through the grievance procedure to Executive Director Fernandez. (RX 14; TR- 623-624). Fernandez met with Kelley on October 8, 2015 to discuss the grievance and to discuss Kelley's issues with a recent schedule change. (Kelley was upset because the change occurred with very little advance notice, and she had "a lot of things already planned."). (TR- 625). During the meeting, Fernandez agreed with Kelley that the schedule change occurred quickly and empathized with Kelley's position. Fernandez then changed

the effective date for the schedule change to accommodate Kelley.³³ However, she did not change the decision to issue Kelley a written warning. (TR-626)

Once again the ALJ is substituting his business judgment for that of the Respondent. SJJS has a policy that requires employees to call in for every day of absence. If an employee is going to be absent for more than one day they must call in on each day unless they have provided verification justifying the absence *and the Company has approved*. Nowhere in the record is it asserted that Kelley's absence was approved, nor is there any evidence supporting the proposition that SJJS waived the requirement that Kelley call in each day.

The ALJ apparently feels that because Kelley showed a supervisor a *document after her absences* saying she had a court appointment on September 22 and a doctor's note for September 23 that SJJS *should have* "approved" her absence and waived the requirement that she call-in each day. While this may be the result the ALJ would prefer if he was making business decisions for SJJS, it is not the case. SJJS did not approve her absence nor did it release her from a duty to call in, and there is no evidence in the record to support contrary conclusions. In her written statement about the issue, Kelley admits that she did not provide documents to her supervisor in advance of her absence and she did not allege that the absences were approved. Instead, she records that on September 21, 2018:

"I told Mr. Bradford that I would not be in the following Tues./Wed. and that I would bring in the necessary paperwork. Mr. Bradford then told me to call back after 10pm and inform Mr. Judkins and I told him that I could not that he had to write it up/type it up." (GC Exh. 19).

The ALJ states that Kelley "did not have to call-in on September 23 for that day's absence because she supplied the respondent with documentation of her scheduled court

³³ Far from showing animosity toward Kelley, Fernandez showed sympathy and compassion in accommodating her family needs.

appointment on September 23, 2015, at 8:30 a.m., and a doctor's note for her daughter which was for September 22, 2015 (TR. 289; GC Exh. 20 and 21)."

He then makes the business judgment that her after-the-absence delivery of an excuse for the absence "constituted sufficient verification justifying the absences, and after receiving that documentation, the Respondent failed to inform her that it was in any way insufficient or that it would not be approved". (Decision, p. 44-45).

It is undisputed that Kelley did not call in on each day of her absence. It is also undisputed that Kelley did not have approval of the Company relieving her from the obligation to call-in. The ALJ improperly substituted his judgment for that of SJJ.S.

Further, there is no causal connection between Kelley's alleged participation in the rally on July 6, 2015³⁴ and the issuance of a written reprimand 80 days later.

The ALJ impermissively second-guessed SJJ.S's application of its policies and erroneously concluded that Kelley was issued a written warning because she engaged in the rally nearly three months prior. SJJ.S issued like discipline to other employees on 98 occasions from March 2014 through May 28, 2015. There is no basis for determining that the discipline issued to Kelley on September 24, 2014 was motivated by illegal animus.

Therefore, the Respondent excepts to the ALJ's decision that the written warning was issued in violation of Section 8(a)(1).

F. FERNANDEZ DID NOT ENGAGE IN SURVEILLANCE OF EMPLOYEES ENGAGED IN THE RALLY

The ALJ erred in concluding that Fernandez unlawfully engaged in surveillance of the employees concerted protected activities in violation of Section 8(a)(1) by observing them from the driveway or parking lot of the facility. (Decision, p. 20) In order to do so,

³⁴ Assuming this is the other "concerted protected activity" that the ALJ left undefined but claims existed.

the ALJ improperly credited far-fetched and inconceivable testimony by Neely (and only Neely) that Fernandez came out of the facility, walked down a driveway approximately 350 feet until she was about 40 feet from the participants at the rally and, in broad daylight, wrote down names of rally participants on pad of paper. Neely testified that Fernandez stayed out at the rally for approximately 10 minutes while employees ran for cover. This fiction was not supported by the testimony of any other witness and is simply is preposterous. Although many rally participants testified, Neely was the only alleged witness to this alleged brazen conduct even though he was one of approximately 40 participants at the rally.

The Complaint does not allege that Fernandez unlawfully surveilled employees in any other way, nor does it allege that any other supervisor surveilled employees in any other way. *See, Complaint.*

Neely's testimony that Fernandez was in the parking lot surveilling employees was fabricated. No credible evidence was offered to support this allegation.

i. TESTIMONY OF GENERAL COUNSEL'S WITNESSES

Under Board precedent, "management officials may observe public union activity, particularly without violating Section 8(a)(1) of the Act, unless such officials do something out of the ordinary." *Arrow Automotive Industries*, 258 NLRB 860 (1981). "A supervisor's routine observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance." *Farm Fresh Co., Target One, LLC & United Food & Commercial Workers Union, Local. No. 99, AFL-CIO*, 361 NLRB No. 83 (2014). Also, an employer's mere observation of open, public union activity on or near its property does not

constitute unlawful surveillance. *Grill Concepts, Inc. d/b/a the Daily Grill & Unite Here, Local 11*, 364 NLRB No. 36 (2016).

Testimony given by General Counsel's witnesses as to supervisors and managers they saw when they were at the rally was consistent in that they testified that they observed supervisors coming to work in the normal course and nothing else. The only exception, and oh, what a notable exception, was the fabricated testimony of Alfred Neely.

Sherman Cochran and Danielle Boatwright testified that they did not see any managers or supervisors during the picket. (TR- 189, 461). Cochran was at the rally from about 9:30 a.m. to 2:30 p.m. and Boatwright was there from about 1:00 p.m. to 2 p.m. (TR- 189, 461).

Clarence Atwater ("Atwater") stated that he saw Manager Childs and Supervisor Ferrell attempting to get to work by walking through the sally port of Calumet Center, but he did not see Fernandez. (TR- 82-83).³⁵ Atwater testified there were about 40 participants at the rally and that he was there from about 8:30 a.m. to 2:00 p.m. (TR-81-82)

Lamont Simpson testified that there were about 40 participants at the rally, and that he was there from approximately 5:15 a.m. to 2:00 p.m. (TR -127-128, 132-133). And, he did not testify that he saw Fernandez other than entering the building. He saw Ferrell, Burton, Sherrod, Cottingham and Fernandez in their vehicles on the way to work and that Supervisor Dix "popped his head out" in the process of letting Fernandez into the facility. (TR- 132-133). Both Dix and Fernandez denied that Dix opened the door for Fernandez, and Dix denied any "popping." (TR- 829). Simpson did not see any employees talking to or interacting with any managers or supervisors during the picket. (TR- 133).

³⁵ General Counsel does not allege illegal surveillance by any supervisor other than Fernandez.

Tamika Kelley testified that she saw supervisors Childs, Johnson, Cottingham, Dix, and Ferrell “going to work,” “driving by,” entering the building through the sally port, and/or “letting Fernandez in.” (TR- 258). She did not testify that any supervisor interacted with, photographed, or took notes of any participants. (TR- 257-259). Kelley testified that she arrived at approximately 8:00 or 9:00 a.m. and that she remained at the rally until approximately 5:00 p.m. (TR- 255, 257).

Jamar Marcus, Ruth Crosby, and Raphael McQueen testified that they only saw supervisors “driving by”. (TR- 390, 481-483, 518-519). None of them testified that any supervisor interacted with, photographed, or took notes of any participants. Marcus testified that he was at that rally from approximately 7:00 a.m. to 10:00 a.m., Crosby from 8:30 a.m. to 4:00 p.m., and McQueen, from 5:45 a.m. to 3:00 p.m. (TR- 389; TR- 478-480; TR- 513, 522).

Of all the participants in the rally, only one, Neely, testified that supervisors came out of the Calumet facility to watch the protest.³⁶ And, he is the only witness who testified that Executive Director Fernandez walked from the front door of the Calumet facility to within 40-50 feet from rally participants. Neely claims that Fernandez stood out there for about 10 minutes with pad of paper in hand, making notes while observing the participants. Further, that Fernandez was blatantly open and obvious that rally participants were hiding behind their cars and hiding their faces. (TR- 327- 329).

It is simply inconceivable that only Neely saw Fernandez. The ALJ though, credited this obvious lie. It is also unbelievable that Fernandez did what Neely accuses her of, and yet no one snapped a picture of her with their mobile devices, no one else saw her taking

³⁶ Neely testified that Fernandez, Stewart, Burton, Cottingham and Dix came out of the facility to watch the protesters. (TR-326-327)

notes, and no one – except Neely – saw her come out of the building and walk up the approximately 350 foot entranceway to where the rally was taking place³⁷ and stand there for 10 minutes making notes.

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 13-14 (2014). Further, credibility determinations need not be all-or-nothing propositions – indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all of a witness' testimony. *Id.*, slip op. at 14.

In this case, the ALJ improperly credited the inherently improbable testimony of Neely as to the alleged actions of Fernandez even where all other General Counsel witnesses who testified that they were at the rally saw certain supervisors coming and going in the normal course, but Fernandez was not observed doing the surveillance that Neely asserts.

³⁷ Respondent's Exhibit #22 is a bird's eye picture ("map") of the Calumet facility. Neely claims that Fernandez left the building by the front door. Assuming that his testimony is true (which it is not), Fernandez must then have walked out the sidewalk that leads to the entrance drive, and then through the parking lot or up the drive way to the westernmost point of the rally. This is marked by a "I" on Exhibit #22. Most of General Counsel's witnesses testified that the rally took place between the "I" and "H" on Exhibit #22. Crosby testified that the "picketing" never went across the access road ("I") to the Calumet facility. Instead, the participants were between the access road ("I" on the map) and then east toward Hamilton Road (toward "H" on the map.) The participants in the rally never picketed across the entrance to the Calumet facility. Instead, they were in front of residences along Glendale Road (marked "H" on the map)(TR- 491-492). McQueen testified that the rally participants never crossed the access road to the Calumet facility. Rather, the participants "stood" around holding signs from about 10 feet east of the Calumet access road ("I") and then east approximately 50 feet toward Hamilton Road and "H" on the map.(TR- 528-529) Atwater testified that the rally was on Glendale (marked "F," "I," and "H" on the map) in front of the parking lot (marked "B" on the map). So, on Glendale, east of the entrance road to the facility. (TR- 81). Cochran and Stephen Johnson testified that the rally was on the "side street" in front of the Calumet building, on Glendale (marked "I" and "H" on Exhibit #22)(TR- 189; TR- 377).

Since Neely's testimony is preposterous and should not have been credited by the ALJ, General Counsel failed to establish that Fernandez surveilled employees on the day of the rally. Furthermore, General Counsel has not alleged that any other supervisor or manager of SJSJ improperly surveilled employees. The conduct of supervisors and managers going about their normal activities, going to and from work, does not constitute illegal surveillance. The ALJ erred in his conclusion that Fernandez surveilled rally participants in violation of Section 8(a)(1). .

ii. THE COMPLAINT DOES NOT ALLEGE THAT FERNANDEZ SURVEILLED EMPLOYEES IN ANY WAY OTHER THAN BY STANDING IN THE PARKING LOT. FERNANDEZ DID NOT ENGAGE IN OTHER SURVEILLANCE.

On the morning July 6, 2015, Manager Christopher Wilson called Fernandez and told her there were many call-offs that morning. She got ready and drove to Calumet, parked her car, and entered the facility. (TR- 599-600). Fernandez came to work using the Davison Freeway coming from the west to east, turning left on to the facility access road ("I" to "J" on Respondent's Exhibit #22). Thus, Fernandez never drove her vehicle in front of where the employees claimed they were either out of their cars, or in their cars preparing to have the rally.³⁸ Fernandez arrived at approximately 8:30 a.m. and she did not notice any picketers or unusual activity or vehicles on Glendale Street. (TR- 601, 662). The testimony of all of General Counsel's witnesses (except Neely), Fernandez, and the security logs maintained in the security office (by members of the bargaining unit) confirm that Fernandez never left the facility until 10:00 p.m. on the day of the rally. (TR- 600-601)(RX 6).

³⁸ See footnote, 37.

General Counsel witness, Hionel Black (“Black”), a former security supervisor who at the time he testified was recently discharged by SJJS for job abandonment,³⁹ testified that he was told by security supervisor, Donald Ferrell , that on the day of the rally Fernandez was in the security office/control room watching the rally. Black also testified that he called Ferrell at the Calumet security office and confirmed with him that Fernandez had been in the security office watching the rally. (TR- 431; 450). Black’s testimony was shown to be fabricated and the ALJ did not credit his testimony about Ferrell. Ferrell was not on the schedule for July 6, 2015 and never stepped foot inside the facility on that day. This fact was confirmed by the security logs, the testimony of Dix who was the security supervisor that day, Ferrell’s time sheet, and the testimony of Leslie. (TR- 620; TR- 810; RX 6; RX 43). Thus, Black’s testimony is incredible. He could not have contacted Ferrell in the facility because Ferrell was not in the facility that day. And, for the same reason, Ferrell could not have observed Fernandez. Fernandez was never in the security office/control room on July 6, 2015:

Q. Specifically, Honiel Black testified that Mr. Ferrell told him that you were in the control room watching the monitors and watching the video feed. Is that true?

A. That is not true.

Q. Did you go in the control room that day?

A. I never went in the control room for any reason that day.

(TR- 620-621).

In fact, while Fernandez knew that there were many call-offs on the morning of July 6, 2015, she did not know that the employees were actually having a rally/picketing on Glendale between the access road to the facility and Hamilton (between marks “I” and “H”

³⁹ Black was terminated for the same reason as Simpson.

on Respondent's Exhibit #22).⁴⁰ (TR- 703-704). She was absorbed with handling the ramifications of the call-ins, including communications with the State of Michigan licensing bodies to inform them residents were locked down and why, and to keep them in the loop. (TR- 601-602, 704). She "did a lot of fielding phone calls from county people, from state people, had some calls from parents that heard from the CMO's, from their contract managers. And then I started getting calls from the county and from the State of Michigan asking me what was going on, why the kids were still locked down." (TR- 606).

Black also testified that in some of the weekly meetings following the rally, Fernandez intimated that she wanted to get every employee's name who participated in the rally. (TR- 421-428). Black's testimony is incredible as he obviously lied about being told by Ferrell that Fernandez was in the control room, and he admits that he only testified because he was fired, and that he was not happy about it. (TR- 444-445).⁴¹ Fernandez denied that she ever asked supervisors or managers to make a list of rally participants:

- Q. Did you at any time go into any of these meetings and encourage or tell people they should be making lists of people who participated in the concerted activity, the picketing or the presentation of a petition?
- A. I did not.
- Q. Did you to your knowledge intimate in any way they should be doing...
- A. I did not.

(TR- 656).

The ALJ erred in concluding that Fernandez unlawfully surveilled rally participants in violation of Section 8(a)(1) by use of security monitors or from the facility (Decision, p.

⁴⁰ See footnote 37, supra.

⁴¹ Further, had she wanted to, Fernandez could have simply reviewed the attendance records. There is no evidence to support that she reviewed the attendance records.

19) as such a charge is not set forth in the Complaint and no witness testimony of other evidence supports that conclusion.

G. THE ALJ ERRED IN FINDING THAT DIX INTERROGATED EMPLOYEES ABOUT THE WRITTEN COMPLAINT ABOUT WORKING CONDITIONS

Respondent excepts to the ALJ's ruling that Dix interrogated employees about their concerted protected activities, sympathies and support, in violation of Section 8(a)(1) of the Act. (Decision, p. 12). Specifically, General Counsel alleges that Dix interrogated employees about the "To Whom It May Concern" anonymous letter that was discovered by Human Resource Administrator Wiser in his mailbox on July 2, 2015. (GCX 2). That letter was never distributed to the facilities' supervisors, nor was it discussed with them. (TR- 597). The testimony from General Counsel's witnesses is contradictory and untrustworthy. Simpson testified that he spoke with Dix in Pod 3 on or about July 2, 2015. He claims that no one else was present, and that Dix asked him if he knew "anything about" the letter. Supposedly, Dix then said that management "ain't going to do shit" about it. (TR- 121). Neely contradicted Simpson and testified that he was with Simpson when the discussion supposedly took place in Pod 3, but they did not speak to Dix, but rather Calumet Facility Manager Christopher Wilson. (TR- 324). Furthermore, Neely's testimony was otherwise untrustworthy. He was obviously lying when he testified that Fernandez came out to the rally with a legal yellow pad, stood about 40 feet from the employees and made a list of employees.⁴² Also, Simpson was clearly wrong, or lying, when he said that Dix buzzed him into the administration area when he allegedly surreptitiously distributed the "To Whom It May Concern" memo at approximately 5:30 a.m. on July 2, 2015. Dix is a Swing Shift Security Supervisor, and he has never been in a SJS facility at that time of the morning.

⁴² See Argument F(i).

(TR- 827). He works either from 7 a.m. to 3 p.m. or 3 p.m. until 11 p.m. (TR 826-27). The ALJ dismissed Simpson's lie as an innocent "mistake" about the time rather than denouncing it for the fabrication it was.

Furthermore, *assuming* that Dix asked Simpson whether he "knew anything" about the To Whom It May Concern memo or said that they "ain't going to do shit," neither of these statements raise to the level of "interrogation" in violation of 8(a)(1).

The Act makes it illegal to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this Title." Section 8(c) of the Act implements the First Amendment by requiring that "any views, argument or opinion, shall not be evidence of an unfair labor practice" so long as such expression does not contain any "threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). "Intemperate" remarks that are merely expressions of personal opinion are protected by the free speech provisions of Section 8(c). *Sears, Roebuck & Co.*, 305 NLRB 193 (1991). Further, disparaging remarks alone are insufficient to constitute a violation of Section 8(a)(1). *Trailmobile Trailer, LLC*, 343 NLRB 95 (2004). A supervisor expressing a preference for a nonunion shop or even telling employees that they should not support a union are statements protected by Section 8(c) of the Act. *Park N Fly, Inc. & Int'l Bhd. of Teamsters, Local 120*, 349 NLRB 132, 141 (2007) (employer did not need a "damn union," union would not do employees any good and owner would not "go for a union in there"); *Evergreen America*, 348 NLRB 178, 200, 204 (statements that union is "no good," "not good for you" and "not a good idea to support the union"); *Children's Services International Inc.*, 347 NLRB 67, 68 (2006) (where employer admittedly upset about employees' union activities remarked on employee' lack of education and told them they were lucky to have

jobs, the Board found that employer was expressing opinion that employees were fortunate to have their jobs and there was no threat that their jobs would come to an end); *Rogers Electric Co.*, 346 NLRB 508, 509-510 (2006) (employer's statement that engaging in protected conduct was the "wrong way to make changes" was found by Board to be personal opinion "no different in kind from one in which an employer tells employees that there is no need to call a union in to resolve issues; the statement amounts only to a personal opinion protected by Section 8(c) that the employees do not need a union"); See also *International Baking Co.*, 348 NLRB 1133, 1135 (2006) (intemperate remarks that are merely expressions of personal opinion protected by Section 8(c)(1)); *Pacific Custom Materials, Inc.*, 327 NLRB 75, at *23 (1998)(affirming ALJ decision that "Respondent is entitled, under Section 8(c) of the Act, to freely express its opinion that the company does not need a union").

A statement that the Company does not care about the concerns of their workers and won't "do shit" is not a threat or an interrogation. Rather, a response of that type shows a lack of concern with employee dissatisfaction, which may be an unfortunate response, but it is not an illegal one. In fact, both Neely and Simpson testified that the Company's alleged response, contrary to the ALJ's conclusion, inspired them to take additional and more significant concerted protected activities rather than discouraged them.

Simpson testified that when Dix told him that Director Steward "balled up," the letter, threw it away and said "they ain't going to do shit," he was disappointed because the employees had hoped that the Company would take action on their concerns. Instead, Simpson said he felt the Company "did not take the [letter] seriously." According to

Simpson, it was because SJJS was unconcerned about the letter and would not make any changes that he and McQueen decided that they would have a rally. (TR- 120-124). In fact, Simpson said the Company's non-response was "a big slap in the face." (TR- 124). Simpson testified that he was alone with Dix when Dix told him about the Company's response.

Contrary to Simpson, Neely testified that it was not Dix, but rather Supervisor Wilson who told him about the Company's response to the letter. TR – 323-24. Further, Neely testified that he and Simpson were together when the conversation took place. Like Simpson, Neely testified as to the effect of the Company's response. Because the Company supposedly responded that it was "not going to do shit with them and they better be at work", Neely and Simpson felt "no one's hearing our issues and concerns" we have "to protest." They then decided that it was necessary to have a rally. TR- 323-325. They called some "people who were in that field." The July 6, 2015, protest was then planned. *Id.*

The statements attributed to Dix do not amount to a threat of reprisal or force and do not constitute a violation of the Act. Where interrogation is sufficiently isolated and occurs in an atmosphere free of coercive conduct, no remedial order should issue in an unfair labor practice case. *Temp Masters, Inc.*, 344 NLRB 176 (2005)(no violation of the Act where a supervisor asked an employee whether a union representative had been on the job site, considering the circumstances surrounding the isolated question, there was no coercive effect to the question); *Toma Metals, Inc.*, 342 NLRB 787 (2004)(question by a low-level supervisor of "what's up with the rumor of the union I'm hearing?" did not violate the Act where employees prompted the question and the conversation happened on the plant floor); and *Dieckbrader Express*, 168 NLRB 867 (1967).

The ALJ erred in concluding that Dix unlawfully interrogated Simpson.⁴³ By Simpson's admissions, the impact of the statement that the Company was not going to "do shit" was to inspire additional and higher levels of concerted protected activities. The ALJ's finding that he "finds it inconceivable that the questioning of Simpson could be more coercive" (Decision p, 11) is not supported by the facts testified by to both Simpson and Neely. The statements, if made, do not raise to the level of interrogation or threat in violation of Section 8(a)(1).

H. THE ALJ ERRED IN FINDING THAT DIX TOLD EMPLOYEES THAT THEIR NAMES WERE "ADDED TO A LIST" AND THAT HE THREATENED EMPLOYEES FOR EXERCISE OF CONCERTED PROTECTED ACTIVITY

The ALJ erred in finding that Dix created an impression of surveillance among employees that their participation in the rally was observed and threatened employees with discharge by telling employees that their names were added to a "list" and that they should watch [his] back. (Decision, p. 20-21)

At hearing, General Counsel witnesses Simpson and Neely testified that Dix told them that Fernandez was in the security office using the perimeter cameras to "zoom" on the rally and that Fernandez was creating a list of every employee that was at the rally. (TR- 139-140, 331-332). Neely testified that Dix told him that his name was on the list and to "watch his back." (TR- 332). In fact, Fernandez never entered the security office on the day of the rally.⁴⁴ And, she never created a list of employees who were participating in the

⁴³ There is no finding in the opinion in regard to the statement putatively made by Wilson to Neely and Simpson. To the extent the ALJ found that the alleged statements by Wilson to Neely and/or Simpson that the Company wasn't going to do shit constituted a violation of the Act, such a finding fails for the reason that the statement was not a threat, was not coercive, was not an interrogation and actually inspired the employee to concerted protected activity.

⁴⁴ See argument F(ii).

rally.⁴⁵ Dix denies telling Simpson and/or Neely that “upper management” or Fernandez was upset about the rally, zooming on the rally participants, and/or making a list of names. (TR- 829-830). Assuming Dix made the statement about the “list,” all disciplines made by SJJS were for legitimate business reasons, as previously set forth in this brief.

Both Neely and Simpson (and only Neely and Simpson) allege that Dix told them about the alleged surveillance by Fernandez (or any other Respondent agent). Simpson’s testimony was untrustworthy in all respects.⁴⁶ What is more, both Neely and Simpson are looking to be rewarded with back pay for making their bogus allegations of discriminatory discharge. Because their testimony is contradicted by each other, because Simpson lied about being let into the administration by Dix and Neely lied about Fernandez surveilling the rally, and also because they are seeking an economic reward their credibility is inherently suspect. *See, N.L.R.B. v Container Corp. of America*, 649 F.2d 1213 (6th Cir. 1981)(“The uncorroborated testimony of an interested charging party does not amount to substantial evidence of an unfair labor practice,” *Sam’s Club v. NLRB*, 141 F.3d 653, 658 (6th Cir. 1998) (“[U]ncorroborated and self-serving statements of a party who stands to benefit from an award of back pay may, standing alone, constitute substantial evidence where such testimony is reasonably deemed to be credible and trustworthy, and where it is not undermined by evidence to the contrary.”). Here, only Neely supports Simpson, and vice

⁴⁵ See argument F. In fact, she never left the building while the rally was on going, and when she arrived for work, the rally was either not on-going, or she did not see the employees participating in the rally because she turned into the facility before arriving at the area at which the rally participants had parked their cars and where the rally was either getting ready to start or on-going. According to General Counsel’s witnesses, the cars and participants were on the residential street between the entrance to Calumet and Hamilton. (TR- 601) Fernandez turned into the facility before reaching that stretch of Glendale. (TR- 601).

⁴⁶ He testified to speaking with Dix alone in Pod 3, in contradiction to the testimony of Neely who said he was there at the time and it was Wilson that spoke to them, not Dix. Further Simpson testified that Dix buzzed him in to an Administrative office at a time of day that Dix has never worked. (See argument B). Neely spun the whopper of Fernandez surveillance of the rally. (See argument F(i)).

versa. And, their stories are internally inconsistent. Their testimony was biased and untrustworthy. The ALJ erred in concluding that Dix created an impression of surveillance and that Dix threatened an employee for exercise of concerted protected activity.

The ALJ improperly credited the testimony of Neely that Dix told him he was on a “list” and to “watch [his] back” despite his obvious lies in regard to the alleged surveillance of the rally by Fernandez and other supervisors, his inability to keep his story straight with Simpson regarding the company’s response to the letter.

Further, the ALJ characterizes this putative statement as a threat of unlawful discipline. (Decision, p. 20). The statement attributed to Dix was not coercive and was not a threat of discipline. There was no threat of reprisal or force. The ALJ erred in crediting the testimony of Neely and/or Simpson and in finding that the statement attributed to Dix was a violation of Section 8(a)(1) of the Act.

I. THE ALJ ERRED IN FINDING THE ALLEGATIONS AGAINST CRAWFORD AMOUNT TO IMPROPER INTERROGATION AS DEFINED BY THE ACT

The ALJ erred in ruling that James Crawford interrogated employees Tamika Kelley and Ruth Crosby about their union sympathies and support, in violation of Section 8(a)(1) of the Act. (Decision, p. 26). Crosby, testified that in a weekly meeting Crawford asked them: “how do we feel about the Union coming into the facility?” (TR- 488). Further, Kelley testified that Crawford asked:

“if we were going to try to organize the Union. He asked if we were going to try to rally. He then stated why were we going to organize the Union, that it wasn’t good for us. They take our wages in our checks. Our jobs wasn’t guaranteed if we joined the Union.”

(TR- 269).

These statements, if made by Crawford do not amount to 8(a)(1) violation. The law

in support of this fact is set forth in argument G on pages 58-61 and for the sake of brevity are incorporated by reference here.

Crawford's statements, if made, were non-threatening, non-coercive, and protected by Section 8(c) of the Act. Furthermore, in response to the alleged statements, Crosby said she was not comfortable discussing the subject and Kelley just did not respond. (TR- 269-270; TR- 488-489). At that point, Crawford dropped the subject entirely and moved on to other matters.

The ALJ erred in finding that Crawford unlawfully interrogated any employee. The comments attributed to him, if true, do not arise to the stature of interrogation, were isolated, non-threatening and protected speech.

J. THE ALJ ERRED IN FINDING THAT BURTON ILLEGALLY INTERROGATED SIMPSON

Respondent excepts to the ALJ's ruling that Burton unlawfully interrogated an employee regarding his engagement in protected concerted activities in violation of Section 8(a)(1) of the Act. (Decision, p. 14).

In paragraph 12 of the Complaint, General Counsel alleges that on or about July 5, 2015, shift supervisor Burton interrogated employees about their participation in the rally. In support of that allegation, General Counsel proffered the testimony of Simpson. Simpson, who, for the reasons already set forth, lacks credibility, testified that at about 10:00 p.m. the night before the rally, Burton called and asked him if he was going to be a part of the rally or rather if he was going to work the next day. (TR- 125-126). In response, Simpson said that he did not know what Burton was talking about. Even assuming that Simpson was testifying truthfully, which he was not, there was nothing threatening,

coercive, or intimidating in the exchange and Burton's statement does not rise to the level of an unlawful interrogation in violation of section 8(a)(1).

Where interrogation is sufficiently isolated and occurs in an atmosphere free of coercive conduct, no remedial order should issue in an unfair labor practice case. *Temp Masters, Inc.*, 344 NLRB 176 (2005)(no violation of the Act where a supervisor asked an employee whether a union representative had been on the job site, considering the circumstances surrounding the isolated question, there was no coercive effect to the question); *Toma Metals, Inc.*, 342 NLRB 787 (2004)(question by a low-level supervisor of "what's up with the rumor of the union I'm hearing?" did not violate the Act where employees prompted the question and the conversation happened on the plant floor); and *Dieckbrader Express*, 168 NLRB 867 (1967).

Toma is on all fours with the situation and discussion between Simpson and Burton. Burton was a first-level, direct supervisor, of Simpson. The alleged questions to Simpson were isolated and there was no threat or coercive effect. Simpson continued with his plan to attend the rally.

General Counsel has not established that Burton coercively interrogated any employee in violation of the Act and the Respondent excepts to the ALJ's finding that Burton violated Section 8(a)(1) of the Act.

K. THE ALJ ERRED IN FINDING THAT THE RESPONDENT ISSUED DISCIPLINE TO KELLEY, COCKRAN OR SINGLETON-GREEN BECAUSE OF THEIR PARTICIPATION IN CONCERTED PROTECTED ACTIVITY

Respondent excepts to the ALJ's ruling that Respondent suspended Kelley, Cochran and Singleton-Green in violation of Section 8(a)(1) of the Act. (Decision, p. 32)

In paragraphs 10 and 19 of the Complaint, General Counsel alleges that Respondent suspended Kelley, Cochran, and Singleton-Green because they (1) they concertedly complained in writing regarding their wages, hours and working conditions, (2) they engaged in the rally on July 6, 2015, and (3) to discourage employees from engaging in these or other concerted activities. These allegations are untrue, and General Counsel has not submitted evidence sufficient to establish a violation of the Act.

First, General Counsel put forth no evidence, whatsoever, establishing that Respondent knew or had any reason to suspect that Kelley, Cochran and/or Singleton-Green authored, had input into or in any way contributed to the “To Whom It May Concern” letter. (Complaint ¶ 10, 19).

Second, on July 6, 2015, thirty one employees failed to show up for work as scheduled. (TR- 599). Most of the employees called-in as required by SJS policies and procedures. As a result miscommunications between management and Human Resources, Respondent’s Human Resources employees believed that Kelley, Cochran and Singleton-Green misrepresented that they were “sick” which would have been a violation of its Time and Attendance policies. (TR- 666). As a result, they were suspended for one day – July 7, 2015 - while Human Resources looked into the issue. Once Human Resources realized that the three employees had in fact called-in for a personal day, Human Resources immediately notified them of its error, paid them for the day off, removed the suspension letters from their files and suspension from their record. All record of the suspensions were removed

from their files and they were sent letters to this effect on July 9, 2015. (RX 9)(TR- 732-733; 790-791).⁴⁷

“This letter serves to inform you that we have completed our review of your attendance. You will be allowed personal leave for July 6, 2015. You will also be paid for July 7, 2015 and the suspension notice will be **removed** from your file.”

General Counsel has absolutely no reason to suspect, nor has it established by any evidence whatsoever, that Respondent was motivated by discriminatory animus. In fact, the actions of Respondent in quickly correcting its administrative error and paying them for any lost time leads directly to a contrary conclusion. The ALJ’s finding that Kelley, Cochran and Singleton-Green were disciplined because of their participation in concerted protected activities in violation of Section 8(a)(1) is in error. While they were notified of a possible suspension, a suspension was never issued or served.

L. SHERROD WAS UNABLE TO TESTIFY IN REBUTTAL TO THE CLAIM THAT HE THREATENED EMPLOYEES WITH DISCHARGE BECAUSE OF THEIR CONCERTED ACTIVITIES

The ALJ erred in his ruling that Sherrod unlawfully threatened employees with discipline for engaging in protected concerted activities in violation of Section 8(a)(1) of the Act. (Decision, p. 22)

Sherrod was not able to testify at the hearing since he was on medical leave. However, the testimony of General Counsel’s witnesses should not have been credited.

Each person identified in the Complaint who General Counsel alleges were discharged or disciplined because they supported the union or engaged in other concerted

⁴⁷ Kelley testified that she did not receive the letter and that she never lived at the address on the letter. During the trial it was discovered that Respondent’s Human Resources inserted the address of another Tamika Kelly that is employed by it. (TR- 308-310). There is absolutely no indicia that this was anything other than an honest mistake.

protected activities were, in fact, disciplined or discharged for legitimate business reasons unrelated to an putative or alleged protected conduct. Furthermore, Simpson, Neely, Black and others failed to testify credibly. Neely manufactured the story about Fernandez walking out to the rally and making notes on participants, and Simpson manufactured the allegation that Dix let him in to the Administrative Offices at a time when Dix has never been in the facility. The ALJ erred in crediting of the General Counsel's witnesses.

M. THE ALJ'S FINDINGS IN REGARD TO THE COMPANY'S DUTY TO BARGAIN IS MOOT.

On March 10, 2016, SJJS filed an Objection to the Election results in 07-RC-169521 by which SPFPA claims to be the representative of the Unit. On March 24, 2016, the Board's Regional Director overruled SJJS's Objection to Election and certified SPFPA as the exclusive collective bargaining representative of the Unit. On April 5, 2016, SJJS filed a Request for Board Review of the Regional Director's Post-Election Decision. 07-RC-169521.

When SJJS failed to bargain with SPFPA, it filed an unfair labor practice charge ("ULP") with the Board on July 19, 2016. (07-CA-180451). That case has wound its way through the NLRB and at the time of hearing was pending before the Sixth Circuit Court of Appeal. (Case No. 17-1098.) Because SJJS did not believe that the SPFPA was properly certified, it would have been a violation of the Act, for it to recognize, deal with, bargain with, or provide support to the Union. The Administrative Law Judge has taken judicial notice of that action. (TR-12)

On November 27, 2017, the Sixth Circuit granted the Board's petition for enforcement of its order. On April 9, 2018 the Union requested bargaining and bargaining

began on May 8, 2018. On June 26, 2018 the Respondent made the postings and certifications required by Region Seven.

VI. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Board reverse the ALJ's Decision and dismiss the Complaint in its entirety.

Respectfully submitted,

BERRY MOORMAN, P.C.

Date: July 10, 2018

/s/Sheryl A. Laughren

Sheryl A. Laughren (P34697)
Sandro D. DiMercurio (P80704)
Attorney's for Respondent
535 Griswold, Suite 1900
Detroit, MI 48226
(313) 496-1200
slaughren@berrymoorman.com
sdimercurio@berrymoorman.com

PRESENTED BY ELECTRONIC SERVICE ON:

Deputy Chief Administrative Law Judge
Arthur Amchan, Deputy Chief Administrative Law Judge

Trial Judge
Thomas Randazzo, Administrative Law Judge
E-Mail: thomas.randazzo@nlrb.gov

Counsel for General Counsel
Donna Nixon
E-Mail: donna.nixon@nlrb.gov
Eric Cockrell
E-Mail: eric.cockrell@nlrb.gov

Representative for Charging Party AFSCME
Reno Thompson
E-mail: rthompson@miafscme.org

Charging Party Tamika Kelley
Email: kelleygurl06233@gmail.com