

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

UNITED STATES POSTAL SERVICE

Respondent

Case 12-CA-207188

and

ANN DOLAN

Charging Party

RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS

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the Charging Party's Exceptions directly from Charging Party on September 10. As the email from the NLRB Electronic Filing System states, the courtesy email from the NLRB does not constitute service of the document by the filing party. Also, it does not constitute a determination that the document has been accepted by the Board as meeting the requirements for filing Exceptions. Respondent did not receive a copy of the Exceptions from Charging Party until September 20, when Charging Party responded to the Board's inquiry about a certificate of service and Charging Party copied Respondent in her response.

Charging Party references eight Exceptions to the Judge's findings of facts and conclusions of law in her table of contents. This Brief addresses Respondent's Exceptions. Section I contains a statement of material facts, and Section II contains specific points of fact in record evidence and case law that support the Judge's findings and conclusions with regard to Charging Party's Exceptions. Respondent submits that the Judge's decision is fully supported by the credible record evidence and case law and urges the Board to adopt the Judge's decision with respect to the Exceptions filed by Charging Party. By contrast, the Charging Party relies on asserted facts that were not part of the record and misconstrues and/or disregards the Judge's reasonable conclusions of fact and law.

I. STATEMENT OF FACTS

Ann Dolan worked off and on for the Postal Service since 1998, most recently as a postal support employee at the Ybor Processing and Distribution Center (P&DC) from August 17, 2017 to September 7, 2017. (JD slip op. at 4). During her previous employment with the Postal Service, she worked for mostly short time periods at various offices. There

were long breaks from employment with the Postal Service, including one from about September 2007 to Christmas 2012 and another from about February 2013 to about November 2016. Notably, she was previously terminated by the Postal Service in about February 2013 when she was working as a carrier and damaged her postal vehicle. (Tr. 73-74).

Dolan was eventually rehired as a postal support employee in about November 2016 and was laid off in January 2017. She then returned as a postal support employee in August 2017, this time at the Ybor P&DC. (JD slip op. at 4, 6, Tr. 74). As a postal support employee, she was required to be a flexible clerical employee who would move to any given area in operations directed by the supervisor of distribution operations. (JD slip op. at 2). If the postal operations needed a postal support employee, like Ms. Dolan, to work in the manual area, that employee would be directed to work in the manual area. Likewise, if the postal operations required the work of a postal support employee on the automated parcel and bundle sorters (APBSs), then Ms. Dolan could be sent to work on the APBSs. (Tr. 32).

When she started at the Ybor P&DC in August 2017, she began a 90-day probationary period. (JD slip op. at 2, Tr. 165). Because she was a probationary employee, the Postal Service progressive system of discipline did not apply to her, except in the context of a scheme failure. (JD slip op. at 3, Tr. 184). As such, she could be terminated for absences and tardies and for performance issues without the requirement of an official discussion, letter of warning, suspension or investigative interview. (Tr. 34, 184, 191, 196).

Dolan was terminated on September 7, 2017 for unsatisfactory work performance and failure to follow instructions. (JD slip op. at 9, GC Exh. 14, Tr. 37, 168). With regard to her failure to follow instructions, acting supervisor of distribution operations Robyn Flick explained that when Dolan was given instructions for a job assignment, Dolan would say she did not feel like doing that job. (Tr. 37). Dolan would also be found outside of her assigned work area. (Tr.164). Before her termination, Flick did have a discussion with Dolan during which she told Dolan she needed to follow instructions when she was given a job assignment. (JD slip op. at 7, Tr. 50-51). The final instance of Dolan's failure to follow instructions was on September 7, when she was instructed to work on the APBS machine for the duration of the night. (Tr. 37-38). Dolan went on her break and never returned to complete her work on the APBS machine. (JD slip op. at 8). The section of the machine she was working on clearly needed staffing when she walked away to take her break, but she nevertheless decided not to return to that section. (Tr. 61, 136-137). No supervisor or manager told her she could choose not to return to her assigned task after her break. (Tr. 147). It is undisputed she was assigned that evening to provide relief on the APBS machine. (Tr. 107). When PSEs are tasked with providing relief, the supervisor – in this case, Regina Johnson - decides what specific assignments on a machine should be given to the PSE, and the supervisor determines when the need for relief on that machine is diminished based on the volume of mail. (Tr. 136, 183). That final instance of Dolan's failure to follow instructions was documented in a September 7, 2017 email from supervisor Regina Johnson to Manager of Distribution Operations (MDO) Jeremy Wray. (JD slip op. at 9; GC Exh. 15; Tr. 167, 194).

Flick made the decision to terminate Dolan based on her direct observations of Dolan's work performance and input from Regina Johnson about similar issues she was having with Dolan – including the incident memorialized in the September 7, 2017 email (Tr. 153) - , and MDO Jeremy Wray concurred with that decision. (JD slip op. at fn. 22; Tr. 59,165-166, 167-168). During Flick's testimony, Flick further explained the basis for each of the unsatisfactory ratings she gave Dolan on the employee evaluation form she presented to Dolan at the time of her termination. With regard to work quantity, Flick explained Dolan was unproductive when she would respond to work assignments by saying she did not feel like doing the work. Regarding work quality, Flick stated that Dolan's work would have to be redone and mail would have to be rerun when Dolan did not do her sweep on the SPB machine. Further, with respect to dependability, Dolan was not a dependable employee who could work independently because Flick would have to supervise her and make sure Dolan was completing her assigned tasks. In terms of work relations, Dolan failed to cooperate well with co-workers, including her supervisors, by repeatedly refusing to follow instructions and complete assignments. Regarding work methods, Dolan received an unacceptable rating because even though her job as a postal support employee was to work where she was needed in the postal operation, she refused to go where she was assigned. Additionally, as demonstrated by the incident involving Dolan on the APBS machine on September 7, she did not handle equipment in an appropriate manner and let the mail go to the residue, and as a consequence, mail had to be reworked. With regard to personal conduct, Dolan failed to demonstrate flexibility in moving from one task to another, as needed in the postal operation. (Tr. 55-57).

During the termination of Ann Dolan in the supervisors' office, Robyn Flick read over the evaluation form aloud and informed Dolan that she was not going to be retained by the Postal Service. (JD slip op. at 9; Tr. 59). Supervisor Regina Johnson was present as a witness while Flick went over the evaluation form with Dolan and informed Dolan of her termination decision. Manager of Distribution Operations Jeremy Wray was present at a cubicle at the back of the office when the termination took place. (Tr. 58-59). Flick and Johnson did not ask any questions of Dolan during the meeting. (Tr. 170). After Flick informed Dolan that she was being terminated, Dolan asked for a union steward. (JD slip op. at 9; Tr. 60, 142). Flick responded by explaining that one was not available and that Dolan was welcome to call one after the termination meeting. (JD slip op at 9; Tr. 60, 142). Jeremy Wray and Regina Johnson did not say anything during the termination. (JD slip op. at fn. 23; Tr. 170). Flick and Johnson escorted Dolan out through the women's locker room shortly after Flick informed Dolan of the termination decision. (Tr. 60, 142, 169). The entire meeting with Dolan lasted approximately five minutes. (JD slip op. at 9 and fn. 23; Tr. 142,170).

II. Record Evidence and Legal Authority Fully Support the Judge's Conclusions and Findings

Charging Party filed eight Exceptions to the Judge's findings of facts and conclusions of law. This Section discusses why Charging Party's Exceptions are procedurally defective and how the Judge's decisions to which Charging Party objects are fully supported by the record evidence and case law.

A. Charging Party's Exceptions are Procedurally Flawed and Should be Disregarded

Respondent asserts that Charging Party's Exceptions are procedurally defective and should be disregarded in all respects.

Section 102.46(a)(1) of the Board's Rules and Regulations requires that:

[e]ach exception must (A) [s]pecify the questions of procedure, fact, law, or policy to which exception is taken; (B) [i]dentify that part of the Administrative Law Judge's decision to which objection is taken; (C) [p]rovide precise citations of the portions of the record relied on; and (D) [c]oncisely state the grounds for the exception.

There is no separate exceptions document in the Charging Party's filing, aside from the first page titled "Table of Contents." In the list of Exceptions included in the table of contents, although Charging Party identifies the parts of the judge's decision to which objections have been made (with the exception of the line simply entitled "NLRB v. Weingarten, Inc"), the exceptions document does not state the questions of procedure, fact, law or policy corresponding with each Exception. Nor do the Exceptions cite to any portions of the records or state the grounds for the Exception.

Further, Charging Party's Brief in Support of Exceptions does not comply with Section 102.46(a)(2) which provides that:

[a]ny brief in support of exceptions must contain only matter that is included within the scope of the exceptions and must contain, in the order indicated, the following: (i) [a] clear and concise statement of the case containing all that is material to the consideration of the questions presented[;] (ii) [a] specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate[; and,] (iii) [t]he argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page citations to the record and the legal or other material relied on.

Charging Party's Brief does not provide a clear statement of the case. While there are headings in the Brief that, for the most part, track the Exceptions listed in the table of

contents, the issues discussed under each heading in the Brief many times have no apparent relevance to that particular Exception. The Brief does not contain an orderly argument of the points of fact and law relied on in support of Charging Party's position on each question and largely neglects to include specific page citations to the record, as well as legal citations. Accordingly, Respondent contends Charging Party's Exceptions and Brief in Support of Exceptions are procedurally defective and, as provided for in Section 102.46(a)(1)(ii), urges the Board to disregard such in their entirety.

B. Charging Party's Exceptions to Factual Findings and Legal Determinations are Unfounded and Should be Disregarded

Respondent further submits that Charging Party's Exceptions to the Judge's factual findings and legal determinations are substantially unfounded as such determinations are fully supported by the credible record evidence and case law.

1. No Weingarten Violation Was Alleged, Nor Is There Any Evidence to Support Such an Allegation

Two of the Exceptions listed in Charging Party's table of contents relate to *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). Charging Party argues the Judge erred by ruling that Respondent did not deny Charging Party's request for a union representative for an interview she reasonably believed would result in discipline. The General Counsel's Complaint and Notice of Hearing rightfully did not allege a *Weingarten* violation because the facts here did not involve an investigatory interview. (GC Exh. (d)). The record evidence is clear the meeting held on September 7 was held solely for the purpose of informing Charging Party of, and acting upon, a previously made termination decision. (JD slip op at 9, Tr. 59). See *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979).

No questions were asked by Flick, Johnson, or Wray, nor did they seek any facts or evidence in support of the termination action. (JD slip op. at fn. 23). *Id.* at 997; *Airco Alloys*, 249 NLRB 524 (1980). Therefore, the meeting was not an investigatory interview, and *Weingarten* did not apply. As such, no legal conclusion was appropriate or necessary regarding the factual finding that Charging Party requested a union representative before the termination meeting. (JD slip op. at 8).

2. The Judge Correctly Found A Lack of Evidence of Disparate Treatment to Support an 8(a)(3) Violation

In the section of Charging Party's brief regarding the Judge's finding about the lack of disparate treatment evidence, Charging Party jumps between several disjointed arguments without ever analyzing the similarly situated probationary employees in the record evidence. The Judge, however, did closely examine the other probationary employees in the record evidence and correctly found that, "the circumstances of Dolan's separation are largely indistinguishable from those of the other two probationary employees separated from the Postal Service." (JD slip op. 12). They, too, were separated due to unsatisfactory performance and failure to follow instructions, and "[n]either was afforded the benefit of an evaluation." (JD slip op. at 12). The Judge also studied the other employees that General Counsel attempted to offer as comparators and appropriately found that those employees were not similarly situated, as they were not probationary employees and were not charged with the same infractions as Dolan. (JD slip op. at 13).

Ignoring the evidence of similarly situated probationary employees, Charging Party argues that the termination was inappropriate because of the postal policy of progressive discipline. However, Charging Party fails to consider the unconverted evidence that the

postal progressive disciplinary system does not apply to probationary employees. (Tr. 184; JD slip op. at 2, 12). Charging Party also takes aim at Manager of Distribution Operations Jeremy Wray in an ineffectual attempt to argue that he instead should have been terminated. In various parts of the brief, Charging Party inappropriately tries to introduce new and irrelevant evidence about Wray that has no bearing on his credibility or her exception about disparate treatment. First, as the Judge reasonably concluded on the record, unless the conviction is for a crime of moral turpitude, it has no bearing on the credibility of a witness. (Tr. 197-198). Considering all the circumstances, the judge was well within his discretion to find that Wray's prior convictions did not impact his credibility. Second, Charging Party's attempt at a comparison between her termination and Wray's employment is also misplaced because they are not similarly situated as Wray is a manager and is not a probationary employee.

Charging Party fails to present any coherent argument regarding the alleged disparate treatment she asserts in the heading of this exception. Her failure to even discuss any of the alleged similarly situated employees only confirms the Judge's proper finding that the General Counsel failed to demonstrate that Charging Party was subject to disparate treatment. And, therefore, an inference of unlawful discrimination could not be made.

3. Management's Knowledge of Charging Party's Limited and Commonplace Union Activity is Not in Dispute

In the heading for the next Exception listed in Charging Party's brief, she states that the Judge erred when he ruled that Respondent did not have evidence that the Postal Service did not have knowledge of Dolan's union activities. She provides no citation to the Judge's decision in making this assertion and the paragraphs that follow under this

heading of her Exception do not coherently expound on this argument about knowledge of union activity. In any case, this Exception is mistaken because the Judge did find that there was evidence of employer knowledge of her union activity, including her requests to speak with union representatives. (JD slip op. at 11). Moreover, in its brief to the Judge, Respondent acknowledged Dolan's limited and routine union activity. Supervisors Flick and Johnson readily acknowledged that Dolan asked to speak with a steward on a number of occasions, but, as Johnson testified, this type of request is common from employees, and there is an established procedure in place for accommodating these requests, including when stewards are not readily available (Tr. 60, 143-144).

On the other hand, there is no evidence that her email to Postal Service Human Resources about her intent to file a grievance with the union ever made its way to her supervisors or managers. (JD slip op. at 11). Also, there is no evidence that management had any knowledge of the grievance worksheet she allegedly filled out on August 25, as Dolan herself conceded she had no idea whether the grievance was ever filed or even presented to management. (Tr. 127, 182).

Regardless, Charging Party is mistaken in arguing that the Judge found the Postal Service did not have knowledge of Charging Party's union activity. It was undisputed that the Postal Service had knowledge of Charging Party's requests for a union representative, and therefore, the Judge imputed knowledge of Dolan's union activity to the Postal Service. (JD slip op. at 11). However, as the Judge correctly concluded, the General Counsel failed to demonstrate employer animus toward Charging Party's union activity, and as will be discussed in the next section, the Judge found Charging Party would have been discharged even in the absence of her union activity.

4. The Judge Properly Concluded Charging Party Would Have Been Discharged Even in the Absence of Her Union Activity

The Judge correctly found that the evidence demonstrates the Postal Service would have separated Charging Party regardless of her union activity. (JD slip op. at 13-14). None of the instances of Charging Party's failure to follow instructions and unsatisfactory work performance involve her limited union activity. Her requests to see a union steward occurred on separate occasions from her cited failure to follow instructions; and, as discussed earlier, the termination meeting following her September 7 failure to follow instructions did not constitute an investigatory interview where *Weingarten* rights would apply. Even absent her limited union activity, Charging Party still would have been terminated because she was a probationary employee who failed to follow instructions. This failure to follow instructions affected all material aspects of her work performance as a PSE, including her work quantity, work quality, dependability, work relations, work methods, and personal conduct. (Tr. 55-57).

Charging Party, however, argues that the Judge erred in reaching this conclusion because of the timing of her termination and the deadline for management's response to presumably the grievance worksheet she filled out on August 25. However, Charging Party herself conceded on the record that she had no idea if that grievance worksheet was ever filed or was ever presented to management for a response. (Tr. 127). The grievance worksheet is not date-stamped as having been received by the Postal Service, and all the fields at the bottom of the first page (under the heading "Step 1 Meeting" are blank), indicating that Charging Party and the union never requested a step one meeting under the grievance process. (GC Exh. 21). Further, General Counsel did not introduce any evidence of grievance paperwork being filed on her behalf, so there is no evidence

whatsoever that the grievance worksheet was ever presented to management for a response. Thus, Charging Party's argument about timing is hollow and has no merit.

Charging Party goes on to deny the failure to follow instructions and unsatisfactory work performance with which she was charged, but she simply goes into a disjointed and protracted discussion without any specific citations to or analysis of record evidence. Charging Party fails to show how she would not have been discharged in the absence of union activities. She does not point to any record evidence demonstrating that she did follow instructions appropriately or did perform work satisfactorily. Contrary to her unsubstantiated argument, the judge correctly concluded that the preponderance of the evidence demonstrates the Postal Service would have separated Charging Party regardless of her protected activity.

5. The Record Demonstrates that Charging Party Conceded She Did Not Clock In After Lunch

Charging Party objects to the Judge's footnote 16, where he notes her testimony about clock rings is inconsistent and unclear and observes that she "conceded that she did not clock in after lunch as she was supposed to." (JD slip op. at 8; Tr. 103-108). However, in her brief, Charging Party never addresses her response on the record to General Counsel's question, "Was this the first time that you had missed a time punch while working at the Ybor facility?," to which she unequivocally responded, "Yes." (Tr. 106). In her Exceptions, she also ignores the fact that when General Counsel also asked her, "Historically, while working for the Postal Service, have you ever missed a time punch?," she did not hesitate in responding, "I am sure I did. I mean I've been with the Post Office a long time, and people make mistakes and it does happen." (Tr. 106). As Charging Party fails to address this specific testimony, her exception is insubstantial. The

Judge's observation about her conceding that she did not clock in is reasonable in light of these unambivalent statements from the Charging Party herself.

6. The Record Evidence Shows that Postal Support Employees Are Expected to Work Wherever They Are Needed

In the decision, the Judge addresses Charging Party's claim that she was not performing work in the proper craft and that she was not medically cleared to perform mail handling work. In doing so, the Judge correctly points to the unconverted testimony that postal support employees are expected to work wherever they are needed. (JD slip op. at 8; Tr. 182-184). Their duties, by nature, are "flexible." (JD slip op. at 2). The Judge also points to General Counsel's own exhibit showing that Charging Party was approved to work by her doctor without any medical restrictions. (JD slip op. at 8; GC Exh. 20). Nonetheless, in her Exceptions, Charging Party makes the same claim again, arguing that the work she was assigned was outside of her craft. She fails to point to any evidence in the record that refutes the testimony by the Manager of Distribution Operations Jeremy Wray that, "[i]n regards to an operation, [the PSEs'] job is to come over and support the supervisor in the processing of the mail based on the supervisor's needs of that operation. Whether it be lunch coverage, helping sweep the bins on the machine, loading mail, anything that the supervisor deems necessary as a relief to the operation of that machine." (Tr. 182-183). The fact that the Charging Party did not want to perform her duties as assigned does not mean that her assignments were improper, and there is no record evidence showing that PSEs could not be assigned the work in question. Instead, the record evidence shows that the assignments were proper and that the Charging Party unreasonably refused to complete them as assigned.

7. The Judge Reasonably Found that Charging Party's Credibility Was Significantly Diminished By Her Efforts to Dictate Her Doctor's Report

In the final section of her brief, Charging Party argues - without any citations to the decision - that the Judge erred when he stated, "that Ms. Dolan lost credibility when she said she was going to speak to her doctor about reasonable accommodations." (CP Except. at 49). However, Charging Party misrepresents the Judge's credibility finding. The Judge did not state that she lost credibility because she talked to her doctor about reasonable accommodations. Instead, in the decision, the Judge cited to Charging Party's own language in her email to the Postal Service's Occupational Health Services department, where she openly admits that she told her doctor she would like a limitation of eight hours on her feet, despite the fact that he did not give her any limitations. (GC Exh. 20; JD slip op. at 4). In her Exception, Charging Party does not address the manipulative suggestion of her email and instead rambles about her right to discuss her job duties with her doctor – a point which is not in dispute in the first place. Thus, the Judge appropriately found that such "manipulative efforts to dictate the contents of her doctor's report significantly diminished her credibility." (JD slip op. at 4).

III. CONCLUSION

For the foregoing reasons, Respondent requests that the Board deny Charging Party's Exceptions in their entirety and her request for oral argument, affirm the Judge's findings of fact and conclusions of law and adopt the Judge's recommended dismissal in full. Specifically, Respondent requests that the Board find, consistent with the Judge, that the Charging Party was terminated for legitimate business purposes due to her failure to follow instructions, long work breaks and her resistance toward work assignments, and not because she engaged in union or other protected concerted activities.

Respectfully submitted,

Handwritten signature of Kelly Elifson in cursive script.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Respondent's Answering Brief to Charging Party's Exceptions has been served this 24th day of September 2018, upon each of the following:

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