

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

**SPECTRUM JUVENILE JUSTICE SERVICES**

**Respondent**

**And**

**Case 07-CA-155494**

**TAMIKA KELLEY, an Individual**

**Charging Party Kelley**

**and**

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

**Case 07-CA-160938**

**Charging Party AFSCME**

**and**

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

**Case 07-CA-174758**

**Charging Party SPFPA**

**and**

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

**Case 07-CA-175342**

**Charging Party Local 120**

**COUNSELS FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO  
RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

Counsels for the General Counsel Donna M. Nixon and Eric S. Cockrell pursuant to Section 102.46 (b)(1) of the Board's Rules and Regulations files this Answering Brief in response to Respondent's Exceptions to the Administrative Law Judge's decision.

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**Counsels for the General Counsel respectfully requests that the Board affirm the ALJ's decision, and in support of said request states as follows<sup>1</sup>:**

On October 11, 2017, Administrative Law Judge Thomas M. Randazzo issued his Decision in the above entitled proceeding. He found that Respondent violated the 8(a)(1), (3) and (5) of the Act in several aspects.

On July 10, 2018, Respondent served upon the Board Exceptions to the ALJ's Decision and a Brief in support of those Exceptions<sup>2</sup>. Respondent excepted various credibility findings, conclusions of law, and remedies. Counsels for the General Counsel now file this Answering Brief in opposition to Respondent's Exceptions.

## **I STATEMENT OF FACTS RELEVANT TO EXCEPTIONS**

### **A. Background**

The ALJ found that Respondent operates two adjacent facilities located at 330 Glendale (Calumet), Highland Park, Michigan; and 1961 Lincoln (Lincoln), Highland Park, Michigan, as maximum security treatment facilities for juvenile prisoners or residents, who have been adjudicated by the criminal justice system. (ALJD P 3, L 16-20; GC 1(mm), par 2; GC 1(oo), par. 2); Tr 68-70, 240, 313). The ALJF found that the Respondent's personnel includes unarmed youth workers and other staff; the Youth workers supervise the residents who are incarcerated inside individual detention rooms. (ALJD P 3, L 28-31, 38-43; Tr 70-71, 76, 241, 312-313, 315, 568-569, 575, 683, 684-685). Executive Director Melissa Fernandez runs the facilities and reports to Roger Swaninger, Chief Executive Officer and President of Spectrum Human Services, Respondent's parent company. (ALJD P 3, L 20-22; Tr 642, 657-658).

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<sup>1</sup> References to the Administrative Law Judge are indicated by ALJ; to the Administrative Law Judge's Decision – ALJD; to the transcript – Tr; to General Counsel Exhibits –GC; to Respondents Exhibits – R; to and to Respondent's Supporting Brief –R Brief.

<sup>2</sup> Counsels for the General Counsel were not served with these documents until July 16, 2018.

The ALJ found that Respondent houses residents within compartments called pods, and Youth workers escort residents to other areas of the facilities where they engage in a variety of activities. (ALJD P 3, L 38-43, 40-45; Tr 71-75, 241, 313-314, 315-317). Respondent assigns radios to its staff. (ALJD P 3, L 45-46; ALJD P 4, L 6-10; Tr 317, 576-578).

**B. The ALJ correctly found that Respondent violated employees' Section 7 rights with respect to their protected concerted activities by unlawfully interrogating them, engaging in unlawful surveillance, threatening employees with discipline, and creating the impression that employees' protected concerted activities are under Respondent's surveillance. (Respondent's Exception Nos. 11 - 17 and 19; ALJD P 4 - 26).**

**1. The relevant facts**

a. Employees' protected concerted written complaints submitted to Respondent about their terms and conditions of employment

The ALJ found that in June and July 2015, morale among the Youth workers was extremely low because they experienced a variety of adverse working conditions, lack of training and low pay. (ALJD P 4, L 23-29; ALJD 5, L 8-14, 35-43; Tr 77-79, 88, 104, 114-115, 124, 185, 248, 249, 318, 319, 385, 477). Also, Respondent increased mandatory overtime called "mandation". (ALJD P 4, L 29-32; Tr 77-79, 115, 150-151, 153, 156, 185, 213, 224, 225, 226-227, 228, 473, 509-510).

The ALJ found that on or about mid-June 2015, employees had discussed their workplace concerns with one another and management, drafted petitions, and gave them to Respondent, but Respondent refused to address such concerns. (ALJD 4, L 33-37, 43-47; ALJD P 5, L 1-2; Tr 79, 104-105, 115-117, 249-251, 319, 324, 385-387, 474, 509-511; GC 2). The ALJ found that on July 2, 2015, Youth worker Lamont Simpson drafted a petition and delivered it to Calumet where he encountered Security Supervisor Damien Dix, who inquired about Simpson's activity. (ALJD P 4, L 45-47; ALJD P 5, L 1-47; ALJD P 6, L 1-4, 7-13; Tr 80, 105, 113-114, 118-119,

125,172, 386- 387,458-459, 510, 826; GC 2; J 1). The ALJ found that Simpson made copies of the Calumet petition and distributed them to Respondent. (ALJD P 6, L 13-16; Tr 119, 120, 173, 174, 511, 181-182, 251, 320-321, 510-512, 596, 770; GC 2, J 1). The ALJ found that Charging Party Kelley/Youth worker prepared a second similar petition pertaining to employees' complaints, and she gave copies to both employees and Respondent. (ALJD P 6, L 18-45; ALJD P 7, L 1-8; Tr 186-188, 251-254, 295, 475-476; 595-598, 660-661, 701, 787; J 1; GC2, GC 7). Also, Kelley both organized and participated in the picketing on July 6, 2015. (ALJD P 27 L 26; ALJD P 40, L 38-42; ALJD P 41, L 1-2; Tr 255-259).

b. Respondent's interrogation of employees at the Calumet facility about their protected concerted picketing activities and sympathies

The ALJ found that on July 3, 2015, Calumet Security Supervisor Damien Dix asked Simpson whether he knew anything about a "letter" put inside Respondent's mailboxes. (ALJD P 7, L 22-24; ALJD P 8, L 1-8, 10; Tr 121, 125, 825-826; GC 2; J 1). Dix said that the managers were meeting to discuss the "letter"; that whoever submitted the "letter" did not sign it; that Facility Manager Kirpheous Stewart said, "they ain't going to do shit"; that Stewart "balled the letter up"; and "threw it away". (ALJD P 7, L 22-24; ALJD P 8, L 1-18; ALJD P 9, L 5-47; ALJD P 10, L 1-12; Tr 121, 174, 175; GC 2).

The ALJ found that about 30 minutes later, Simpson received a phone call from Youth worker Raphael McQueen, who reiterated what Dix said about the "letter" and that someone told McQueen about it. (ALJD P 12, L Tr 122, 175; GC 2). McQueen told Simpson that Stewart "balled up the letter", said that "they ain't going to do shit", and that Respondent did not take the letter seriously. (ALJD P 12, L 23-26; Tr 122-123, 124; GC 2). Simpson told McQueen that employees must picket to get Respondent's attention, and they discussed a date to conduct the picketing. (ALJD P 12, L 23-26; Tr 123, 127).

The ALJ found that on or about July 4, 2015 or July 5, 2015, at Calumet, in the presence of Youth worker Alfred Neely, Simpson told Calumet Facility Manager Christopher Wilson and Calumet Shift Supervisor Johnson that employees drafted a petition and requested that they forward it to the Director; Johnson agreed. (Tr 321-322; GC 2; J 1). After work, Wilson told Neely and Simpson that Respondent is “not talking about shit with them”. (Tr 323-324). Also, Wilson said that Calumet Center Director Stewart is “not talking about shit” and all employees had better be at work. (Tr 767-768, 770; GC 2).

The ALJ found that on the evening of July 5, 2015, Calumet Security Supervisor Cornelius Burton called Simpson at home. (ALJD P 12, L 35-36; Tr 124-125). Burton asked whether he was a part of the picketing, and Simpson feigned ignorance. (ALJD P 12, L 35-38; Tr 124-125). Burton said that it had become “crazy” because employees called off work. (ALJD P 12, L 35-39; Tr 125). Burton asked Simpson whether he would be present at work on July 6, and Simpson said yes. (ALJD P 12, L 40-41; Tr 125).

The ALJ found that on July 5, 2015, on the midnight shift, many employees called off from work before their scheduled shift began on July 6. (ALJD P 12, L 23-27; Tr 357). Calumet Facility Manager Steven Johnson spoke with a couple of employees by phone. (ALJD P 12, L 38-39; Tr 354, 357-358). On the evening of July 5, Steven Johnson sent e-mails to “the director”, along with other managers, who were scheduled to begin work on July 5, at 6:00 a.m. (ALJD P 12, L 29-30; Tr 358-359). Late in the evening on July 5, 2015, Simpson called Calumet Shift Supervisor Steven Johnson in order to call-off from work on July 6. (ALJD P 12, L 40-41; Tr 126). The procedure for calling-off work allows employees to notify their supervisor before the beginning of the shift provided they have accrued leave time, and no discipline will be issued. (ALJD P 12, L 30-33; Tr 84, 126-127, 388).

c. Employees picket Respondent's facility

The ALJ found that Respondent refused to address employees' complaints, and employees decided, concertedly, to picket on July 6 and 7, 2015 outside of Respondent's facilities. (ALJD P 12, L 23-25; Tr 80-81, 122-125, 255, 256, 324-325, 511-512, 528-529; GC 2). On July 6, 2015, employees participated in the picketing from about 5:15 a.m. to 5:00 p.m. (ALJD P 14, L 15-18, 22-30, 32-42; ALJD P 20-21; Tr 82, 127-129, 132-133, 189, 257-258, 303 325-326, 479-481, 513-514, 518, 521). Simpson was a lead organizer. (ALJD P 36-40; ALJD P 38, L 16-18; ALJD P 38, L 22-25; ALJD P 38, P 30-31; Tr 115-140, 113-140, 134-137, 174, 175, 321-322; 323-324, 826, GC 2, J 1). Also, employees carried a variety of picket signs, which Kelley created. (ALJD P 14, L 15-18, 22-30; Tr 82, 129-132, 176, 189, 256-257, 301-302, 477-479, 516-518; GC 4).

The ALJ found that on July 6, 2015, about 6:00 a.m., Calumet Facility Manager Christopher Wilson notified Executive Director Fernandez that many employees had called-off from work. (ALJD P 14, L 44-46; Tr 598-599, 661, 686). Also, Fernandez called the Lincoln facility and confirmed that 31 employees had called-off. (ALJD P 14, L 46-47; Tr 599). Fernandez dressed immediately and went to Respondent's facilities. (ALJD P 14, L 47; ALJD P 15, L 1-7; Tr 599-560, 600, 601-607, 661, 663). During the shift-change on July 6, 2015, at Calumet, Shift Supervisor Steven Johnson met with Calumet Facility Managers Leroy Sherrod and Christopher Wilson. (ALJD P 15, L 22-24; Tr 359-360). They discussed the many employee call-offs and a plan to address the staffing deficit. (ALJD P 15, L 20-23; Tr 360, 361-362, 483).

The ALJ found that about 8:00 a.m., at Calumet, Steven Johnson, Calumet Facility Manager Wilson, and Supervisor Carter met in order to service the residents. (ALJD P 15, L 31-32; Tr 362). They discussed the lack of staffing, and Steven Johnson agreed to remain at work

after his shift ended. (ALJD P 15, L 31-32; Tr 363). Facility Manager Sherrod arrived, and Carter announced that he saw vehicles parked in front of the building. (ALJD P 15, L22- 25; Tr 363, 365-366). They discussed the lack of staffing, decided to list all of the employees who called off, and determine why they engaged in such conduct. (ALJD P 15, L 25-26; Tr 364). Johnson inquired as to the rationale for employees' protest and suggested that somebody should meet with them to ascertain their concerns. (ALJD P 15, L 25-26; Tr 363). Sherrod said that it doesn't matter who called off; they're all going to get fired anyway. (ALJD P 15, L 26-27; Tr 364). Also, Sherrod said that he spoke with Director Kirpheous Stewart and that they are all going to get fired, and Johnson asked how Respondent would accomplish this. (ALJD P 15; L 27-29; Tr 364-365). Sherrod said it doesn't matter; they're going to get fired. (ALJD P 15, L 30; Tr 365).

The ALJ found that on July 6, 2015, about 10:00 a.m., by radio, Steven Johnson was directed by Calumet facility Director Kirpheous Stewart to report to Administration. (Tr 367, 770, 771). Enroute to Administration, Johnson took a shortcut through the security office. (Tr 367). On one of the security monitors, Johnson observed that an unidentified security officer had a camera directed on the front of Calumet where employees were picketing. (Tr 368-369).

The ALJ found that about mid-morning on July 6, 2015, Johnson met with Calumet Facility Director Stewart and Executive Director Fernandez. (ALJD P 15, fn 11; Tr 370). Stewart asked Johnson about the status of employee call-offs and staffing. (ALJD P 15, fn 11; Tr 370). Fernandez congratulated Johnson about his shirt displaying Respondent's logo. (ALJD P 15, fn 11; Tr 370-371, 373-374, 686). Johnson returned to the intake area. (ALJD P 15, fn 11; Tr 371-372). Manager Wilson asked Johnson what Stewart and Fernandez discussed. (Tr 372). Johnson said that they asked about staffing. (ALJD P 15, fn 11; Tr 372). Wilson complimented Johnson

on his “Spectrum” shirt and stated that the ones wearing the same shirt were responsible for employees calling off and missing work. (ALJD P 15, fn 11; Tr 372-373). The ALJ found that Executive Director Fernandez did not leave work until about 10:00 p.m. on July 6, 2015. (ALJD P 15, L 34-35; Tr 601-608).

d. Respondent’s surveillance of employees who engaged in the picketing

The ALJ found that picketers observed a number Respondent’s supervisors and managers at the exterior of Calumet. (ALJD P 16, L 22-24; Tr 82-83, 258, 303-304, 326-329, 390, 481-482, 519). The ALJ found that Fernandez arrived at the Calumet entrance on July 6, 2015. (ALJD P 14, L 37-40; Tr 519, 555-556, 690-691; R 22). During the picketing, Fernandez was seen as she wrote on a yellow pad of paper, and observed the picketers. (ALJD P 16, L 22-26; Tr 327-329).

e. Respondent threatens its employees, creates the impression of surveillance and further interrogates employees

The ALJ found that on Thursday, July 9, 2015, at Calumet, during a weekly meeting, Security Supervisor Hionel Black met with other supervisors, managers, and directors, including but not limited to, Executive Director Fernandez and Director of Operations Douglas Burke. (ALJD P 19, L 23-43; Tr 415, 417, 418, 420-421, 424-425, 428, 434, 435, 436, 438, 652-653, 655, 656). Respondent discussed employees’ call-offs from work, their picketing activity, and the effect of such conduct on its operations. (ALJD P 19, L 23-43; Tr 422, 425). Respondent knew the identity of the employees who participated in the picketing because they were observed on the security cameras. (Tr 428). The ALJ found that Executive Director Fernandez told her staff to secure the names of all employees who were involved in the picketing. (ALJD P 19, L 23-43; Tr 423-424, 426, 428, 436-437).

The ALJ found that during a subsequent Respondent meeting, Director of Operations Burke told supervisors that they must watch what they say, employees must be very meticulous about their time and attendance, and there would be no “leeways”, which meant that Respondent would discipline employees accordingly. (ALJD P 19, L 23-43; Tr 426-427, 428). On July 8, 2015, Respondent discharged Facility Manager Steven Johnson. (ALJD P 15, fn 11; Tr 355, 356; J 1). Also, the ALJ found that on July 9, 2015, Calumet Security Supervisor Damien Dix told Youth worker Alfred Neely that Dix was with Executive Director Fernandez who used the security cameras to observe employees while they picketed on July 6, 2015. (ALJD P 16, L 27-29; Tr 330-331, 332; J 1). Dix said that Fernandez was watching employees and writing down their names. (ALJD P 16, L 30-31; Tr 331). Dix told Neely that Fernandez wrote down Neely’s name, which was on Fernandez’s list. (ALJD P 16, L 30-31; Tr 331, 332). Dix said that Neely must watch his back. (ALJD P 16, L 31-32; Tr 332).

The ALJ found that on July 9, 2015, Calumet Facility Manager Leroy Sherrod told two employees, including Youth worker Jamar Marcus, that employees messed up, twice stated that they’re going to get fired, and said that employees did not have representation. (ALJD P 21, L 15-18; ALJD P 22, L 12-14; Tr 383, 390-391). Simpson returned to work on July 9, 2015, and Supervisor Dix approached and said that upper-management, including Fernandez, was “pissed” and “highly upset” about employees’ picketing. (ALJD P 22, L 27-29; Tr 139, 140, 143; J 1). Dix said that Fernandez was inside the security booth while employees picketed. (ALJD P 22, L 30-31; Tr 139, 140-141). Also, Dix said that Fernandez was using the security cameras to zoom-in on employees who were engaged in the picketing and writing their names on a list. (ALJD P 22, L 30-32; Tr 139-142). Dix told Simpson that Fernandez had a hit list for everybody who was outside, and that Simpson better be careful because she’s (Fernandez) gunning for whomever

was outside and involved in the picketing. (ALJD P 22, L 32-34; Tr 140). Dix reiterated that Fernandez was gunning for employees, that she created a hit list, and that she was “pissed”. (ALJD P 22, L 27-34; Tr 140).

The ALJ found that on July 10, 2015, Facility Manager Sherrod told Neely and Marcus that they are all hit, they are on the list, and that employees are pretty much hit. (ALJD P 21, L 12-17; Tr 332-334, 391, 392). Sherrod did not testify. (ALJD P 21, L 20). About mid-August 2015<sup>3</sup>, during employees’ meeting with Lincoln Supervisor Michael Caston and Facility Manager Crawford, employees were asked by Crawford about their union sympathies and whether they would attempt to hold another rally (ALJD P 24, L 46-47; ALJD P 25, L 1-9; Tr 267-270, 306). Also, Manager Crawford asked why employees are going to organize a union. (ALJD P 25, L 4-6; Tr 269, 306). Also, he told employees that their jobs are not guaranteed if they joined a union, and employees did not desire to speak with him. (ALJD P 25, L 6, 9-12; Tr 269, 488-489). Further, Manager Crawford asked Kelley whether she was going to join the union (ALJD 25, L 9-12; Tr 270, 306).

**2. The ALJ correctly found that General Counsel’s witnesses were credible where Respondent’s witnesses were not credible (Respondent’s Exception Nos. 2, 4, 11, 20; ALJD P 8, L 38 – 43)**

a. The ALJ’s general credibility resolutions

The ALJ found that General Counsel’s witnesses were generally very credible. (ALJD P 8, L 38-40). In contrast, the ALJ found that Respondent’s witnesses testified in a less convincing manner. (ALJD P 9, L 5-7).

b. The ALJ’s specific credibility resolutions

i. Youth worker Lamont Simpson

The ALJ found that Lamont Simpson was a very credible witness. (ALJD P10, L 2-5).

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<sup>3</sup> Employee Ruth Crosby testified that this meeting occurred in July 2015, shortly after the picketing. (Tr 487-488)

**ii. Supervisor Cornelius Burton**

The ALJ found that on July 5, 2015, Supervisor Cornelius Burton unlawfully interrogated Lamont Simpson about his participation in the picketing. (ALJD P 38, L 25-26; Tr 125, 126).  
Burton did not testify at the trial. (ALJD P 12, P 41-42).

**iii. Security Supervisor Damien Dix**

The ALJ completely credited the testimony of General Counsel's witnesses, including but not limited to, Youth worker Lamont Simpson, instead of Supervisor Damien Dix' testimony. (ALJD P 9, L 7-20; ALJ P 10, L 7-12; ALJD P 12, L 13-15; ALJD P 38, L 18-22, 25-31, 33-37; Tr 118-119, 120, 121, 125, 139-143, 174, 175, 330-332, 511, 825-837, GC 2, J 1).

**iv. Executive Director Melissa Fernandez**

The ALJ completely credited General Counsel's witnesses over the testimony of Melissa Fernandez. (ALJD P 17-19; ALJD, P 18, L 34-47; ALJD P 19, L 1-6; ALJD P 33; L 9-13; Tr 82, 132-133, 258, 303, 326, 328-329, 331, 368-370, 372-373, 431, 450, 481, 518, 519).

**v. Youth workers Alfred Neely and Jamar Marcus**

The ALJ found that Youth workers Alfred Neely and Jamar Marcus were credible witnesses. (ALJD P 17, L 5-6; ALJD P 21, L 12-20; ALJD P 22, L 12-18; ALJD P 24-26; ALJD P 16, L 1-5; ALJD P 33, L 10, 12-13; ALJD P 35, L 6-7; Tr 327-329, 423, 428, 334, 390-392, 436-437). Manager Leroy Sherrod did not testify at trial. (ALJD P 21, L 20).

**vi. Facility Manager Steven Johnson**

The ALJ found that Steven Johnson corroborated the testimonies of Youth workers Neely and Marcus. (ALJD P 21, L 22-24). Also, Johnson was more credible than Manager Kirpheous Stewart. (ALJD P 21, L 24-30, 32-39; Tr 362, 364, 365-367, 775).

**vii. Security Supervisor Hionel Black**

The ALJ found the testimony of Security Supervisor Hionel Black more credible, with the exception of his testimony that on July 6, 2015, Black contacted Supervisor Donald Farrell to determine whether any staff had called off work. (ALJD P 16, L 14-20; ALJD P 19, L 11-12, 18-21; ALJD P 33, L 10-13; Tr 423-424, 426- 428, 431, 436-437, 450).

**viii. Facility Manager James Crawford**

Crawford did not testify at the trial to rebut Charging Party/Youth worker Tamika Kelley's testimony. (ALJD P 25; L 1-12; 14-18, 19-21; Tr 269, 270, 306, 472-473, 487-489).

**C. The ALJ correctly found that Respondent, on July 7, 2015, suspended employees Tamika Kelley, Sherman Cochran, and Delaine Singleton-Green for engaging in protected concerted activity, in violation of Section 8(a)(1) of the Act. (Respondent's Exception No. 18; ALJD P 26-32)**

**1. The relevant facts**

**a. Charging Party/Youth worker Tamika Kelley and Youth worker Delaine Singleton-Green**

The ALJ found that Charging Party/Youth worker Kelley's shift was scheduled to begin on July 6, 2015, at 6:00 a.m. (ALJD P 27, L 15-16; Tr 259). Kelley properly called off work. (ALJD P 27, L 15-22; Tr 259-261). Supervisor Clifford Judkins told Kelley that several employees had already called off work. (ALJD P 27, L 21-24; Tr 260). The ALJ found that Kelley participated in the picketing on July 6, 2015, and she returned to work on July 7. (ALJD P 27, L 26-27; Tr 257, 261, 262). On July 7, Respondent issued a suspension to each of Kelley and Youth worker Delaine Singleton-Green. (ALJD P 27, L 27-29; Tr 260-264, 691; GC 11, 31; J 1). Kelley notified employees about her suspension. (ALJD P 27, L 29-32; Tr 329, 264-265, 691; GC 11; J 1). Respondent notified Kelley that she would be paid for the date of her suspension, but Respondent did not notify Kelley as to the removal of such discipline. (ALJD P 27, L 34-38; ALJD P 28, L 12-13; Tr 264-265, 306-309; GC 11).

b. Youth worker Sherman Cochran

The ALJ found that current Youth worker Sherman Cochran, who was scheduled to work the midnight shift, which began at 10:00 p.m., on July 5, 2015, called off work in order to participate in the picketing on July 6, 2015; he had personal days available to cover his absence. (ALJD P 26, L 43; ALJD P 27, L 1-3; Tr 189-190, 193-198, 256; J 1). On July 6, 2015, Cochran participated in the picketing. (ALJD P 27, L 5; Tr 188-189). Cochran returned to work in the evening of July 7, 2015 and he was suspended because of his July 4<sup>th</sup> call off. (ALJD P 27, L 2, 5-9; Tr 191-192, 198; J 1). Cochran contacted Respondent, who directed him to report to work on July 8, but he did not receive notice that the suspension had been rescinded. (ALJD P 27, L 9-13; Tr 198-199).

c. Picketing Continued

The ALJ found that on July 7, 2015, picketing began about 8:30 a.m. (ALJD P 14, L 16-18; ALJD P 27, L 40-41; Tr 83, 329). As a result of the suspensions by Respondent on July 7, employees believed that discharge was imminent because of their picketing, and such activity ended a short time thereafter. (ALJD P 27, L 40-46; Tr 329-330; GC 11). On July 7, 2015, Kelley filed the original NLRB unfair labor practice charge in Case 07-CA-155494, and subsequently, Respondent refused to speak with employees by suspending its procedure of debriefing them at the beginning of their shift. (ALJD P 27, L 46-47; Tr 329-331; GC 1(a) - (c)).

**2. The ALJ's credibility resolutions**

The ALJ found the testimony of Tamika Kelley and Sherman Cochran credible over Fernandez's testimony. (ALJD P 8; L 38-47; ALJD P 9, L 1-3; ALJD P 28, L 27-45; ALJD P 29, L 1-15).<sup>4</sup>

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<sup>4</sup> Singleton-Green did not testify at the trial.

**D. The ALJ correctly concluded that Respondent unlawfully discharged its employee Alfred Neely because he engaged in protected concerted picketing activity, in violation of Section 8(a)(1) of the Act. (Respondent's Exception No. 1; ALJD P 33-36)**

The ALJ found that Respondent hired Youth worker Alfred Neely in January 2011. (ALJD P 33, L 7-9; Tr 311, 312). On August 19, 2015, Neely was participating in a game with the residents and another staff member. (ALJD P 33, L 15-16; Tr 334). A resident asked Neely for a sweater, which is kept in the pod's control room. (ALJD P 33, L 16-17; Tr 335). Neely referred the resident to Youth worker Jamar Marcus, who was closer to the pod's control room. (ALJD P 33, L 18-19; Tr 335, 393-394). Marcus agreed to secure a sweater for the resident. (ALJD 19-20; Tr 335-336, 394). The ALJ found that Marcus entered the control room to use the telephone in order to speak with his mother. (ALJD P 33, L 20-21; Tr 394). Shortly thereafter, Executive Director Fernandez and operations Manager Keith Leslie observed Marcus using the telephone. (ALJD P 33, L 21-23; Tr 394, 630-631, 803). Marcus then obtained the resident's sweater and returned to Neely. (ALJD P 33, L 24-25; Tr 394). Fernandez and Leslie followed Marcus. (ALJD P 33, L 25; Tr 336-337). Neely called Supervisor Brigiette Richard, to request a break, and she agreed to relieve him later because she was not available. (Tr 337-338, 815). Supervisor Dix told Fernandez that Neely had just requested a break and said that Neely wanted to speak with Fernandez, but she declined the request. (Tr 633).

The ALJ found that at the end of their shift, Respondent met with Neely and Marcus. (ALJF P 33, L 27). Sherrod told Neely that he was being suspended pending investigation. (ALJD P 33, L 27-29; Tr 339; GC 23). In response to Neely's inquiry, Sherrod ordered Neely to write a statement to explain why Marcus was on the telephone. (ALJD P 33, L 29-30; Tr 339). Neely said that he did not know about Marcus' conduct. (ALJD P 33, L 30-32; Tr 339-340). Also, Respondent ordered Marcus to prepare a statement. (ALJD P 33, L 33-34; Tr 340).

Respondent's discipline for Neely and Marcus stated that they violated resident ratio rules. (ALJD P 33, L 36-39; Tr 397-398; GC 23, 27).

The ALJ found that on August 19, 2015, Neely met with Vice President and Human Resources and Training Director Donald Fields, who did not understand how Neely did anything wrong. (ALJD P 33, L 39-41; Tr 348). Also, Fields told Neely that in the future Neely should notify his supervisor and tell Marcus not to use the telephone. (ALJD P 33, L 41; ALJD P 34, L 1Tr 348). Fields said he would send an e-mail to Fernandez because Neely did nothing wrong, and Neely showed Fields a statement that he prepared for Respondent. (ALJD P 34, L 1-2; ALJD P 34, L 7-10; Tr 348-349; GC 22). On or about August 29, 2015, by phone, HR Administrator James Wisner told Neely that he had been discharged. (ALJD P 34, L 12-13; Tr 342; J 1). Neely asked why he was discharged for Marcus' conduct. (ALJD P 34, L 14; Tr 342). Wisner said that Fernandez, Fields, and CEO Roger Swaninger decided to discharge Neely. (ALJD P 34, L 14-16; Tr 342-345,642, 786-787; GC 1).

The ALJ found that subsequently, Neely attempted to reach Fields by phone, but there was no response. (ALJD P 34, L 16-17; Tr 349). In writing, Respondent discharged Neely and Marcus. (ALJD P 34, L 17-25, 27-28; Tr 349-350, 399-400; GC 24, 28).

**E. The ALJ properly concluded that Respondent's issuance of written discipline to Tamika Kelley on September 24, 2015, for her September 22 and 23, 2015 call-offs from work, violated Section 8(a)(1) of the Act. Respondent's Exception No. 10; ALJD P 40-45)**

The ALJ found that on September 18, 2015, in writing, Respondent notified Kelley that she would be transferred from Schedule C to Schedule A, effective within two days. (ALJD P 41, L 9-13; Tr 271-272; GC 12). The transfer would change Kelley's off-days from Tuesdays and Wednesdays to Sundays and Mondays. (ALJD P 41, L 13-14; Tr 272). Kelley told Respondent that she was not given sufficient notice of the schedule change because she had prior

scheduled appointments. (ALJD P 41, L 14-16; Tr 272). Also, ALJ found that on September 19, 2015, Kelley met with Respondent. (ALJD P 41, L 19, 21-22; Tr , 272-274; J 1). Kelley reiterated that she was not given sufficient notice for the schedule change because of her prior scheduled appointments. (ALJD P 41, L 22-23; Tr 274). Fullerton said that the schedule change would occur regardless of whether Kelley agreed with the change. (ALJD P 41, L 24-25; Tr. 274; GC 12).

The ALJ found that about three hours later, Respondent gave Kelley a written performance evaluation. (ALJD P 41, L 25-28; Tr 275; GC 13). Kelley challenged the veracity of the document, which she said was prompted because she stood up for herself and announced that she would file a grievance. (ALJD P 41, L 28-32; Tr 276; GC 13). On September 19, 2015, Kelley submitted letters to Respondent in order to grieve her performance evaluation. (ALJD P 41, L 32-37; Tr 278-283, 289-300; GC 14, 15, 20 and 21).

The ALJ found that on September 21, 2015, Kelley contacted Respondent. (ALJD P 41, L 15-19, 39-40; Tr 272, 282; J 1). Kelley told Respondent that she would not come to work on September 22 and 23 because of prior scheduled personal appointments, which she had documented. (ALJD P 41, L 40-42; Tr 282, 289, GC 20, 21; J 1). Bradford referred Kelley to Supervisor Judkins, but she declined to speak with Judkins because she had already informed Bradford of her call-offs. (ALJD P 41, L 43-45; Tr 282; J 1). Respondent suspended Kelley September 22 or 23, 2015. (ALJD P 41, L 45-46; ALJD P 42, L 1-3, 9-12; Tr 184-186, 283-284; GC 16, 17). The ALJ found that Respondent did not subsequently notify Kelley that the suspension had been rescinded or reduced. (ALJD P 43, L 8-10; Tr 289-293).

The ALJ found that Kelley arrived for work on September 24, 2015, and Supervisor Kerwin Johnson notified her that she has been suspended. (ALJD P 42, L 1-3; Tr 284). Kelley

told Johnson about her prior meetings and conversations with Respondent. (ALJD P 42, L 3-4; Tr 284). Johnson told Kelley that he (Johnson) was unaware of her circumstances. (ALJD P 42, L 5-6; Tr 284). Johnson gave Kelley a written reprimand. (ALJD P 42, L 6-8; Tr 284, 285, 286; GC 16). Kelley said that she would file a grievance. (ALJD P 42, L 8-9; Tr 284). During the same shift, Johnson gave Kelley a written corrective action plan stating that she improperly called-off. (ALJD P 42, L 9-10; Tr 284-285, 286; GC 17). Respondent did not inform Kelley that her disciplinary suspension had been changed. (ALJD P 42, L 9-12; Tr 291-293; GC 16, GC 17, GC 18).

The ALJ found that subsequently, Respondent notified Kelley that a meeting had been scheduled on October 1, 2015, and such meeting occurred on that date. (ALJD P 42, L 14-17; Tr 286; J 1). Kelley said that she had prior scheduled appointments and a four-day vacation. (ALJD P 42, L 17-19; Tr 287). Respondent told Kelley that she was required to call-off on for each day. (ALJD P 42, L 19-21; Tr 287). Kelley replied that she previously met with Respondent, that she had called-off work with Bradford on September 21, and Respondent was aware of her prior scheduled appointments. (ALJD P 42, L 17-21; Tr 287). Kelley told Respondent's HR Department that she wanted to meet with Fernandez. (ALJD P 42, L 21-22; Tr 288). The HR Department stated that Fernandez would be contacted for a meeting. (ALJD P 42, L 22-23; Tr 290). Kelley was not returned to Schedule C, but Respondent reimbursed her by submitting her personal leave for September 22 and 23. (ALJD P 42, L 24-25; Tr 288-289).

The ALJ found that on October 2, 2015, Kelley hand-delivered a letter to Fernandez's mailbox. (ALJD P 42, L 27-29; Tr 288, 290-291; GC 19). On October 8, 2015, Kelley met with Fernandez. (ALJD P 42, L 29-30; Tr 625). Fernandez reviewed Respondent's time and attendance policy with Kelley. (ALJD P 42, L 31). Also, Fernandez admitted to Kelley that the

schedule change occurred quickly and empathized with Kelley's circumstances. (ALJD P 42, L 32-33; R 14, at 36-40). Fernandez changed the effective date for the schedule change in order to accommodate Kelly, but she did not change her decision to issue a written discipline. (ALJD P 42, L 33-35).

**F. The ALJ properly concluded that Respondent discharged its employee Lamont Simpson because he engaged in protected concerted activity, in violation of Section 8(a)(1) of the Act. (Respondent's Exception No. 3; ALJD P 36-40)**

**1. The relevant facts**

The ALJ found that Respondent hired Youth worker Lamont Simpson in June 2011. (ALJD P 36, L 21, 23-24; Tr 112, 113, 177). In October 2014, he began working a second part-time job at the Motor City Casino (casino) in Detroit, Michigan. (ALJD P 36, L 21-23; Tr 150-152, 176). During 2014, Respondent mandated Simpson to work overtime. (ALJD P 36, L 24-26; Tr 152). A conflict arose in Simpson's scheduling because Respondent mandated him on the same days that he was scheduled to work at the casino or if he had to pick-up his daughter from daycare. (ALJD P 36, L 25-27; Tr 152-153, 164). To resolve the conflict, Simpson was required to secure a replacement employee to work his shift, or Respondent's supervisors told Simpson that if he bought their lunch, he would be removed from the mandation list. (ALJD P 36, L 27-30; Tr 152-153, 155). About late 2014 or early 2015, Manager Leroy Sherrod told Simpson that he—Sherrod—would no longer accommodate the scheduling of Simpson's second job. (ALJD P 36, L 32-36; Tr 155, 156).

During the week of August 10, 2015, Simpson asked Supervisor Carter<sup>5</sup> whether he could submit his casino work schedule so that he would not be mandated to work on the scheduled dates for his casino job. (ALJD P 36, L 40-42; Tr 159, 160; GC 5). Carter said that he

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<sup>5</sup> At trial, Respondent's Counsel Sheryl Laughren stated that Carter is no longer employed by Respondent. (Tr 162). Further, Counsel Laughren stated that during the time in question, Childs was a supervisor within the meaning of Section 2(11) of the Act and an agent within the meaning of Section 2(13) of the Act. (Tr 162).

would see what he could do. (ALJD P 36, L 43; Tr 159). Simpson also told Manager Childs that he did not have a problem with mandation, but he requested that it not conflict with his casino work schedule. (ALJD P 36, L 43-45; Tr 159-160, 161; GC 5). Childs requested that Simpson provide his casino schedule. (ALJD P 36, L 45-46; Tr 160). Childs said that he would see what he could do, but he did not provide any further response to Simpson's request. (ALJD P 36, L 46-47; ALJD P 37, L 1-2; Tr 160-161).

The ALJ found that on September 18, 2015, Respondent told Simpson to take a break because he is being required to work a mandated shift. (ALJD P 37, L 4-5; Tr 164-165). Simpson replied that he had to pick-up his child, and he was unable to work a mandated shift. (ALJD P 37, L 5-6; Tr 164-165). On September 18, 2015, before the end of his shift, Supervisor Bridget Richards called Simpson and said that he is required to work a second shift. (ALJD P 37, L 6-7; Tr 165-166; GC 6). Simpson declined because he had to pick-up his daughter and work at his casino job. (ALJD P 37, L 8-9; Tr 166). Several minutes later, Manager Sherrod demanded that Simpson work a mandated shift. (ALJD P 37, L 9-10; Tr 166). Simpson said that he could not stay and had already told Supervisor Richards. (ALJD P 37, L 10-12; Tr 166). Several more minutes later, Supervisor Donald Farrell announced over the radio that Simpson, along with other employees, would be mandated after their breaks. (ALJD P 37, L 12-13; Tr 166).

The ALJ found that Richards called Simpson, who requested to secure a replacement to work in his place. (ALJD P 37, L 16-17; Tr 167). Richards agreed and reiterated that Simpson must stay. (ALJD P 37, L 16-17; Tr 167). Simpson was unsuccessful in locating a replacement. (ALJD P 37, L 18; Tr 167). Supervisor Farrell announced over the radio the names of the employees who had been mandated to work the next shift. (Tr 167). Simpson punched out at the end of his scheduled shift. (ALJD P 37, L 19; Tr 167). Richards asked Simpson whether he was

going to take a break, and Simpson said no. (Tr 167). Simpson replied that he was unable to work a mandated shift. (ALJD P 37, L 18-19; Tr 167). Subsequently, Simpson picked up his daughter, dropped her off at home, and went on to work his scheduled shift at the casino. (ALJD P 37, L 20-21; Tr 167). During a break at Simpson's casino job, he retrieved a voice message on his phone from Respondent stating that he was suspended pending investigation. (ALJD P 37, L 21-24; Tr 167-168). The ALJ found that on or about September 21, 2015, Respondent notified Simpson that he had been discharged. (ALJD P 37, L 26-39; Tr 112, 168-170; J 1, GC 6).

- G. **The ALJ correctly found that in March 2016, after the SPFPA representation election, Respondent coercively informed employees that breaks between scheduled and mandated shifts would no longer be allowed because they voted for the Union, in violation of Section 8(a)(1) and 8(a)(3) of the Act. (Respondent's Exception No. 8; ALJD P 45-50)**
- H. **The ALJ correctly found that in March 2016, after the SPFPA representation election, Respondent [and] unilaterally eliminated [the breaks] between scheduled and mandated shifts without bargaining or providing the Union with an opportunity to bargain over that change, in violation of Section 8(a)(1), (3) and (5) of the Act. (Respondent's Exception No. 9; ALJD P 50-52)**
- I. **The ALJ correctly found that Respondent discriminatorily required part-time contingent employees to work mandated overtime because the employees selected the Union as their collective-bargaining representative, in violation of Section 8(a)(1) and (3) of the Act. (Respondent's Exception No. 7; ALJD P 53-55)**
- J. **The ALJ properly found that on June 1, 2016, as a result of its unlawful unilateral change in requiring part-time contingent employees to work mandatory overtime shifts, Respondent discharged its contingent part-time employee Quiana Jenkins, in violation of Section 8(a)(1) and (5) of the Act. (Respondent's Exception No. 5; ALJD P 50-55)**
- K. **The ALJ properly found that in April 2016, Respondent discriminatorily and unilaterally required part-time contingent employees to work mandated overtime shifts without bargaining or providing the Union [with] an opportunity to bargain over that change, in violation of Sections 8(a)(1), (3) and (5) of the Act. (Respondent's Exception No. 6; ALJD P 50-52)**

1. The relevant facts

a. Respondent's elimination of breaks

The ALJ found that before the March 3, 2016, Board election, Respondent afforded employees the opportunity to take a break of about 30 minutes to one hour between the end of the scheduled shift and the beginning of their mandated shift. (ALJD P 45, L 28; ALJD P 46, L 36-37, 39-42; ALJD P 47, L 1-7; Tr 94-95; 219, 378-379; 442-443; 464; 489; J 4).

The ALJ found that after the NLRB representation election held on March 3, 2016, Respondent eliminated the breaks between employees' scheduled and mandated shifts. (ALJD P 45, L 28-40; ALJD P 47, L 35-39; ALJD P 47, L 42-43; Tr 106-107, 219, 465, 501, 706; , J-2, J 4). Also, after the NLRB election, Respondent required employees to immediately report directly to their assigned pod. (ALJD P 47, L 5; ALJD P 48, L 17; ALJD P 48, L 11-18; Tr 219, 465).

The ALJ found that about mid-March 2016, Manager Leroy Sherrod notified employees by radio that they could no longer take breaks between their scheduled and mandated shifts. (ALJD P 47, L 39-42; ALJD P 48, L 13-18; Tr 98-101, 220, 219, 378-379, 464-465).

The ALJ found that about a couple of weeks later, Supervisor Sherrod told employees that employees were no longer allowed to take a break. (ALJD P 48, L 20-22; Tr 221, 462-463, 465). Sherrod announced that Respondent must follow the rules and employees could no longer take breaks because they voted for Union. (ALJD P 48, L 20-30; Tr 220-221). Employees were no longer allowed to take breaks between their scheduled and mandated shifts. (ALJD P 48, L 1-7; Tr 466, 490, 502, 503).

b. Respondent's mandation of contingent employees

The ALJ found that after employees voted in favor of Charging Party SPFPA as their collective-bargaining representative, Respondent began calling the names of contingent employees to work mandated shifts. (ALJD P 50, L 16-19; Tr 91). Beginning about April 2016,

Respondent announced and required contingent employees to work mandated shifts. (ALJD P 50, L 25-29, 33-34, 36-43,45-47; ALJD P 51, L 1-2; Tr 93, 222, 379-380, 462-463). Respondent hired Youth worker Quiana Jenkins on August 10, 2015 as a contingent part-time employee. (ALJD P 50 L 25-26; ALJD P 53, L 7-8; Tr 214-215). Respondent allowed Jenkins to choose a contingent part-time status because she has children and was unable to work weekends. (ALJD P 50, L 26-34; ALJD P 53, L 9-10; Tr 212-213, 214-218, 229). The ALJ found that after the representation election, Respondent mandated additional contingent employees to work overtime despite their objections and Respondent's initial agreement to refrain from mandating them. (ALJD P 51, L 3-9; Tr 462-464, 467-469).

c. Respondent's discharge of its employee Quiana Jenkins

After Charging Party SPFPA won the Board representation election, Respondent notified contingent employees that they would be required to work mandated overtime shifts. (ALJD P 53, L 10-13; Tr 464, 467-469). About mid-April 2016, Respondent announced that contingent employees, including but not limited to Quiana Jenkins, are now required to work mandated shifts. (ALJD P 53, L 10-15; Tr 222-223). Contingent employees notified Youth worker Clarence Atwater, who serves as contact for Charging Party SPFPA, that Respondent was now mandating employees to work overtime. (ALJD P 51, L 11-16; Tr 93-94, 108-109).

The ALJ found that Respondent mandated Jenkins to work overtime in mid-April 2016, April 29, 2016, and early May 2016 even though she had to pick up her children and she was threatened with termination. (ALJD P 52, L 13-14; ALJD P 53, L 10-18; Tr 223-224, 225). Also, Respondent gave Jenkins a write-up on May 10, 2016. (ALJD P 53, L 19-24; Tr 226; GC 8). On May 27, 2016, Respondent mandated Jenkins to work overtime even though she was unable stay because she had to pick up her children. (ALJD P 53, L 31-47; Tr 226-228). Respondent

discharged Jenkins effective on May 27, 2016 (ALJD P 53, L 31-47; ALJD 54, L 1-3; Tr 225).

On May 30, 2016, Respondent notified Jenkins that she had been discharged. (ALJD P 53, L 37-39, 40-43, 45-47; ALJD P 54, L 1-3; Tr 228-230, 231-232; GC 9, 10; J 1).

## **2. The ALJ's credibility resolutions**

The ALJ found that Fernandez's testimony about employees' breaks was not credible. (ALJD, P 47, L 19-21). The ALJ found credible, however, the testimony of employees, including Quiana Jenkins, Clarence Atwater, Danielle Boatwright, Kalaundra Hall, and Ruth Crosby, along with Manager Steven Johnson and Supervisor Hionel Black. (ALJD P 8, L 38-43; ALJD, P 47, L 21-33, 35-43; ALJD P 48, L 1-18; ALJD P 50, L 25-29, 31-34, 36-43; Tr 98-101, 214-215, 217-218, 379, 445-447, 464-465, 490, 500-502, 652).

## **II. ARGUMENT**

**Exception 1:** The ALJ erred in finding that Respondent discharged employee Alfred Neely for engaging in protected concerted picketing activity ("CPA"), in violation of Section 8(a)(1) of the Act.

**Exception 2:** The ALJ erred in crediting the testimony of Neely.

**Exception 11:** The ALJ erred in finding that Respondent, on July 6, 2015, by Executive Director Melissa Fernandez, engaged in unlawfully surveillance of employees' CPA in violation of Section 8(a)(1) of the Act.

**Exception 12:** The ALJ erred in finding that Respondent, on July 9, 2015, by Calumet Security Supervisor Damon Dix, created the impression that employees' protected activities were under surveillance and coercively informed an employee that he could be disciplined for engaging in protected activities in violation of Section 8(a)(1) of the Act.

**Exception 14:** The ALJ erred in finding that Fernandez was observed in the Operational Control Center watching the picketing on surveillance monitors.

**Exception 15:** The ALJ erred in finding that on July 9, 2015, Respondent, by Calumet Security Supervisor Damon Dix, coercively informed employees that Respondent's management was upset about the picketing and threatened employees could be disciplined for such activity, in violation of Section 8(a)(1) of the Act.

**Exception 19:** The ALJ erred in finding that Respondent, on July 7 and 10, 2015, by Calumet Facility Manager Leroy Sherrod, unlawfully threatened employees with discipline for engaging in protected concerted activities in violation of Section 8(a)(1) of the Act.

**A. THE ALJ WAS CORRECT IN HIS FACTUAL FINDING THAT RESPONDENT VIOLATED THE ACT WHEN IT DISCHARGED ALFRED NEELY FOR ENGAGING IN PROTECTED AND CONCERTED PICKETING.**

**1. Neely participates in protected concerted Activity, and Respondent surveilles, and threatens him, and creates an impression of surveillance.**

The ALJ found that on July 4 or 5, 2015, Neely was present when employee Lamont Simpson spoke to Calumet Facility Manager Christopher Wilson and Shift Supervisor Steven Johnson. Simpson asked Johnson and Wilson to give the petition he had earlier placed in supervisor's mailboxes to Calumet Director Kirpheous Stewart and they agreed. The ALJ further found that Wilson came back later that evening and told Neely that he spoke to Stewart and said, "they're not going to talk about shit," and that the employees "better be at work." The ALJ noted that Wilson was not called to testify to contradict Neely's assertion, and while Stewart testified on behalf of Respondent, he failed to rebut the assertions by Neely. Thus, Respondent was well aware of Neely's involvement with the concerted petition.

Neely testified that on July 6, he picketed outside the Calumet facility and while he was picketing, he saw Fernandez watching the picketers writing something on a yellow pad of paper. The ALJ not only credited his testimony, but he credited the testimony of Former Security Supervisor Hionel Black who testified that the cameras in the security pod are positioned outside the exterior of the building and are focused on the gates and fences. However, some of the cameras can be moved to look at the details outside the facility. Black testified that after the rally, he attended a meeting with various supervisors, including Fernandez and that Fernandez wanted everybody's name that picketed.

Neely testified that on the following day, July 7, 2015, in a conversation with Calumet Facility Manager Leroy Sherrod, who came into pod 6 where Neely was working, Sherrod said, "you all was on that list," and "you're all hit." (Tr. 334) Neely testified that being "hit" was

slang for “you all [are] in trouble.” (Tr. 334) Similarly, Calumet youth worker Jamar Marcus testified that he had a conversation with Sherrod who told him the employees “messed up,” and they were going to get fired. (Tr. 390–391.) Sherrod also told him that “he was hit, like we’re on the hit list.” (Tr. 391) In addition, Sherrod said “you all are stupid, like you all are hit, like they’re going to get rid of you all.” (Tr. 392) Sherrod did not testify to rebut the testimonies of Neely and Marcus.

Neely also testified that on July 9, Calumet Security Supervisor Damon Dix told him that Fernandez had written his name down on a list. Dix told Neely that “you need to watch your back, man.”

The ALJ noted that Facility Manager Steven Johnson also offered testimony consistent with Neely’s and Marcus’ assertions that Respondent indicated employees would be disciplined or discharged for engaging in the picketing activities. He testified that Sherrod told him that “it don’t matter about who called off; they’re all going to get fired anyway.” (Tr. 364) Sherrod also reported that he spoke to Kirpheous Stewart and they were all going to be fired anyway. (Tr. 365–367.)

Both Dix and Fernandez denied the statements made by Neely, however the ALJ specifically credited Neely’s testimony. The ALJ found Neely to be “truthful and a solid witness.” He found that the testimony of former manager Steven Johnson who testified that the employees’ picketing activity was being watched by Respondent was also truthful. In comparison, the ALJ found Fernandez to be insincere and evasive, and he found her testimony implausible. The ALJ noted that Fernandez denied knowing anything about the rally, despite two thirds of her employees calling off and the rally occurring in plain sight at the front of the building while she drove into the facility. Let it not be unsaid that this is a prison facility and as

such any type of disturbance inside or outside is probably scrutinized by security and reported. Yet, Fernandez who admitted that she jumped up, got dressed and raced to the facility to respond to the “all hands on deck crisis”, never asked anyone, no one told her and she was not aware that her employees were picketing outside of the facility. She also testified incredibly that as Executive Director that she didn’t know whether supervisors were present or helping with this crisis. The ALJ noted where her testimony was understated, nonchalant and incredible. He also found her testimony incredible when she was later testifying about why she suspended employees, testimony which was contradicted by Respondent’s position statement submitted during the investigation of the case.

Similarly, Dix also testified that he was unaware of the rally/picketing, which the ALJ also found implausible. As the Manager of Security, he would have direct knowledge of any disturbances in or around the facility. Yet incredibly, he testified that he was unaware of the rally. He also gave general denials about all of the conversations that he had with employees, yet several employees testified that he came up to them and said things about the petition, the rally, the surveillance and threatened employees. The ALJ found that his testimony was guarded, defensive and implausible.

The ALJ noted that Stewart denied that he told Johnson that anyone who picketed would be discharged. (Tr. 775; ALJD P21 L32-35) However, Johnson never testified that Stewart made the statement to him. He testified that Sherrod conveyed to him that Stewart said the picketers were all going to be fired, an assertion that was not contradicted or disputed by Sherrod because he did not testify. In addition, Stewart failed to deny making such a statement to Sherrod. The ALJ credited Johnson’s testimony and specifically discredited Stewart’s testimony.

In deciding whether a remark is threatening or coercive, in violation of Section 8(a)(1) of the Act, the Board applies the objective standard of whether the remark would reasonably tend to interfere with the free exercise of employee rights, and does not look at the motivation behind the remark, or rely on the success or failure of such coercion. *Air Management Services, Inc.*, 352 NLRB 1280, 1286 (2008); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Rossmore House*, 269 NLRB 1176, 1177 (1984); *Medcare Associates, Inc.*, 330 NLRB 935, 940 (2000). The Board has held that employers' threats of discipline or job loss for participation in protected concerted activities constitute violations of Section 8(a)(1) of the Act. *Baddour, Inc.*, 303 NLRB 275 (1991).

In this case, Dix's statement to Neely were clearly threats of discipline, and Sherrod's statement to Neely and Marcus that there were "on that list," and they were "all hit" (in trouble) was a coercive and threatening statement. Both statements indicated that Respondent identified them as being two of the employees who engaged in picketing, and that their participation in that activity meant they would be subject to future discipline or discharge. These statement therefore constituted a threat of discipline or discharge for engaging in protected, concerted activities in violation of Section 8(a)(1) of the Act.

## **2. The ALJ found that Respondent's reason for discharging Neely was pretextual**

Respondent asserts in its exceptions that Neely was discharged for allowing his pod to go out of ratio. It points to regulations and rules that state that a pod is required to be 10:1 for staff to resident.

The ALJ on the other hand found that Neely did nothing wrong. The testimony of both Neely and youth worker Jamar Marcus show that on August 19, 2015, Neely was working with residents on a board game, with teacher Mrs. Spratt. One of the residents asked Neely for a

sweater. The evidence shows that resident's sweaters are kept in a locker in the pod's control room, which is inaccessible to residents. Thus, Neely directed the resident to Marcus who was closer to the control room. Marcus then left the pod to go into the attached control room. While there, he made a telephone call to his mother to inform her that a family member had died. While on the call, Fernandez and Operations Manager Keith Leslie entered the control room and found Marcus on the telephone. Neely was still with the residents, doing his job. Neely learned later that Marcus was on the phone and had been caught by Fernandez and Leslie. Later that day, both Neely and Marcus were suspended pending investigation. Neely testified that later, he met with Vice President of Human Resources Donald Fields, and told him what occurred. Fields told Neely that he did not understand how Neely did anything wrong and that he would send an email to Fernandez because Neely did nothing wrong. The ALJ noted that while Fields testified that he received and approved the decision to discharge, he never rebutted the testimony of Neely that his actions did not warrant discharge.

The ALJ correctly held that the General Counsel made a prima facie showing that Neely's protected concerted conduct was a motivating factor in Respondent's decision to discharge him. The ALJ found that there was no question that Respondent harbored animus towards the protected concerted activity and noted that within 2 months of Neely's PCA, he was discharged.

The ALJ found that Respondent did not demonstrate that it would have discharged Neely in the absence of his protected conduct. The ALJ noted that Neely was discharged because of Marcus's conduct, who by all accounts left to get a resident a sweater. The record established that it was not uncommon for youth workers to leave the pod to go to the control room to retrieve items. It is also undisputed that Neely continued to perform his work by interacting with the

residents. The evidence did not support that Neely was aware of Marcus's conduct or that he aided in Marcus's conduct. Respondent argues that Neely was correctly terminated because he took no action when the pod went out of ratio. However the ALJ correctly held that this argument is nonsensical. The ALJ held that Marcus left the room for an accepted and legitimate purpose, and that the record is devoid of evidence showing that Neely could have or should have seen that Marcus was involved in any other purpose.

The ALJ correctly held that "as there is an insufficient and false justification given by Respondent for Neely's discharge and a failure to provide evidence that an investigation revealed that Neely was somehow responsible for Marcus' actions when he was out of the classroom and out of sight from Neely. The ALJ found that this warrants an inference that his discharge was discriminatorily motivated. *Integrated Electrical Services*, 345 NLRB 1187, 1199 (2005); *Washington Nursing Home*, 321 NLRB 366, 375 (1996), and he found that Respondent failed to rebut the General Counsel's showing that Neely was discharged for engaging in protected concerted activities.

**Exception 3:** The ALJ erred in finding that Respondent discharged employee Lamont Simpson for engaging in protected CPA, in violation of Section 8(a)(1) of the Act.

**Exception 4:** The ALJ erred in crediting the testimony of Simpson.

**Exception 12:** The ALJ erred in finding that Respondent, on July 9, 2015, by Calumet Security Supervisor Damon Dix, created the impression that employees' protected activities were under surveillance and coercively informed an employee that he could be disciplined for engaging in protected activities in violation of Section 8(a)(1) of the Act.

**Exception 13:** The ALJ erred in finding that Respondent, on July 3, 2015, by Calumet Security Supervisor Damon Dix, unlawfully interrogated employees regarding their engagement in CPA in violation of Section 8(a)(1) of the Act.

**Exception 17:** The ALJ erred in finding that Respondent, on July 5, 2015, by Calumet Shift Supervisor Cornelius Burton, unlawfully interrogated an employee regarding his engagement in CPA in violation of Section 8(a)(1) of the Act.

**B. THE ALJ WAS CORRECT IN HIS FACTUAL FINDING THAT RESPONDENT VIOLATED THE ACT WHEN IT DISCHARGED LAMONT SIMPSON FOR ENGAGING IN PROTECTED AND CONCERTED PICKETING**

**1. Simpson participates in protected concerted Activity**

On July 2, 2015, Simpson placed a petition about working conditions in the mailboxes of various managers. Simpson testified that he created the petition based on complaints from other employees about working conditions. He entered the mailbox, and was confronted by Security Supervisor Damon Dix who asked what he was doing. Simpson concealed the petition and said he was doing something else.

The ALJ found that Respondent Human Resources Administrator James Wisner, upon retrieving the petition from his mailbox, emailed a copy of the Calumet petition to Fernandez and Donald Fields, the Vice President of Human Relations. Fernandez acknowledged that Wisner emailed the petition to her and to Fields. Fernandez, despite testifying at trial that she did not provide the Calumet petition to anyone else, nevertheless admitted that she “may have” sent it to CEO Roger Swaniger. (Tr. 597–598) Fernandez further admitted that she discussed the employees’ Calumet petition with the human resources personnel and with her “management team,” and she discussed the fact that the staff was unhappy. (Tr. 660–661).

**2. Simpson is unlawfully Interrogated by Calumet Security Supervisor Damon Dix, and by Calumet Shift Supervisor Cornelius Burton in violation of Section 8(a)(1) of the Act**

a. Interrogations by Calumet Security Supervisor Damon Dix

Simpson testified that on July 3, 2015, approximately 2 hours after he left the petition in the mailboxes, he had a conversation with Calumet Security Supervisor Damien Dix, who entered the room in pod 3 and asked Simpson whether he knew anything about a “letter” that was put in the mailboxes of the management officials. The ALJ found that while Dix testified on Respondent’s behalf, he failed to deny that he asked Simpson whether he knew anything about

the letter/petition, and he failed to offer any legitimate explanation for his question. (Tr. 825-837)

Simpson testified that after he denied any knowledge of the petition, Dix told him the managers and supervisors had a meeting in which they talked about the unsigned letter. Dix then told Simpson that Kirpheous Stewart stated: “they ain’t going to do shit,” and that Stewart “threw [the petition] away.” (Tr. 121) With regard to Simpson’s assertion that Dix told him that Stewart wasn’t “going to do shit” about the employees’ concerns in their petition, at trial, Stewart failed to deny that he made that statement to Dix. However, Dix denied that he told Simpson that Respondent “wouldn’t do shit about the employees’ concerns,” and he also went so far as to deny that he was ever aware of the written complaints or petition submitted by the employees. (Tr. 829–831)

The ALJ credited the testimony of Simpson and specifically discredited the testimony of Dix. He found Dix to be guarded, defensive and stated that he appeared less than forthright. The ALJ also found it implausible that Dix was not aware of the petition/complaints considering that Fernandez was notified of the complaints immediately after they were placed in the mailboxes and she testified that she discussed the petition with her management team and supervisors. Further, the ALJ did not credit Dix’s testimony that he did not buzz Simpson into the mailbox area as Simpson testified that he did. Dix testified that he is never in that area at 5:30 am, yet later testified that he couldn’t recall what shift he worked that day. The ALJ found that although Simpson may have been in error about the time that he delivered the petitions to the mailboxes, it is undisputed that he did.

In Respondent’s exceptions, it asserts that Dix’s questions to Simpson and statement that management “ain’t going to do shit” did not amount to a violation of the Act and are akin to a

personal opinion protected by Section 8(c) of the Act. However this couldn't be further from the truth.

As the ALJ cited, the Supreme Court has held that “mutual aid or protection” concerns “the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to ‘improve terms and conditions of employment or otherwise improve their lot as employees.’” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). The Board determines “whether under all the circumstances the interrogation [of an employee] reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” *Scheid Electric*, 355 NLRB 160 (2010); *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In *Intertape Polymer Corp.*, 360 NLRB 957 (2014), the Board noted that, based upon its decisions in *Phillips 66 (Sweeny Refinery)*, 360 NLRB 124, 128 (2014) and *Rossmore House*, supra, it considers the following factors in determining whether questioning an employee regarding their sympathies pertaining to protected concerted activity or union activity is unlawful: (1) whether there is a history of employer hostility to or discrimination against protected activity; (2) the nature of the information sought; (3) the identity of the questioner; (4) the place and method of the interrogation; and (5) the truthfulness of the employee’s reply.

In applying these factors, the ALJ found it inconceivable that the questioning of Simpson could be more coercive, as all of the factors strongly indicated a coercive interrogation. In this case, the evidence established hostility, the comments were seeking evidence of concerted activity, and the identity of the questioner was a high ranking official, See *Matros Automated Electrical Construction Corp.*, 353 NLRB 569, 571 (2008), enfd. 366 Fed.Appx. 184 (2d Cir. 2010). The method and place of the interrogation is also evidence of its coerciveness, as

Simpson had just 2 hours earlier covertly left the petition in the managers' mailboxes, and the questioning took place in Simpson's workstation as Dix sought him out and entered the room in pod 3 to ask him if he knew anything about the complaints about working conditions. The Board has also found that such employee attempts to conceal support for protected concerted or union activities weigh in favor of finding an interrogation unlawful. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1182 (2011); See, e.g., *Sproule Construction Co.*, 350 NLRB 774, 774 fn. 2 (2007); *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 fn. 1 (2003), affd. mem. 121 Fed. Appx. 720 (9th Cir. 2005). Finally, while Dix testified at trial, he failed to deny that he questioned Simpson, and he failed to offer any legitimate explanation for the questioning. The Board has found that a respondent's failure to offer or articulate a legitimate explanation for its questioning of employees serves as further evidence of the coercive nature of the interrogation. *Sproule Construction Co.*, supra at 774 fn. 2.

b. Threats and the Impression of surveillance by Calumet Security Supervisor Damon Dix

The ALJ also credited the testimony of Simpson that when he returned to work on after the rally, Supervisor Dix came to his pod and informed him that "upper management" was "pissed about the rally." (Tr. 139.) Specifically, Dix told Simpson that Fernandez was in the control room when the employees were picketing and she was zooming in with the surveillance cameras on the picketers, "taking names down," and she was "pissed." (Tr. 140.) According to Simpson, Dix told him that Fernandez had a "hit list for everyone who was outside," she had their names, and they better "be careful because she was gunning for whoever was at the Rally." (Tr. 140.)

The ALJ found Dix's statement to Simpson constituted threats to employees that they would be disciplined or discharged, and similarly found Dix's information about Fernandez's surveillance did create the impression of surveillance.

c. Interrogation by Calumet Shift Supervisor Cornelius Burton

Simpson testified that as a result of feeling like their petition was not being addressed by management, he and other employees decided to organize a rally on July 6. They called employees, who then began to call off work. At around 10:00 p.m. on July 5, Calumet Shift Supervisor Cornelius Burton called Simpson at home and asked him if he was part of the "rally" or picketing. (Tr. 124–125.) When Simpson denied knowing anything about it, Burton said, "come on, man, you know this is me; you don't have to be like that with me." (Tr. 124–125.) Simpson testified that Burton also told him: "It's getting crazy around here because people keep calling off left and right." (Tr. 125.) Simpson then called Calumet Supervisor Steven Johnson around 11 p.m. on July 5 and told him he would not be coming to work the following day. Burton was not called to testify at trial, and therefore Simpson's testimony on this matter was not disputed.

Despite being undisputed, Respondent excepts to the ALJ's finding that that Burton interrogated Simpson. They argue that the discussion did not rise to the level of a violation of the Act.

In applying *the Intertape Polymer Corp.*, factors to this discussion, the evidence is clear that this was an unlawful interrogation. First, as the ALJ pointed out, Simpson had already been interrogated by Dix and told that their PCA meant nothing to management. Second, Burton was seeking to know if Simpson was involved in the PCA. Third, this was not just any supervisor asking Simpson about his involvement in the PCA, this was Simpson's direct supervisor. His

dominion over Simpson was obvious. Finally, as the ALJ noted, the fact that Simpson felt the need to conceal his involvement in the PCA shows that he feared retaliation and did not want to disclose his involvement. Thus, most of the factors leave no doubt that this was an unlawful interrogation in violation of 8(a)(1) of the Act.

It is also probative that Respondent did not call Burton or Sherrod to testify so as to deny or refute that the illegal conduct that occurred. Such failure should lead to an adverse inference that they would have testified adversely to Respondent if they had been called to testify.

*Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (Mar. 11, 2016), *Hialeah Hospital*, 343 NLRB 341, 393 fn. 20 (2004); *Gerig's Dump Trucking*, 320 NLRB 1017, 1024 (1996); *International Automated Machines*, 285 NLRB 1122, 123 (1987), *enfd.* 851 F.2d 720 (6th Cir. 1988).

**3. The ALJ was correct in finding that Simpson was unlawfully discharged**

Respondent asserts in its exception that Lamont Simpson was discharged for refusing mandatory overtime. However, as the ALJ found, Simpson had long had another job as a security guard at a casino and had overtime made arrangements with various supervisors and managers to avoid any conflict with that job and any working hours with Respondent. As the ALJ noted, Simpson tried to provide his schedule to supervisor Emmanuel Carter and Manager Childs. He informed them that he was trying to avoid any conflict with this schedules. However, on September 18, 2015, Respondent scheduled Simpson for mandatory overtime despite his efforts. Simpson informed several supervisors that he was unable to work because he had to pick up his daughter from school and then report to work at the casino. Simpson tried to find a replacement for the work at Respondent, but was unable to do so.

In order to establish that an employee was terminated in retaliation for his protected concerted and/or union activities, the General Counsel must present enough evidence to support an inference that the employee's protected concerted or union activities were a motivating factor in Respondent's decision to terminate his employment. *Wright Line*, 251 NLRB 1083, 1089 (1980). In order to establish a prima facie case, the General Counsel must demonstrate the following: (1) the employee was engaged in protected concerted and/or union activity; (2) the employer had knowledge of that activity and (3) the employer had anti-union animus.

*Integrated Electrical Services Inc.*, 345 NLRB 1187, 1199 (2005); *Wal-Mart Stores*, 340 NLRB 220, 221 (2003). The burden then shifts to the employer to show that it would have taken the same action even if the employee had not been engaged in union activity. *Wright Line*, supra, at 1089; *Integrated Electrical Services Inc.*, supra, at 1187, fn 5; *KFMB Stations*, 343 NLRB 748, 751 (2004). The General Counsel's prima facie case is not rebutted when a respondent's reason for its actions is shown to be false or non-existent. *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981). An employer's motive may be inferred from the total circumstances provided and from the record as a whole. *Coastal Insulation Corporation*, 354 NLRB No.70, 32 (2009); *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Evidence of suspicious timing, failure to adequately investigate alleged misconduct, departures from past practices, past tolerance of behavior for which the discriminatees suffered adverse action, disparate treatment of the discriminatees, and false reasons given in defense, all support inferences of discriminatory motivation. *Coastal Insulation Corporation*, supra; *Adco Electric Incorporated*, 301 NLRB 1113, 1123 (1992); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Banta Catalog Group*, 342 NLRB 1311 (2004).

Simpson's protected concerted activity is clear. He was the lead organizer of the petition. He drafted it and submitted it. Dix then interrogated him about it and his involvement with it. Simpson also provided a copy of the petition to supervisors Johnson and Wilson, and asked them to find out Respondent's response to it. He was then told that it was thrown in the trash. Simpson also organized the picketing. He was front and center during the picketing, was there most of the day carrying signs and even arranged for television coverage. The ALJ found that after the picketing, Dix coercively informed him that Fernandez used the camera in the security control room to zoom in on the picketers, that she was taking down names and had a hit list, and that he should watch out, which constituted an unlawful threat of discipline or discharge. The ALJ further found that Respondent harbored animus toward the protected concerted picketing activity as evidenced by the manager's statements that Fernandez was "pissed" and upset about the picketing, and that those employees were on hit lists and they would be disciplined or discharged. The ALJ also found that the timing of Simpson's discharge was suspect in that it occurred approximately 3 months after he engaged in the protected concerted activity. *Mesker Door*, 357 NLRB 591, 592 fn. 5 (2011); See *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

The ALJ then found that Respondent's asserted reason for discharging Simpson was pretextual and that it failed to carry its burden to show that he was discharged even in the absence of his protected concerted activity. Simpson had received a suspension for missing mandation on May 7, 2015. Other employees who missed mandation more than once were not discharged. Employee Jason Pritchard was disciplined for missing mandation on May 24, 2016, and had an earlier occasion of missing mandation on May 11, 2016, he was not discharged. (GC 49; Tr 734-735). Marshawn Mackie was suspended on December 3, 2015 for missing mandation,

and he had two prior occasions of missing mandation on September 7, 2015 and September 24, 2015, he was not discharged. (GC 37; Tr 235-236). Both Pritchard and Mackie also had other attendance infractions, and were not discharged. Simpson was discharged because he missed mandation on September 18. Unlike these other employees, there was no mention of the May 7 incident on Simpson's discipline, so he was suspended and discharged for just the September incident. Darnesha Coy received a written warning on June 28, 2016 (GC 61) for refusing mandation and was just suspended for her second offense on October 21, 2016. (GC 70).

Additionally, other employees received lesser discipline for a first offense of refusing mandation, Danielle Boatwright received a written reprimand on June 22, 2016 for abandoning her mandatory shift (GC 57), LaTonya Hewitt also received a written warning on June 25, 2016 for refusing mandation (GC 59), as did Phillip Thomas on June 28, 2016 (GC 62), Nicole Ndjebo on October 15, 2016; (GC 69), and Damon Singleton on November 16, 2016. (GC 71). Brandon Dunn refused mandation, was insubordinate, and used abusive language, and was only suspended (GC 63).

As the ALJ found, Simpson was treated in a disparate manner and/or Respondent was enforcing its rules in a manner to allow no leeway so as to discharge the lead activist of the employees' protected concerted activities.

**Exception 5:** The ALJ erred in finding that on June 1, 2016, as a result of its unlawful unilateral change in requiring part-time contingent employees to work mandatory overtime shifts, Respondent discharged employee Quiana Jenkins in violation of Section 8(a)(5) and (1) of the Act.

**Exception 6:** The ALJ erred in finding that in April, 2016, Respondent discriminatorily and unilaterally required part-time contingent employees to work mandated overtime shifts without bargaining or providing the Union an opportunity to bargain over that change, in violation of Section 8(a)(5), (3), and (1) of the Act.

**Exception 7:** The ALJ erred in finding Respondent discriminatorily required part-time contingent employees to work mandated overtime because the employees selected the Union as their collective-bargaining representative, in violation of Section 8(a)(1) and (3) of the Act.

**Exception 8:** The ALJ erred in finding that in March 2016, after the SPFPA representation election, Respondent coercively informed employees that breaks between scheduled and mandated shifts would no longer be allowed because they voted for the Union, in violation of Section 8(a)(1) and 8(a)(3) of the Act.

**Exception 9:** The ALJ erred in finding that in March 2016, after the SPFPA representation election, Respondent unilaterally eliminated between scheduled and mandated shifts without bargaining or providing the Union an opportunity to bargain over that change, in violation of Section 8(a)(5), (3), and (1) of the Act.

**C. THE ALJ WAS CORRECT IN FINDING THAT SPFPA WAS THE EXCLUSIVE REPRESENTATIVE OF THE BARGAINING UNIT AND THAT RESPONDENT FAILED TO BARGAIN WITH THE UNION PRIOR TO MAKING CHANGES IN TERMS AND CONDITIONS OF EMPLOYMENT**

**1. Respondent unilaterally changed the policy of mandation for contingent employees**

On March 3, 2016, a representation election was held and SPFPA was elected the exclusive representation of the youth workers. On March 10, Respondent filed objections to that election, and on March 24, the Regional Director overruled the objections and certified the Union as the exclusive representative of the unit. Respondent thereafter filed a request for review, which was denied, and then failed and refused to bargain with SPFPA. The Union filed case 07-CA-180451. On November 22, 2016, the Board decided that case [364 NLRB No. 149] and found that Respondent failed to bargain with the Union, in violation of 8(a)(5) of the Act. Respondent appealed that decision to the 6<sup>th</sup> circuit court of Appeals, and the Board petitioned for enforcement. On November 27, 2017, the court granted the Board's petition for enforcement and found that Respondent violated the Act when it refused to bargain with the Union. In April 2018, the Union again requested to bargain and bargaining began on May 8, 2018.

Respondent excepts to the fact that it had a policy prior to the election of SPFPA as the exclusive representative of the employees of not requiring contingent or part-time employees to work overtime.

It is well established that unilateral changes by an employer during the course of a collective-bargaining relationship concerning matters that are mandatory subjects of bargaining are normally regarded as per se refusals to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962). The Board has held that a unilateral change in a mandatory subject of bargaining is unlawful only if it is “material, substantial, and significant.” *Flambeau Airmold Corp.*, 334 NLRB 165, 165 (2001), modified 337 NLRB 1025 (2002); *Alamo Cement Co.*, 281 NLRB 737, 738 (1986).

Current employee Atwater testified that prior to the election, full-time employees could be required to work overtime, but contingent employee only volunteered for overtime if they desired. Employee Quiana Jenkins testified that after she was hired in 2015, she had conversations with several supervisors who informed her that contingent employees were able to create and choose their own schedules. She testified that prior to the election, contingent employees could volunteer to work overtime, but could not be required to do so. The ALJ noted that several managers and supervisors confirmed that contingent employees could not be mandated for overtime. The ALJ pointed to testimony by Security supervisor Hionel Black and Facility manager Steven Johnson, who both testified to that policy. The employees further testified that in April 2016, after the election, they were informed of the policy change that contingent employees could be mandated. Jenkins testified that she discussed this with Shift supervisor Larry Edwards who informed her that Fernandez was now requiring contingent employees to be mandated. Employee Danielle Boatwright testified that Sherrod told her that now contingents are getting mandated too. Boatwright testified that she also talked to Kirpheous Stewart who confirmed that everybody is getting mandated now. Boatwright testified that beginning in April, she was then mandated as a contingent employee. Atwater testified that after the election, he began to hear contingent employees being called for mandated shifts, and that he

was contacted by several contingent employees and asked why they were being mandated. Atwater testified that many employees considered him the contact for the Union. Atwater testified that to his knowledge, the Union was not contacted about this change. SPFPA Union official Worthen testified that Respondent never notified the Union of the change, and thus didn't bargain with the Union.

In response, Respondent presented records showing that contingent employees had worked overtime prior to the election. However, the ALJ did not give that evidence any weight because Respondent admitted that contingent employees had volunteered for overtime and it could not, based on those records distinguish those employees who were mandated and those employees who volunteered for overtime. (ALJD 52, Tr. 737-738; R. 17)

The policy related to overtime is clearly a term and condition of employment and is also a mandatory subject of bargaining. *Randolph Children's Home*, 309 NLRB 341, 343 at fn. 3 (1992); *Flambeau Airmold Corp.*, supra 173.

The ALJ found that Respondent change was unilateral and a violation of 8(a)(5) of the Act. *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975); *Flambeau Airmold Corp.*, supra. Despite Respondent continuing to contest the Union's status as the bargaining representative, Respondent "acts at its own peril in making [such] changes in terms and conditions of employment," and its actions constitute a violation of Section 8(a)(5) and (1) of the Act. *Mike O'Connor Chevrolet*, supra; *Flambeau Airmold Corp.*, supra.

The ALJ also found that Respondent implemented this unilateral change in policy because "the employees selected the Union as their collective bargaining representative." The

ALJ found that the timing of the change is evidence that it was motivated by unlawful considerations, namely that the employees elected the Union.

**2. Respondent discharged Quiana Jenkins because of its unilateral change**

It is undisputed that Quiana Jenkins, a contingent employee, was mandated to work overtime on May 6, 2016. She was given a written reprimand. On May 27, 2016, she missed another day of mandated overtime and was discharged. Respondent excepts to the ALJ's finding that her discharge was in violation of 8(a)(5) and (1) of the Act.

The Board has held that employees disciplined or terminated as a result of an employer's unlawful unilateral change constitute violations of Section 8(a)(5) of the Act. *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001), modified 337 NLRB 1025 (2002); *Consec Security*, 328 NLRB 1201 (1999); *Great Western Produce, Inc.*, 299 NLRB 1004 (1990); See, e.g., *Windstream Corp.*, 352 NLRB 44, 44 (2008) (held any employees terminated as a result of employer's unlawful unilateral change violated Sec. 8(a)(5) of the Act). Contrary to Respondent's exception, the ALJ did not find a violation of 8(a)(3) of the Act and the analysis specifically contrasted those discussions. Thus, the question here revolves around whether Respondent unilaterally changed the policy, and If the Respondent's unlawfully imposed rules or policies were a factor in the discipline or discharge, then the discipline or discharge violates Section 8(a)(5). *Great Western Produce, Inc.*, 299 NLRB at 1005.

The ALJ found that since Respondent unlawfully changed the policy requiring contingent employees to work overtime, and unlawfully discharged Jenkins after they did so and she informed them that she could not work that mandated shift. The ALJ stated that Respondent acted at its peril and violated 8(a)(5) and (1) of the Act in its discharge of Jenkins.

**3. The ALJ correctly found that Respondent unlawfully informed employees that breaks between scheduled and mandated shifts were no longer allowed and then unilaterally eliminated the policy**

Respondent excepts to the ALJ's finding that it unilaterally changed the policy of providing employees with a break between a scheduled or mandated shift and that it informed employees of this change, without bargaining with the Union or providing the Union with notice of the change. Respondent asserts that such a policy never existed and that employees merely requested and was granted a break.

Respondent points to a 2014 town hall meeting with employees where these breaks were discussed and testified that she clarified with her managers that such breaks were not necessary or required by the State, as employees asserted in the meeting. However, there is no evidence that this information was ever shared with employees. Employees testified that the breaks ranged between 30 to 60 minutes and that it was announced on the radio when the mandated employee would take the break.

The ALJ credited the testimony of witnesses that the policy changed in mid-March 2016. Atwater testified that managers began telling employees to go directly to their scheduled mandation (overtime shift), instead of a break. Atwater testified that Sherrod was one of the supervisors who announced that change, and since that time, employees are no longer allowed to take breaks between a scheduled and mandated shift. Boatwright testified that in March or April 2015 (this is obviously an error since the facts pertain to 2016), both Sherrod and Manager Childs informed her that there would be no more breaks allowed at the Calumet facility. (Tr 464-465) Jenkins testified that she questioned Sherrod a few weeks later about the change, he responded, "you guys voted the Union in, so we have to follow the rules...no one can take breaks." (Tr 220-221) Sherrod did not testify to rebut this statement.

Respondent's failure to call him as a witness should lead to an adverse inference that he would have testified adversely to Respondent if he had been called to testify. *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (Mar. 11, 2016), *Hialeah Hospital*, 343 NLRB 341, 393 fn. 20 (2004); *Gerig's Dump Trucking*, 320 NLRB 1017, 1024 (1996); *International Automated Machines*, 285 NLRB 1122, 123 (1987), enfd. 851 F.2d 720 (6th Cir. 1988). The ALJ found this statement a violation of Section 8(a)(1) of the Act.

There is no doubt that Respondent did not notify the Union of any change in policy because it denies that the policy was changed. Further, the Union representative testified that Respondent did not notify it prior to any change. The ALJ found that Respondent's policy or practice of allowing for employee breaks between their scheduled and mandated shifts, was a mandatory subject of bargaining. That policy or practice was also material, substantial, and significant as it significantly impacted employees' conditions of work. The ALJ further found that Respondent was obliged to bargain with the Union about the change and did not do so. The ALJ correctly found the change was a *fait accompli* and a violation of 8(a)(5) and (1) of the Act.

The ALJ also found that the statement to employees that the breaks were eliminated because they voted for the Union, established that the change was motivated by unlawful considerations, such as the employee's vote for the Union. In crediting the witness, the ALJ found that the unilateral elimination of breaks between scheduled and mandated shifts also constituted a violation of 8(a)(3) of the Act.

**4. Respondent's assertion that the ALJ's finding with respect to the Duty to Bargain is Moot is False**

The ALJ found that Respondent had a duty to bargain with SPFPA and as a result of its failure, it failed and refused to provide the Union with requested information, failed and refused to bargain about the mandation policy for contingent employees, failed and refused to bargain

with the Union about breaks between regular and mandated shifts, and discharged Quina Jenkins under its unilaterally implemented mandation policy. Thus, the ALJ's finding that Respondent failed to bargain with SPFPA is not merely a point to be found, it is a decision to be upheld.

**Exception 10:** The ALJ erred in finding that Respondent's issuance of written discipline to Tamika Kelley on September 24, 2015, for her September 22 and 23, 2015 call-offs from work, violated Section 8(a)(1) of the Act.

**Exception 16:** The ALJ erred in finding that in August/September 2015, during a weekly employee meetings, Lincoln Facility Manager James Crawford unlawfully interrogated employees regarding their protected concerted and union activities in violation of Section 8(a)(1) of the Act.

**Exception 18:** The ALJ erred in finding that Respondent, on July 7, 2015, suspended employees Tamika Kelly, Sherman Cochran, and Delaine Singleton-Green for engaging in CPA in violation of Section 8(a)(1) of the Act.

**D. THE ALJ WAS CORRECT IN FINDING THAT THAT RESPONDENT UNLAWFULLY DISCIPLINED CHARGING PARTY TAMIKA KELLY ON SEPTEMBER 24, 2015, AND UNLAWFULLY DISCIPLINED CHARGING PARTY TAMIKA KELLY, SHERMAN COCHRAN AND DELAINE SINGLETON-GREEN ON JULY 7, 2015**

**1. Respondent unlawfully suspended employees Charging Party Tamika Kelly, Sherman Cochran, and Delaine Singleton-Green for engaging in PCA in violation of Section 8(a)(1) of the Act**

Charging Party Kelly, Cochran and Singleton-Green called off work per Respondent's procedure for July 6, 2015, and they had the time available to do so. On July 6, all three participated in the rally in front of the Calumet facility. As the ALJ found, Respondent surveilled the employees, threatened employees that there was a list created of employees who picketed and that they were going to be disciplined. Additionally, Charging Party Kelly was one of the key organizers of the rally. She notified the employees in the Lincoln Center and created all of the picket signs.

On July 7, 2015, the day after the rally, Supervisors Judkins, Kerwin Johnson and Eugene George suspended Kelley and employees Delaine Singleton-Green and Sherman Cochran based on their time and attendance. (Tr 261-263, 192, 198; J 1, GC 11, GC 31). Judkins referred

Cochran to Lincoln Facility Director Oliver Cooper with his concerns. (Tr 192, 198; J 1).

Charging Party Kelley notified employees who were participating in the picketing on July 7, 2015 that Respondent gave her a disciplinary suspension pending investigation. (Tr 329, 691; GC 11; J 1). As a result, many employees who had begun picketing on July 7 stopped picketing for fear of discipline. Charging Party Kelley served the suspension on July 7, 2015. (Tr 264-265) On a later day, George notified Charging Party Kelley that she would be paid for the date of her disciplinary suspension, (Tr 264-265, 306-307, GC 11), and Respondent paid her for her absence. (Tr 264-265, 308; GC 11). However, Respondent did not notify Charging Party Kelley that the disciplinary suspension had been rescinded. (Tr 265, 308-309; GC 11).

On July 8, 2015, Cochran contacted Cooper. (Tr 198). Cooper told Cochran to report to work on the evening of July 8, but Respondent did not inform him that the disciplinary suspension had been rescinded. (Tr 198-200).

There was no reason for the suspension. The employees had called off work appropriately and in a timely manner and had the time available to call off. Yet, Respondent suspended them for no legitimate reason. Fernandez testified that it is the usual policy to suspend employees who call off appropriately with time available. However, she presented no evidence of this contention, and she wouldn't because such a contention would be too costly for any Employer. In effect, Respondent would suspend employees who call off, and then pay them not only for their time off, but for the unnecessary suspension. A party's failure to offer documentation in support of witness testimony warrants an inference that the documentation would not support the party's position. *Bay Metal Cabinets, Inc.*, 302 NLRB 152, 178-179 (1991).

In its position statement during the investigation which Fernandez read aloud at trial, Respondent stated that the three employees were suspended because it was believed they were

taking sick leave fraudulently when they were observed picketing. Given that they didn't call in sick, there was no evidence of them using sick leave or engaging in any fraud. Thus, they were suspended because they were observed picketing, and took off from work to do so.

Respondent argued that it cured the suspension by rescinding it and paying the employees for the loss time. However, while there is evidence that they paid the employees for the suspended day in question, there is no evidence that they informed the employees that the suspensions were rescinded. Alleged letters were never sent, one was sent to the wrong employee and no effort was made either during the course of the investigation or prior to the investigation to cure the alleged "mistake."

Applying *Wright Line*, the employees called off work and lawfully picketed on July 6, 2016. Respondent knew that these employees picketed, assumed that they called in sick and intended to use that pretext to discipline them for the asserted fraud. However, no fraud was committed and Respondent jumped to the pretextual conclusion so as to punish the picketers. No rational reason was given for this decision or the rush to discipline. These suspensions are a clear violation of the Act and further proof that Respondent was observing employees picketing.

An inference of animus and discriminatory motive may be derived from examining all the circumstances of a case, including suspicious timing, a false justification given for a discipline, and the failure to adequately investigate alleged misconduct. *Integrated Electrical Services*, supra at 1199; *Washington Nursing Home*, 321 NLRB 366, 375 (1996). Providing a false justification for a discipline supports an inference that Respondent has another motive for its actions that it wants to conceal. *Pan American Electric*, 321 NLRB 473, 476 (1996); *Shattuck Denn Mining Corp. v NLRB*, 362 F.2d 466, 470 (9<sup>th</sup> Cir. 1966).

## **2. Lincoln Facility Manager James Crawford unlawful interrogation**

Employees Ruth Cosby and Charging Party Kelley both testified that they met with manager James Crawford and supervisor Caston, at some point between July and September, 2015 in a meeting with employees and supervisors in Lincoln Center multipurpose room. Crosby testified that Crawford asked what they thought about the Union coming into the facility. They responded that they did not feel comfortable talking about the Union with him. Charging Party Kelley testified that Crawford asked if they were going to try to organize the Union and why they were going to organize the Union, stated that the Union wasn't good for them, the Union would take their wages, and their jobs weren't guarantee if they joined the Union. Charging Party Kelley stated that employee Lisa Crawford (unrelated) said that they are damned if they do, and damned if they don't. She said that they exhausted all of their options trying to work with supervisors and managers. She asked, "why not try the union?" Charging Party Kelley testified that she told them that they (Crawford and Caston) were just going to report back to management and it could cost them their jobs. She then said that Crawford asked if she was going to join the union and she replied that she wasn't comfortable speaking with him because everything they say and do is held against them. Manager Crawford did not testify to refute these statements.

This corroborated and un rebutted testimony interrogation was at the beginning of the Union campaign. Crawford asked the employees directly about their interest in organizing a Union. He had no valid reason for asking these questions, other than to know who was involved. He surely did not assure them that no reprisals would result, even after they expressed concern. Under the totality of the circumstances, the questioning was coercive in violation of Section 8(a)(1) of the Act.

## **3. Respondent unlawfully disciplined Tamika Kelly on September 24, 2015**

The ALJ found that Charging Party Kelley was disciplined on September 24, 2015, in retaliation for her protected concerted activities in violation of 8(a)(1) of the Act. Respondent excepts to this finding and states that Kelly was disciplined because she failed to call in for each day of her absence. This exception should be discredited.

The ALJ found that Charging Party Kelly was engaged in protected concerted activity and that Respondent was aware of her activity. She wrote the petition that was circulated in the Lincoln facility and put it in the mailboxes of Respondent's supervisors and managers. Charging Party Kelly helped to organize the picketing and created all of the signs that employees carried. She brought the signs in her automobile and everyone obtained them from there, which no doubt was viewed by Respondent who was, according to supervisor Black, zooming in on picketers. Further, it is clear that she was observed picketing because Respondent said so in response to her July 7 discipline. Further, after Charging Party Kelley was disciplined on July 7, 2015, she filed this case, on behalf of herself and other employees. Thus, Respondent was without a doubt aware of her protected concerted activity.

The testimony and evidence also showed that Charging Party Kelley's schedule was suddenly changed on September 18, which conflicted with already scheduled appointments. In an effort to avoid this conflict, Kelly sought meetings with various supervisors. She also sent letters of complaint to Managers Oliver and Fernandez. Her efforts to get relief were in effect ignored.

On September 21, Charging Party Kelley called off for September 22 and 23, by calling Lincoln Facility Manager Bradford. However, On September 24, 2015, when Charging Party Kelley returned to work, she was informed by Respondent that she was suspended for no call/no show, even though she had the time available and had called ahead of time. The discipline (GC

16) indicated that it was a written warning for “failing to call off or reporting to work late for her scheduled shifts on 9-22-15 and 9-23-15.” Later that day, Charging Party Kelley was issued another discipline which stated that she received the earlier discipline because “she called off 1 or more times in consecutive pay periods.” (GC 17). However, Respondent provided another discipline to the NLRB during the course of the investigation of this case, dated October 8, 2015, which states that she was issued a counseling for September 22 and 23, 2015, for “calling off her shifts for the following two days.” (9/22, 9/23). (Tr 293, GC 18).

The ALJ correctly found that “Respondent’s attendance policy does not require employees to call in each day of a multi-day absence when verification justifying the multi-day absence is supplied to the Respondent.” Thus, he found no legitimate business basis for Respondent to issue Kelly the discipline. Further, the ALJ also noted the shifting reason for disciplining Kelly which supports an inference that its stated reason for the discipline is false. *Rogers Electric, Inc.*, 346 NLRB 508, 518 (2006); *Philo Lumber Co.*, 236 NLRB 647, 650 (1978).

The evidence established that she did call off for September 22 and 23, following the procedure set forth by Respondent and that she had leave time available. Further, the ALJ noted that Respondent presented no justification for the discipline for September 22, since even looking at their arguments for the discipline, it is undisputed that she called in for that day more than three hours ahead of time. He also noted that Kelly provided documentation of a doctor’s note for her daughter for September 22 and of her scheduled court appointment for September 23. Thus, she provided sufficient verification justifying her absences. The ALJ found that Respondent had false or no justification for the issuance of the discipline, which supports an inference that Respondent had an unlawful motive for its actions. *Pan American Electric*, 321

NLRB 473, 476 (1996); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

**Exception 20:** The ALJ erred in repeatedly making erroneous credibility findings. At every turn, the ALJ credited the testimony of the General Counsel's witnesses, despite their pecuniary interest in the outcome of the proceeding, contradictory testimony about interactions with Respondent's supervisors, and the preposterous and uncorroborated nature of their testimony.

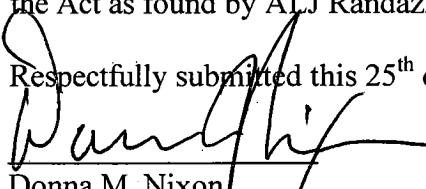
Respondent excepts to the ALJ's credibility decisions. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

The ALJ specifically credited the testimony of the General Counsel's witnesses and specifically for each witness discredited Respondent's witnesses. He provided coherent and cogent reasons for his credibility decision based on the demeanor of the witnesses, corroboration and the reasonableness of the testimony. There is nothing in the exceptions or the record that should lead the Board to overturn his determinations.

#### **E. CONCLUSION**

Based on the above and the record as a whole, Counsels for the General Counsel respectfully requests that the Board find that Respondent violated Sections 8(a)(1), (3) and (5) of the Act as found by ALJ Randazzo and Order appropriate remedies.

Respectfully submitted this 25<sup>th</sup> day of September 2018.

  
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