

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

UNITED STATES POSTAL SERVICE)	
)	
Respondent)	
and)	Cases: 5-CA-180590
)	
LARRY PRETLOW)	
)	
An Individual)	
)	

**RESPONDENT’S ANSWERING BRIEF TO
GENERAL COUNSEL’S EXCEPTIONS**

Respondent, United States Postal Service, respectfully submits the instant brief opposing the exceptions filed by Counsel for the General Counsel. Judge Amchan’s decisions, both initially and upon remand, explicitly rejected General Counsel’s theory that the June 8 evaluation of Charging Party Pretlow was designed as a means for provoking Pretlow. As the Judge explained initially, and in his more recent decision, Respondent could not have known that by merely meeting with Pretlow to discuss his progress, Pretlow would be provoked to act out in the bizarre way he did. In short, the evaluation meeting (whatever its motivation) could not have been designed as a scheme to provide a subsequent basis to terminate Charging Party. A finding that the evaluation meeting itself was discriminatorily motivated does not mean that the termination resulting from Pretlow’s outburst was contaminated and therefore also illegal.

The Judge’s further finding; that all employees, especially probationary employees, must expect to face evaluation of their work progress at some point is spot-on. This is especially true in Mr. Pretlow’s case. There was ample evidence, cited by the Judge, that Respondent has a

long-established policy of evaluating probationary employees. Moreover, Respondent and the Union had just recently (March 2016) reiterated the need for such probationary employees in exactly Mr. Pretlow's circumstances to be evaluated repeatedly during their first 90 days. And several of Mr. Pretlow's co-workers had the same evaluations shortly after Pretlow received his.

If anything, the Judge's decision did not go far enough in finding that Respondent's policy of evaluating probationary employees was a completely legitimate and innocuous exercise of well-established rules.¹ There were hundreds of evaluations of other probationary employees in Alexandria, VA, including at the Engleside facility. (Resp. Exhs. 20, 21, 22) There was also uncontradicted testimony about other (earlier) evaluations at Engleside. (Tr. 430)

There are two related legal claims General Counsel makes in his exceptions: that the Judge erred in not connecting the unlawful evaluation with the termination (by not finding that the first requires a corresponding finding about the latter) and that the Judge erred also by finding that Charging Party would likely have been evaluated at some point. The crux of both of these determinations by the Judge was that the June 8 evaluation may have been the result of retaliation, but that Pretlow's conduct in that meeting was not pre-ordained or predictable and that Pretlow's bizarre behavior was not excusable or "provoked" and thus the termination was not tainted as a matter of law, despite the genesis of the meeting. Again, there is ample support

¹ GC's entire case, and the Judge's retaliation finding, are based entirely on an absence of evaluation documents for other employees at the Engleside facility. The absence of prior evaluation documents was inferred to mean there were no such evaluations, and thus that Pretlow's evaluation was disparate treatment and therefore retaliatory. However, there were previous evaluation documents about prior evaluations at Engleside. (Tr. 425-27) The prior documents were lost however, when the Alexandria Post Master engaged in several purges of office furniture, desks and file cabinets (including personnel files with evaluation forms) in an unrelated fit to eliminate "clutter." (Tr. 384-396; 427-431) The Postmaster was terminated, in part, for these offenses. (Resp. Exh. 19) Thus, while there were few extant evaluation forms, the absence should not have been the basis for any type of adverse inference or finding. Rather, the absence of prior documents was completely explained, corroborated by testimony of two government officials, demonstrated by documentary evidence, and uncontradicted. Nonetheless, this mountain of evidence was rejected in favor of an "inference" – or rather a predisposition toward assuming guilt. Be that as it may, Respondent does not except to the retaliation finding here. Rather, this explication is offered solely to point out that there was ample evidence of evaluations, even evaluations at Engleside. Thus, ample support for the Judge's finding (that employees should expect to be evaluated) is found in the record.

for the Judge's decision both as to the facts and his application of the law.

There is abundant evidence that Pretlow "should" have been evaluated – and therefore would likely have been evaluated, even if the timing of the June 8 meeting was suspect. The record was replete with references to the contractual requirement to conduct evaluations on all probationary employees (like Pretlow), with contract interpretation guidance, with memoranda of understanding, internal Postal rules and, of course, with hundreds of prior employee evaluations. See: Resp. Exhs. 7, 10, 11, 12, 13, and 14; GC Exhs. 12, 21, and 22. There can be no dispute that Postal Service employees should expect to be given probationary evaluations – at some point – since it was required and was regularly undertaken (see Resp. Exhs. 20, 21, and 22 – hundreds of evaluation forms for other Alexandria, VA employees). Moreover, the Arbitrator, in her award reinstating Mr. Pretlow required that he be placed back into probationary status where his progress could be reviewed. She also admonished Pretlow to behave himself. (GC Exh. 2) Consequently, Mr. Pretlow could and should have expected to be given some kind of progress review while he was in a probationary status. He should also have wanted such assessment and coaching so that he could be in a position to learn the job and achieve permanent employment. In fact, he complained about the lack of prior evaluation. (Resp. Exh. 7, pg. 33 of 41)

Whether the June 8 evaluation meeting took place or not, the Judge's finding that Pretlow would have been evaluated has ample support in the record. More importantly, however, that fact disconnects the motive for the June 8 meeting from any allegedly required finding that the subsequent termination was infected with bias.

The Judge found that Respondent could not have known that Pretlow would overreact or would be "hypersensitive" or would engage in insubordinate behavior during the evaluation meeting. Thus, while the June 8 meeting was a product of retaliation, it was not intended as a

set-up to have an excuse or pretext to terminate Pretlow. Instead, Pretlow's own un-provoked behavior during the meeting was an independent and untainted basis for his termination. That is a factual finding that is also supported. See, for example, *USPS and Shelley Oglesby*, 07-CA-170211, JD-24-17 (4/18/17)(Judge upholds termination of charging party for refusing to participate in probationary evaluation). Whether characterized as an "outburst" or bizarre behavior, or as "insubordination" what is clear and amply supported is that Mr. Pretlow's behavior constituted a refusal to control himself and to allow a normal procedure to take place. Employees are evaluated all the time and are often given critical reviews of their work progress. (Tr. 406-413) Yet, such evaluations are not legal provocation to refuse or rant and rave, as Pretlow did.

It was also appropriate to refer to Mr. Pretlow's further bizarre behavior subsequent to the June 8 meeting. Such later conduct corroborated that Mr. Pretlow was unstable and uncontrollable and had to be forcibly restrained and taken away to the Hospital for psychiatric evaluation due to his further outburst. This reference supported that Pretlow's prior June 8 behavior was real, and not some strange fiction created by management or the union.

General Counsel would ignore all the pertinent facts and focus solely on a legal theory that once retaliatory animus is found at all, any further action by the employer must be tainted and illegal. That is not the law.

Supershuttle of Orange County, 339 NLRB 1 (2003) and *Kiddie, Inc.*, 294 NLRB 840 (1989) are indeed distinguishable – as described in detail by the Judge here. In both cases, the employer created a pretext for termination by staging investigations for the sole purpose of terminating the employee. By contrast, in this case, no such effort was made or found. Quite the contrary. Here, the Judge repeatedly found that Respondent could not have known that Pretlow would behave in the manner he did. As a result, whatever its purpose, the June 8 meeting was

not designed as a means to entrap Pretlow or as a set-up to create the circumstances under which Respondent would have a basis to fire Pretlow.

Nor was the meeting itself any kind of provocation, such that Pretlow's outburst(s) would be excused. Rather, Mr. Pretlow's behavior, his own actions, his words and his refusal to cooperate peacefully and reasonably during the meeting constituted an independent set of facts that he and he alone was responsible for. His behavior was within his control, was unprovoked and was a legitimate (and untainted) basis for his termination.

Repeatedly, Mr. Pretlow has acted out based on his own extreme "hypersensitivity." The Arbitrator cautioned him about this. The Union cautioned him about this. General Counsel opted to not even call him as a witness for fear of how he would act as a witness, and didn't even allow Pretlow to remain in the hearing room during the case. During the hearing, when called by Respondent's counsel, Pretlow broke down sobbing after just a few innocuous questions. Mr. Pretlow has repeatedly gone after and threatened everyone with whom he has dealt, including General Counsel, the Judge, his Union, and (of course) his employer. General Counsel would like to ignore all of this evidence of his "hypersensitivity." But that hypersensitivity is exactly what caused Pretlow to act out in the way he did during the June 8 evaluation. General Counsel should no more condone his behavior than his behavior when he attacks and threatens the very NLRB people who are championing his cause, or the Judge who presided over his case.

Mr. Pretlow has shown over and over again that he is unstable and uncontrollable. General Counsel has seen his bizarre ranting and raving first-hand, and has been the victim of it too. It seems somewhat absurd then for General Counsel to claim that Respondent must have provoked this behavior simply by wanting to talk with Mr. Pretlow about his progress as a probationary employee.

In the final analysis, the Judge’s factual findings and conclusions are fully supported by the record. While the Judge could easily have found that the June 8 meeting was not the product of retaliation (especially as there was no actual evidence of malice or ill-will but only “inference”) what he did find was fully documented in the record. The Judge made the factual and legal finding that the motive for the June 8 meeting was disconnected from the motive to terminate Mr. Pretlow. He was well within his authority in doing so. As a result, his decision must stand, and General Counsel’s exceptions must be rejected.

For all the foregoing reasons, Respondent respectfully requests that each of the exceptions urged by General Counsel be rejected in their entirety.

It is, this 26th day of October, 2018,

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing Respondent's Answering Brief to General Counsel's exceptions were sent this 26th day of October, 2018, as follows:

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