

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON D.C.**

**YP MIDWEST PUBLISHING, LLC,  
d/b/a DEX YP**

**Respondent**

**and**

**07-CA-218455**

**DISTRICT 4, COMMUNICATIONS  
WORKERS OF AMERICA (CWA), AFL-CIO**

**Charging Party**

**GENERAL COUNSEL'S EXCEPTIONS  
TO ADMINISTRATIVE LAW JUDGE'S DECISION**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the General Counsel respectfully files exceptions to the Decision of Administrative Law Judge Melissa M. Olivero, dated June 18, 2020.<sup>1</sup> The General Counsel takes exception to the following findings, conclusions, and recommendations of the Administrative Law Judge on the grounds that they are contrary to the law and evidence, and not supported by the record. The General Counsel further excepts to the Administrative Law Judge's failure to make certain findings and conclusions on the grounds that her failure to do so is contrary to the mandate of Section 102.45 that an Administrative Law Judge's Decision "must include findings of fact, conclusions, and the reasons therefore, upon all material issues of fact, law, or discretion presented on the record."

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<sup>1</sup> The following references are used in these Exceptions and the supporting brief:

Administrative Law Judge's Decision: ALJD (followed by page number)

Transcript: Tr (followed by page number)

General Counsel Exhibit: GC (followed by exhibit number)

Respondent Exhibit: R (followed by exhibit number)

## EXCEPTIONS

1. The General Counsel takes exception to the Administrative Law Judge's conclusion that YP Midwest Publishing, LLC, d/b/a DEX YP (the Respondent) did not violate the Act when it made midterm modifications to its 2016-2019 collective bargaining agreement with District 4, Communications Workers of America (CWA), AFL-CIO (the Union) without the Union's consent contrary to Section 8(d) of the Act and in violation of Section 8(a)(5) [ALJD at 18].<sup>2</sup>

2. The General Counsel takes exception to the Administrative Law Judge's admission of, and reliance on, parol evidence [ALJD at 13-18] for the purpose of varying the following provision of the parties' collective bargaining agreement (herein "the 401(k) language"):

The Company 401K [sic] matching rate for all bargaining unit employees will be no less than 100% for each employee dollar contributed to individual accounts up to 5% maximum contribution. If during the term of the Agreement, the Company maximum contribution % is increased for non-represented, non-bargained [sic] employees, the % shall also be increased for bargained employees [GC 2 at 138].

3. The General Counsel takes exception to the Administrative Law Judge's failure to find that Respondent's proffered basis for the admission of parol evidence in this case was Respondent's entirely false representation to the ALJ that the Union inserted the 401(k) language in the contract draft and that Respondent's agents "didn't catch it." [Tr. at 15, 95 at LL. 8-22].

4. The General Counsel takes exception to the Administrative Law Judge's failure to make explicit her finding of fact that Respondent inserted the 401(k) language in the draft of the parties' collective bargaining agreement [ALJD at 8, lines 17-18].

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<sup>2</sup> Additional references to the record and supporting legal authorities and argument in support of these Exceptions are set forth in the brief filed herewith.

5. The General Counsel takes exception to the Administrative Law Judge's implication that there is doubt or uncertainty that Respondent inserted the 401(k) language in the parties' collective agreement because it is contrary to the ALJ's express finding that the 401(k) language was in the first draft sent by Respondent's labor and employment attorney, Brian Herman, to the Union on April 21, 2017 [Compare ALJD at 8, lines 17-18; GC 7 and 8; and Tr. at 102, 142 with ALJD at 12, lines 27 and 45; ALJD at 15, fn. 10].

6. The General Counsel takes exception to the Administrative Law Judge's characterizations that the 401(k) language "found its way" into the parties' collective bargaining agreement [GC 2 and 7] because it is contrary to the ALJ's findings [ALJD at 7, LL. 34-35; ALJD at 8, LL. 7-18] and the indisputable evidence [GC 7 and 8] that Respondent inserted the 401(k) language in the parties' collective agreement [Compare ALJD at 8, lines 17-18 with ALJD at 12, LL. 27 and 45; ALJD at 15, fn. 10].

7. Given Respondent's unexplained failure to introduce into evidence the e-mail and draft contract without the 401(k) language that Respondent contends it sent to the Union, the General Counsel takes exception to the Administrative Law Judge's failure to draw an adverse inference that no such documents exist [Tr. at 15, 94-95].

8. The General Counsel takes exception to the Administrative Law Judge's failure to conclude that Respondent did not show that the 401(k) language it inserted into the contract draft it sent to the Union on April 21, 2017, was a "mistake" given that the record is bereft of evidence regarding:

- Why Respondent drafted the 401(k) language (including the 5% matching contribution formula) it sent to the Union on April 21, 2017, if Respondent did not intend to propose that the language be included in the parties' contract;

- Who, on Respondent's behalf, inserted the 401(k) language (including the 5% matching contribution formula) in the contract draft it sent to the Union on April 21, 2017; and
- Why Respondent inserted the 401(k) language (including the 5% matching contribution formula) in the contract draft it sent to the Union if Respondent did not intend to propose that the language be included in the parties' contract.

9. The General Counsel takes exception to the Administrative Law Judge's failure to draw an adverse inference from Respondent's unexplained failure to call to testify its current employee and admitted agent, Robert Baker (Human Resources Senior Manager), a witness who may reasonably be assumed to be favorably disposed to Respondent and is likely to have knowledge [ALJD at 3, Tr. at 83, 118-121] regarding the events underlying the instant matter including, but not limited to:

- Why Respondent drafted the 401(k) language (including the 5% matching contribution formula) it sent to the Union on April 21, 2017 if Respondent did not intend to propose that the language be included in the parties' contract;
- Who, on Respondent's behalf, inserted the 401(k) language (including the 5% matching contribution formula) in the contract draft it sent to the Union on April 21, 2017; and
- Why Respondent inserted the 401(k) language (including the 5% matching contribution formula) in the contract draft it sent to the Union if Respondent did not intend to propose that the language be included in the parties' contract.

10. The General Counsel takes exception to the Administrative Law Judge's failure to find that the Respondent presented no evidence whatsoever in support of its entirely specious claim that the Union attempted to defraud Respondent by inserting the 401(k) language in the draft contract [Tr. at 15].

11. The General Counsel takes exception to the Administrative Law Judge's admission of, and reliance on, parol evidence when Respondent failed to prove mistake, fraud, illegality,

duress, lack of consideration or any other cause which would have rendered the parties' agreement invalid [ALJD at 13-18].

12. The General Counsel takes exception to the Administrative Law Judge's implicit ruling that parol evidence of antecedent understandings and negotiations is admissible if it is in writing: [ALJD at 15: "In this case, however, there is an actual written and signed agreement (R 2) that contradicts the language of the final version of the MOA" (i.e., the parties' 2016-2019 collective bargaining agreement)].

13. The General Counsel takes exception to the Administrative Law Judge's failure to find that the parties' collective bargaining agreement [GC 2] is a complete and accurate integration of the parties' agreement.

14. The General Counsel takes exception to the Administrative Law Judge's failure to make a finding and legal conclusion that on September 15, 2017, Respondent, through its labor attorney, Steve Flagler, manifested Respondent's assent to the parties' 2016-2019 collective bargaining agreement [GC 2] including the 401(k) language [GC 9 and 10].

15. The General Counsel takes exception to the Administrative Law Judge's failure to make a legal conclusion that on September 15, 2017, Respondent, through its labor attorney, Steve Flagler, agreed to be bound by the terms of the parties' 2016-2019 collective bargaining agreement including the 401(k) language [GC 9 and 10].

16. The General Counsel takes exception to the Administrative Law Judge's failure to conclude that Respondent's course of conduct in proposing and agreeing to contract language

regarding its 401(k) matching contribution for bargaining unit employees was a binding “manifestation of assent.” [ALJD at 18].

17. The General Counsel takes exception to the Administrative Law Judge’s conclusion that there wasn’t any “meeting of the minds” regarding the amount of Respondent’s match of its employees’ 401(k) benefit [ALJD at 14].

18. The General Counsel takes exception to the Administrative Law Judge’s conclusion that the parties “only agreed to memorialize the existence of Respondent’s 401(k) program” in the parties’ collective bargaining agreement [ALJD at 14] because that conclusion is contrary to the testimony of Teri Pluta credited by the Judge and summarized in the ALJD as follows:

[Pluta] and Halpern had a “sidebar,” during which they discussed the 401(k) plan. (Tr. 139–140.) Pluta said, “we’ll have a deal as long as . . . you have language in the contract that guarantees the 401(k).” (Tr. 140.) Halpern agreed, but did not want to work out the language at that time. (Tr. 140.) [ALJD at 6].

19. The General Counsel takes exception to the Administrative Law Judge’s finding that “the agreement reached by the parties at the bargaining table,” set forth in the parties’ September 16, 2016 agreement to “acknowledge the provision of a 401(k) benefit to bargaining union [sic] employees in the drafting of the collective bargaining agreement” [R 2 at 20] “differs completely” [ALJD at 16] from the language in the final version of the parties’ 2016-2019 collective bargaining agreement:

The Company 401K [sic] matching rate for all bargaining unit employees will be no less than 100% for each employee contributed to individual accounts up to 5% maximum contribution. If during the term of the Agreement, the Company maximum contribution % is increased for non-represented, non-bargained [sic] employees, the % shall also be increased for bargained employees [GC 2 at 138].

20. The General Counsel takes exception to the Administrative Law Judge's failure to make a finding of fact that Respondent's bargaining notes from the parties' September 16, 2016 discussion regarding the 401(k) reflect that Respondent's lead negotiator, Keith Halpern, indicated to the Union: "401(k) in bargaining agreement" [R 8].

21. The General Counsel takes exception to the Administrative Law Judge's failure to find that the 401(k) language – including the 5% matching formula – that Respondent proposed to the Union on April 21, 2017, and the parties mutually assented to on September 15, 2017, is not "so palpably at odds" with the parties' September 16, 2016 agreement [R2 at 20] to "acknowledge the provision of a 401(k) benefit to bargaining union [sic] employees in the drafting of the collective bargaining agreement" as to put the Union on notice of an obvious mistake by the Respondent [ALJD 14-15].

22. The General Counsel takes exception to the Administrative Law Judge's failure to find that the 401(k) language – including the 5% matching formula – that Respondent proposed to the Union on April 21, 2017, and the parties mutually assented to on September 15, 2017, is not "so palpably at odds" with the 4.8% matching contribution match in effect at that time as to put the Union on notice of an obvious mistake by the Respondent [ALJD at 14-15].

23. The General Counsel takes exception to the Administrative Law Judge's "logical inference" that the Union "must have known that Respondent matched its employees contributions to the 401(k) plan at less than 5%" based on the fact that more than a year prior to the parties reaching final agreement on the 2016-2019 collective bargaining agreement – including the 401(k) language – the Union proposed and Respondent rejected a 5% matching contribution [ALJD at 15].

24. The General Counsel takes exception to the Administrative Law Judge's failure to make a finding of fact that Teri Pluta was brought in to lead negotiations for the Union on an emergency basis due to a staffing shortage [Tr at 135, 157] and that prior to the negotiations at issue in this case, Pluta had very little direct involvement or familiarity with the YP bargaining unit or their terms and conditions of employment [Tr at 135].

25. The General Counsel takes exception to the Administrative Law Judge's finding that "Respondent was not bound to follow the language in the contract because [sic] does not accurately reflect the agreement of the parties" to "acknowledge the provision of a 401(k) benefit to bargaining union [sic] employees in the drafting of the collective bargaining agreement" [ALJD at 15].

26. The General Counsel takes exception to the Administrative Law Judge's implicit conclusion of law that the parties' September 16, 2016 agreement that Respondent "acknowledge the provision of a 401(k) benefit to bargaining union [sic] employees in the drafting of the collective bargaining agreement" precluded Respondent from offering and the Union accepting the 401(k) language – including the 5% matching contribution – that Respondent proposed to the Union on April 21, 2017, and the parties mutually assented to one year later on September 15, 2017 [ALJD at 18].

27. The General Counsel takes exception to the Administrative Law Judge's implicit conclusion of law that Respondent's rejection of the Union's proposal for a 5% matching contribution on June 29, 2016, precluded Respondent from offering and the Union accepting a 5% matching contribution more than a year later on September 15, 2017 [ALJD at 18].

28. The General Counsel takes exception to the Administrative Law Judge's conclusion that "[n]o agreement was reached regarding the amount of Respondent's match of its employee contributions" [ALJD at 14] as contrary to the undisputed evidence that on April 21, 2017, Respondent sent the 401(k) language it inserted into the draft contract to the Union's lead negotiator, Teri Pluta, [GC 7 and 8] and that on September 15, 2017, the parties manifested assent to the 2016-2019 collective bargaining agreement, including the 401(k) language [GC 9 and 10].

29. The General Counsel takes exception to the Administrative Law Judge's conclusion that "the parties never reached agreement regarding the amount of Respondent's match of employee contributions to its 401(k) plan" [ALJD at 18] as contrary to the undisputed evidence that on April 21, 2017, Respondent sent the 401(k) language it inserted into the draft contract to the Union's lead negotiator, Teri Pluta [GC 7 and 8] and that on September 15, 2017, the parties manifested assent to their 2016-2019 collective bargaining agreement, including the 401(k) language [GC 9 and 10].

30. The General Counsel takes exception to the Administrative Law Judge's conclusion that "the language in the MOA (i.e., the parties 2016-2019 collective bargaining agreement) setting forth a 5% match amount does not accurately reflect the agreement reached, by the parties during *bargaining* [emphasis added]" [ALJD at 18] to the extent that the ALJ's use of the term "bargaining" includes Respondent sending the 401(k) language it inserted into the draft contract to the Union's lead negotiator, Teri Pluta, on April 21, 2017 [GC 7 and 8] and the parties' September 15, 2017 manifestation of assent to their 2016-2019 collective bargaining agreement, including the 401(k) language [GC 9 and 10].

31. The General Counsel takes exception to the Administrative Law Judge's conclusion that "a 5% match was never agreed to in *bargaining* [emphasis added]" [ALJD at 13] to the extent that the ALJ's use of the term "bargaining" includes Respondent sending the 401(k) language it inserted into the draft contract to the Union's lead negotiator, Teri Pluta, on April 21, 2017 [GC 7 and 8] and the parties' September 15, 2017 manifestation of assent to their 2016-2019 collective bargaining agreement, including the 401(k) language [GC 9 and 10].

32. The General Counsel takes exception to the Administrative Law Judge's finding Teri Pluta's testimony that Respondent guaranteed a 5% matching contribution "in writing" (i.e., in the parties' 2016-2019 collective bargaining agreement) [GC 2] was "conflicting," "contradictory" or "directly at odds" with her testimony that Respondent rejected the 5% match "at the table" (i.e., the parties' bargaining sessions from June to September 2016) [ALJD at 11-12].

33. The General Counsel takes exception to the Administrative Law Judge "not accept(ing)" Teri Pluta's testimony that Respondent agreed to a 5% match [ALJD at 12] because in this case whether Respondent agreed to a 5% match is a questions of law, not a question of fact.

34. The General Counsel takes exception to the Administrative Law Judge's characterization that Respondent labor attorney Steve Flagler, "admitted difficult points on cross-examination" when he testified that he "missed" the 5% match amount in the draft contract inasmuch as Flagler's so-called admission was part and parcel of Respondent's false narrative that the Union inserted the 401(k) language into the contract.

35. The General Counsel takes exception to the Administrative Law Judge's reliance on the Board's decision in *MV Transportation, Inc.*, 368 NLRB No. 66 (2019) as irrelevant because the

instant matter is not a unilateral change case, it is a contract modification case [Compare ALJD at 16 with Tr. at 63, LL 3-6].

36. The General Counsel takes exception to the Administrative Law Judge's reliance on evidence that "Respondent and its predecessor have never matched represented employee contributions at 5%" as irrelevant because the instant matter is not a unilateral change case, it is a contract modification case [Compare ALJD at 14, 17 with Tr. at 63, LL. 3-6].

37. The General Counsel takes exception to the Administrative Law Judge's failure to make a finding of fact that Respondent's former employee Steve Flagler, one of the principals involved in drafting and reviewing the parties' 2016-2019 collective bargaining agreement [GC 2], is a labor relations attorney with more than 25 years of experience, including: "a lot of contract bargaining, a lot of effects bargaining, a lot of working with management and HR around resolving general labor issues and keeping tabs on labor-related litigation" [Tr at 98, 84].

38. The General Counsel takes exception to the Administrative Law Judge's failure to make a finding of fact that one of the Respondent's "main goals" with regard to the negotiations at issue in this case was to "align union benefits with management policies and benefits" [R 7].

39. The General Counsel takes exception to the Administrative Law Judge's failure to make a finding of fact that consistent with Respondent's "main goal" of "align(ing) union benefits with management policies and benefits," Respondent's 401(k) language proposal sent to the Union on April 21, 2017, included the same 5% matching contribution that Respondent provided to its management employees [R 6 at pgs. 1-2; Tr. at 101-102].

40. The General Counsel takes exception to the Administrative Law Judge's finding of fact that "after acquiring YP Holdings, Respondent bargained with the Union and the parties agreed only to memorialize the existence of the 401(k) program in the MOA" [ALJD at 14] because: (1) it is undisputed that Respondent acquired YP Holdings on June 30, 2017 [ALJD at 3]; and (2) there is no evidence of the parties reaching any such agreement on or after June 30, 2017.

41. The General Counsel takes exception to the Administrative Law Judge's conclusion that "[n]o specified amount of employer match was ever established" [ALJD at 15].

42. The General Counsel takes exception to the Administrative Law Judge's conclusion that "the Union and Respondent reached an agreement merely that the MOA [i.e., the collective bargaining agreement] would acknowledge the provision of a 401(k) benefit to employees" [ALJD at 15].

43. The General Counsel takes exception to the Administrative Law Judge's conclusion that "the negotiated agreement that the MOA [R 2] would contain a memorialization of the existence of Respondent's 401(k) program controls" [ALJD at 15].

44. The General Counsel takes exception to the Administrative Law Judge's finding and/or conclusion that "this case involves a mistake, made by the parties after the initial version of the MOA was both signed and ratified, by the inclusion of language in the final version of the MOA [i.e., the collective bargaining agreement] that directly contradicted the agreement reached by the parties" [ALJD at 16].

45. The General Counsel takes exception with the Administrative Law Judge's finding and conclusion that the evidence in this case establishes that no agreement ever existed between the parties regarding the 401(k) language [ALJD at 16].

46. The General Counsel takes exception with the Administrative Law Judge's failure to address that in addition to the maximum 5% match, the 401(k) language of the parties' 2016-2019 collective bargaining agreement also provides for a 100% or "dollar for dollar" match formula [GC 2 at 138] which Respondent also modified effective January 1, 2018, changing it to a "graduated" match formula of "100% match of first 3% deferred; 60% of next 3%" [R 9].

47. The General Counsel takes exception to the Administrative Law Judge rescinding the maximum 5% match established by the parties in their 2016-2019 collective bargaining agreement [ALJD at 18].

48. The General Counsel takes exception to the Administrative Law Judge rescinding the 100% "dollar for dollar" matching formula established by the parties in their 2016-2019 collective bargaining agreement [ALJD at 18].

48. The General Counsel takes exception to the Administrative Law Judge rescinding the provision in the parties' 2016-2019 collective bargaining agreement stating: "If during the term of the Agreement, the Company maximum contribution % is increased for non-represented, non-bargained employees, the % shall also be increased for bargained employees" [GC 2 at 138] based on her erroneous conclusions that: "the Union and Respondent reached an agreement merely that the MOA [i.e., the collective bargaining agreement] would acknowledge the provision of a 401(k) benefit to employees" [ALJD at 15]; and "the evidence in this case

establishes that no agreement ever existed between the parties regarding the 401(k) language [ALJD at 16].

50. The General Counsel takes exception to the Administrative Law Judge effectively rewriting the 401(k) language in the parties' 2016-2019 collective bargaining agreement from the language proposed by Respondent on April 21, 2017 and agreed to by the parties on September 15, 2017:

The Company 401K [sic] matching rate for all bargaining unit employees will be no less than 100% for each employee dollar contributed to individual accounts up to 5% maximum contribution. If during the term of the Agreement, the Company maximum contribution % is increased for non-represented, non-bargained [sic] employees, the % shall also be increased for bargained employees [GC 2 at 138].

to read instead: *“The Company’s 401(k) program exists”* [ALJD at 14, LL. 17-18, 27, 38].

51. The General Counsel takes exception to the Administrative Law Judge’s interpretations of the Board’s decisions cited in the Decision and the Judge’s application of those cases to the instant matter [ALJD at 13-16].

Dated at Grand Rapids, Michigan, this 18<sup>th</sup> day of August 2020.

Respectfully submitted,

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