

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

BANNUM PLACE OF SAGINAW, LLC

Respondent		
and	Cases	07-CA-207685 07-CA-215356

**LOCAL 406, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS (IBT)**

Charging Party Local 406		
and	Case	07-CA-211090

ERNIE AHMAD, an Individual

Charging Party Ahmad

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

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

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I. EXCEPTIONS¹

On July 6, 2020, Respondent filed 138 Exceptions and a brief in support to the Decision of ALJ Ira Sandron dated May 29, 2020. Those exceptions essentially except to all, if not most aspects of his decision. To conserve space and avoid duplication, they will be listed and responded to in the Argument section of this brief.

II. STATEMENT OF FACTS²

A. Background³

Respondent is a halfway house for federal inmates. Bannum, Inc., the parent company operates four such facilities, one of which is Respondent. (T 324) On September 5, Charging Party Local 406 filed a petition in Case 07-RC-205632 seeking to represent the social service coordinators, case managers and counselor aides of Respondent. (GC 4; Tr 33) The NLRB scheduled a hearing in the matter to resolve certain issues. That hearing was rescheduled from September 14, to September 21, to September 27. (GC 5; Tr 33) On October 31, the Regional Director issued a Decision and Direction of Election (DDE) in Case 07-RC-205632. The decision addressed Respondent's contentions that 1) the Bureau of Prisons (BOP) was a joint employer, 2) that the counselor aides were guards, and 3) that the social service coordinators and case managers were exempt as supervisors and/or professionals. (GC 6) Among other holdings, the Regional Director found that the BOP was not a joint employer with Respondent.

As a result of the DDE, an election was held on November 7, which Charging Party Local 406 won. (Tr 37) On November 15, Charging Party Local 406 was certified as the exclusive collective-bargaining representative of the petitioned- for employees. (GC 7; Tr 38)

¹ Throughout this brief the following references will be used: Administrative Law Judge 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), Complaint Paragraph: C (followed by paragraph number)

² These are facts which the Counsel for the General Counsel urges should be credited. Credibility will be addressed in the Argument section.

³ Dates are in 2017 unless otherwise specified.

B. Conversations between Employee Greg⁴ Price and Director Ken Schram

Greg Price was employed as a case manager by Respondent from January 27, 2017 until September 28. (Tr 81) In June 2017, unhappy with the employees working conditions and wages, Price met with Schram, the only supervisor at the facility, to discuss a wage increase for employees. (Tr 89) Price complained because the inmates made more than the employees did when they were able to get jobs. (Tr 89) Schram told Price that Respondent would not give a pay raise. (Tr 89) Price asked Schram about forming a union. Schram's response was to do what you have got to do. (Tr 89)

Price talked to other employees to gauge their interest in a union, and then contacted Charging Party Local 406 to begin the organizing drive. They arranged the first organizing meeting for June 19, at 3 p.m. (Tr 90) Price then told Schram about the meeting and that he and employee Melonie Turner were going to leave from work at 2:30 p.m. Schram stated that he was for the meeting because if the employees got a raise, then he in turn could ask for a raise. (Tr 91)

On June 19, the day of the meeting, Price reminded Schram about the meeting. Schram told Price that they could attend the meeting, but afterwards, they had to get their butts back to work. (Tr 93) Schram told Price that they could just call it their lunch. (Tr 94) However, Price only had an hour lunch period. (Tr 94) Price and Turner attended the meeting at the Charging Party Local 406's facility which was about 15 minutes away from Respondent. (Tr 95) Price and Turner left Respondent's facility at 2:30 p.m. and returned at 4:15 p.m. Upon return, Price went into Schram's office to let him know that they returned from the meeting. (Tr 95) Schram asked him how it went and asked what they talked about. (Tr 95) Price responded that the employees were looking for better wages, better insurance, some personal time, vacation time, and cameras around the facility

⁴ In his Decision, the ALJ referred to Mr. Price as Gregory Price. However, his correct name is Greg Price.

and better lighting for safety reasons. (Tr 95) Price testified that he was paid by Respondent for the time he attended this meeting. (Tr 96)

Price testified that there was another organizing meeting scheduled for August 7, 2017 and he informed Schram that he and Turner had to leave the facility at 1:45 p.m. (Tr 99) Price testified that they returned to the facility at 4 p.m. from the meeting. Price testified that he was paid by Respondent for the time he attended this meeting. (Tr 152, GC 13)

Price testified that there was another organizing meeting scheduled for August 21, 2017 and he informed Schram about this meeting prior to the meeting (Tr 101) and that he and Turner were going to attend. Price also testified that prior to August 21, he also had another conversation with Schram about the organizing meetings. He testified that Melanie Turner and new employee Tracey Douglas were present. (Tr 104) Price testified that Schram informed Turner and he that Schram hired another pro-union employee, and that she wants to be a part of the union committee. (Tr 104) Price responded that there was a meeting scheduled for August 21, and they had to leave at 1:45 p.m. to attend the union meeting. Schram responded that they could go, and when it is done to come right back. Price testified that they returned from the meeting at 4 p.m., (Tr 105) and they were paid by Respondent for that time.

Price testified that after this meeting, he talked to Schram in his office. He said that Schram asked him again what was discussed in the meeting. (Tr 105) Price responded that they discussed wages, better lighting, cameras around the facility, cost of living, shift premiums, and retirement benefits. Price testified that Schram said that the employees were asking for way too much and Mr. (John) Rich, (President and Corporate Counsel of Respondent) was not going to approve of any of it. (Tr 105) Schram said that Mr. Rich would just shut the place down, which is what he would do if he were in that position. (Tr 105) Price also testified that Schram discussed employee Maria Torres (Tr 106-107) and his concern about her tardiness, leaving Respondent without permission, leaving

Respondent on the clock to go to Saginaw County Court to file paperwork, and leaving to go get her kids from school when they were sick. Price testified that he told Schram that she is a single mother and has nobody. He asked, what is she supposed to do and what are you going to do about it? Schram's reply was nothing. (Tr 106) Price testified that it was not unusual for Schram to share this type of information with him because they had a great relationship at that time and he believed that Schram was bouncing the issue off him and looking for advice.

The ALJ noted that Schram's "timecard report (R. Exh. 10 at 3) and the log for August 21 (R. Exh. 5) show that Schram left at 2:23 p.m. on August 21. However, on cross-examination, Schram conceded that it was possible that he could have stayed past that time if something came up. Inasmuch as Schram was the sole supervisor at the facility, that would not seem surprising. Even assuming that Price was mistaken on the date, and the conversation was on August 7 or August 31 rather than August 21, as the ALJ noted, it is clear that such a conversation took place given the detail described by Price "and that Price's recollection of its contents was reliable."

Price testified that there was another union meeting on August 31, but he did not discuss the meeting with Schram afterwards.

Price testified that he had a conversation with Schram in August in Schram's office. He said that Schram wanted Price to work with him if Charging Party Local 406 was voted in as the representative of the employees, so that Price would not file any grievances against him. (Tr 109) Price responded that if that is the case, Schram needed to stop working to cover the shifts when a counselor aide calls off work, and instead find someone else to work the overtime. Schram stated that he believed that he had the right to run the day-to-day operations as best fit. (Tr 109)

Price testified that on September 5, he had a conversation with Schram about the petition for representation. Schram asked him if the petition was going to be filed that day and Price answered that he thought it would be. (Tr 110) Later, after his hour lunch, Price asked Schram if he received

the petition and Schram said that he had, and he forwarded it to his supervisor, Compliance Manager Katrina Teel. Price testified that on September 13, Schram was livid that union busters were calling him and he called Price a “fucking asshole.” He said that Price put Schram’s personal cell phone number on the petition as the Employer, instead of Respondent’s telephone number. (Tr 110-112, GC 4)

Price also testified that on September 13, Schram informed him that he received an e-mail that NLRB hearing scheduled for September 14 was postponed. Price responded that he was already aware of that. Schram then got upset and said that he thought they were supposed to communicate what is going on. (Tr 128)

Price testified that on September 20, he asked Schram for a copy of the contract between Respondent and the Bureau of Prisons (BOP). Price stated that at the time, Matt Call, the contract oversight specialist from the BOP was present at the facility doing an audit. Schram went into the conference room and returned with a copy of the contract and asked, “how much do you love me.” (Tr 117-118)

C. Discharge of Greg Price

Price testified that prior to September 26, he had a discussion with Schram and informed Schram that he was going to Detroit to attend the NLRB representation hearing on September 27 because he was a potential witness. They discussed that there was something to do at the Bay County Sheriff’s office, but Price stated that he had to attend the hearing in Detroit. (Tr 126) On September 26, Price saw Schram copying some materials on the copy machine. (Tr 123) Schram said that Teel called and she wanted job descriptions for all employees sent to her. Price stated that she must want them for the NLRB hearing the next day. Price told Schram again that he would be attending the hearing the next day too. (Tr 123-125)

Price testified that he was scheduled to work from 12 p.m. until 9 p.m. However, due to the hearing in Detroit, he arrived at work at 5:30 a.m. (Tr 129) Price also testified that he then went to the NLRB representation hearing with Charging Party Local 406 representative Grant Hemenway. (Tr 129) Price testified that he came in early because Schram allowed him to attend Union organizing meetings on the clock, so he thought that he was supposed to attend the NLRB hearing on the clock since he was a potential witness. (Tr 129) Price testified that he attended the NLRB hearing. He testified that Teel, the compliance manager, was present at the hearing. He testified that the NLRB hearing ended early and afterwards, Hemenway drove Price back to Charging Party Local 406's facility so that Price could get his vehicle, and then Price drove himself back to Respondent's facility, where he arrived back at 2:30 p.m. and clocked out of work. (Tr 129) Price testified that he clocked out because he had 9 hours on the clock, which is all they are allowed to have due to restrictions on overtime. (Tr 130) Price testified that when he punched out he made eye contact with Schram, who did not say anything to him. (Tr 130)

Schram testified that he received several calls from his supervisor Teel. In one of those conversations, she asked if Price was at work. (Tr 480) Schram responded that he was not there, that he punched in around 5 a.m. in the morning and that the logbook said, "court against Bannum." Price stated that he came back, signed out and left and that the logbook said that he worked his hours. (Tr 481) Schram testified that Teel called back later and said that Price was suspended pending investigation and for him to inform Price. (Tr 481)

Price testified that Schram called him later that night and left a message. Price then called Schram and recorded the conversation. (GC 10; Tr 135) In the conversation, Schram informed Price that Teel terminated his employment for abandoning his job. (GC 10, p. 4; Tr 476) Price asked why Schram did not call him because he knew he was going to the NLRB hearing. (GC 10 p, 4) Schram did not give a direct response.

Rich, who is located in Florida, testified that he made the decision to terminate Price based on information from Teel. (Tr 229-330) Teel, who is located in South Carolina, did not testify.⁵ Rich testified that Teel informed him that Price attended the NLRB hearing in Detroit, and then failed to show up for his shift. He then came in to work at approximately 2:30 p.m. in the afternoon and clocked out. (Tr 330-331) Rich stated that later he also learned that Price clocked in at 5:30 a.m.. (Tr 331) Rich testified that he did not discuss the issue with Schram, the person who would have direct knowledge about the issue and other similar situations at the facility. (Tr 383) Rich testified that he did not interview Price, (Tr 397) obtain his discipline or attendance records, (Tr 384) or compare his actions to any other employee. Yet Rich stated that he had never seen another situation like this, which increased the severity of the issue. (Tr 335) Rich stated that he could not remember the discharge of employee Maria Torres (GC 11), who was discharged in 2017 for a myriad of incidents, including insubordination, lateness, repeatedly failing to report to work and repeated excessive absenteeism. (GC 3, P. 2, 3, 8, 10, 11, 12, 15, 16). Rich was also not familiar with employee Johnta Menge who received four warnings for several incidents of not showing up for work (GC 3, p. 20, 21, 22, 24) or employee Stacey Moore who failed to show up for work for several days in February and April 2017, and only received warnings. (GC 3, p. 6, 7) However, all of these disciplines were copied to Teel.

D. Conversations between Director Schram and other employees

Former employee Sharda Nash testified that during her third shift on the weekends, she had conversations with Schram about Charging Party Local 406. She testified about one such

⁵ Respondent did not call Compliance Manager Teel as a witness. Although Respondent initially sought to postpone the trial because she assertedly had other obligations, it did not make other efforts to have her testify such as the General Counsel did with its witness BOP employee Matthew Call. Additionally, the ALJ offered at the end to leave the record open so that Respondent could present Teel on a later date. Respondent declined that offer. The failure to produce such a key witness should lead to an adverse inference that Teel would have testified adversely to Respondent if she 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), enf. 851 F.2d 720 (6th Cir. 1988).

conversation with Schram that occurred in November, before the NLRB election and that Charging Party Ahmad was present for the conversation. (Tr 53; 70) She testified that Schram called them into his office and asked them how they were going to vote. Schram told them that they should vote against Charging Party Local 406 because if they were to get a union, then the facility would close and their wages would probably drop because they would have to pay union dues and he would have to be stricter on them as a boss, and he would not be as lenient as he was. (Tr 52-54) Charging Party Ahmad corroborated this conversation. Ahmad testified that Schram said that he did not want them to form a union. Schram said that he would rather fight for them, than have them stuck with the union or something they did not want. Schram stated that if they organized the union, that the facility would shut down. Schram said that they would not be a team anymore, and he would have to act like a boss and be strict. (Tr 255-256)

Nash also testified that she received a voicemail message from Schram, two days before the NLRB election. (GC 8; Tr 58) In this voicemail message, Schram stated that he wanted to meet with her and other employees because he did not want them to vote for the Union. Schram told Nash that he knows she has to deal with Charging Party Ahmad and he did not want Ahmad to fill her with propaganda, so he wanted to help them as a boss. (GC 8)

Charging Party Ahmad testified that in September or October, an exact date unknown⁶, he met with Schram, Price and Turner after a staff meeting⁷. He said that conversation turned to the organizing meetings amongst the three employees, and Schram joined the conversation and said that it was okay for Turner and Price to attend those union meetings on the clock, but they could not have meetings at Respondent's facility.⁸ (Tr 252-253)

⁶ Price was discharged on September 28, 2017, so this conversation had to have occurred in September 2017, not October.

⁷ Ahmad testified that although he worked for Saginaw County Mental Health Services during the day, and only worked at Respondent on third shift, he attended monthly staff meetings at Respondent during the day. (Tr 267)

⁸ Ahmad testified that he didn't leave Respondent to attend the organizing meetings because he worked somewhere else during the day.

Charging Party Ahmad testified about another conversation he had with Schram in his office in early November. They were alone and Schram said that if they formed a union, they would shut down. (Tr 258-260)

E. Discharge of Charging Party Ahmad

Charging Party Ernie Ahmad began working at Respondent in October 2016 as a part-time counselor aide. (Tr 240) At his hire interview, Ahmad arranged, in conjunction with the Acting Director, to only work third shift on the weekends at Respondent because he worked full-time on the first shift at Saginaw County Mental Health. (240-243) In order to obtain this approval, Ahmad had to submit a form from Saginaw County Mental Health verifying his employment and hours (Tr 243-244) and the Acting Director also called the facility to verify this information. (Tr 244)

Charging Party Ahmad made it clear that he could only work third shift (12 a.m. to 8 a.m.) for Respondent because he worked first shift (8 a.m. to 5 p.m.) at Saginaw County Mental Health. (Tr 244)

In April, shortly after Ken Schram was hired as Director of Respondent's facility, Charging Party Ahmad had another conversation about his employment at Saginaw County Mental Health. (Tr 245) At that time, Schram asked him if he had another job. Ahmad responded that he worked full-time at Saginaw County Mental Health. Schram asked Ahmad if there was a union at the facility, and Ahmad answered that there was. Schram asked if he was involved with the union. Ahmad answered that he was the Local President of the union. Schram asked him what he did as the Local President. Ahmad explained that he handled grievances, disciplines, terminations, collective bargaining and negotiating contracts. (Tr 245-246)

Charging Party Ahmad testified that in November, prior to his discharge on November 21, management posted a new staff schedule stating, "starting 12/3/2017 all CA's (Counselor Aides) will have at least 2 consecutive days off!" (Tr 270) Ahmad testified that beginning on December 3,

2017, his schedule was changed from third shift to second shift working from 4 p.m. to 12 a.m. on Thursday of that week. (Tr 271-272; GC 15) Ahmad testified that he spoke to Schram immediately after seeing the post about the change in schedule and noted that he had been moved from third shift to second shift. (Tr 276-278) Ahmad asked him why his schedule had been changed and stated that he could not work second shift due to his other job. He also pointed out that another employee, Ramesse Amegah, who was scheduled for third shift could work second shift. Schram's response was, "oh well."

In October, Ahmad verbally requested three days off, November 11, 12 and 18. Schram informed Ahmad that he had to use a vacation request form. (GC 16, Tr 280) Ahmad had never used this form or ever heard of it (Tr 283) so he asked Schram where to find the form. Schram told him that it was in the conference room cabinet in a book. (Tr 293) Prior to this time, according to Ahmad, he just verbally told Schram that he wanted to take a day off and had never been told to use a form. (Tr 293) According to Nash, prior to the union election, she also would verbally request time off. (Tr 64) However, after the election, she began to put her requests for vacation in writing because of this incident with Ahmad. (Tr 65) Nash testified, that she had never used a vacation request form or been disciplined for not doing so.

As instructed, on November 3, Ahmad submitted two vacation request forms, one requesting November 11 and 12, and the other requesting November 18. (GC 16; GC 12(000706); Tr 283) Schram approved Ahmad to take off November 11, after he switched his shift with another employee, but denied his request for November 12 and 18. (Tr 286; GC 16)

Charging Party Ahmad testified that he was sick on November 11, so he called in sick on November 11 for his November 12 shift and spoke to Schram, who said ok. (Tr 147) However, later on the day of November 12, Schram called Ahmad and told him he needed to bring in a

doctor's note. (Tr 289) On November 15, Ahmad brought in a doctor's note to work and Schram, refused to accept it. However, he did initial that he saw it. (Tr 290; GC 17)

Ahmad testified that he worked his next scheduled day on November 17, but then called in to take off on November 18 due to a family emergency with his son. (Tr 293) He testified that he spoke to Schram before his shift, who responded ok. Then, on November 21, Schram called Ahmad and left a message. Ahmad returned his call and Schram informed him that he was terminated effective immediately. (Tr 294) Ahmad did not receive a termination letter and had no prior discipline or attendance points.

Rich testified that he made the decision to terminate Charging Party Ahmad. (Tr 368) He testified that he discharged Ahmad based on conversations with Compliance Manager Teel and Vice President Sandy Allen⁹. Rich said that they relayed to him that Ahmad had been denied two vacation days and then called in sick on both of those days, which he found as grounds for termination.(Tr 369) Rich testified that he did not discuss the matter with Schram, or Charging Party Ahmad before making his decision. (Tr 405) Rich also did not review Ahmad's discipline or attendance records before making his decision. (Tr 405) Rich testified that it is Respondent's policy that employees are required to bring in a doctor's note whenever they call in sick, (Tr 406-9) even for one day. (Tr 415)

III. ARGUMENT

Exception 1. The Judge's failure to adhere to his ruling that he would permit Bannum to present evidence regarding Bannum's motion to dismiss that the Board lacks jurisdiction as Bannum is a joint-employer with the Federal Bureau of Prisons. [JD 1:17-23].

Exception 2. The Judge's finding that Bannum was not a joint and/or co-employer of the Federal Bureau of Prisons. [JD 1:14-23]

⁹ Respondent did not call Compliance Manager Teel or Vice President Sandy Allen to testify as witnesses. Such failure should lead to an adverse inference that Teel 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).

Exception 5. The Judge failed to permit Bannum to cross examine, prejudicing Bannum’s factual record and leading to an inaccurate creditability and factual finding by the Judge. [JD 4-5:37-4]

Exception 17. The Judge’s finding that the Respondent has admitted Board jurisdiction is inaccurate. [JD 7: 11-12]

A. Respondent is not a Joint Employer with the Federal Bureau of Prisons

Respondent filed a pretrial motion to dismiss on January 27, 2020 arguing that the NLRB lacks subject matter jurisdiction in this matter alleging that the Federal Bureau of Prisons (BOP) was a joint or single employer with Respondent. The Board denied that motion to dismiss in a pretrial decision on February 20, 2020. The ALJ also denied the motion pre-trial, and explained his reasons at trial. (ALJD 2:14-15)

In summary, the ALJ stated that the joint employer argument was considered and rejected in Case 07-RC-205632, in the DDE issued on October 31, 2017 9. (GC 6) In that DDE, which resulted after a two-day hearing in which the BOP was served with notice, the Regional Director for Region Seven relying on *BFI Newby Island Recyclery*, 362 NLRB 1599 (2015) held that Respondent, an Employer within the meaning of the Act, was not a single or joint employer with the BOP. The Regional Director found that the BOP “did not exercise significant control over the day-to-day activities of the employees, and that the BOP merely oversees that Respondent complies with the contract (between them).” Thus, the relationship between the BOP and Respondent was fully litigated with both Respondent and BOP having an opportunity to present evidence and witnesses and cross examine witnesses on the issue of jurisdiction.

Respondent was notified of its right pursuant to Section 102.67 of the Board’s Rules and Regulations to file a request for review. However, Respondent did not file a request for review of this decision. In fact, an election was held on November 7, and subsequently, as noted by the ALJ, Charging Party Local 406 was certified as the exclusive bargaining representative of the petitioned for unit of employees. (ALJD 2:16-17)

Pursuant to Section 102.67 (g) of the Board's Rules and Regulations,

The Regional Director's actions are final unless a request for review is granted. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

As the Supreme Court and the Board have held, "in the absence of newly discovered and previously unavailable evidence or special circumstances, the respondent may not relitigate in an unfair labor practice case issues that were or could have been litigated in the prior representation proceeding." *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921 (1997) citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); See also, *Salem Hospital Corp.*, 357 NLRB No. 119 (2011), enfd. 808 F.3d 59, 72–74 (D.C. Cir. 2015); and *Nursing Center at Vineland*, 318 NLRB 901, 903 (1995), enfd. mem. 151 LRRM 2736 (3d Cir. 1996); and *Western Temporary Services*, 278 NLRB 469 n. 1 (1986), enfd. 821 F.2d 1258 (7th Cir. 1987). See also *FedEx Freight, Inc.*, 362 NLRB No. 74, slip op. at 1 n. 1 (2015) (treating respondent's request to admit additional evidence in the refusal-to-bargain proceeding as a motion to reopen the representation proceeding and denying the request because the respondent failed to establish that the evidence existed but was unavailable at the time of the representation hearing or could not have been discovered with reasonable diligence, that the evidence would change the result, and that respondent moved promptly to present the evidence), enfd. 816 F.3d 515 (8th Cir. 2016); and *Kawah Manor*, 367 NLRB No. 22 (2018) (rejecting the respondent's argument that there were special circumstances warranting reconsideration of the appropriate bargaining unit in the 8(a)(5) refusal-to-bargain proceeding because respondent, as a successor, was not a party to the prior representation proceeding and the predecessor failed to request Board review of the regional director's unit determination in that proceeding).

The ALJ permitted Respondent to “present evidence of (1) any changed facts since October 3, when the representation case (R case) hearing concluded; (2) any changes in the law since October 31, when the Regional Director issued a DDE; and (3) any other evidence for which it could show good cause why it was not presented at the R case hearing.” (ALJD 2:17-22) Respondent’s arguments do not offer any newly discovered or previously unavailable evidence, it does not offer any changed facts, nor does it allege any special circumstances that would require the Board to review the decision made in the representation proceeding.

Respondent excepts to the fact that the ALJ did not allow the General Counsel’s witness to testify about a Toughy authorization from the Department of Justice, and audits and monitoring. (TR 597-598, 604). However, Respondent’s questions to this witness were beyond the scope of the General Counsel’s questions, and were timely objected to. In reply, Respondent stated that it was asking the question to bear on the witnesses credibility. (Tr 605) The ALJ then let Respondent make an offer of proof in one instance, and continue with his questions in the other.

Finally, Respondent objects to the ALJ’s statement that Respondent admitted jurisdiction. This is an error. However, it was more of a clerical error because the ALJ had already decided that issue in an earlier paragraph in his decision when he stated,

On the first day of hearing, I explained my reasons for denying the motion, and I will not repeat them in detail. To summarize, the Respondent’s joint-employer argument was considered and rejected in Case 07–RC–205632, and the Union was certified as the collective-bargaining representative of the petitioned-for unit on November 15, 2017. I stated that the Respondent would be allowed to present evidence of (1) any changed facts since October 3, 2017, when the representation case (R case) hearing concluded; (2) any changes in the law since October 31, 2017, when the Regional Director issued a Decision and Direction of Election; and (3) any other evidence for which it could show good cause why it was not presented at the R case hearing. The Respondent did not present any such evidence, and I adhere to my earlier order denying the motion.

Thus, Respondent has presented this joint/single employer argument at various stages of litigation. The fact remains that Respondent has a contract with the BOP and that

BOP monitors adherence to that contract. This alone, does not satisfy the requirements of joint or single employer, as the Region's DDE held. Nothing new, novel or special was presented to change that decision.

Exception 3. The Judge's findings regarding the testimony and credibility with regard to Gregory Price was inaccurate and ignored evidence to the contrary. [JD 4:27-30].

Exception 4. The Judge's findings regarding the testimony and credibility with regard to Ernie Ahmad was inaccurate and ignored evidence to the contrary. [JD 4:32-35].

Exception 6. The Judge mischaracterized the testimony of Bannum's President, John Rich. [JD 5:5-14]

Exception 7. The Judge's findings regarding John Rich's testimony and credibility are not supported by record evidence, are contrary to the record, and/or are implausible. [JD 5:5-14]

Exception 8. The Judge's findings ignore record evidence of his role in the organization and un rebutted testimony regarding termination. [JD 5: 5-14]

Exception 9. The Judge's finding as to the testimony and credibility of Kenneth Schram and his testimony are inaccurate and ignore the testimony and record. [JD 5: 19-39; 6: 1-4]

Exception 10. The Judge's findings with respect to Kenneth Schram's changing his testimony are not accurate. [JD 5 25-31]

Exception 11. The Judge ignored evidence supporting Kenneth Schram's testimony. [JD 5: 19-39; 6: 1-4]

Exception 12. The Judge ignored evidence and made clearly erroneous conclusions with respect to the testimony of Kenneth Schram. [JD 5: 19-39; 6: 1-4]

Exception 13. The Judge erred in making a "missing witness" rule determination with respect to Katrina Teel. [JD 6: 9-30]

Exception 14. The Judge's position with respect to Katrina Teel's role in the case is not supported by record evidence and testimony. [JD 6: 15-30]

Exception 15. The Judge's findings that Bannum's counsel declined his offer to accommodate the testimony of Katrina Teel is inaccurate and ignores the fact she was unavailable and Counsel was denied a motion to postpone the hearing. [JD 6: 10-35; n. 7]

Exception 16. The denial of Bannum's motion to postpone the hearing unjustly prejudiced Bannum. [JD 6: 10-35; n. 7]

Exception 21. The Judge's credited inconsistent testimony of multiple General Counsel witnesses and failed to properly assess their credibility. [JD 8: 7-18]

Exception 25. The Judge failed to properly assess the credibility of Price, despite providing facts that were not consistent with his testimony and his inability to recall facts. [JD. 8: 36-38; 9: 1-4]

Exception 33. The Judge improperly credited the testimony of Nash with respect to a meeting in October or early November with Nash and Ahmad. [JD. 10: 15-23]

Exception 88. The Judge's failure to assess the credibility and fact Schram was no longer an employee of Bannum at the time of his testimony, had no personal interest in the outcome of the case, was subpoenaed, was asked to come in each day off of his regular and current job for 3 days to attend the hearing, drove over 2 hours to come to the hearing each way, and the events in question occurred two and one-half years prior to the hearing. [JD. 22 - 24]

Exception 100. The Judge’s credibility and findings regarding Ahmad, despite his repeated failure at hearing to answer seminal questions regarding his absences. [JD. 24-28]

B. The ALJ’s credibility determinations should not be overruled.

Respondent excepts to the ALJ’s credibility decisions. The Board’s established policy is not to overrule an ALJ’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).

1. Credited witnesses:

The ALJ credited Marian Novak who was a credible witness. (ALJD 4:17-18) Her testimony was corroborated by documents and other witnesses. She testified about organizing efforts begun by discriminatee Greg Price, and corroborated later testimony by Charging Party Ahmad and Price that they were told that Price and Turner could attend organizing meetings on the clock. (Tr 30) Although her memory about a specific date may have been inaccurate, (Tr 39) she testified credibly that organizing meetings did occur and that employees of Respondent attended. Novak testified that after a petition was filed, Price attended the NLRB hearing for the representation case on September 27, as a potential witness for Charging Party Local 406. She testified about the DDE that issued by the Regional Office, the election on November 7, and the certification of Charging Party Local 406 as the exclusive representative of Respondent’s employees. She also testified that no representative of Respondent came to Charging Party Local 406 seeking to change any policies. (Tr 37)

The ALJ credited Sharda Nash who was a very credible witness who had no reason to lie about the facts of this case given that she had nothing to gain or lose from its outcome. Contrary to Respondent’s characterization of her as a disgruntled former employee, as the ALJ stated, “the mere fact that she quit, is insufficient to draw such a conclusion or to show bias against the company, and

nothing in her testimony demonstrated that she was skewing her testimony because of hostility to Schram.” Nash testified about unlawful conversations that she had with Director Ken Schram, where he interrogated her about how she was going to vote in the union election, threatened to “pull the contract and close the facility” if they voted for the Union, threatened to be stricter as a boss. (Tr 53-54) She testified about a recorded voicemail message that he left for her warning her of Union propaganda she might receive from Charging Party Ahmad. (GC 8; Tr 54-59)

The ALJ also credited Greg Price. He stated that Price testified in a “straightforward and confident manner, and his testimony was quite detailed and substantially consistent on direct and cross examination. Any uncertainties and imprecisions in his testimony were within reasonable bounds and did not undermine his overall credibility.” Price testified credibly that he had many conversations with Director Schram about the Union. Price testified that Schram was initially in support of the Union, which Schram corroborated when he testified on cross examination that he stopped supporting the Union when Price said that he only cared about himself. (Tr 494) Price testified that he obtained permission from Schram to attend organizing meetings on the clock. Schram denied this on direct, but on cross examination admitted that he knew that the employees were going to the meetings, but told them not to tell him what was going on. (512-513) Price credibly testified that before the petition was filed, Schram wanted to know what was discussed at the meetings, and even stated that the employees were asking for too much when Price informed him of their discussions. Price testified that after the petition was filed, Schram began to express statements of futility, that the Union would not be successful because Respondent has a contract with the BOP. Price also credibly testified without rebut that on September 27, he clocked in at 5:30 a.m. to attend the representation meeting, and he clocked out at 2:30 p.m. Price testified that Schram saw him clocking out and did not say anything to him. He credibly testified that he did not stay longer because employees were told not to work over 9 hours. Price also testified that he was

discharged on September 28 by telephone for not working on September 27. He testified without rebuttal that he had no prior attendance record and only one unrelated discipline.

The ALJ also credited Charging Party Ahmad. Although he said that Ahmad was at times vague in his testimony, and was clearly reluctant to explain the personal reasons behind his leave requests, the ALJ found that “he made no efforts to overstate the facts in his favor, that other witnesses corroborated his testimony and he appeared to be generally sincere.” Ahmad testified that he had several conversations with Schram about the Union, one of which was corroborated by Sharda Nash. Around the time of the Union election, his schedule was changed. He testified that he had the same schedule for his entire time at Respondent on third shift, so as not to conflict with his other job that Respondent was well aware of. Ahmad testified that he requested three days off, November 11, 12 and 18. He testified that Schram told him that he had to submit his request on a vacation request form. Ahmad testified that he never had any difficulty taking time off before, and he never used the vacation request form in the past. This was corroborated by evidence that the vacation request form was only used once by an employee in 2017. Ahmad testified that his November 12 and 18 requests were denied. Ahmad testified that he was sick on November 12, and Schram told him to get a doctor’s note, which he did. Ahmad testified that Schram would not accept his doctor’s note, but initialed it. This is corroborated by the evidence. Ahmad testified that he worked on Friday November 17, but called off on November 18 due to a family emergency with his son. Ahmad testified that he was discharged on November 21.

Matthew Call, from the BOP testified that in 2017, he was the contract oversight specialist for Respondent from 2014 until October 2019. He credibly testified about comments made by Schram to him about the Union. He said that Schram told him that if the Union wins the election, Respondent would not negotiate with the Union and would not bid on the next contract and would cease doing business in the area. (Tr 589) Call also testified, as stated above that the Department of

Labor's wage determination document is the lowest wage and vacation amounts that a contractor such as Respondent can pay its employees, not the highest. (Tr 593-594) Mr. Call was a third-party witness and had no invested stake in the outcome of this trial. Thus, his testimony was above reproach.

2. Discredited Witnesses:

The ALJ did not credit Respondent's corporate President and corporate counsel John Rich, who is employed by Respondent's "parent company." The ALJ found his testimony "markedly evasive, nonresponsive, and generalized." The ALJ specifically noted Rich's testimony that he "decides all terminations," yet he was evasive and vacillated on whether Manager Katrine Teel (Teel), Schram's supervisor, brings all disciplinary matters to his attention and the role she plays in deciding disciplines. The ALJ noted that he equivocated on his knowledge of the disciplinary policies in effect at the facility. Further, Rich could not say whether Teel, who attended the R-case hearing, informed him that Price was also there because "I didn't pay attention to who else was at the hearing, other than Katrina Teel." (Tr 398) The ALJ found this testimony incredulous given that Rich admitted that Teel's conversation with him was about Price. Rich testified that employees at the facility who call in sick for 1 day (even on a Sunday) are required to obtain a doctor's note that they were ill. The ALJ noted that this assertion was contradicted by Schram, is not contained in any written policies of Respondent or any other evidence of record, and on its face flies in the face of reason. He found it "ridiculous" that Rich testified that Ahmad should have gone to a clinic on Sunday, November 12, when his doctor's office was closed, to obtain documentation of his illness. (ALJD 5-17).

It should also be noted that Rich testified that he made the decision to discharge Price, without investigation, because Respondent's compliance officer Katrina Teel, who did not testify¹⁰, informed him that Price did not work on September 27. Without knowing why Price did not work, where he was, or anything about the practice at the facility, Rich testified that he made the decision to discharge Price. Rich testified that he also made the decision to discharge Ahmad, again without investigation. When asked if it was normal to require a doctor's note from an employee for one sick day, he answered incredibly that this was Respondent's practice. He produced no documents to support this alleged policy¹¹, and even the sick leave policy does not contemplate such an unworkable and unrealistic practice. Rich also testified that the Department of Labor wage determination document is a requirement and that Respondent could not vary from those wages or vacation determinations. However, this was directly contradicted by BOP's witness Matt Call, who was the former contract compliance officer overseeing Respondent, who the ALJ credited. He testified that the wage determination is a "floor" and contractors such as Respondent can give higher wages and more vacation to its employees. Call's testimony is corroborated by the document itself.

The ALJ found Ken Schram to be unreliable on pivotal matters.

He was evasive about his conversations with Price about the Union and about Price's attendance at union meetings and the R case hearing, and about attendance and leave policies and practices at the facility. He often answered in summary fashion rather than providing specific details on his conversations with Price, and in general. General Counsel's Exhibit 8 directly contradicted his testimony that he did not tell employees that Ahmad was filling their heads with union propaganda. Schram directly contradicted himself on whether Teel told him after she left the R case hearing that Price had been there, changing his testimony on direct examination that she did not mention Price to testifying on cross-examination that she did. His testimony that he was unaware that Price was going to attend the R case hearing on

¹⁰ Such failure should lead to an adverse inference. *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).

¹¹ Likewise, failing to produce evidence in its custody that would prove a contention made by its witness, should lead to an adverse inference that such documents do not exist. *Pioneer Hotel & Gambling Hall*, 324 NLRB 918, 927 (1997) citing *Auto Workers v. NLRB*, 459 F.2d 1329, 1338-1340 (D.C. Cir. 1972)

September 27 and did not approve Price's going there on the clock was unbelievable in light of the fact that he admittedly was informed that morning that Price had punched in much earlier than his scheduled shift and written "Court versus Bannum" in the logbook.

Additionally, Schram testified that he did not threaten employees that the facility would close if they voted for the Union. Yet he admitted that he discussed the end of the contract and the possible closure of the facility with employees, and admitted that these comments might have occurred in his many conversations with employees about the Union. Schram testified that he never told anyone that the facility would close or that it would be futile to have a union at the facility because of the contract with the BOP, yet BOP's witness Matt Call, who was the former contract compliance officer overseeing Respondent testified that this is exactly what Schram said to him. Schram testified that he did not know that employees were going to the organizing meetings during work time, then contradicted himself when he said that he knew but told them not to tell him about it. (Tr 511-513) Schram testified that on September 27, Respondent had to cancel a DHO hearing, which was very important because Price was not at work. However, he then stated that when he saw Price at 2:30 p.m. on that day, he did not tell Price anything about going to the DHO hearing, he also did not know if the important DHO hearing was rescheduled or held. As stated, Schram's testimony was filled with inconsistent testimony and the ALJ was absolutely correct in not crediting him.

The ALJ also did not find credible Schram's testimony regarding Ahmad where he stated that he concluded that Ahmad that he had a "pattern" of calling off work for days for which he had been denied vacation leave (November 12 and 18), which is what caused him to request a doctor's note from Ahmad for November 12. The ALJ noted that when Schram requested the doctor's note from Ahmad, there was no pattern since it was November 12 when he made this request and the 18th

had not occurred. The ALJ stated that a pattern of one is an oxymoron. The ALJ noted that Ahmad had an otherwise perfect attendance record.

Finally, the ALJ also noted that Schram falsely testified that he changed employee schedules after the election of the Union to “benefit staff’s mental health,” but offered no explanation or support for this contention, at the detriment of Ahmad, in which Schram’s response was, “oh well!”

3. The ALJ was correct in applying the missing witness rule to Katrina Teel.

On February 18, 2020, Respondent filed a motion to postpone the trial to a date uncertain for the purported reason that its witness Katrina Teel was unavailable for the dates of the trial because of an audit being conducted by the BOP. (GC 1(v)) That motion was denied. As was noted in the denial, the audit was scheduled after the Notice of Hearing for this trial issued, and Respondent provided no information that it had attempted to reschedule the audit. (GC 1(y))

Towards the end of trial, the ALJ asked Respondent’s attorney if he was planning on calling Ms. Teel. Respondent answered as follows:

MR. HAMMOND: Yes. She remains unavailable. However, we believe the record evidence is sufficient to be able to provide the information we were going to give through her. So we do not -- we no longer want to have Ms. Teel as a witness. And we rest at this time.

JUDGE SANDRON: And just for the record, I recall that I stated in one of our later conference calls that if the -- your motion to postpone was denied by the deputy chief judge that we would try to accommodate --

MR. HAMMOND: I appreciate that, Your Honor.

JUDGE SANDRON: -- Ms. Teel's schedule.

MR. HAMMOND: Yes.

(TR 569-570)

In his decision, the ALJ applied the missing witness rule to draw an adverse inference against Respondent’s for its failure to call Teel and Sandra Allen, its Vice President of Operations as witnesses. According to Rich, and as noted by the ALJ, both participated in discussions with

respect to the discharge of Price and Ahmad. In applying this rule, the ALJ noted that Schram played no role in the decisions to discharge Price or Ahmad; rather Rich was the decision-maker. However, Rich relied solely on the information that Teel provided to him. Rich did not have a conversation with Schram, was not in Michigan on the date in question, and has little to no information about the regular events that occur at the facility. Although Schram has made recommendations to Teel to discharge employees in the past, he did not do so with respect to Price. Instead, Teel sua sponte initiated Price's discharge without a complaint or any input from Schram. Only Teel knew what triggered her investigation of Price's activities on the day of the R-case hearing and she was the critical link, as noted by the ALJ. Her testimony related to both Price and Ahmad were critical and Teel's absence provided a hole in Respondent's defense related to the discharge of the two employees.

Exception 18. The Judge's finding that Schram told Turner and Price they could leave for their lunch and they could call that their lunch hour is inaccurate. [JD 7: 39-43; 8: 1]

Exception 19. The Judge ignored record evidence as to Price's credibility and attendance. [JD 8: 1-5]

Exception 20. The Judge failed to properly acknowledge the inconsistent testimony of General Counsel's witnesses regarding their attendance at the alleged union meetings. [JD 8: 7-9]

Exception 22. The Judge ignored testimony and records that demonstrate false testimony of Price. [JD. 8; 7-9; 20-33]

Exception 23. The Judge made an improper conclusion of law and ignored facts in evidence with regard to Price's testimony regarding an essential question of fact. [JD. 8: 36-38]

Exception 24. The Judge ignored the inconsistent testimony of Price and record evidence, and found that Price had attended a meeting on August 21, 2017. [JD. 8: 36-38; 9: 1-4]

Exception 26. The Judge's findings that Turner and Price attended a meeting, despite record evidence contradicting the testimony. [JD. 9: 1-10]

Exception 27. The Judge ignored facts and evidence related to Price's allegation he attended a meeting on August 21st and found that Price spoke with Schram, despite record evidence that demonstrates neither Price nor Schram were present at the time. [JD. 9: 1-26]

Exception 28. The Judge made a conclusion of fact unsupported by records as to Schram's presence at the building. [JD. 9: 19-22]

Exception 29. The Judge made a determination that a conversation took place, despite the record evidence contrary to the finding and affidavit and hearing testimony of Price. [JD. 9: 1-26]

Exception 30. The Judge failed to utilize the missing witness rule against General Counsel with respect to Melanie Turner and Union organizer, Grant Hemenway. [JD. 7: 1-44; 8: 11-18; 9: 1-26]

Exception 31. The Judge improperly permitted and relied on the hearsay testimony of Novak. [JD. 8: 26-34]

Exception 61. The Judge inappropriately applied facts outside the Complaint and failed to address the effect on credibility of the witnesses. [JD. 20: 1-16]

Exception 90. The failure of the Judge to only assess the failure to call a witness against Bannum and not the General Counsel, when the General Counsel had the burden of proof to establish a *prima facie* case regarding Price's termination. [JD. 22-24]

C. Respondent Paid employees to attend Charging Party Local 406 organizing meetings during work times.

The undisputed fact is that Director Schram allowed employees Price, Turner and Douglas to attend Charging Party Local 406 organizing meetings during work time and the ALJ credited the General Counsel's witnesses in this regard. Price testified that before every Union organizing meeting that he attended, he notified Schram who was leaving from the facility to attend, that they had attended and that they had returned from the meeting. The ALJ noted that Price so informed Schram on June 19, he then left work at 2:30 p.m., and when he returned at 4:15 p.m., he went into Schram's office and informed Schram what was discussed at the meeting. The ALJ noted that Price's timecard report does not show that he punched out that day, and Price testified that he was paid for all of the hours on the clock.

The ALJ noted that both Price and Ahmad testified about a meeting that they attended to discuss union organizing that occurred after a staff meeting. The ALJ credited Price's more detailed account that the meeting occurred that this meeting occurred prior to an August 7, Union organizing meeting. However, they both testified that as they were discussing union organizing with Turner, Schram came over and stated that he supported their efforts and would allow Price and Turner to attend union meetings on the clock.

The ALJ also credited Price's testimony that on August 7, he reminded Schram that he and Turner were going to the meeting. They then punched out at 1:45 p.m., and returned at 4 p.m. The

ALJ noted that the Price's timecard did not support this testimony, however; he credited Price's testimony based on the totality of the evidence. He noted that Union Organizer Novak testified that both Price and Turner informed her that they were attending the meetings with Respondent's permission. (Tr 30) She also testified that Price and Turner attended the meeting on August 7 and Price was paid for the entirety of that day.

Respondent argues that the missing witness rule should have been applied against the General Counsel for failing to call Turner and Union organizer Grant Hemingway as witnesses. However, the missing witness rule requires that the witness be under the control of the party that should have called them. Turner, a former employee of Respondent, is not under the General Counsel's control and neither is Hemingway, who is a former business agent of Charging Party Local 406. (Tr 29) Thus, an adverse inference in this instance would have been inappropriate.

Exception 32. The Judge improperly ruled as fact that Schram told Ahmad that if the employees formed a union, the facility would be shut down. [JD. 10: 10-14]

Exception 33. The Judge improperly credited the testimony of Nash with respect to a meeting in October or early November with Nash and Ahmad. [JD. 10: 15-23]

Exception 34. The Judge improperly failed to recognize the voice message from Schram to Nash contained no threats of closure or wage reduction. [JD. 10: 25-28]

Exception 35. The Judge failed to properly address the inconsistency between the allegations that Price requested and voluntarily received a copy of Bannum's contract with the Bureau of Prisons and financials, but the same day allegedly told a Bureau of Prison's official Bannum would not bargain with the union and not seek an extension of the contract with the Bureau of Prisons. [JD. 11: 15-22, n. 11]

Exception 36. The Judge failed to address the inconsistency between Matt Call's testimony and the lack of any allegation of failure to bargain after the union election and testimony and fact that the facility continues to operate after the contract in place at that time expired. [JD. 11: 15-22, n. 11]

Exception 57. The Judge's conclusion that Price and Schram had a discussion on August 21 is not substantiated by record evidence. [JD. 18: 21-26]

Exception 58. The Judge's findings regarding the allegation that Schram violated Section 8(a)(1) by threatening Price that the facility would be shut down in connection with employee seeing union representation ignores the records and improperly misapplies the law. [JD. 18: 45-46; 19: 1-5]

Exception 59. The Judge failed to consistently apply his lack of support to find, "About September 20, [Schram] told employees that they were supposed to communicate with him and tell him what was going on regarding the union organizing drive, in his findings regarding the credibility of the General Counsel's witnesses and Price's allegations. [JD. 19, 20-23]

- Exception 62.** The Judge abused his discretion by finding against Bannum on allegations that were not alleged in the Complaint and for which General Counsel did not Amend the Complaint without providing Bannum notice and opportunity to respond. [JD. 20: 1-16]
- Exception 63.** The Judge improperly failed to apply his finding regarding the call with Nash to his other findings regarding the credibility of Nash and Ahmad's other allegations. [JD: 18-33]
- Exception 64.** The Judge failed to properly apply the law with respect to his finding against Bannum related to the 8(a)(1) allegations. [JD. 20: 35-41; 18 -20]
- Exception 65.** The Judge improperly found animus against Bannum based on facts unrelated to the decision maker. [JD. 22: 10-21]
- Exception 89.** The Judge's failure to adequately assess and consider the consistency of a former employee's [Schram] testimony with Price's secret voice recording of Schram on September 28, 2017 and that Schram had no idea there was such a recording until after he was sequestered for two days and over two years after the fact. [JD. 22-24]
- Exception 93.** The Judge's finding that Schram spoke with Ahmad on August 7, 2017 with Ahmad, Price and Turner. [JD. 24: 25-30]
- Exception 94.** The Judge's failure to assess the General Counsel's failure to call Turner. [JD. 24: 25-30]
- Exception 95.** The Judge's conclusion that Schram asked if there was a union at Ahmad's full-time job and that Ahmad said he was the union's chapter president. [JD. 24: 28-30]
- Exception 96.** The Judge's finding of animus in Nash's voice mail of November 5, 2017. [JD. 24: 32-35.]
- Exception 97.** The Judge's finding of animus from Nash's voice mail is inconsistent with the Judge's earlier finding that he found no violation related to the call from Schram and Nash. [JD. 20: 22-33; JD. 24: 32-35]
- Exception 98.** The Judge's finding of implied animus. [JD. 24: 37; 27; 6]
- Exception 99.** The Judge's failure to find any adverse inference from the lack of testimony from any other witness from the bargaining unit of animus.[JD. 24: 37; 27; 6]

D. Coercive Interrogation and Threats

To establish a violation of coercive interrogation, the General Counsel must show that, under all the circumstances, the questioning reasonably tended to restrain, coerce, or interfere with employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Circumstantial factors relevant to the analysis include the employer's background (i.e., whether there is a history of union hostility or discrimination), the nature of the information sought (i.e., whether the interrogator appeared to be seeking information on which to base taking action against individual employees), the identity of the questioner (i.e., whether he or she held a high position in

the company hierarchy), the place and method of interrogation (i.e., whether the employee was called from work to the interrogator's office, and whether there was an atmosphere of unnatural formality), and the truthfulness of the employee's reply. *Trinity Services Group, Inc.*, 368 NLRB No. 115, slip op. 6 (2019) *citing* *Rossmore House*, supra fn. 20 (1984); *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); see also *Temp Masters, Inc.*, 344 NLRB 1188, 1188 (2005), *affd.* 160 F.3d 684 (6th Cir. 2006).

In deciding whether a remark is threatening, 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).

Price testified and the ALJ found that after the Union organizing meeting on August 21, he talked to Schram in his office. Price testified that Schram asked him what was discussed in the Union meeting. Price responded that they discussed wages, better lighting, cameras around the facility, cost of living, shift premiums, and retirement benefits. Price testified that Schram responded that the employees were asking for way too much and Rich, was not going to approve of any of it. Schram said that Rich would just shut the place down, which is what he would do if he were in that position. (Tr 105) Schram did not deny having this conversation. (Tr 494) Instead he felt that Price was looking out for himself and being selfish. (Tr 494) The ALJ concluded that this interrogation did not initially violate the Act because Price was the leading union organizer and Schram had given permission for Price to attend the meeting. However, the ALJ found that Schram violated the Act by threatening Price that the facility would shut down in connection with

employees seeking union representation. The ALJ then held that this unlawful threat tainted the interrogation and made it coercive, thus violating the Act.

Although Price was an open union supporter, conversations about union activities between employers and employees are only considered lawful when they are unaccompanied by coercive statements. See *Colonial Parking & Unite Here Local 23*, 363 NLRB No. 90 (Jan. 5, 2016). Here, we have threats and interrogation, and interference in section 7 activities.

In its defense, Respondent presented documents indicating that Schram left the facility on August 21 at 4 p.m., and while Turner and Price returned to the facility around this time, they soon after left to do field work. (R 5) However, Schram testified that during this time period, employees did not punch in and out when they left, they just left. (Tr 472) He said that records were poorly kept. Further, the date when this conversation occurred is less material to the fact that Price testified credibly and Schram did not deny that he made the statement.

The ALJ also found that in late October, Ahmad had a conversation with Schram in Schram's office. Schram asked if he could talk to him because the petition had been filed. Schram told him that if the employees formed a union, the facility would be shut down. Ahmad could not recall how he responded.

The ALJ also credited the testimony of Sharda Nash and Charging Party Ahmad when they testified that Similarly, in October or November, Schram called employee Sharda Nash and Ahmad into his office. Schram asked them how they were going to vote in the Union election. He told them that they should vote against the Union because if they were to get a union, then the facility would close and their wages would probably drop because they would have to pay union dues and he would have to be stricter on them as a boss, and he would not be as lenient as he was. (Tr 52-54) Ahmad testified that Schram said that he didn't want them to form a union.

These statements contain hallmark threats to close the facility, and a threat to strictly enforce rules. All of these threats are violations of the Act. *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418 (2004) (statement that if union was elected the employer would “close the business and move to Indiana” violated the Act); *Dlbak Corp.*, 307 NLRB 1138 (1992), the Board held that statements about a plant closure and loss of jobs made without any rational basis are unlawful; *Shearer's Foods, Inc.*, 340 NLRB 1093, 173 LRRM 1459 (2003) (employer violated 8(a)(1) when manager told employee(s) that if company president “had his say, the plant would shut down if the Union came in.”) 267 NLRB 682, 114 NLRB 1120 (1983); *Hyatt Regency Memphis*, 296 NLRB 259, 271 (1989) (Employer’s indication that employees would not “get away with things” 8(a)(1) threat of benefit and change of working conditions); *United Artists Theatre Circuit, Inc.*, 277 NLRB 115, 121 (1985) (Explicit threats to diminish the quality of employee working conditions should the employees select the Union “cannot but effect employee sentiment regarding the decision to support or oppose the Union.”)

Further, it is important to note that in fact Schram changed schedules suddenly directly after the NLRB election and denied Ahmad’s request for days off, when in the past he would have “called everyone” or covered the day himself. (Tr 489) *Foley Material Handling Co.*, 317 NLRB 424 (1995) (threats to discontinue breaks and to stop driving workers to and from work site constituted unlawful reprisal). As Schram testified, he informed employees that if the Charging Party Local 406 was voted in, he could no longer do union work so he couldn’t cover for anybody anymore.” (Tr 562)

Additionally, the ALJ also found an unalleged interrogation when Schram began the conversation with Ahmad and Nash by asking them how they were going to vote. The ALJ first set out under “well-established precedent the Board may find a violation not alleged in the complaint, even where the General Counsel has not filed a motion to amend, if the issue is closely related to

the subject matter and has been fully and fairly litigated. *Enloe Medical Center*, 346 NLRB 854, 854, 854 fn. 3 (2006), citing *Desert Aggregates*, 340 NLRB 289, 292–293 (2003). Here, the violation was contained in the same conversation in which Schram made other statements that violated the Act, and Schram had an opportunity to testify thereon. Thus, he found that Schram further violated the Act by interrogating Ahmad and Nash about their union sympathies when Schram asked them if they were going to vote in the union election.

Nash testified that she received a voicemail message from Schram, two days before the NLRB election. (GC 8; Tr 58) In this voicemail message, Schram stated that he wanted to meet with her and other employees because he did not want them to vote for the Union. Schram told her that he knows she has to deal with Ernie Ahmad and he did not want Ahmad to fill her with propaganda, so he wanted to help them as a boss. (GC 8)

The ALJ did not find a violation in this call, however; the call evidenced Schram's animus towards the Union and towards Ahmad.

Schram did not deny making any specific statement. He testified that he had many conversations with employees about the Charging Party Local 406, and may have raised the closing of the facility during those conversations. He said that he definitely conveyed his opposition to the Union, but that was only after Price indicated his selfish motives. He denied telling anyone, including BOP's representative Matt Call that the facility would close if Charging Party Local 406 was voted in. However, Call testified that Schram told him that if the Union were voted in, Respondent would not negotiate with the Union and they were not going to bid on the upcoming contract with the BOP, and then cease doing business. (Tr 589-590) Schram's testimony about these statements was inconsistent, at best and while he generally stated that he did not threaten anyone, this self-defensive, generalized denial should not be credited.

Thus, the evidence reflects that Respondent violated Section 8(a)(1) of the Act by threatening, interrogating and interfering with employees, are all serious unfair labor practices.

E. The Legal Standard for 8(a)(3) and 8(a)(4) Discipline Violations

Section 7 of the Act guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) of the Act implements the guarantees of Section 7 by prohibiting adverse actions against employees for engaging in concerted activity that is protected by Section 7 of the Act. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *SKD Jonesville Division L.P.*, 340 NLRB 101, 103 (2003).

The Supreme Court has indicated that the statutory phrase "mutual aid or protection" should be liberally construed to protect concerted activities directed at a broad range of employee concerns. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-568 and 567 n.17 (1978). Thus, concerted actions of employees are protected under Section 7 if they might reasonably be expected to affect terms or conditions of employment. *Meyers Industries*, 268 NLRB 493, 497 (1984) ("*Meyers I*"), remanded sub. nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), reaffirmed on remand, (1986) ("*Meyers II*"), affirmed sub. nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). Accord *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 835 (1984).

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). 577

F.3d 467 (2d Cir. 2009). As the ALJ stated, in *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 5–8 (2019), the Board clarified the animus element of this test, explaining that the General Counsel “does not *invariably* sustain his burden of proof under *Wright Line* whenever, in addition to protected activity and knowledge thereof, the record contains *any* evidence of the employer’s animus or hostility toward union or other protected activity.” *Id.*, slip op. at 7 (emphasis in original). “Instead, the evidence must be sufficient to establish that a causal relationship exists between the employee’s protected activity and the employer’s adverse action against the employee.” *Id.*, slip op. at 8.

Once the General Counsel makes out a prima facie case, the burden shifts to respondent to show that the same action would have taken place even in the absence of the protected activity. *Wright Line*, above at 1089; *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996). To establish this affirmative defense, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 1 (2018); *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007). Where the General Counsel has made a strong showing of discriminatory motivation, the employer’s defense burden is substantial. *Bally’s Park Place, Inc.*, 355 NLRB 1319, 1321 (2010), *enfd.* 646 F.3d 929 (D.C. Cir. 2011); *East End Bus Lines*, *ibid.*

The *Wright Line* analysis also applies to alleged violations of Section 8(a)(4). *Freightway Corp.*, 299 NLRB 531, 532 fn. 4 (1990); *P.I.E. Nationwide*, 295 NLRB 382 (1989). Section 8(a)(4) covers the conduct of an employee who appears at a Board hearing even though he or she did not testify. *Belle Knitting Mills, Inc.*, 331 NLRB 80, 103 (2000); *Virginia-Carolina Freight Lines, Inc.*, 155 NLRB 447, 452 (1965).

The purpose of Section 8(a)(4) is to ensure effective administration of the Act by providing immunity to individuals who initiate unfair labor practice charges or assist the Board in proceedings under the Act. *General Services*, 229 NLRB 940 (1977). The Supreme Court has determined that Section 8(a)(4) of the Act applies not only to the filing of charges and testifying at a formal hearing, but also includes giving affidavits during an investigation; appearing, but not testifying, at a Board hearing; and being subpoenaed. *NLRB v. Robert Scrivener d/b/a AA Electric Co.*, 405 U.S. 117 (1972).

Exception 37. The Judge made an illogical finding of fact not supported by the evidence, by stating, “Schram did not explicitly approve this, but Price testified that he clocked in and then left for the meeting [NLRB representation hearing on September 27, 2017] because Schram had previously given him permission to go to the union meeting on the clock.” [JD. 11: 1-39]

Exception 38. The Judge leaves out important evidence and facts regarding Price’s actions following the representation hearing on September 27, 2017. [JD. 11: 41-42]

Exception 39. The Judge failed to address important facts regarding Price’s duties on September 27, 2017.

Exception 40. The Judge ignores relevant facts regarding Schram and the discipline of Price. [JD. 12: 1-6]

Exception 41. The Judge improperly credits Price for abandoning his job and ignores the contemporaneous exhibits that contradict Price’s testimony regarding a DHO hearing scheduled at Bay County Jail. [JD 11: 33-42; 12: 1-26]

Exception 42. The Judge’s credit for Price not coming to work for a scheduled hearing is not supported by reasonable facts or inferences. [JD 11: 33-42; 12: 1-26]

Exception 43. The Judge improperly failed to address that fact that Price clocked in to work without any permission. [JD 11: 33-42; 12: 1-26]

Exception 44. The Judge failed to address Price’s testimony regarding why he clocked in nearly 7 hours early. [JD 11: 33-42; 12: 1-26]

Exception 45. The Judge abused his discretion in crediting Price for clocking in nearly 7 hours early, Price’s schedule for September 27, 2017, Price’s testimony that he was not provided permission to not work on September 27, 2017, Price’s testimony he was not subpoenaed for the hearing, Price’s testimony that no Union representative told him he could leave his job, the lack of any other employee who had clocked in and left for a full day, plus an hour of overtime, Price’s testimony that he clocked in and out for 9 hours, including an hour of overtime because Bannum was cracking down on overtime, and General Counsel’s exhibit of a recording of Schram speaking to Price, in which Schram was unaware he was being recorded, on September 28, 2017 in which Schram states Price was to go to the DHO hearing and that Price had not requested the day off. [JD 11: 33-42; 12: 1-26]

Exception 46. The Judge improperly held Schram contradicted his testimony regarding his discussion with Teel. [JD. 12: 18-27]

Exception 47. The Judge failed to address the full testimony of Schram with regard to his conversations with Teel. [JD. 12: 18-27]

- Exception 48.** The Judge failed to properly address the credibility of Schram and Price by ignoring evidence with respect to Price’s attendance at the September 27, 2017 hearing. [JD 11: 33-42; 12: 1-26]
- Exception 49.** The Judge failed to address facts regarding the time records and Price’s schedule on September 27, 2017. [JD 11: 33-42; 12: 1-26]
- Exception 50.** The Judge’s findings regarding Rich’s decision to terminate are not substantiated by record evidence or applicable law. [JD. 12: 29-39]
- Exception 66.** The Judge improperly assesses and makes conclusions regarding the actions and statements made by Schram against Bannum in the termination of Price. [JD. 22:15-20]
- Exception 67.** The Judge improperly applied the law and facts regarding the timing of Price’s discharge. [Tr. 22: 25-28]
- Exception 68.** The Judge improperly applied the law and facts regarding investigation of Price’s discharge. [JD. 22: 30-37]
- Exception 69.** The Judge’s finding of a cursory investigation is not supported by the record. [JD. 22: 30-37]
- Exception 70.** The Judge failed to address the critical fact that there is no dispute Price clocked in 7 hours prior to his shift without authorization, left in the middle of his shift without authorization, failed to attend a hearing, and worked unauthorized overtime on September 27, 2017. [JD. 22: 30-37]
- Exception 71.** The Judge’s position that Bannum maintained “incredibly lenient” policy on attendance is not supported by the record. [JD. 22: 44-46; Tr. 23]
- Exception 72.** The Judge erred in stating, “Clearly, the discharge of Price was far out of proportion to the way the Respondent disciplined other employees, some of whom had repeated incidents of misconduct.” [JD. 23: 27-32]
- Exception 73.** The Judge improperly failed to take into consideration the serious and differentiation of Price’s actions on September 27, 2017 and improperly failed to compare the factual difference between the examples he cited and Price’s conduct. [Tr. 22: 44-46; Tr. 23; Tr. 24: 1-21]
- Exception 74.** The Judge inaccurately states that Price was disciplined more severely than other employees who engaged in similar or more egregious misconduct. [JD. 23: 29-32]
- Exception 75.** The Judge improperly states General Counsel supported the animus prong of *Write Line*. [JD. 23: 35]
- Exception 76.** The Judge failed to properly address the application of Bannum’s handbook, policies, and the record evidence with respect to his conclusion that Bannum would not have discharged Price other than for his protected activities. [JD. 23: 37-39]
- Exception 77.** The Judge improperly concluded Price’s termination would not have occurred other than for his termination. [JD. 23: 37-39]
- Exception 78.** The Judge misapplied the law with respect to his finding that Price’s termination would not have occurred other than for his termination. [JD. 23: 37-39]
- Exception 79.** The Judge was incorrect in fact and law in concluding, “Granted, Price could have exercised better judgment and returned to work immediately after the R case concluded.” [JD. 23: 41-42.]
- Exception 80.** The Judge’s finding that Schram condoned or tacitly approved Price’s conduct on September 27, 2017. [JD. 23: 42-43]

Exception 81. The Judge omits facts and mischaracterized the testimony of witnesses regarding Schram's actions on September 27, 2017 with regard to Price's activities and knowledge. [JD 23: 41-47]

Exception 82. The Judge is incorrect that Price did not do anything with respect to Price on September 27, 2017. [JD 23: 41-47]

Exception 83. The Judge's findings with regard to Teel and her initiation of the investigation are not supported by the evidence. [JD. 24: 1-3]

Exception 84. The Judge's findings crediting Price are unsubstantiated by the record and the Judge ignores contemporaneous statements made by Schram to Price regarding the hearing at Bay County. [JD. 24]

Exception 85. The Judge's finding regarding the hearing and credibility of Price and Schram regarding the hearing at Bay County. [JD. 24]

Exception 86. The Judge's findings regarding other employees. [JD. 24]

Exception 87. The Judge's finding that the Respondent failed to rebut the General Counsel's *prima facie* case.[JD. 2. 20-21]

Exception 91. The failure of the Judge to acknowledge Rich's testimony and lack of evidence of animus on Rich as the decision maker. [JD. 22-24]

F. The Discharge of Price

1. Respondent was aware of Price's Union activities

It is undisputed that Price was the lead organizer for Charging Party Local 406. He informed Schram that he was going to contact the Union due to wages and other working conditions, and then informed Schram after he did. In fact, Schram admitted that he had many conversations with employees about the Union, including with Price. As the ALJ noted, Schram and Teel also had actual knowledge that Price attended the R case hearing on September 27 on behalf of the Union. In fact, Price advised Schram of this on multiple occasions.

2. Animus

The ALJ noted that Schram committed several violations of 8(a)(1) both before and after Price's discharge. On August 21, he threatened Price that Respondent would shut down the facility if the employees unionized. On two occasions in late October or early November, he made the same threats to Ahmad and Nash, as well as threatening them with stricter enforcement of work rules if the Union was voted in.

The evidence also displays that Schram was at first eager for the Union to come in, possibly so that he himself would see improvements and higher wages. This is displayed in his grant of time

for employees to attend union meetings on the clock and his eagerness to assist the union supporters to find like-minded employees to assist. However, at some point, his support soured and he was openly hostile to the Union. This is evidenced in his comments to Price that the Union shouldn't file grievances against him, his comments to Nash about Ahmad, his comments to Call and his threats to employees.

3. Respondent discharged Price for his Union Activities and because he attended an NLRB R case hearing on behalf of Charging Party Local 406

Respondent assertedly discharged Price because he did not work on September 27.

According to Rich, who assertedly made the decision to terminate, no investigation occurred into his absence. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991) (failure to adequately investigate alleged misconduct can infer an unlawful motive). Rich did not review Price's discipline or attendance records. Rich did not discuss the decision to terminate with Schram or Price. No effort was made to determine why Price did not work. According to Rich, he received information from Teel that Price did not work on September 27, and decided to terminate him. Later, he learned that Price clocked in at 5:30 a.m. and clocked out at 2:30 p.m. (Tr 331)

According to Respondent's records, many employees failed to show up for work. Maria Torres, Johnta Menge, Jared Klass, Beverly Smith and Stacey Moore are but a few who received multiple warnings for failing to show up for a scheduled shift, leaving in the middle of a shift, repeated absences and tardies. Torres continued in employment for months after her first instance of no call-no show, as did Moore. As the ALJ noted, Respondent demonstrated an incredibly lenient policy toward employees who violated attendance and other examples. The ALJ specifically noted Torres' record, which is substantial:

Insubordination (February 9).
Improper notification for calling out for shift (June 30).
Arrived 40 minutes late without calling (August 30).
Arrived to work 22 minutes late (September 13).

Did not come into work and claimed unaware that she was scheduled when Schram called her (September 18).
Arrived 22 minutes late (September 27).
Suspended for arriving 22 minutes late and clocking out early without notifying director (September 30).
Insubordination when presented write-up for being late (October 2).

Moreover, she had arrived late eight times between June 6–September 26, from 7 minutes to 52 minutes. The ALJ also noted that Respondent’s records showed that “the following employees received repeated written warnings but were not suspended or terminated. JM (Johnta Menge) called out for his scheduled shift on June 2, 3, and 10, and was a no call/no show on June 9. SM (Stacey Moore) failed to report or give notice on February 26, and April 15 and 16. BS (Beverly Smith) received one warning for arriving 48 minutes late on September 25 and 5 warnings for unsatisfactory performance, from December 4, 2017–January 25, 2018, including working on personal matters instead of her assigned work, for which she had previously been warned several times. Finally, JK (Jared Klass) arrived 24 minutes late (December 26) and received three warnings for unsatisfactory conduct, from January–March 2018, including sleeping on the job for the second night in a row, for which he had been counseled the day before.” (ALJD 23) Price, on the other hand, had no record of prior disciplines or attendance issues.

As the ALJ noted, Price was discharged almost immediately after attending the R-case hearing on behalf of the Union. Such timing evidences a causal link between that protected activity and his loss of employment. *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 1 (2020); *Velox Express, Inc.*, 368 NLRB No. 61, slip op. at 10–11 (2019). It is undisputed that Teel called Schram on September 27, and specifically asked if Price came to work. Why? Teel did not ask about other employees, only Price who attended the NLRB hearing in Detroit as a potential witness for Charging Party Local 406. Teel, who was also at the NLRB hearing, was well aware of Price’s whereabouts. Schram who had been informed by Price that he was going to attend the NLRB hearing, was well aware of Price’s whereabouts. Schram knew that he had allowed Price to attend

organizing meetings “on the clock,” and that Price was at the NLRB hearing related to the petition for representation as a result of that organizing. In fact, according to Schram, Price noted in Respondent’s logbook that he was at “court against Bannum.” Teel then called Rich, and what can only be described as a rubber stamp, Rich approved the discharge of Price with no further information.

It is probative that Respondent did not call Compliance Manager Teel as a witness. As discussed above, her testimony as to why she inquired about Price after the hearing and why she sought his discharge is crucial to the analysis of why Price was discharged. Respondent’s failure to call her as a witness should and did lead to an adverse inference that Teel would have testified adversely to Respondent if she 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 “**cat's paw**” rule provides that an employer cannot shield itself from liability for unlawful termination by using a purportedly independent person or committee as the decisionmaker where the decisionmaker merely serves as the conduit, vehicle, or rubber stamp by which another achieves his or her unlawful design. *Staub v. Proctor Hospital*, 562 U.S. 411(2011); *Bozzutos, Inc.*, 365 NLRB No. 146 (2017); *JM2*, 363 NLRB No. 149 (2016)

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).

Respondent argues that because Price was not present to go to the Bay County jail to attend a DHO hearing regarding an inmate, and that this should lead to his discharge. The ALJ rightly

dismissed that assertion. The ALJ noted that Price informed Schram that he was going to the R-case hearing and Schram did not object. Further, Schram's assertion that the DHO hearing was so important is contradicted by his lack of information about whether it was rescheduled and the fact that he saw Price at 2:30 p.m., and could have taken him to the DHO hearing at that time, if needed. Indeed, Respondent's assertion that missing the DHO hearing could lead to discharge, is belayed by their lack of evidence presented on that point. Failing to produce evidence in its custody that would prove a contention made by its witness, should lead to an adverse inference that such documents do not exist. *Pioneer Hotel & Gambling Hall*, 324 NLRB 918, 927 (1997) citing *Auto Workers v. NLRB*, 459 F.2d 1329, 1338-1340 (D.C. Cir. 1972).

Viewing the totality of the circumstance, it is evident as found by the ALJ that Price's discharge was pretextual. The investigation was a sham, as neither Price nor Schram were interviewed. Key evidence such as Price's discipline file and attendance records were ignored. Respondent has a history of disciplining absences and failure to report to work with verbal or written warnings, and even repeated incidents often did not result in discharge. Further, the timing of the discharge with the NLRB hearing cannot be ignored. Price was, after all, a potential witness for Charging Party Local 406, in the "court case against Bannum." His discharge was a violation of 8(a)(3), (4) and (1) of the Act.

Exception 51. The Judge's finding that Ernie Ahmad's interview is un rebutted is not accurate. [JD. 13: 8-14]

Exception 52. The Judge failed to properly address his finding that Schram asked Ahmad's credibility regarding union status. [JD. 13: 15-22]

Exception 53. The Judge failed to properly address the testimony of Schram and Ahmad, and record evidence regarding change of schedules. [Tr. 13: 31-41; 14: 1-3]

Exception 54. The Judge ignored the testimony of Schram that vacation slip forms were already present when Schram became Bannum's Director and Ahmad's limited work schedule and interaction with other employees with respect to process. [JD. 14: 29-41; 15. 15: 1-41]

Exception 55. The Judge's conclusions of fact with respect to Ahmad's requests are inconsistent with testimony, facts, and record evidence. [JD. 14: 29-41; 15. 15: 1-41]

- Exception 56.** The Judge failed to properly address the testimony and facts related to Ahmad's termination. [JD. 14: 29-41; 15. 15: 1-41; 16: 143, n. 17; 17, 1-47; 18, 1-4]
- Exception 92.** The Judge's decision on Rich's determination to terminate Ahmad.[JD. 24]
- Exception 100.** The Judge's credibility and findings regarding Ahmad, despite his repeated failure at hearing to answer seminal questions regarding his absences. [JD. 24-28]
- Exception 101.** The Judge's finding of a cursory investigation. [JD. 25: 3-7]
- Exception 102.** The Judge's finding of disparate treatment in discharging Ahmad. [JD. 25-30]
- Exception 103.** The Judge's finding that Ahmad's discipline was disproportionate. [JD. 25-30]
- Exception 104.** The Judge's failure to assess relevant facts regarding Ahmad's schedule and staffing. [JD. 25-30]
- Exception 105.** The Judge's failure to assess relevant facts regarding practice regarding working for other employees and testimony of Bannum's Director. [JD. 25-30]
- Exception 106.** The Judge's failure to assess and apply the handbook, work rules, Standard of Conduct and Work Rules. [JD. 25-30]
- Exception 107.** The Judge's failure to assess the repeated nature of Ahmad's absences and his failure to report to work on days he had previously asked to not work. [JD. 25-20]
- Exception 108.** The Judge's failure to assess the difference in Ahmad's discipline and other employees. [JD. 25-30]
- Exception 109.** The Judge's finding that General Counsel established a prima facia case that Bannum took action against Ahmad in November.
- Exception 110.** The Judge's failure to assess the efforts of Schram to find coverage for Ahmad's request for time off. [JD. 25-30]
- Exception 111.** The Judge's failure to support his findings with any records or documents to demonstrate any other employee failed to report to work more than one time after requesting time off. [JD. 25: 10-30]
- Exception 112.** The Judge's failure to address Schram had to work in Ahmad's place when Ahmad called off on days Schram had denied off after looking for coverage. [JD. 25-30]
- Exception 113.** The Judge's findings about the reason for CAs taking 2 consecutive days off as a reason for changing schedules. [Tr. 25: 24-32]
- Exception 114.** The Judge's finding that changing schedules was due to Ahmad's union activities and sympathies. [JD. 25: 24-32]
- Exception 115.** The Judge's failure to address and take into account Schram's duties as director to change schedules for all employees and staffing. [JD. 25: 24-32]
- Exception 116.** The Judge's findings regarding the documentary evidence of denial of time off. [JD. 25]
- Exception 117.** The Judge's finding regarding time off request of Nash and Ahmad. [JD. 25: 37-46; 26]
- Exception 118.** The Judge's finding that Respondent failed to rebut the presumption that denial of Ahmad's vacation requests was improperly motivated. [JD. 25: 37-46; 26]
- Exception 119.** The Judge's failure to assess the lack of evidence of any other employee who had required time off and not come in to work. [JD. 25: 37-46; 26]
- Exception 120.** The Judge's finding that Schram and Rich's testimony with respect to submission of a doctor's slip contradicted. [JD. 26: 4-16]

- Exception 121.** The Judge’s finding and inference against Schram regarding requesting a doctor’s note when he called off after he was denied time off. [JD. 26: 4-16]
- Exception 122.** The Judge’s failure to assess the combative testimony of Ahmad in his assessment of the credibility of Schram’s decision to request a doctor’s note. [JD. 26: 4-16]
- Exception 123.** The Judge’s failure to assess the limited amount of work time Ahmad worked in his short employment tenure when assessing his lack of prior discipline. [JD. 26]
- Exception 124.** The Judge’s failure to accurately and completely look at the facts related to the call offs of Ahmad and the decision to ask for a doctor’s note and discharge of Ahmad. [JD. 26]
- Exception 125.** The Judge’s findings regarding the events leading to Ahmad’s discharge. [JD. 26: 19-45]
- Exception 126.** The Judge’s findings against both Rich and Schram’s testimony that Ahmad should have gone to a doctor on a Sunday when he was sick. [JD. 26: 19-45]
- Exception 127.** The failure of the Judge to acknowledge that Schram was sequestered during Rich’s testimony and the consistency of their testimony on the doctor’s note. [JD. 26: 19-45]
- Exception 128.** The Judge’s conclusion that Schram should have called the doctor if he wanted more information. [Tr. 26]
- Exception 129.** The Judge’s failure to take into account at any time in his conclusions Ahmad’s testimony that he signed an application that he acknowledged at the hearing was not true so he could get a job with Bannum. [Tr. 24-28]
- Exception 130.** The Judge’s decision that no doctor’s notes were received for employees that were absent. [Tr. 26]
- Exception 131.** The Judge’s conclusion inference that Rich’s decision to terminate Ahmad after consultation with Allen and Teel. [Tr. 26]
- Exception 132.** The Judge’s conclusion that Bannum failed to rebut the presumption that Ahmad’s discharge was based upon his union sympathies and activities. [Tr. 27: 1-2]
- Exception 133.** The Judge’s conclusion that Ahmad had a perfect record, when he was a part-time employee for only a year. [Tr. 27: 1-6]
- Exception 134.** The Judge’s conclusions regarding other employees and Ahmad’s termination that were not similar. [Tr. 27: 1-6]
- Exception 135.** The Judge’s conclusion that Ahmad’s discharge violated Section 8(a)(3) and (1) of the Act. [Tr. 27: 1-6]
- Exception 136.** The Judge’s finding that denying Ahmad’s vacation request violated Section 8(a)(3) of the Act. [Tr. 27: 37-44]
- Exception 137.** The Judge’s inconsistent finding that denial of Ahmad’s request for vacation was an unfair labor practice, where it had not changed its policy regarding a vacation request slip and the ability to approve or deny other employee requests. [Tr. 27: 26-44; 28: 1-10]

G. Respondent Discharged its employee Charging Party Ahmad Because He Engaged in Protected Concerted and Union Activities

1. Respondent was aware of Charging Party Ahmad’s Union activity

Shortly after Schram became the Director of Respondent, he questioned Ahmad about his other job and whether the employees there were represented by a union. Schram then asked Ahmad

if he was involved in the union, and Ahmad responded that he was the President of the Local. Schram then asked him what he did as the President and Ahmad explained that he negotiated contracts, handled grievances, etc.

As found by the ALJ, once the Union organizing drive began at Respondent, Schram knew that Ahmad was involved. Charging Party Ahmad testified that in September, Ahmad met with Price and Turner after a staff meeting to discuss the organizing drive and meetings. Schram joined the conversation and said that it was okay for Turner and Price to attend those union meetings on the clock, but they could not have meetings at Respondent's facility.¹²

The ALJ also noted that Nash received a voicemail message from Schram, two days before the NLRB election where Schram stated that he wanted to meet with her and other employees because he did not want them to vote for Charging Party Local 406.(Tr 59-63; GC 8) Schram told Nash that he knows she has to deal with Ernie Ahmad and he did not want Ahmad to fill her with propaganda, so he wanted to help them as a boss. The ALJ correctly found that this demonstrated express animus towards Ahmad.

The ALJ also noted that Charging Party Ahmad had another conversation with Schram in his office in late October or early November after the petition had been filed. They were alone and Schram said that if the employees formed a union, Respondent would shut down. (Tr 258-260)

2. Respondent changed Charging Party Ahmad's schedule

When Charging Party Ahmad was hired in on October 20, 2016, he made it clear to Respondent's Acting Director that he worked first shift at an unrelated full-time job and thus would only be able to work part-time for Respondent on third shift. He obtained clearance to do so by submitting his schedule from Saginaw County Mental Health, and by providing contact information

¹² Ahmad testified that he did not leave Respondent to attend the organizing meetings because he worked somewhere else during the day.

so that Respondent could verify his other employment. As the ALJ noted, at all times during his employment, Ahmad worked from 8 a.m. to 5 p.m. Monday through Friday for Saginaw County Mental Health. Thus, he was only able to work the night shift Friday, Saturday and Sunday for Respondent. He remained with that schedule until after the NLRB election, when a new schedule was posted for December.

Charging Party Ahmad testified that in November, shortly before the November 7, NLRB representation election, management posted a new staff schedule stating, “starting 12/3/2017 all CA’s (Counselor Aides) will have at least 2 consecutive days off!” (Tr 270) Ahmad testified that beginning on December 3, 2017, his schedule was changed from third shift to second shift working from 4 p.m. to 12 a.m. on Thursday of that week. (Tr 271-2; GC 15) Ahmad testified that he spoke to Schram immediately after seeing the notice about the change and asked Schram why his schedule had been changed and stated that he could not work second shift. (Tr 276-8) He also pointed out that another employee Ramesse Amegah, who was scheduled for third shift could work second shift. Schram’s response was to say, “oh well.” As the ALJ noted, at trial, Schram offered no cogent explanation for the need or timing of this change, vaguely alluding to employees’ mental health.

The evidence is clear that Schram changed Ahmad’s schedule from third to second shift in retaliation for his support of Charging Party Local 406. *Willamette Indus., Inc.*, 341 NLRB 560, 562 (2004) (discharge of open union supporter for absences, numerous 8(a)(1) statements, and change in shift schedules) Respondent had an agreement to allow Ahmad to work third shift. Then, then without any reason, and with an alternative in Ramesse Amegah, Schram changed the schedule to punish the one who was filling other employee’s heads with union propaganda.

3. **Respondent denied Charging Party Ahmad vacation requests and changed its sick leave policy because Ahmad engaged in Protected Concerted and Union Activities.**

Charging Party Ahmad testified that he submitted a request for time off for November 11, 12 and 18 for personal reasons. Schram then required that the request be made on a special form. Ahmad testified that prior to that time, he requested time off verbally, so he was unaware of a written form. Schram testified that although employees were supposed to submit vacation requests on the vacation request form, he did accept handwritten notes and sometimes took the request verbally.

Nevertheless, on November 3, Ahmad submitted two requests, one for November 11 and 12, and the second for November 18. On November 7, 2017, the date when Charging Party Local 406 won the representation election, Schram denied Ahmad's request for November 12 and 18. Schram stated that he would allow Ahmad to switch with another employee so that Ahmad could have off on November 11.

This denial for leave was unusual, as both Schram, Nash and Ahmad testified that it was unusual for a day off request to be denied. Nash testified that she had never had a vacation request denied. She testified that if she needed a day off, she would try to find a replacement, and if unable to do so, she would inform Schram who would try to find a replacement, or work the day in question himself. Schram testified that he would ask everyone if they were available to cover or frequently worked himself when coverage was not available. As the ALJ noted, all of the vacations requests contained in GC 12 and R 6, were approved with the exception of Ahmad's November 12 and 18 requests. In contrast, in this instance, Schram asked only two employees if they were available to switch. One switched for November 11, and the other was unable to switch. No other effort was made to allow Ahmad to take his requested days off.

Not coincidentally, Schram threatened a week prior that he would have to be a boss and strictly enforce policies. He threatened that he would not be lenient anymore and they would no longer be a team.

Schram denied Ahmad's request because employees voted for Charging Party Local 406 and because Ahmad supported the Union. No other explanation for this sudden and complete turnaround in practice makes sense. *Willamette Indus., Inc., Supra.*

On November 11, Ahmad fell ill and called in sick for his November 12 midnight shift. Later, Schram called Ahmad and informed him that he was required to bring in a doctor's note before returning to work. On November 15, Ahmad brought in a doctor's note, which Schram refused to accept. Schram did initial the note indicating that he saw it. (G17)

When asked if it is normal procedure for an employee to be required to bring in a doctor's note after one day of absence, Rich incredibly answered yes. He vacillated somewhat when asked to clarify his answer, but remained firm that it is policy to require a doctor's note after one absence. (Tr 406-415) When asked if that policy is in the employee handbook. Rich responded that there was not a policy because hourly employees, such as Ahmad had no sick leave days given. Yet, he admitted that sick leave is taken by employees. (Tr 416)

As the ALJ noted, contrary to Rich, Schram testified that doctor's notes are not ordinarily required for employees who call in sick. Schram instead relied on Ahmad's "pattern" of calling in sick for his reason for requiring a doctor's note. However, as noted by the ALJ, Ahmad had no previous disciplines of any kind, either for attendance or otherwise, in his over one year of employment. Therefore, the pattern that Schram based his decision on was for the one day in question, November 12. The ALJ found this argument patently unbelievable and rightly stated, "demanding that an employee with an unblemished attendance record get a note for being sick 1 day is not within reasonable norms, especially when November 12 was a Sunday. Accordingly, I

conclude that the Respondent has failed to rebut the presumption that this conduct was improperly motivated.”

4. Respondent discharged Charging Party Ahmad in violation of 8(a)(1) and (3) of the Act

The record evidence shows that Ahmad was engaged in protected concerted and union activities and that Schram was well aware of his activities. (Tr 126) The evidence also shows that Schram was initially favorable to the Union, but then became increasingly hostile to the possible election of Charging Party Local 406. As a result, Schram made unlawful statements to Ahmad and expressed hostility towards Ahmad in particular because Schram knew that he supported Charging Party Local 406. *Integrated Electrical Services Inc.*, 345 NLRB 1187, 1199 (2005); *Wal-Mart Stores*, 340 NLRB 220, 221 (2003).

According to Rich, he made the decision to discharge Charging Party Ahmad. (Tr 368) He testified that Ms. Teel and Vice President Sandy Allen relayed to him that Charging Party Ahmad had requested three days off, and was denied two of those days. Ahmad then called in sick for those two days. Based on that information, Rich stated that he discharged Ahmad. (Tr 368) Rich did not speak to Charging Party Ahmad before making his decision. (Tr 405). Rich also did not speak to Schram before making the decision to terminate. (Tr 405) Similar to Price, he did not review Charging Party Ahmad’s discipline or attendance records. (Tr 405)

As stated above, Charging Party Ahmad was required to bring in a doctor’s note for his illness on November 12. Rich stated that he reviewed Ahmad’s doctor’s note, but stated that it was three or four days after he called in sick. (Tr 406) Rich stated that Respondent’s policy required Charging Party Ahmad to get a doctor’s note immediately on the day he called in. (Tr 406-415) In actuality, there is no sick leave policy. (Tr 416) As the ALJ found:

Ahmad was sick on a Sunday, and the following day was a holiday. On November 14, he went to his doctor and received a note stating that he was seen that day, that he had had a contagious illness on November 12, and to

contact the doctor with any questions. He submitted it to Schram. Schram testified that he found the note unsatisfactory because it was after the fact. How he could have expected Ahmad to go to a doctor on a Sunday, when he was sick, is beyond my comprehension. Moreover, Schram failed to take the opportunity to call the doctor if he wanted more information about the nature of Ahmad's illness on November 12. I reject out of hand as absurd Rich's testimony that if Ahmad was ill on November 12, he should have gone to a clinic that same day and obtained proof that he was sick and could not work.

Rich also discussed the wage determination document (R 12) that is published by the Department of Labor, and which applies to Respondent. He stated that it shows the required wages and benefits for the types of positions listed. (Tr 366-367) He then testified that Respondent was unable to give Ahmad more benefits than are listed on that form. However, Call, who was the contract oversight specialist at the BOP in 2017, stated that the wage determination document is the minimum level of wages and benefits that a contractor such as Respondent can pay its employees, not the required wage and benefits.

On November 18, Ahmad called off work due to a family emergency. He notified Schram, who simply responded ok. As the ALJ noted, Respondent did not seek any further elaboration from Ahmad for his absence. The ALJ also noted, "that Rich made his decision to discharge Ahmad based solely on his conversations with Teel and Allen. Thus, by his own testimony, Rich neither talked to Schram nor saw Schram's written recommendation."

In essence, Charging Party Ahmad was discharged because he called in for two days after he was denied leave. As stated earlier, according to Respondent's records, many employees failed to show up for work. Maria Torres, Johnta Menge and Stacey Moore are but a few employees who received multiple warnings for failing to show up for a scheduled shift, leaving in the middle of a shift, repeated absences and tardies. Torres continued in employment for months after her first instance of no call-no show, as did Moore. Ahmad, on the other hand, had no record of prior disciplines or attendance issues. Respondent offered no explanation for this disparate treatment of its employees.

To summarize, Respondent changed Charging Party Ahmad's schedule so that he would not be able to work for Respondent, then Respondent required him to use a special form to submit his request for time off, then denied his request for time off, which was a change in practice. Then Respondent required Charging Party Ahmad to submit a doctor's note for one day of illness and then refused to accept the doctor's note when he attempted to submit it. Then it discharged him because he had a family emergency on a day when he had attempted to take leave. Also, similar to Price's discharge, Rich who was the asserted "decision maker," did not consult with Schram, the Director of the facility, nor did he follow-up on the evidence or seek explanation from Ahmad.

All of this occurred days after the election when Charging Party Local 406 was voted in as the exclusive representative of the employees. As stated earlier, 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). All of these factors exist here with respect to the discharge of Charging Party Ahmad.

Exception 60. The Judge misapplied facts, ignored facts in the record, and misapplied the law with respect to his finding of a violation of Section 8(a)(5). [JD. 19: 28-44; 2016]

Contrary to Respondent's assertion, the ALJ did not find a violation of Section 8(a)(5) in his decision.

Exception 138. The Judge's Conclusions in paragraphs 1, 3, 4, and 5 at Page 28 of his Decision and his Remedy and Recommended.

The conclusions set forth by the ALJ on page 28 of his decision are supported by the Facts and Findings he stated in his decision, which we support in this brief.

IV. CONCLUSION

For the reasons set forth above and in ALJ Sandron's Decision and Recommended Order, it is urged that Respondent's Exceptions be denied in their entirety and the Board affirm the findings of fact, conclusions of law, and recommended remedy of ALJ Sandron in his Decision and Recommended Order in this matter.

Respectfully submitted this 24th day of September, 2020.



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