

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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NEW CONCEPTS FOR LIVING, INC.,	:		
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	:	CASES	22-CA-187407
	:		22-CA-195819
	:		22-CA-197088
and	:		22-CA-205843
	:		22-CA-208390
	:		
COMMUNICATIONS WORKERS OF	:		
AMERICA, LOCAL 1040	:		
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**CHARGING PARTY EXCEPTIONS TO THE ADMINISTRATIVE  
LAW JUDGE**

Pursuant to §102.46(a) of the Board’s Rule and Regulations, Series 8, as amended, Charging Party Communications Workers of America, Local 1040 hereby files exceptions to the Decision of Administrative Law Judge (ALJ) Jeffrey Gardner, dated January 8, 2021, for the reasons set forth in Charging Party’s Brief in Support of Exceptions, filed herewith. The Charging Party takes exception to the following:

1. Charging Party excepts to the factual accuracy of the statement that “Well before October 2016, a decertification petition was being circulated among employees.” (ADLJ, p. 4).
2. Charging Party excepts to the factual accuracy of the summary of Setteducati’s statements that “At the end of the meeting, Setteducati told the staff that there was a specific window of time to legally decertify a union. He also told staff that he wanted to give merit raises to those who worked harder than others, but that the Union would not let him give merit raises.” (ADLJ, p. 5).

3. Charging Party excepts to the factual accuracy as not supported by the evidentiary record that “Baldicanas recorded one side of this phone call between Williams and Setteducati while standing in or about the doorway to Williams’ office.” (ADLJ, p. 5, fn. 6).
4. Charging Party excepts to the factual accuracy as not supported by the evidentiary record that Ingram’s collection of authorization cards was less than 30-40: “I find that the really number was likely lower.” (ADLJ, p. 6).
5. Charging Party excepts to the factual accuracy as not supported by the evidentiary record of the following statement: “But in fact, only a handful of employees had actually authorized dues to be deducted, with nearly every employee having already requested in writing that the Employer cease deducting dues from their paychecks.” (ADLJ, p. 6)
6. Charging Party excepts to the factual accuracy of the following statement: “It is undisputed that it was Respondent who was pushing for negotiations to move faster, requesting that the parties meet twice per week, and complaining that the Union cancelled some scheduled sessions.” (ADLJ, p. 7).
7. Charging Party excepts to the factual accuracy of the following statement: “When Respondent counsel Pinarski was confronted with these facts, her response was that two days a week was very difficult for the Union due to their schedules.” (ADLJ, p. 7).
8. Charging Party excepts to the factual accuracy of the determination that “It is undisputed that Cusack had repeatedly emphasized that it was not the company’s position that it

can't pay the Union's proposed wage increases but that it won't agree to pay them" (ADLJ, p. 7).

9. Charging Party excepts to the factual accuracy of the determination that "By all accounts, the poll was designed to mimic an NLRB election." (ADLJ, p. 7).
10. Charging Party excepts to the following conclusion as unsupported by the record: "I found employee Bryan Baldicanas to be less than credible. He was at times evasive, and repeatedly looked to counsel table when difficult questions were posed. Though I do not believe he made any intentionally false statements, he did appear to be unusually cautious in his testimony particularly for a former employee." (ADLJ, p. 8).
11. Charging party excepts to the following conclusion as unsupported by the record: "I also found Union witness Robert Yeager to be similarly less than credible in his testimony. He was very defensive when challenged on cross examination, and seemed evasive, straining to support the litigation position of the Union." (ADLJ, p. 8).
12. Charging Party excepts to the following conclusion as unsupported by the record: "I found Respondent attorney Cusack. . . no less credible in testifying honestly about his role in bargaining and what took place during and between bargaining session. In particular his candor regarding the motivations for Respondent's bargaining position consistently rang true." (ADLJ, p. 8).
13. Charging Party excepts to the determination, as unsupported by the factual record, that the General Counsel's argument regarding Setteducati's two meetings "ignores the un rebutted testimony of the petitioner Marshall that efforts to gather support for the

petition had been in the works for weeks or longer, and that he had delivered signatures to the Region on more than one previous occasion trying to file the petition. Moreover, while Setteducati did address employee questions about the decertification petition, even the General Counsel concedes it is not unlawful for an employer to respond to such questions.” (ADLJ, p. 9).

14. Charging Party excepts to the factual accuracy of the determination that “At no time did Setteducati tell employees they should decertify the Union, nor did he suggest that Respondent would stand in the way of their keeping the Union. Indeed, Setteducati emphasized that the choice was solely that of the employees, that Respondent was then bargaining with the Union, and would continue to do so. There was also no evidence that any employee signatures were elicited from that one location in support of the decertification petition following Setteducati’s appearance there.” (ADLJ, p. 9).

15. Charging Party excepts to the following legal conclusion as unsupported by evidentiary record and the law that “As such, to the extent that Respondent provided any aid in support of the filing of the October 2017 decertification petition by his statements, I find it was no more than the ministerial assistance permitted under the Act. Accordingly, I will recommend that this allegation be dismissed.” (ADLJ, p. 10).

16. Charging Party excepts to the factual accuracy of the following statement: “Respondent does not dispute that it distributed the memorandum and form, and that it collected them back from employees for payroll purposes.” (ADLJ, p. 10).

17. Charging Party excepts to the characterization of the evidence presented by the General Counsel: “Here, although the complaint had alleged two supervisory employees by name had solicited employees to sign the withdrawal form, neither of these individuals was called to testify, nor was any evidence elicited to advance the theory that they engaged in this alleged solicitation, though the allegation was never withdrawn. Rather the General Counsel merely argues that distributing the forms was coercive, and collecting the forms (from over 90% of employees in less than a week) constituted an unlawful poll which it later relied on in part for its good faith doubt of the Union’s majority status.” (ADLJ, p. 10).
18. Charging Party excepts to the ADLJ’s reliance on Valley Medical Center, 368 NLRB No. 139 (2019) as inapplicable to the allegations.
19. Charging Party excepts to the legal conclusion as unsupported by the record and the relevant case law that “As such, at the time it distributed the memorandum to employees, Respondent was actually privileged to cease deducting dues altogether across the Board. It makes no sense that affording employees who so chose to continue having their dues deducted. And despite the General Counsel’s assertion that Respondent maintained a list of those who had withdrawn and those who had not for purposes beyond payroll administration, there was no evidence to support this assertion. Accordingly I will recommend that this allegation be dismissed.” (ADLJ, p. 10).
20. Charging Party excepts to the legal conclusion that “Despite the General Counsel’s assertion that Respondent intended to maintain a list of those who signed a card for purposes beyond payroll administration, there were actually no cards signed. And, I do

not find that the language of the memorandum are coercive or tend to make employees feel peril in submitting or not submitting a card. Accordingly, I will recommend that this allegation be dismissed.” (ADLJ, p. 11).

21. Charging Party excepts to the legal conclusion as unsupported by the record and caselaw which found that “the language of the September 12, 2017 Setteducati letter to be non-coercive expressions of his views about unionization and run of the mill opinions that are lawful under the Act. Similarly, I find the statements attributed to Respondent’s consultant to be primarily rooted in fact, and further non-coercive expressions of Respondent’s views. Nothing in either communication contained any threat of reprisals against employees, nor any promises of benefits. Nothing about the language to which the General Counsel objects strikes me as informing employees that it would be futile for them to select the Union as their collective bargaining representative. Accordingly, I will recommend that this allegation be dismissed.” (ADLJ, p. 11).

22. Charging Party excepts to the legal conclusion as unsupported by the record and the caselaw “that what the General Counsel labels as regressive bargaining proposals were no more than hard bargaining on the part of an employer who knew it had the upper hand at the bargaining table. The wage freeze and reopener proposal, for example, came after its initial proposal for merit pay was dismissed out-of-hand by the Union.” (ADLJ, p. 12).

23. Charging Party excepts to the legal conclusion that “Similarly, the union shop and checkoff proposals, while clearly anathema to the Union, were within Respondents rights to make, and were accompanied by an explanation as to why Respondent was resistant to those provisions. I find the fact that Respondent proposed agreeing to union shop if the

Union agreed to a poll of its members rather than being evidence of bad faith, was evidence of the genuine nature of its explanation as to why it was so resistant to a union shop.” (ADLJ, p. 12).

24. Charging Party excepts to the legal conclusion that “an employer is not required to agree to accept any particular contract term, and it is not clear from the evidence that the parties had reached a firm agreement on an arbitration clause earlier in bargaining.” (ADLJ, p. 12).

25. Charging Party excepts to the characterization of the evidence in the following statement as inaccurate: “The testimony of both Respondent and Union bargaining members present at negotiations consistently echoed Cusack’s position that although money was tight, Respondent’s proposals were not based on an inability to pay, but rather merely that they would not pay and did not want to pay what the Union was seeking. The Union’s own bargaining notes confirmed that Cusack consistently took this position.” (ADLJ, p. 12-13).

26. Charging Party excepts to factual accuracy of the statement that “the Union acknowledged that it had not reviewed that information, calling into question whether the Union even believed it needed that financial information.” (ADLJ, p. 13).

27. Charging Party excepts to the legal determination that “Because I [sic] Respondent’s alleged bargaining violations to have been no more than hard bargaining on the part of Respondent, that Respondent was not obligated to provide the requested financial information beyond what it had already provided to the Union, and that the other alleged

conduct on the part of Respondent did not violate the Act. I find that the totality of Respondent's conduct does not support a finding of bad faith bargaining in violation of Section 8(a)(5) of the Act. Accordingly, I will recommend that these allegations be dismissed." (ADLJ, p. 13).

28. Charging Party excepts to the legal determination as unsupported by the evidence and the caselaw that "This is the unusual case where Respondent was lawfully able to poll its employees. First, it clearly had a good faith doubt as to the Union's majority status." (ADLJ, p. 14).

29. Charging Party excepts to the legal determination as unsupported by the facts and the caselaw "that taken together in the context of this case, these items did support a good faith doubt on the part of the Respondent sufficient to allow it to conduct a lawful poll." (ADLJ, p. 14).

30. Charging Party excepts to the legal conclusion that "As for the poll itself, it is clear that, though not perfect, Respondent attempted to follow the Board's gold-standard procedure for a valid election, mimicking the Board's Excelsior list, the Board's Election Notice, the setup of a voting place, the presence of observers, a private place to mark ballots, and a secure ballot box." (ADLJ, p. 14).

31. Charging Party excepts to the following legal conclusion: "More importantly, the election adequately met each of the safeguards delineated in Struksnes. The purpose of the poll was plainly to determine whether the Union had the support of the majority of unit employees, and both the Union and employees were made aware of that. Employees

were told they were not required to vote, that their votes were secret, and that Respondent would honor the employees' wishes. The polling was in fact done by secret ballot, and I have not found that Respondent engaged in unfair labor practices or otherwise created a coercive atmosphere. Accordingly I find the September 21, 2017 poll of employees, which had 82% turnout of eligible voters, and in which 87% of employees voted against being represented by the Union was lawful." (ADLJ, p. 14).

32. Charging Party excepts to this conclusion on the grounds that it misrepresents the nature of the amended complaint, the evidence and the caselaw: "Notwithstanding that I have not found Respondent to have violated the Act in any of the manner alleged, the General Counsel's position ignores the fundamental truth underlying this case, that it was the Union's own absence over the span of multiple years that ultimately led to the loss of support." (ADLJ, p. 15).

33. Charging Party excepts to the legal conclusion that "Respondent was within its right to withdraw recognition of the Union." (ADLJ, p. 15).

34. Charging Party excepts to recommended order that the amended complaint be dismissed. (ADLJ, p. 16).

Date: March 5, 2021

Respectfully submitted,

/s/ Annmarie Pinarski  
Annmarie Pinarski, Esq.  
Attorneys for Charging Party

