

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ONPOINT CONSULTING, INC.

and

Case 5-CA-32978

DANNI O'NEAL, an Individual

Christopher R. Coxson, Esq.,
for the General Counsel.
Sundeep Hora, Esq.,
of Washington, DC, for the Respondent.

DECISION

Statement of the Case

C. Richard Miserendino, Deputy Chief Administrative Law Judge. This case was tried in Washington, DC on July 30, 2007. The charge was filed on March 30, 2006, and amended on May 16, 2006. The complaint issued on April 30, 2007,¹ alleging that the Respondent violated Section 8(a)(1) of the Act by unlawfully telling employees that if an employee told a supervisor that the employee was going to take a problem to the Union, the Respondent would regard this as a threat subject to discipline. It further alleges that the Respondent violated Section 8(a)(1) of the Act by unlawfully terminating the employment of Individual Charging Party Danni O'Neal for engaging in protected concerted activity. Finally, the complaint alleges that the Respondent violated Section 8(a)(3) of the Act by unlawfully terminating Individual Charging Party O'Neal because she told a supervisor that she was going to have her Union shop steward resolve her claim for 2-hours travel pay.

The Respondent's timely answer denied the material allegations of the complaint. The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file briefs.

¹ The parties stipulated at the hearing that the proper name of the Respondent is "OnPoint Consulting, Inc.," a Virginia corporation, rather than "OnPoint Consulting, LLC." The parties further stipulated that the case caption, as well as paragraph 2(a) of the complaint should be amended to reflect the correct name. (Tr. 6-7.) In addition, Counsel for the General Counsel amended paragraph 4 of the complaint at the hearing without objection to add Captain Eric G. Bates as a supervisor and agent of the Respondent within the meaning of Section 2(11) and 2(13) of the Act. Respondent amended its answer to admit paragraph 3 of the complaint that the Union is labor organization within the meaning of the Act and that it is the lawful bargaining representative of the security officers employed by the Respondent at the FAA building. (Tr. 7.) Finally, the Respondent amended its answer to admit that the individuals listed in amended paragraph 4 of the complaint are supervisors and agents within the meaning of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

5 Findings of Fact

I. Jurisdiction

10 The Respondent, a Virginia corporation, with an office and primary place of business in Arlington, VA, admits and I find that it is engaged in the business of providing security guard services for customers located outside the State of Virginia, including the Federal Aviation Administration (FAA) facility, located at 800 Independence Avenue, S.W., Washington, DC. During the 12-month period preceding March 30, 2006, the Respondent provided security services valued in excess of \$50,000 to the U.S. Department of Transportation, an agency of
15 the United States government. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

20 II. Alleged Unfair Labor Practices

A. Facts

25 Individual Charging Party Danni O'Neal was employed by the Respondent as an armed security officer at the FAA facility for approximately 2 ½ years. In fall 2005, she reported to Lieutenant Eric G. Bates², who reported to Captain Kevin Brown, who reported to the facility commander, Major Denise Wright, who reported to the Deputy Project Manager Andriana Overton. O'Neal was considered by her superiors to be a "very good" officer. She was never disciplined during her employment and was considered polite and respectful. (Tr. 152.) She was terminated on December 7, 2005.

30 1. December 1 and 3, 2007

35 In late November 2005, O'Neal volunteered to work an extra shift on December 1 to help a fellow officer, who suffered a family tragedy. (Tr. 40.) When she reported for duty at 5:45 a.m. on December 1, Lieutenant Bates told O'Neal that she was not needed because the other officer had reported for work. Unbeknown to O'Neal, Bates had unsuccessfully attempted to phone her earlier that evening, but could not reach her and did not leave a voice message because O'Neal's message machine was not working properly. (Tr. 83; 112-113; 121; R. Exh. 15.) Without any discussion, O'Neal promptly returned home. (Tr. 90.)

40 Two days later, on Saturday, December 3, O'Neal reported for her regular shift. She asked Lieutenant Bates if she would be paid for two hours travel pay as per the collective-bargaining agreement for coming work on December 1.³ Bates testified that he told O'Neal that "as per Major Wright, I was instructed to inform you that because I attempted to call you, you were not going to --- I can't authorize --- I cannot authorize you to get travel pay but I did say I'm quite sure that if you sat down, you know, and talked to Major Wright, explain the situation, what

² Subsequent to the events involved herein, Bates was promoted to the rank of captain.

50 ³ Under Article VI, Section 5 of the applicable collective bargaining agreement, "[a]n employee called in outside his regular work schedule shall be guaranteed a minimum of two (2) consecutive hours of work or pay in lieu thereof." (GC Exh. 2, page 9.)

happened, you know, I'm quite sure you'll be able to get it." (Tr. 90-91.) O'Neal denied that Bates made that statement. (Tr. 41, 47.) Rather, she testified that Bates told her to take the matter up with Major Wright because he was not authorized to grant travel pay. (Tr. 21, 46, 90.)

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2. December 5, 2007

On Monday, December 5, at 1:15 p.m., O'Neal reported for the pre-shift "guard mount" meeting.⁴ When the meeting ended, she went to Major Wright's office to ask about travel pay. Wright was seated at the supervisor's desk in the office. Captain Kevin Brown was also present.⁵ O'Neal asked Wright if she would be paid for the two hours as per the contract. (Tr. 140.) According to O'Neal, Wright told her that she would not be paid for travel time because Bates had left messages on her telephone answering machine telling her not to report to work. (Tr. 24, 26.) O'Neal denied receiving a phone call or a message from Bates. There are two versions of what transpired next.

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According to O'Neal, at that point she told Wright, "I'll take this up with my shop steward, Union representative," and started to walk away. (Tr. 24, 25.) Wright called her back stating, "O'Neal, why can't we resolve this matter?" When O'Neal began to respond, Wright interrupted her, prompting O'Neal to tell Wright that she was being disrespectful. (Tr. 25.) Wright countered that O'Neal likewise was being disrespectful. The conversation deteriorated and eventually Captain Brown dismissed O'Neal to go to her post.⁶ (R. Exh. 4.)

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Major Wright testified that O'Neal entered the office upset, loud and boisterous. (Tr.141.) She stated that O'Neal demanded to know why she was not getting two hours travel pay. Wright testified that when she tried to explain that Bates had left a message at her house, O'Neal interrupted her, denied that she had been called, and continued to interrupt Wright as she attempted to speak. (Tr.142.)

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The two argued about whether Bates had made the call and left a message. (Tr. 145-146.) Wright testified that she tried to get O'Neal to calm down, but O'Neal "wanted to argue, like somebody wanted to fight in the street, not trying to talk about a situation." (Tr. 146.) Wright also stated that O'Neal walked out of the office stating that she was going to let her shop stewardess handle the problem and that she did not want to be late to her post. (Tr. 146, 147.) Wright called O'Neal back and Captain Brown told her that she was on "administrative" which meant that she did not need to worry about being late. (Tr.146.) Wright asserted that she called O'Neal back to try to calm her down because security officers carry weapons and she did not want O'Neal to go to her post upset. (Tr.143.) Wright stated that when O'Neal returned, she would not face Wright when Wright spoke, but instead turned her body toward Captain Brown. Eventually O'Neal left to go to her post after telling Wright that she did not have anything else to say because Wright was not helping the problem. (Tr. 147.)

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⁴ Security officers attend a guard mount meeting at the beginning of their shift where they are briefed on events which occurred on the previous shift and they are issued their equipment, including a loaded hand gun, baton, handcuffs, and mace. At the end of the shift, the security officers return all of their equipment.

⁵ Officers Frimpong and Somerville were within earshot of Major Wright's office. Officer Lita Matthews was at Post#1, which was a short distance from Major Wright's desk. (Tr. 26, 51-53.) None of these individuals (Captain Brown, Officers Frimpong, Matthews or Somerville) appeared at the trial or testified.

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⁶ O'Neal testified that she did not shout, scream or use profanity during the conversation. (Tr. 27, 33.)

On her way to her post, O'Neal informed Union Steward Angela Brown of her conversation with Major Wright. Union Steward Brown stated that O'Neal told her that Wright refused to grant travel pay and that Wright had acted rudely. (Tr. 59.) Angela Brown told O'Neal that they would discuss the incident in greater detail at the end of the shift.

In the meantime, Wright directed Captain Brown to prepare a memo recommending that O'Neal be terminated for disorderly conduct and insubordination. She also phoned her supervisor, Deputy Project Manager Andriana Overton, to tell her about the meeting with O'Neal and to recommend that O'Neal's employment be terminated.⁷ (Tr. 149, 160.) Overton told Wright to hold-off on terminating O'Neal because Wright did not have all the details about what transpired between Bates and O'Neal regarding the two hours of pay. (Tr.149, 171.)

When Wright asked Bates about the phone calls to O'Neal, he "told [her] that he didn't leave a message for her. (Tr. 158.) Rather, Wright testified that "he wrote it in the log. He said that her phone was broken, making some kind of fax sound or something." (Tr. 159.) In other words, Wright had denied the travel pay based on her mistaken assumption that O'Neal had left a message. O'Neal had truthfully denied that Bates had left her a message.

After speaking with Bates, Wright called Overton again to update her on what she had learned from him. (Tr. 159.) Overton told Wright to pay O'Neal the two hours of travel time and to hold another meeting with O'Neal. She also told Wright that O'Neal was entitled to have a Union representative present at the meeting if she wanted one. (Tr. 151-152, 158, 185.) Finally, Overton told Wright to get statements from other employees because she wanted a recommendation based on the facts and the collective-bargaining agreement. (Tr.183.) Later that day, December 5, Major Wright sent a Recommendation of Termination memo to Overton for approval. (Tr. 198; R. Exh. 4.)

3. December 7, 2005

Two days later, on December 7, O'Neal reported to work, attended the guard mount meeting, and was told to report to Major Wright's office, where she met Union Steward Angela Brown, Major Wright, Captain Brown and Lieutenant Bates. (Tr. 28, 61, 96, 98.) The un rebutted evidence shows that Captain Brown started the meeting by stating that if an employee told management that he/she was going to report a problem to the Union, the statement would be taken as a threat and the employee would be disciplined. (Tr. 28, 61, 72.) Union Steward Angela Brown credibly testified that she asked Captain Brown why an employee would be disciplined for going to the Union with a problem?⁸ (Tr. 61, 72 -73) Before Captain Brown could answer, Major Wright interjected that O'Neal would be paid for the two hours, but she was going to be disciplined for her conduct on December 5. (Tr. 29, 64.) Union Steward Brown testified she repeatedly asked Captain Brown why an employee would be disciplined for stating that she/he was taking a problem to the Union, but neither he nor Wright answered the question. (Tr. 61.) Instead, Major Wright told O'Neal that she was disorderly and insubordinate and that she

⁷ Wright testified that she called Overton because she did not have the authority to terminate O'Neal. (Tr. 155.)

⁸ Counsel for the General Counsel filed a posthearing motion to strike a portion of the Respondent's posthearing brief at pages 11-12 that asserts that Angela Brown did not recall Captain Brown being present at the December 7 meeting. In its response, the Respondent stated that it had mistakenly referred to "Captain Brown," rather than "Lieutenant Bates." The motion is therefore denied.

did not have to act that way in order to get two hours pay. (Tr. 62.)

When the meeting ended, O'Neal was dismissed to go to her post with a loaded firearm. (Tr. 29-30.) Wright called her supervisor, Andriana Overton, with an update on what had
 5 transpired at the meeting. Wright testified that she told Overton that O'Neal's conduct at the second meeting was similar to her conduct at the December 5 meeting. Wright also told Overton that she was standing by her recommendation to terminate. (Tr. 164, 185-186.) Overton reviewed some written statements collected by Wright, accepted Wright's recommendation, and approved the termination of O'Neal's employment for insubordination and disorderly conduct.
 10 (Tr. 187; R. Exh. 4.) Bates was directed to disarm O'Neal, who by now had been at her post almost five hours.

Thirty minutes before her regular shift ended, O'Neal was relieved from her post in order for her to attend a meeting in Wright's office. When she arrived at the office, Lieutenant Bates
 15 collected O'Neal's equipment, i.e., her firearm, baton, radio, flashlight, and security vest. (Tr. 30-31.) They joined Major Wright, Captain Brown and Union Steward Martin McNair. Wright gave O'Neal the Recommendation of Termination memo, which she refused to sign. (Tr. 31, 33.)

B. *Credibility Resolutions*

1. Lieutenant Bates

Various aspects of Lieutenant Bates' testimony concerning his December 3 conversation with O'Neal are unpersuasive. First, although Bates testified that he told O'Neal that Major
 25 Wright had instructed him to deny the travel pay, there is no evidence to support that assertion. To the contrary, the evidence shows that Wright did not speak to Bates about O'Neal's travel pay until December 5, which was after Overton told her to talk to Bates to find out whether or not he actually contacted O'Neal on December 1. (Tr. 158.) Next, the undisputed evidence shows that O'Neal never asked Bates about travel pay on December 1. Thus, there would have
 30 been no reason for Bates to discuss the matter with Wright prior to December 3, when O'Neal first brought it up. Lastly, Wright testified that prior to talking to Bates on December 5, she "didn't know exactly what was going on," with respect to his discussion with O'Neal. (Tr. 149-150.) Indeed, because Wright had not spoken to Bates about travel pay, she mistakenly assumed that Bates had told O'Neal over the phone not to come to work. The contravening evidence therefore
 35 taints Bates' credibility as a whole.

In addition, Bates' testimony that he told O'Neal on December 3 that if she explained what happened to Wright she likely would approve the travel pay is implausible. Wright did not
 40 impress me as a person who could be easily persuaded to change her mind. Even after Wright found out that Bates had not actually spoken to O'Neal or left her a message, Wright did not decide to pay O'Neal travel pay. Rather, she was directed to do so by her supervisor, Andriana Overton.

On the other hand, O'Neal's testimony regarding her December 3 conversation with
 45 Bates was short, simple, and more plausible. She testified that when she asked about the travel pay, Bates told her he was not authorized to grant travel pay, and that she should take it up Major Wright, which she did. I therefore credit O'Neal's testimony on this point.

Various aspects of Bates' testimony regarding the December 7 meeting are likewise
 50 dubious. For example, Bates testified that the December 7 meeting was called in part to find a "common ground" on the travel pay issue. The undisputed evidence shows, however, that the decision to pay O'Neal's travel time was made two days earlier, when Wright spoke to Overton

on the phone on December 5. (Tr. 101, 152, 185.) Thus, contrary to Bates' assertion, the travel pay issue was a non-issue before the meeting began.

5 Bate's testimony regarding the December 7 meeting was also suspiciously selective. He testified that he was unable recall what Captain Brown stated at the beginning of the meeting because "the conversation occurred too long ago." (Tr. 99, 100-101, 113.) Minutes later, however, he stated that he specifically remembered O'Neal telling Wright that she was not afraid to say whatever she needed to say, unlike the other officers, who did not have "the balls to say what I say or something of that nature." Bates did not explain why this single sentence by 10 O'Neal endured the passage of time, while the opening remarks by Captain Brown were a faded memory.

15 Nor did Bates explain why he did not mention this remark in a December 7 written statement that he gave to Wright after the meeting ended. (R. Exh. 10.) According to Bates, he was specifically asked by Wright to be a witness at the December 7 meeting. Inexplicably, he did not mention the remark in the written statement which he gave on the same date nor did he mention anything else about the December 7 meeting. (Tr. 117.) One would expect that if O'Neal had made such a statement on December 7, Bates would have noted while it was fresh in his mind. Inexplicably, he failed to do so. Yet, more than a year later, he recalled it was made, 20 even though his memory on other parts of the discussion where faded.

25 Likewise, Bates' testimony that O'Neal was "upset, demonstrative, a little belligerent," at the meeting and that she left for her post "pissed off," upset and angry is implausible. It is difficult to believe that a Major, a Captain, and a Lieutenant, in a disciplinary meeting, would allow a "pissed off, angry" officer with a loaded gun to go to her post and engage the public. (Tr. 123, 124, 168.) I find that Lieutenant Bate's testimony on this point strains credulity.

30 In contrast, both O'Neal and Union Steward Brown credibly denied that O'Neal acted out or was belligerent at the December 7 meeting. (Tr. 29 -30, 49, 75.) Union Steward Angela Brown testified that she spoke on behalf of O'Neal at the December 7 meeting which is consistent with O'Neal's repeated request that she wanted a Union representative to handle the matter. I credit their corroborative and consistent testimonies over Bates' selective memory.

2. Major Wright

35 The evidence viewed as a whole shows that Major Wright's testimony concerning O'Neal's December 5 conduct is embellished and exaggerated. Wright testified that O'Neal entered her office "upset, loud, boisterous" like "somebody who [wanted] to fight in the street," a hot headed person. (Tr. 145-147.) However, Respondent's Exhibit 4, the "Recommendation of Termination" memo given to O'Neal, which was jointly prepared by Captain Brown and Major Wright on December 5,⁹ casts doubt on this aspect of Wright's testimony. (Tr. 167.) 40

The memo begins:

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50 ⁹ Wright's testimony about when she gave the termination memo to Andriana Overton conflicts with Overton's recollection on when she received the document. Wright testified that she gave the memo to Overton on December 7. (Tr. 151.) Overton testified that she received the termination memo on December 5 or early on December 6. (Tr. 198.) Overton testified that she read the memo when she received it, but did not approve the termination until after the December 7 meeting at which time she signed the document. (Tr. 198; R. Exh. 4, page 2.)

5 This is an official notice of Recommendation of Termination in reference to
 your **Insubordination** and **Disorderly Conduct**. On Monday, December 5, 2005
 at approximately 1325 hours. You, Officer O'Neal, entered the security office
 and directed a question to the Facility Commander, Major Wright in reference
 to 2 hours of traveling time you felt you should have received, which took place
 on Thursday, December 1, 2005. Major Wright explained to you that Lieutenant
 Bates had placed numerous calls to your residence informing you not to report
 for duty. You, Officer O'Neal then stated, "Never mind," interrupting and raising
 your voice over Major Wright while she was trying to further explain the situation.
 10 **(Insubordination)**....

15 Notably, this paragraph of the memo does not state, or even imply, that O'Neal entered the
 office "upset, loud and boisterous" ready for a fight. At best it reflects that after Wright denied
 the travel pay request based on the erroneous belief that Bates had told O'Neal not to report to
 work, O'Neal sought to end the conversation by telling Wright in a raised voice, "Never mind."

The memo goes on to state:

20 Officer O'Neal you stated to Major Wright, "I'm going to let Martin-McNair and
 Angel Brown handle this" with an intimidating gesture. Officer O'Neal then stated,
 "I am going to be late to my post" in a rude manner. Major Wright struggled to
 explain, "You are on administrative," Officer O'Neal walked out of the Security
 Office without being dismissed and proceeded towards the lobby area.

25 This paragraph of the memo does not depict an employee who "wanted to fight in the street."
 Rather, it depicts an employee who voluntarily went to talk to management before her shift
 began about her right to a benefit provided by the collective-bargaining agreement. When
 O'Neal realized that her attempt to get paid was futile she sought to extract herself from an
 argument with her supervisor by announcing that she would let her Union representative to
 30 handle the matter. Although the memo describes O'Neal's conduct as rude, it stops short of
 describing her as "hot tempered, angry or upset." Indeed, the absence of such a description or
 words to that effect in the memo undercuts Wright's credibility on this point.

35 The memo also calls into question the real reason Major Wright ordered O'Neal to come
 back and continue the discussion. Wright testified that she called O'Neal back to the office to
 calm her down. But the memo states:

40 Upon return, Major Wright tried to inform you that the Misconduct was not
 necessary. That the two of you could discuss this rationally. Officer O'Neal
 you stated, "She" meaning Major Wright was being rude to you. Officer
 O'Neal, Major Wright struggled trying to explain to you that a Union Shop
 Steward was not needed at this time. You, Officer O'Neal, then refused to
 make eye contact or verbally acknowledge Major Wright. Instead, you chose
 to turn your body and directed your attention to Captain K. Brown who was
 45 not addressing the issue. You demonstrated blatant disregard for your
 Facility Commander (**Insubordination**). Officer O'Neal you were then asked,
 by Captain Brown, "Why can't this matter be resolved here? Officer O'Neal
 you then stated again, "I'll just let Martin-McNair and Angel Brown handle it.
 Major Wright again stated that the matter could be handled between the two
 50 of you. You continued to look at me, Capt. K. Brown, and say nothing, totally
 ignoring her, Major Wright (**Insubordination**).

Contrary to Wright's testimony, the memo shows that Wright called O'Neal back to the office to dissuade her from taking the matter to the Union. The evidence further shows that rather than argue with Wright, O'Neal declined to discuss the matter further. When Wright and Captain Brown persisted in trying to get O'Neal to resolve the travel pay claim without the help of a Union representative, she repeated that she wanted to let her Union representatives handle the matter and said nothing more.

Finally, and contrary to Wright's assertions, the Respondent's Exhibit 4 further shows that O'Neal did not storm-off from the meeting, but was dismissed by Captain Brown to go to her post. (Tr. 169.)

The memo concludes by stating:

I, Capt. Brown, then asked you did you not want to resolve this matter now. You shook your head indicating no. I then dismissed you and you went to your post.

The Recommendation of Termination also fails to support Wright's testimony that O'Neal's conduct on December 5 disrupted work in the control room by distracting the officer monitoring the surveillance cameras. (Tr. 149 .) The memo does not state that O'Neal's conduct disrupted work in the control room or anywhere else. Since the memo was prepared by both Wright and Captain Brown shortly after the meeting, it is more likely, than not, that the memo would have specified this point had it actually occurred.

In addition, no one else with first hand knowledge of the December 5 meeting corroborated Wright's assertion that O'Neal distracted the officer monitoring the surveillance cameras. A December 5 written statement, purportedly supplied by Officer Lita Williams, who was the officer monitoring the surveillance cameras, does not state or even imply that she was distracted or unable to perform her job.¹⁰ (R. Exh. 7.) Nor does the December 7 written statement of Captain Brown mention or imply that O'Neal's conduct distracted Williams' from performing her duties. For all of these reasons, I find that Wright's statement that O'Neal distracted the officer monitoring the surveillance cameras, standing alone, lacks credulity.

Nor does the Recommendation of Termination corroborate Wright's testimony that O'Neal was so angry, upset and hot tempered during the December 5 meeting that she presented a danger to herself, her co-workers, and the public. (Tr. 157-158.) In this connection, Lieutenant Bates described the work environment and the required demeanor of each officer as follows:

[E]very officer has a weapon that's a deadly weapon. Not only do they have a baton, which can be lethal, but you also have a revolver with six rounds loaded ... you always want to maintain an even keel... because ... if you overact, you hold someone's life in your hands ... if that happens, then you can have a serious accident over something very minor.

¹⁰ Although Matthews' written statement generally describes O'Neal as rude, belligerent, and angry, which tends to support Wright's testimony, O'Neal's unrebutted credible testimony shows that Wright and Matthews were close friends and former roommates, which supports a reasonable inference that Matthews was biased. (Tr. 36.) For this reason, and because the written statement is an unauthenticated hearsay statement, I do not give it any weight.

(Tr. 93.)

5 If O'Neal's conduct had presented a danger, it more than likely would have been mentioned in the memo and it is less than likely that Captain Brown would have dismissed O'Neal to go to her post. Thus, the evidence viewed as a whole does not support Wright's assertions that O'Neal presented a danger to herself, her co-workers, and the public.

10 In addition, the evidence shows that the Respondent allowed O'Neal to return to work two days later on December 7. In the interim, Wright recommended that O'Neal be terminated and discussed the situation twice with her supervisor, Deputy Project Manager Andriana Overton. Notwithstanding these discussions and the alleged reasons for termination, neither Overton, Wright, or Captain Brown determined that it would be unsafe, unwise, or too risky to allow O'Neal to return to work on December 7. Indeed, O'Neal returned to work on December 7
15 and was issued a loaded weapon. Minutes later, she was called to a disciplinary meeting where she allegedly became upset once again. Yet, the evidence shows she again was allowed to go to her post fully armed, where she worked for 5 hours, before she was discharged. For these reasons, I find that Wright's (and Overton's) assertions that O'Neal's conduct presented a danger to the Respondent's mission stretches credulity.

20 Based on the evidence viewed as a whole, I find that Major Wright's testimony concerning O'Neal's conduct on December 5 was embellished, exaggerated, and unpersuasive

25 Regarding the December 7 meeting, the Respondent argues at page 15 of its posthearing brief that neither Lieutenant Bates nor Major Wright heard Captain Brown state at the December 7 meeting that if an employee tells management that he/she is going to take a problem to the Union, it will be considered a threat subject to discipline. The implication is that these witnesses tacitly denied that Captain Brown made the assertion. I disagree. The evidence shows that neither Major Wright nor Lieutenant Bates denied nor rebutted the testimony
30 attributing this statement to Captain Brown.

Major Wright testified that Captain Brown started the meeting by addressing the disorderly conduct. "He said something about her conduct was not going to be acceptable." (Tr. 160.) When Wright was asked specifically, "what did he say?" she testified as follows:

35 A. Witness: His back was turned to me. I could not really hear him clearly. I know that he told – he gave Ms. O'Neal her chance to have her say, so that she can tell, you know, get it out and tell us what else --- what was going on.

40 Q. Judge Miserendino: Well, what did he say to her?

A. Witness: I didn't hear him.

45 Q. Judge Miserendino: You didn't hear him?

A. Witness: I didn't hear him clearly. His back was to me. (Tr. 161.)

In addition, Wright's unconvincing testimony was contradicted by other evidence introduced by the Respondent. Respondent's Exhibit 34 is a hand drawn diagram prepared by
50 Lieutenant Bates at trial showing the location of everyone at the December 7 meeting. (Tr. 96 - 105.) According to Bates, and Respondent's Exhibit 34, Wright sat on one side of a supervisor's desk, O'Neal stood directly across from her, Union Steward Brown sat to the right of O'Neal,

and Captain Brown, who chaired the meeting, sat at the end of the desk facing everyone. In other words, contrary to Wright's testimony, Captain Brown did not have his back to Wright while he was speaking. Indeed, Bates, who was seated at the Post #1 control panel during the meeting, was behind Captain Brown and farther away than anyone else, but did not assert that he could not hear Captain Brown. Thus, based on the evidence viewed as a whole, it is inconceivable that Wright could not have heard Captain Brown given her very close proximity to him.

Nor did Lieutenant Bates deny, rebut or dispute that Captain Brown made the statement. Instead, he testified that he was unsure who said what at the meeting because it took place almost a year earlier. (Tr. 99.) His testimony on this point was interspersed with "I guess," "pretty much I would imagine" "I guess that's what was said, something of that nature." (Tr. 99 - 100.) His testimony was unspecific, lacked detail, and unpersuasive and certainly did not constitute a denial.

Finally, Wright's testimony that the December 7 meeting was called to give O'Neal an opportunity to tell her side of the story is dubious. First, the evidence shows that on December 5 Wright had already made a written recommendation to Overton to discharge O'Neal, which supports a reasonable inference that she already had made up her mind to discharge O'Neal. Next, there is no evidence that Captain Brown explained to O'Neal that the purpose of the meeting was to find out if there was something troubling her on December 5. Rather, the credible evidence shows that Captain Brown opened the meeting by stating if an employee told management that he/she was going to report a problem to the Union, the statement would be taken as a threat and the employee would be disciplined. On the heels of that statement, Captain Brown told O'Neal that although she would be paid travel pay, she was going to be disciplined for her conduct on December 5. Those are not words of a supervisor who is seeking to find out if something was troubling an employee. Rather, those are words of a supervisor who unsuccessfully sought to dissuade an employee from going to the Union with a problem, and who wanted to express his disappointment to her for doing so.

3. Angela Brown

Union Steward Brown credibly testified that she told O'Neal going into the December 7 meeting to let her do the talking. (Tr. 74.) She further testified that Wright kept telling O'Neal that she needed to respond for herself and it appeared Wright was trying to aggravate O'Neal to get her to respond. Union Steward Brown described Major Wright's tone as rude and angry. (Tr. 63-64.) Contrary to Wright's testimony, Angela Brown did not recall O'Neal getting upset. Rather, she credibly testified that O'Neal was respectful. (Tr. 29-30.)

In its posthearing brief at page 19, the Respondent asserts that Union Steward Brown is not a credible witness because she did not recall that Lieutenant Bates was present at the December 7. First, Bates did not speak or participate in the meeting. Second, he did not sit at the supervisor's desk with everyone else. He sat off to the side at the Post# 1 control panel. It is conceivable therefore that Union Steward Brown did not realize that he was present or even part of the meeting. That being so, the fact that Union Steward Brown did not remember that Bates was present does not taint her credibility or call into question her ability to recollect the pertinent facts.

The Respondent also asserts at pages 19-20 of its posthearing brief that Union Steward Brown's testimony should be stricken because after she completed her direct testimony Counsel for the General Counsel inexplicably gave Union Steward Brown a copy of her pretrial affidavit to review during the recess. When the hearing resumed with cross-examination, Respondent's

counsel moved to strike the direct testimony. I reserved ruling on the motion, but directed the parties to address the issue in their posthearing briefs by specifically showing how the Respondent was prejudiced by the action.

5 After careful review, I decline to strike Angela Brown's direct testimony. Her direct examination was completed prior to the recess. Respondent's counsel had the opportunity to fully cross-examine Angela Brown, and had reviewed her pretrial affidavit before doing so. I am not persuaded that the Respondent's case was prejudiced in any way. The Respondent's motion to strike is therefore denied.

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4. Danni O'Neal

15 Individual Charging Party Danni O'Neal generally was a credible witness. She admitted that she interrupted Major Wright on December 5 and she admitted that she turned her body away from her at times. (Tr. 34.) Although she asserted that no one raised their voices during the December 5th exchange (Tr. 33), it is implausible that neither she nor Wright raised their voices as they interrupted and talked over each other.

20 I credit, however, O'Neal's testimony that she allowed Union Steward Angela Brown to do the talking at the December 7 meeting. It is consistent with her repeated requests on December 5 to have her Union representative handle the problem and her refusal to discuss the matter herself. It is also corroborated by the credible testimony of Union Steward Brown, who stated that she did the talking at the December 7 meeting.

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5. The absence of Captain Kevin Brown at trial

30 Captain Kevin Brown was a key witness to the events in this case. He was present and had first hand knowledge of what transpired at the December 5 and December 7 meetings. As a management official, he authored, with input from Wright, the December 5 termination memo, which offers a different perspective of O'Neal's conduct than the testimony of Wright at the hearing. Captain Brown clearly could have elaborated, detailed, and defined what he and everyone else stated at the both meetings. Respondent's counsel represented to me that Captain Brown would be called as a witness. (Tr. 146.) He was not called. He did not appear at the hearing. There was no explanation given for his failure to be called as a witness.

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40 "Where a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1123 (1987) (emphasis added). The theory behind the rule is that, all other things being equal, a party will of his own volition introduce the strongest evidence available to prove his case. If evidence within the party's control would in fact strengthen his case, he can be expected to introduce it even if it is not subpoenaed.... Conversely, if such evidence is not introduced, it may be inferred that the evidence is unfavorable to the party suppressing it." *U.A.W. v. NLRB (Gyrodyne Co.)*, 459 F.2d 1329, 1338 (D.C. Cir. 1972).

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Because Captain Kevin Brown did not testify at trial, I adversely infer that had he testified his testimony would have been unfavorable to the Respondent on several key factual points concerning O'Neal's conduct on December 5 and 7, 2007, including, but not limited to, whether:

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- O'Neal was hot tempered and angry at the December 5 and 7 meetings;
- Wright called O'Neal back to the December 5 meeting in order to calm her down;

- O'Neal disrupted work in the control room on December 5;
- O'Neal was so angry and upset on December 5 and 7 that she presented a danger to herself, her co-workers, and the public;
- Captain Brown dismissed O'Neal to go to her post armed on December 5 and 7;
- Captain Brown began the December 7 meeting by stating if an employee told management that he/she was going to report a problem to the Union, the statement would be taken as a threat and the employee would be disciplined;
- O'Neal told Wright in the December 7 meeting that the other officers did not have the "balls to speak their minds;"
- O'Neal allowed Union Steward Brown do the talking for her at the December 7 meeting; and
- The purpose of the December 7 meeting was to give O'Neal a chance to explain if something was bothering her on December 5.

C. Analysis and Findings

1. Section 8(a)(1) threat

Paragraph 10 of the complaint alleges that the Respondent unlawfully restrained and coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act when Captain Brown threatened O'Neal and Union Steward Brown by telling them if an employee tells a supervisor that the employee was going to take a problem to the Union, Respondent's management would regard that statement as a threat subject to discipline.

Section 8(a)(1) is violated when an employer interferes with, restrains, or coerces employees in the exercise of their rights guaranteed in Section 7. The test is whether the employer's statement may reasonably tend to interfere with the employees' exercise of their Section 7 rights. The test does not turn on the employer's motive or on actual effect. *Lee Lumber & Building Material*, 306 NLRB 408, 409 (1992).

The undisputed evidence shows that O'Neal repeatedly stated on December 5 that she wanted a Union Steward to handle her request for travel pay. I have credited the testimonies of O'Neal and Union Steward Brown that two days later Captain Brown opened a meeting by telling them if an employee tells a supervisor that the employee was going to take a problem to the Union, Respondent's management would regard that statement as a threat subject to discipline. I have also drawn an adverse inference from the failure of the Respondent to call Captain Brown as a witness to deny that he made this statement. I find that Captain Brown's statement tended to unreasonably interfere with O'Neal right to complain about the denial of a contractual right and to seek Union assistance in pursuing that claim in violation of Section 8(a)(1) of the Act.

2. Section 8(a)(1) discharge

Paragraph 10 of the complaint also alleges that the Respondent violated Section 8(a)(1) of the Act by terminating Charging Party Danni O'Neal after telling her that if an employee tells a supervisor that the employee was going to take a problem to the Union, Respondent's management would regard that statement as a threat subject to discipline.

In its post-hearing brief, the General Counsel argues that the Respondent made this statement after the December 5 meeting during which O'Neal told management that she wanted her Union stewards to handle her claim for travel pay under the collective-bargaining

agreement. It asserts that O'Neal was engaged in protected concerted activity when she requested the travel pay and therefore her termination violated Section 8(a)(1) of the Act. It further asserts that the only issue is whether O'Neal's conduct was so opprobrious so as to lose the protection of the Act.

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The Respondent's post-hearing brief does not address the issue of whether O'Neal was discharged because of protected concerted activity in violation of Section 8(a)(1). Nor does it address the issue of whether her conduct was so opprobrious that it lost the protection of the Act. Rather, the Respondent focuses exclusively on whether O'Neal's discharge under a *Wright Line*¹¹ analysis was unlawfully motivated in violation of Section 8(a)(3).

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a. The appropriate legal analysis

It is well settled that an employee who honestly and reasonably believes that an employer is acting contrary to the employee's collectively bargained rights is entitled to complain to the employer about such action. The employee's conduct is protected unless the manner in which the employee made the complaint was too far out of line. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Felix Industries*, 331 NLRB 144 (2000), enfd. denied and remanded 251 F.3d 1051 (DC Cir. 2001), on remand *Felix Industries, Inc.*, 339 NLRB 195 (2003). The Board has held that where, as here, the conduct for which the Respondent claims to have discharged O'Neal is protected activity, the *Wright Line* analysis is not appropriate. 331 NLRB at 146.

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O'Neal clearly had the right to ask and argue about her travel pay. It is undisputed that under these circumstances the collective-bargaining agreement provided for two hours of travel pay. Her invocation of the collective-bargaining agreement's terms was protected concerted activity. The only question, therefore, is whether O'Neal's conduct on December 5, 2005, caused her to lose the protection of the Act.

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In *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), the Board stated:

[T]he Board and the courts have recognized ... that even an employee who is engaged in concerted activity can, by opprobrious conduct, lose the protection of the Act.

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The decision as to whether the employee has crossed the line the line depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

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b. The *Atlantic Steel* factor analysis

With respect to the place of the discussion, the evidence shows that the exchange between O'Neal and Wright took place at the supervisor's desk in Major Wright's office, which is adjacent to the Post #1 control panel, down the hall from the break room. Although O'Neal engaged Wright in a one-to-one discussion, the physical layout of the office area is such that other employees in close proximity of the office could overhear the conversation. There is no evidence that O'Neal used profane or abusive language or screamed at Wright. At best the evidence shows that when Wright told her that Bates had left a phone message, O'Neal raised

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¹¹ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)

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her voice and interrupted Wright telling her “Never mind,” as she sought to end the discussion to go to her post. At that point, Wright ordered O’Neil to return to the office which she did, but not by choice. After the two accused each other of being rude, Wright unsuccessfully tried to convince O’Neil that the travel pay issue could be resolved without the help of a Union steward. O’Neil refused to make eye contact or verbally acknowledge Wright, except to state that she wanted to let her Union steward handle the matter. When Wright pressed O’Neil again to resolve the matter without a Union representative, O’Neil refused to look at her, said nothing, and eventually was dismissed by Captain Brown to go to her post. Under these circumstances, I find that this factor (place of discussion) neither weighs in favor nor against the Act’s protection of O’Neil’s conduct.

Regarding the subject matter of the discussion, O’Neil went to Wright to request two hours travel pay as per the collective-bargaining agreement. She initially sought payment from her immediate supervisor, Lieutenant Bates, who told her that she needed to take the matter up with Wright. The discussion concerned O’Neil’s rights under the collective-bargaining agreement and therefore constituted protected concerted activity. This factor weighs heavily in favor of the Act’s protection.

With respect to the nature of O’Neil’s remarks, the credible evidence shows that they were not heated, hot-tempered, angry, or interlaced with profanity. When I pressed Wright to specifically tell me what O’Neil actually stated, Wright generalized stating that “[s]he was loud. She was just cutting me off. She wouldn’t let me speak. Demanding.” (Tr. 145.) Wright conceded that it was not what O’Neil said, but how she said it. (Tr. 145.) In these circumstances, the nature of O’Neil’s remarks weigh heavily in favor of the Act’s protection. *Syn-Tech Windows Systems*, 294 NLRB 791, 792 (1989) (angry finger-pointing at management official during discussion of employee grievances is not sufficiently egregious to remove the protections of the Act).

With respect to whether O’Neil’s remarks were in any way provoked by an employer’s unfair labor practice, the evidence shows that Wright denied O’Neil travel pay without ever talking to Bates and without checking the log book to determine whether Bates had successfully left a message for O’Neil. (R. Exh. 15, page 3.) Wright’s decision to deny travel pay was therefore based on a completely erroneous assumption. O’Neil disputed Wright’s untrue assertions. The two argued. O’Neil’s reaction was spontaneous and reflexive. When she saw that there was no point in pursuing the matter with Wright, O’Neil cut-off the conversation telling Wright, “Never mind” I will let my Union stewards handle the matter. I find that Wright’s unfounded denial of travel pay provoked the response she got from O’Neil. I further find that when O’Neil sought to extricate herself from a futile debate by leaving for her post, Wright made matters worse by ordering O’Neil to return to the office and repeatedly telling her that she did not need a Union steward to resolve the problem. Accordingly, I find that the provocation factor weighs in favor of the Act’s protection.

The above analysis reflects that two factors weigh heavily in favor of the Act’s protection, one factor weighs in favor, and the factor is neutral. Accordingly, I find that O’Neil did not lose the protection of the Act during the December 5 meeting. Therefore, the Respondent violated Section 8(a)(1) of the Act by discharging Individual Charging Party Danni O’Neil.

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3. Section 8(a)(3) discharge

Paragraph 11 of the complaint alleges that the Respondent violated Section 8(a)(3) of the Act by terminating the employment of Individual Charging Party Danni O'Neal for telling management that she was going to seek the Union's assistance in handling her travel pay claim.

a. *The appropriate legal standard*

In *Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that union activity was a motivating factor in the employer's decision¹². Specifically, the General Counsel must establish union activity, knowledge, animus or hostility, and adverse action, which tends to encourage or discourage union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Inferences of animus and unlawful motive may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Once accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that the reasons for its decision were not pretextual or that it would have made the same decision, even in the absence of protected concerted activity. *T&J Trucking Co.*, 316 NLRB 771 (1995).

b. *The General Counsel's evidence*

The undisputed evidence shows that the Respondent knew that O'Neal wanted her Union steward's assistance in pursuing her travel pay claim, which Wright had denied. It is reflected in the Recommendation of Termination prepared by Captain Brown and Wright, which Overton, reviewed, approved, and signed. (R. Exh. 4.) There is also ample evidence of the Respondent's animus toward the Union. Animus can be reasonably inferred from Wright's insistence that the travel pay issue be resolved without Union intervention and is also evident from Captain Brown's opening statement at the December 7 meeting: i.e., if an employee with a problem tells management that it is going to let the Union handle the matter, it management will take it as threat and the employee will be disciplined. Captain Brown also told O'Neal that she was going to be disciplined for her conduct at the December 5 meeting at which she repeatedly told management that she wanted to have her Union steward handle the travel pay claim. A few hours later, O'Neal's employment was terminated.

I therefore find that the General Counsel has satisfied its initial evidentiary burden. The burden now shifts to the Respondent to persuasively establish by a preponderance of the evidence that it would have discharged O'Neal, regardless of her protected Union activity.

c. *The Respondent's evidence*

The Respondent asserts that no evidence of unlawful motivation exists because the ultimate decision to terminate the employment of Individual Charging Party Danni O'Neal was made by DPM Andriana Overton, who was one step removed in the process. The evidence shows, however, that Overton received, reviewed, and acted on the Recommendation of Termination, which states that O'Neal repeatedly insisted on having her Union representatives

¹² *In re Manno Electric, Inc.*, 321 NLRB 278, 280, fn. 12 (1996).

5 handle the travel pay issue, despite Wright's attempts to address the issue without Union
intervention. The evidence also shows that Wright kept Overton updated by phone of every
development including the December 7 meeting. Indeed, Wright testified that she called Overton
and "explained to her everything that went on in the meeting" (Tr. 164.) The evidence
10 therefore supports a reasonable inference that Overton was aware of Captain Brown's opening
statement that if an employee tells a supervisor that the employee was going to take a problem
to the Union, Respondent's management would regard that statement as a threat subject to
discipline. Accordingly, Overton possessed the same knowledge of and animus toward O'Neal's
protected Union activity and therefore the same motivation to discourage this type of Union
activity, when she decided to approve the recommendation of termination.

15 The Respondent also asserts that as the ultimate decision-maker Overton was insulated
from unlawful activity because she followed the collective-bargaining agreement and insisted
that there be a fact-finding investigation before she approved the Recommendation of
Termination. A careful review of the evidence, however, shows that that termination of
employment was verbally recommended before the investigation began and was recommended
20 in writing before the investigation was completed. When Wright sent the written
Recommendation of Termination to Overton on December 5, only two written statements had
been received: one from Officer Lita Matthews and one from Individual Charging Party O'Neal.
(R. Exhs. 5 and 6.) Over the next two days, five more written statements were submitted: two by
Wright herself; one from Captain Brown; one from Lieutenant Bates; and one from Officer
Daniel Frimpong. (R. Exhs. 8, 9, 10, 11, 12, respectively.) Thus, the evidence supports a
reasonable inference that the investigation was not undertaken in order to make a determination
25 on whether to terminate O'Neal, but was undertaken in order justify a conclusion already
reached.

30 The inference is further supported by the fact that the statements basically reiterate what
was appears in the Recommendation of Termination. Respondent's Exhibit 8 read juxtapose
Respondent's Exhibit 4 shows that Wright's December 6 statement essentially repeats what
was stated in the written recommendation of termination that she helped prepare. (Compare, R.
Exh. 8 to R. Exh. 4.) Although her December 6 statement states that O'Neal raised her voice
"belligerently" and spoke in a "belligerent" manner when she told Wright that she wanted her
Union representatives to handle the manner, it does not state that O'Neal was physically
threatening, refused to follow orders, disrupted operations or distracted the officer manning Post
35 #1.

40 Wright's December 7 written statement, which she prepared after the meeting with
O'Neal, describes O'Neal's demeanor at the December 7 meeting as rude and "belligerent" and
attributes to O'Neal the statement that she was the only officer "that has the balls to speak up
for herself." (R. Exh. 9.) Yet, Wright did not state that O'Neal was physically threatening or that
she refused to follow orders.

45 The December 7 written statement by Captain Kevin Brown is almost a verbatim
rendition of the Recommendation of Termination which was submitted to Overton two days
earlier. (R. Exh. 11.) It focuses exclusively on the events which transpired on December 5.
Remarkably, Captain Brown's written statement makes absolutely no mention of the December
7 meeting, which he chaired earlier that day. It does not state that O'Neal acted rude, angry or
belligerent at the December 7 meeting or otherwise corroborate Wright's recollection of that
meeting.

50 Although he was specifically asked by Wright to attend the December 7 meeting as a
"witness," Lieutenant Bates' December 7 statement likewise does not even mention the

December 7 meeting. (R. Exh. 10.) Rather, his written statement exclusively describes his conversations with O'Neal on December 1 and 3.

5 Officer Daniel Frimpong, who was in a nearby locker room on December 5, when the exchange between Wright and O'Neal occurred, also gave a written statement on December 7. It states that on December 5, Frimpong heard Major Wright ask O'Neal to come back so they could work something out, and O'Neal refused stating that she would be late for her post. (R. Exh. 12; Tr. 52.) However, Frimpong's recollection of what he heard on that day conflicts with Wright's testimony that O'Neal did return to the office. (Tr. 146.)

10 That leaves Officer Matthews' December 5 written statement, which for reasons stated above, I give no weight, as well as Individual Charging Party O'Neal's December 5 written statement, which Overton did not remember reviewing. (Tr. 199, 201-202.)

15 When these statements are read together, the evidence viewed as a whole shows that the investigation ordered by Overton and conducted by Wright was merely a formality which served no purpose other than to justify Wright's written recommendation that was submitted before the investigation was completed. Thus, in the final analysis, when Overton, who knew of O'Neal's insistence on Union representation and management's opposition thereto, approved the Recommendation of Termination, it amounted to little more than a "rubber stamp."

20 More importantly, neither the Recommendation of Termination nor the investigation support the reasons asserted by the Respondent for terminating O'Neal's employment. There is no evidence that Individual Charging Party O'Neal was insubordinate, i.e., refused to follow an order of management. See *Carolina Freight Carriers Corp.*, 295 NLRB 1080, 1084 (1989). There is no argument or evidence that O'Neal refused to obey an order to stop talking or to be quiet or to return to the office. To the contrary, the evidence shows that from the outset O'Neal followed the directions of management. When she initially approached Lieutenant Bates to ask about travel pay, he told her to take it up with Major Wright, which she did. When Wright told O'Neal to return to the office, after she walked out, O'Neal obeyed her order. In addition, she remained in the office until dismissed by Captain Brown to go to her post. The Respondent has not provided any evidence showing that O'Neal refused to follow a management order.

30 In addition, there is no credible evidence that O'Neal's conduct disrupted operations or more specifically distracted the officer monitoring the surveillance cameras. It is not mentioned in the Recommendation of Termination or in any of the written statements. Nor is there any credible evidence to support the assertion O'Neal presented a danger to the public, her co-workers, and herself.¹³ When asked to explain why she allegedly lost confidence in O'Neal Wright testified: "[w]hen Officer O'Neal came in and she was loud and boisterous, I pretty much – I didn't have full confidence in her. So – in her ability to go back to work." (Tr. 157.)

On direct examination she was asked and she answered:

45 Q. What is it about her conduct that you feel made you lack complete confidence in her abilities? What was it about her conduct?

A. I felt that it could create an unreasonable risk to the employees and the visits.

50 ¹³ Moreover, there is no evidence that O'Neal acted "unprofessionally" once she left the confines of Wright's office to return to her post.

Q. In what sense though?

A. Because she was angry and she wasn't thinking rationally.

5 (Tr. 158, L 6-13.)

10 Notwithstanding Wright's professed lack of confidence, the undisputed evidence shows that after the December 5 exchange, O'Neal was dismissed to her post with a loaded weapon, allowed to complete her shift, and was allowed to return to work two days later at which time she was issued a loaded weapon.

15 I find that the Respondent's proffered reasons for termination are pretextual. The undisputed evidence shows that O'Neal had no prior discipline and was considered a good officer. At most, her behavior on December 5 was rude and disrespectful. *Union Carbide Corporation*, 331 NLRB 356, fn. 1 (2000); *Antenna Department West*, 266 NLRB 909, 913-914 (1983). At best it was tantamount to "disorderly conduct," a nondischargeable offense under the contract's disciplinary code guideline. (G.C. Exh. 2, page 42.) The Respondent nevertheless seized upon and embellished this behavior to cloak its real, though discriminatory, motive of discouraging employees from seeking Union representative in resolving issues involving rights and benefits arising under the collective-bargaining agreement. The Respondent therefore has failed to show that it would have terminated the employment of Individual Charging Party Danni O'Neal, absent her protected Union activity. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act as alleged in the amended complaint.

25 Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
- 30 2. The International Union of Security, Police and Fire Professionals is a labor organization within the meaning of Section 2(5) of the Act.
- 35 3. By telling employees that they will be disciplined, if the employees tell management that they are going to seek assistance from the Union in resolving an issue arising under the collective-bargaining agreement, the Respondent violated Section 8(a)(1) of the Act.
- 40 4. By discharging Individual Charging Party Danni O'Neal on December 7, 2005, for engaging in protected concerted activity under Section 7 of the Act, the Respondent violated Section 8(a)(1) of the Act.
- 45 5. By discharging Individual Charging Party Danni O'Neal on December 7, 2005, for telling management that she was going to seek the assistance of the International Union of Security, Police and Fire Professionals in order to resolve an issue arising under the collective-bargaining agreement, the Respondent violated Section 8(a)(1) and (3) of the Act.
- 50 6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

5 Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

10 The Respondent having discriminatorily discharged Danni O'Neal in violation of Section 8(a)(1) and 8(a)(3) of the Act, I shall recommend that the Respondent be ordered to immediately offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of her discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall further recommend that the Respondent be ordered to remove from its files any reference to the unlawful discharge of Danni O'Neal.

15 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

20 The Respondent, Onpoint Consulting, Inc., its officers, agents, successors, and assigns, shall

25 1. Cease and desist from

30 (a) Telling employees that they will be disciplined, if the employees tell management that they are going to seek assistance from the Union in order to resolve an issue arising under the collective-bargaining agreement.

(b) Discharging Danni O'Neal because she engaged in concerted protected conduct under Section 7 of the Act.

35 (c) Discharging Danni O'Neal because she told management that she was going to seek assistance from the Union in order to resolve an issue arising under the collective-bargaining agreement.

40 (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

45 (a) Within 14 days from the date of this Order, offer Danni O'Neal full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

50 ¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Make Danni O’Neal whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

5 (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Danni O’Neal and within 3 days thereafter notify Danni O’Neal in writing that this has been done and that the discharge will not be used against her in any way.

10 (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

15 (e) Within 14 days after service by the Region, post at the FAA facility, located at 800 Independence Ave, SW, Washington, DC, copies of the attached notice marked “Appendix.”¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous
20 places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current
25 employees and former employees employed by the Respondent at any time since December 6, 2000.

30 (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 7, 2008

35 _____
C. Richard Miserendino
Deputy Chief Administrative Law Judge

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45
50 _____
¹⁵ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT tell employees that they will be disciplined, if the employees tell management that they are going to seek assistance from the Union in order to resolve an issue arising under the collective-bargaining agreement.

WE WILL NOT discharge Danni O'Neal because she engaged in concerted protected conduct.

WE WILL NOT discharge Danni O'Neal because she told management that she was going to seek assistance from the International Union of Security, Police and Fire Professionals in order to resolve an issue arising under the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, offer Danni O'Neal full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Danni O'Neal whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against him, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful discharge of Danni O'Neal.

ONPOINT CONSULTING, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

103 South Gay Street, The Appraisers Store Building, 8th Floor
Baltimore, MD 21202-4061
Hours: 8:15 a.m. to 4:45 p.m.
410-962-2822.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 410-962-3113.