UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

AMERICAN CIVIL LIBERTIES UNION, INC.

and

NONPROFIT PROFESSIONAL EMPLOYEES UNION (NPEU), INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL ENGINEERS (IFPTE) LOCAL 70 A/W INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL ENGINEERS, AFL-CIO, CLC

Cases 05-CA-300367
and
05-CA-302762

COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S PRE-HEARING MOTION TO DEFER BOARD ACTION TO THE PENDING GREIVANCE AND ARBITRATION PROCEEDINGS

On July 20, 2023, the American Civil Liberties Union, Inc.'s ("Respondent") filed its Pre-Hearing Motion to Defer Board Action to the Pending Grievance and Arbitration Proceedings ("Motion"). The Motion should be rejected by the Administrative Law Judge ("ALJ") because Respondent fails to set forth any basis by which this case could be deferred, and thus, fails to meet its burden. As a threshold matter, the parties do not have a collective-bargaining agreement ("CBA") containing a negotiated grievance and arbitration procedure. The parties have never negotiated an agreement establishing a grievance and arbitration procedure providing for the resolution of a large range of disputes between Respondent and its represented employees. As such, the parties have not agreed to be bound by Respondent's unilaterally determined Policy No. 527. Moreover, the issues presented in Respondent's unilateral arbitration are entirely undefined as evidenced by transcripts of the ongoing arbitration, and a clearly defined issue before an arbitrator is essential to evaluate whether deferral is appropriate under any deferral framework. Finally, though Respondent's Motion should be denied for any of

the above-stated reasons standing alone, it should also fail because two of the allegations contained in the Consolidated Complaint and Notice of Hearing ("Complaint" or the "the Complaint"), specifically Senior Policy Counsel Katherine Oh's ("Oh") denied transfer request, and Respondent's failure to bargain with the Nonprofit Professional Employees Union (NPEU), International Federation of Professional & Technical Engineers (IFPTE) Local 70 a/w International Federation of Professional & Technical Engineers, AFL-CIO, CLC ("Charging Party") over Oh's discharge, are not before an arbitrator.

For the above stated reasons, counsel for the General Counsel ("CGC") respectfully requests that the ALJ deny Respondent's Motion.

I. FACTS

A. Background

On or about May 11, 2021, Charging Party became the exclusive collective-bargaining representative of certain employees of Respondent, including Oh. In the more than two years since its recognition, Charging Party has been unsuccessful in reaching an initial CBA with Respondent. As a result, the parties have not agreed to a grievance and arbitration procedure in which the parties have agreed to be bound, and that allows for a broad range of disputes to be deferred. Therefore, as required by law, Respondent has continued to apply its Policy No. 527 as the status quo ante while negotiations between the parties continue. (MOT at 3).[1]

Policy No. 527 contains Respondent's unilaterally determined procedures by which employees can challenge their termination. (GC Exhibit 1). These procedures were drafted and implemented by Respondent, without input from the Charging Party or the bargaining-unit employees. (MOT at 3). The last time Policy No. 527 was modified in May 2020, Respondent

[1] MOT indicates a citation to Respondent's Motion.

had not yet recognized Charging Party as the exclusive collective-bargaining representative of its employees. (MOT at 3). Therefore, Respondent could not possibly have negotiated with the Charging Party about the current iteration of Policy No. 527. The parties have not entered into any kind of written agreement to abide by Policy No. 527, or by any other grievance and arbitration procedures. As a unilaterally imposed policy, Respondent is under no contractual obligation to Oh or the Charging Party to abide by Policy No. 527. Since Charging Party, Oh's exclusive collective-bargaining representative, has been unable to finalize a CBA with Respondent containing an agreed-to grievance and arbitration machinery, her only option in the event of her discharge was to avail herself of Policy No. 527.

On May 5, 2022, Respondent discharged Oh citing tweets and statements she made about toxic management practices within Respondent's organization. More specifically, Oh had complained that Respondent was making decisions that would burden employees' workloads, with only a limited chance of success, and without a detailed understanding of the costs in terms of time and morale. At the time of her termination, Oh had established herself as a workplace advocate active in discussing working conditions at Respondent's office with other employees concerning Respondent's a fear-based leadership style, verbal abuse by managers and supervisors, sexism in Respondent's National Political Advocacy Division, a lack of institutional response to instances of hate and violence directed towards Asian Americans and Pacific Islanders, and unmanageable workloads. Mere months after Oh's advocacy contributed to Respondent's public termination of Respondent's National Political Director Ronald Newman ("Newman"), , and a short time after raising concerns about Newman's mentee and successor, Ben Needham ("Needham"), Respondent fired Oh.

The Charging Party filed the charges in this matter on July 28 and August 18, 2022. On March 13, 2023, the Complaint in these cases issued alleging Respondent violated Section 8(a)(1) of the Act by discharging Oh because she engaged in protected concerted activity and to discourage such activities; by refusing to transfer Oh because she engaged in protected concerted activity and to discourage such activities; and violated Section 8(a)(5) of the Act by discharging Oh without giving the Charging Party notice and an opportunity to bargain over her discharge.

B. As Her Only Option, Oh Availed Herself of Respondent's Policy No. 527 to Contest Her Termination

On July 19, 2022, Charging Party assisted Oh in utilizing Respondent's Policy No. 527 to contest her termination to an arbitrator. (GC Exhibit 2). Two days of arbitration regarding Oh's termination occurred on March 6 and June 7, 2023. Additional arbitration dates are anticipated in the future.

Despite Respondent's repeated assertion in its Motion that the Charging Party initiated the proceedings under Policy No. 527 and is representing Oh in the arbitration proceeding, Respondent insisted before the arbitrator that the Charging Party is not a party to the arbitration proceeding concerning Oh's termination, drawing specific attention to the fact there is no CBA between the parties. (GC Exhibit 3).[2] In fact, during the first two days of arbitration, Respondent's counsel made a point of noting on at least seven separate occasions that Charging Party is not a party to the arbitration proceeding regarding Oh's termination. (GC Exhibit 3). For instance, Respondent's counsel stated:

> Now, as we've discussed, although Ms. Oh is represented in this proceeding by a labor organization, the NPEDU, she and the ACLU are the sole parties to this proceeding. This dispute does not involve a collective bargaining agreement. No collective bargaining agreement has yet been negotiated by the union and the

[2] General Counsel's Exhibit 3 is an excerpt from the transcript of the March 6, 2023 arbitration proceeding.

> ACLU. The case arises solely under an employment policy adopted by the ACLU decades ago, long before the union was recognized, called board policy 527. (GC Exhibit 3, 13:19-14:2).

Respondent's counsel repeated this general line of argument throughout the arbitration.

C. The Parties' Do Not Agree on the Issue Before the Arbitrator

Based on the arbitration transcripts, the proceeding before the arbitrator indisputably concerns Oh's termination, however the actual issue before the arbitrator is unsettled. At arbitration, Respondent proposed that the issue before the arbitrator is whether it merely had "grounds for termination." (GC Exhibit 4, 111). In response to Respondent's proposed issue at arbitration, Oh's representative disputed Respondent's phrasing of the issue and proposed that the issue is whether Respondent had "just cause" to terminate Oh's employment. (GC Exhibit 3 at 35:16-17, GC Exhibit 4 at 112:20-113:6, 114:12-14, 117:2-5). The question of the issue before the arbitrator became so confusing that the parties ultimately agreed to let the arbitrator decide based on his reading of Policy No. 527. (GC Exhibit 4, 116-118). Not in dispute however is that the issue before the arbitrator does not include whether Oh was terminated for protected concerted activities, or whether Respondent denied Oh's request for transfer due to her protected concerted activities, or whether Respondent violated Section 8(a)(5) by failing to bargain with the Charging Party regarding its decision to terminate Oh, as alleged in the Complaint.

II. ARGUMENT

A. Legal Framework

In its Motion, Respondent primarily relies on *Collyer* and *Dubo* in arguing for deferral to Policy No. 527 – its unilaterally determined status quo ante. In determining whether *Collyer* deferral is appropriate, the Board considers six factors: (1) whether the dispute arose within the confines of a long and productive collective-bargaining relationship; (2) whether there is a claim

of employer animosity to the employees' exercise of protected rights; (3) whether the agreement provides for arbitration in a very broad range of disputes; (4) whether the arbitration clause clearly encompasses the dispute at issue; (5) whether the employer asserts its willingness to resort to arbitration for the dispute; and (6) whether the dispute is eminently well suited to resolution by arbitration. *United Parcel Service*, 369 NLRB No. 1 slip op. (2019) citing *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies*, 268 NLRB 557 (1984). The Board's longstanding policy under *Dubo Manufacturing Corp.* is to defer cases where the matter in dispute in an unfair labor practice case is being processed through the grievance-arbitration machinery to which the parties have contractually agreed. 142 NLRB 431, 432 (1963). By way of explanation of its decision to defer to arbitration in *Dubo*, the Board wrote:

> The Board policy is to effectuate, wherever possible, the intent of Congress expressed in Section 203(d) of the 1947 Labor Management Relations Act, namely, "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." In effectuating that congressional intent, the Board has recognized existing arbitration awards, and in certain circumstances has required parties before resorting to Board processes to utilize the grievance and arbitration procedure in agreements to which they are signatory. *Id.*

Where the Board defers under *Dubo*, the appropriateness of deferral and the arbitrator's decision is evaluated under the *Spielberg-Olin* standard. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984). Under this standard, the Board presumes that an arbitrator has ruled on an unfair labor practice when presented in some manner with the facts relevant to both a contractual violation and an unfair labor practice. *Olin Corp.*, 268 NLRB 573 (1984).

In *Babcock & Wilcox* the Board revisited its post-arbitration deferral standard, finding the test under *Olin/Spielberg* did not adequately balance the protection of employee rights under the

Act with the national policy of encouraging arbitration of disputes over the application or interpretation of collective-bargaining agreements. 361 NLRB 1127 (2014). Under the *Babcock & Wilcox* post-arbitration deferral standard,[3] deferral will be appropriate where the arbitration procedures appear to have been fair and regular, the parties agreed to be bound, and the party urging deferral demonstrates that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law "reasonably permits" the arbitral award. *Id.* As the moving party, Respondent bears the burden of proving that deferral to the parties' contractual grievance/arbitration procedure is appropriate. See *Doctors' Hospital of Michigan*, 362 NLRB 1220, 1232 (2015).

B. Without a CBA, Respondent's Motion Fails as A Threshold Matter

Noticeably, Respondent's Motion fails to cite any authority that the ALJ can defer to a unilaterally imposed procedure in which the parties have not agreed to be bound. Respondent has not cited this authority because Board law is clear that the existence of a CBA is a threshold requirement for both pre- and post- arbitral deferral under the *Collyer* and *Dubo* frameworks.

The Board's longstanding policy of deferring cases to grievance and arbitration proceedings relies upon the existence of a collective-bargaining relationship, and accompanying machinery, by which parties have agreed to be bound for the purposes of resolving disputes. *International Harvester Co.*, 138 NRLB 923 (1962). The purpose of deferral is to promote industrial peace by encouraging the regular practice and procedure of collective bargaining. *Id.*

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[3] Although the Board overturned *Babcock & Wilcox* in *United Parcel Service*, 369 NLRB No. 1 slip op. (2019), the General Counsel is currently seeking to overturn *United Parcel Service* and return to the *Babcock & Wilcox* standard. This issue is pending before the Board in *Phillips 66*, Case 15-CA-263723.

This purpose, however, is not served by deferring to a unilaterally imposed, employer-controlled, procedure which has not been bargained with the employees' exclusive collective-bargaining representative.

When considering *Collyer* deferral, the first and sixth factors make clear the absolute necessity of a CBA as a condition for deferral. The first *Collyer* factor, whether the dispute arose within the confines of a long and productive collective-bargaining relationship, makes clear that the existence of a CBA is an essential prerequisite for any request to defer. The parties in this case do not have anything resembling a long and productive collective-bargaining relationship. The dispute in this matter arises out of a nascent collective-bargaining relationship, in which the parties have not yet reached a first contract even though Charging Party has been seeking one since its recognition on May 11, 2021. Without a negotiated CBA, deferral is entirely inappropriate in this matter. Even the cases relied on by Respondent in support of its Motion clearly articulate the threshold requirement of a CBA for deferral. For instance, in *Pontiac Osteopathic Hospital*, cited prominently in Respondent's Motion, the ALJ specifically found:

> As there is no collective-bargaining agreement in this case and the Appeals Board procedure, even if analogized to arbitration, is not contained in a contract to which all parties have agreed to be bound, deferral is clearly inappropriate. *Pontiac Osteopathic Hosp.*, 284 N.L.R.B. 442, 467 (1987).

Some version of the same requirement can be found in each case Respondent cites in support of its Motion.

Further, the sixth *Collyer* factor, whether an issue is well suited to arbitral resolution necessitates the existence of a CBA. An issue is well-suited to arbitral resolution when "the meaning of a contract provision is at the heart of the dispute." *San Juan Bautista Medical Center*, 356 NLRB 736, 737 (2011). Deferral is inappropriate when "no construction of the

contract is relevant for evaluating the reasons advanced by [r]espondent for failing to comply with that contract provision." *Id.*, citing *Struthers Wells Corp.*, 245 NLRB 1170, 1171 fn. 4 (1979), enfd. mem. 636 F.2d 1210 (3d Cir. 1980). Deferral is also inappropriate if the contract provision at issue is unambiguous. *Id.*; *Doctors' Hospital of Michigan*, 362 NLRB at 1232; see also *New Mexico Symphony Orchestra*, 335 NLRB 896, 897 (2001). Here, as there is no CBA, Respondent failed to establish that a contract provision is in dispute, and for this reason the matter cannot be well suited to arbitral resolution.

Similarly, under *Dubo*, the Board permits deferral where the matter in dispute in an unfair labor practice case is being processed through the grievance-arbitration machinery, and there is a reasonable chance that the use of that machinery will resolve the dispute or set it at rest. 142 NLRB at 431. There simply is no such grievance and arbitration machinery in this case. Without a CBA or collectively-bargained grievance and arbitration machinery there is no reasonable chance that Respondent's unilaterally imposed machinery will resolve this dispute.

Despite Respondent's selective argument in its Motion that the presence of a neutral arbitrator in this matter distinguishes this case from cases like *Pontiac Osteopathic* or *The American League of Professional Baseball Clubs*, the fact remains that in each of these cases respondents' requests for deferral were dismissed because the existence of a CBA is a threshold requirement for deferral. *Pontiac Osteopathic* 284 NLRB 442 (1987); *The American League of Professional Baseball Clubs*, 180 NLRB 190 (1969). Respondent ignores language in each of these cases explicitly requiring the existence of a CBA to defer unfair labor practice cases to arbitration, as if doing so will render their holdings non-binding. Respondent's Motion is entirely devoid of legal authority that would permit deferral in the absence of a CBA. Instead, Respondent is reduced to arguing that its unilaterally imposed procedure is sufficient without any

CBA between the parties. There is, to CGC's knowledge, no precedent for the Board's policy of deferral under *Collyer* or *Dubo* to force parties into arbitration under unilaterally imposed, employer-created, procedures.

Without a negotiated CBA, deferral is inappropriate, and the ALJ should reject Respondent's Motion.

C. The Parties Have Not Agreed to Be Bound to Policy No. 527

Despite Oh availing herself of the only process available to her, Respondent's unilaterally imposed arbitration procedure, neither she nor Charging Party have agreed to be bound to Policy No. 527. While the Board has evaluated deferral under several frameworks, all of them require that the parties have agreed to be bound to the grievance and arbitration procedure before the Board or an ALJ can consider deferral. The very existence of deferral relies upon the existence of a collective-bargaining relationship, and accompanying machinery, by which parties have agreed to be bound for the purposes of resolving disputes. *International Harvester Co.*, 138 NRLB 923 (1962). Under *Collyer*, this requirement is emphasized in the third factor, which examines whether the parties' agreement provides for arbitration in a broad range of disputes. 192 NLRB at 837; see also, *United Parcel Service*, 369 NLRB No. 1 slip op. (2019); *United Technologies*, 268 NLRB 557 (1984). Under *Dubo*, the requirement is at the core of the public policy justification for deferral, that the use of the parties' grievance and arbitration procedure furthers industrial peace, and that there is a reasonable chance that the use of that machinery will resolve the dispute or set it at rest. *Dubo Mfg. Corp.*, 142 NLRB at 431.

In this case, because the evidence is clear that the parties have never successfully bargained a grievance and arbitration procedure and have no history of operating under any grievance and arbitration agreement, the parties have not agreed to be bound by Policy No. 527.

Respondent attempts to gloss over this deficiency by handwaving and gesturing at the detailed nature of its unilaterally imposed Policy No. 527. However, absent a contract between the parties containing a grievance and arbitration machinery, there is no agreement by the parties to be bound to a set of grievance or arbitration procedures.

The parties did not negotiate over Policy No. 527. By Respondent's own admission in its Motion, Policy No. 527 has remained in place as the status quo ante while Respondent and Charging Party negotiate their first CBA. (MOT at 3, 10). This means that Respondent did not negotiate with the Charging Party, or anyone else, about Policy No. 527, and that Charging Party did not consent or agree to be bound to Policy No. 527. Further cementing the point that Charging Party has not agreed to be bound by Policy No. 527 is Respondent counsel's opening statement at arbitration that Charging Party is "not a party" to the arbitration proceeding. Specifically, Respondent's counsel, began the arbitration hearing with the admission that:

> although Ms. Oh is represented in this proceeding by a labor organization, the NPEDU, she and the ACLU are the sole parties to this proceeding. This dispute does not involve a collective bargaining agreement. No collective bargaining agreement has yet been negotiated by the union and the ACLU. The case arises solely under an employment policy adopted by the ACLU decades ago, long before the union was recognized, called board policy 527.
> (GC Exhibit 3, 13:19-14:2).

As Respondent's counsel admitted in the above, the parties have not agreed to be bound to Policy No. 527, and as such, the ALJ should deny the Motion.

D. Deferral is Inappropriate Because the Parties Cannot Agree on the Issue Before the Arbitrator, and the Arbitrator is Not Authorized to Decide the Statutory Issue Before the ALJ

To defer under either the *Spielberg/Olin* or *Babcock & Wilcox* standards, the issues presented to the arbitrator must be clearly articulated. However, the transcripts in the ongoing

arbitration reveal that Respondent and Oh's representative do not agree on the issue before the arbitrator, and because the parties do not have a CBA allowing for the deferral of a broad range of disputes, including the statutory issue before the ALJ, deferral is inappropriate.

While the proceeding before the arbitrator undisputedly concerns Oh's termination, the actual issue before the arbitrator remains unknown. Respondent articulated its understanding of the issue presented to the arbitrator differently in its Motion to the ALJ than it did to the arbitrator. While Respondent argues in its Motion that the issue presented to the arbitrator is whether Respondent had "just cause" to terminate Oh's employment, its arguments to the arbitrator framed the issue as merely a question of whether Respondent had mere grounds to terminate Oh's employment. (GC Exhibit 4, 111). At arbitration, Oh's representative disputed Respondent's framing and accused it of trying to avoid the "just cause" standard articulated in Policy No. 527. (GC Exhibit 4 at 113:2-6). The issue of the question before the arbitrator became so confusing that the parties decided to simply leave it up to the arbitrator to decide the issue. (GC Exhibit 4 at 116-119).

Regardless of which version of the question presented the arbitrator ultimately accepts, it is undisputed that neither of the questions presented to the arbitrator address whether Oh's conduct in discussing her working conditions was a motivating factor in Respondent's decision to terminate her. To sufficiently address the unfair labor practice at issue concerning Oh's termination, and the statutory question before the ALJ, the issue before the arbitrator would at a minimum have to include whether Respondent terminated Oh for engaging in protected concerted activity as alleged in the Complaint. Therefore, because the parties cannot agree on the issue being arbitrated regarding Oh's termination, and because the issue of her protected concerted activities as a

motivating factor for termination is not before the arbitrator, the ALJ should reject Respondent's Motion.

E. This Case Should Not be Deferred Because the Issue of Oh's Transfer, and Respondent's Failure to Bargain over her Termination are Not Before an Arbitrator

In evaluating whether deferral is appropriate, the Board considers whether the issues before the arbitrator adequately encompass the alleged unfair labor practices. *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Parcel Service*, 369 NLRB No. 1 slip op. (2019); *United Technologies*, 268 NLRB 557 (1984); *Babcock & Wilcox*, 361 NLRB 1127 (2014); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) and *Olin Corp.,* 268 NLRB 573 (1984).

While the ongoing arbitration proceeding concerns Oh's termination, albeit in disputed fashion, it does not address any of the other allegations contained in the Complaint. In addition to the allegation related to Oh's discharge, the Complaint alleges that Respondent violated Section 8(a)(1) of the Act by denying her transfer request and Section 8(a)(5) by failing to bargain over its decision to terminate her. Neither of these allegations are before the arbitrator.

III. CONCLUSION

Because there is no CBA containing a grievance and arbitration procedure, the parties did not agree to be bound to Policy No. 527, the issue before the arbitrator is unknown and does not address the Region's allegations of retaliation for protected concerted activities, and there are additional allegations in the Complaint not p the arbitrator, CGC respectfully requests the ALJ reject Respondent's request to defer this matter to arbitration.

Dated at Washington, DC this 1st day of August 2023.

Respectfully submitted,

/s/ Katherine E. Leung

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August 2023, the foregoing COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S PRE-HEARING MOTION TO DEFER BOARD ACTION TO THE PENDING GREIVANCE AND ARBITRATION PROCEEDINGS was e-filed and sent by electronic mail, upon the following persons:

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GENERAL COUNSEL EXHIBIT 1

Policy #527

General Personnel Policies

I. Terms of Employment — National Office

A. Executive Director

The Board of Directors is responsible for hiring and firing the Executive Director. The Executive Director serves at the pleasure of the Board of Directors.

B. Other Staff

The Executive Director is responsible for all hiring and firing of National staff. While ultimate responsibility for such hiring and firing remains with the Executive Director, they may delegate this authority as they deem appropriate.

II. Employment Rights of National ACLU Executive Director and Senior Staff

A. At-Will Employment

1. Executive Director

Because of the Executive Director's unique role and relationship with the Board of Directors, the Executive Director's employment may be terminated at the discretion of the Board (i.e., the Executive Director is an "at-will" employee), except for reasons prohibited by law or ACLU policies relating to employment. [1] The Board may also employ the Executive Director under an employment contract, which may provide additional terms regarding any termination of employment.

2. Senior Staff

As with the Executive Director, the highest ranking senior management staff (i.e., Senior Staff) have special responsibilities and unique relationships with the organization and with the Executive Director that distinguish them from other employees. Because of their unique position, their employment may be terminated at the discretion of the Executive Director (i.e., they are "at-will" employees), except for reasons prohibited by law or ACLU policies relating to employment. In determining whether an employee is a Senior Staff member who may be employed on an "at-will" basis, each of the following criteria must be met:

a) the employee must hold a senior management position directly below the Executive Director and must report directly to the Executive Director;
b) the position must require a special relationship of trust and confidence with the Executive Director and/or Board;
c) the position must require the exercise of significant independent judgment and discretion in the implementation of policy;[1] and
d) the position must be designated as a senior staff position by the Executive Committee or the Board.

B. Procedure for Terminating A Senior Staff Member

1. Notice

Before terminating the at-will employment of a Senior Staff member the Senior Staff member shall be given reasonable notice of the effective date of the termination.

2. Arbitration

If the Senior Staff member claims that their termination[2] was for reasons prohibited by law or ACLU policies relating to employment, or that the denial of severance pursuant to Section II.C below was improper, then nothing shall preclude the Senior Staff member and the ACLU from entering into a written agreement which provides for resolution of the dispute pursuant to the binding arbitration procedures set out in Section III.B.3. below. The ACLU is encouraged to enter into such agreements at the request of the Senior Staff member.

If a Senior Staff member and the ACLU agree to binding arbitration and if the arbitrator determines that the Senior Staff member was terminated for a reason prohibited by law or ACLU policies relating to employment, then the arbitrator shall direct that the Senior Staff member be rehired with back pay[3] unless the arbitrator determines that the employment relationship is irreparably damaged, in which event the arbitrator shall direct that the ACLU provide the Senior Staff member

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[1]By way of illustration, Senior Staff at the National level who may be employed "at-will" are the Legal Director, National Political Advocacy Director, Deputy Executive Director, Chief of Staff, Chief Operating Officer/General Counsel, Chief Communications Officer, Chief Development Officer, and Director of Affiliate Support and Nationwide Initiatives. Department heads and project directors who do not report directly to the Executive Director are not considered senior staff for purposes of this policy.

[2]Termination includes suspension without pay for greater than seven (7) days and constructive discharge. To prove a constructive discharge the Senior Staff member must demonstrate that their working conditions were so intolerable because of a hostile work environment caused by conduct prohibited by law or ACLU policy related to employment that a reasonable person in like circumstances would have felt compelled to resign.

[3] In a case in which the arbitrator finds that a suspension without pay was for a reason prohibited by law or ACLU policies relating to employment, the arbitrator shall award the Senior Staff member the lost pay and benefits and direct that the suspension be removed from the employee's permanent file.

with back pay and with additional compensation as damages in lieu of reinstatement, in addition to the required severance pay under Section II.C. If the arbitrator determines that severance was improperly denied then the arbitrator shall direct the payment of severance pursuant to Section II.C. below[4].

In all cases the decision of the arbitrator shall be final and unreviewable.

C. Severance Pay

An Executive Director or Senior Staff member whose employment is terminated for reasons other than misconduct shall be entitled to a minimum of two (2) weeks severance pay or one (1) week of severance pay for each full year or pro rata fraction thereof of ACLU service, whichever is greater, up to a maximum of twenty-four (24) weeks. In determining years of ACLU service, time accrued prior to a break in service of more than one year shall not be counted, unless the employee was on an authorized leave of absence (for example: family leave or medical leave); and when an ACLU employee has previously received severance pay pursuant to this policy, the date of hire for determining years of service shall in no event be earlier than the date of termination for which severance was paid. An Executive Director or Senior Staff member whose employment is terminated for misconduct shall not be entitled to severance pay.

III. Employment Rights of Non-Senior National ACLU Staff

A. Grounds for Termination

Non-Senior Staff[5] may not be terminated in the absence of just cause. Just cause means misconduct or inadequate job performance based upon a rule or standard that was known or which should have been known by the employee.

Misconduct includes, but is not limited to, the following:

1. Misappropriation of ACLU property;
2. Wrongful use or theft of property or services;
3. Fraud or falsification of records;
4. Unauthorized disclosure of confidential or proprietary information;
5. Conduct prohibited by ACLU Employment Policies;
6. Physical or verbal harassment prohibited by the ACLU Equal Employment Opportunity and Harassment Policy;
7. Endangering the health or safety of another employee;
8. Physical aggression;

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[4]Severance pay shall be in addition to any back pay and damages awarded to a Senior Staff member pursuant to Section II.B.2.above.

[5]This policy does not apply to employees covered by a collective bargaining agreement or probationary employees.

9. Serious misbehavior while on the job;
10. Significant active or passive insubordination;
11. Continued absence or lateness after due warning.

Inadequate job performance is the serious or repeated failure to meet a known job standard. In cases of inadequate job performance the supervisor should make a reasonable effort to resolve the problem informally, such as by notifying the employee of the problem and proposing ways to remedy it. If, after a reasonable period for correction, the problem still persists, employment may be terminated pursuant to the procedures set forth in Section III.B below.

B. Procedures For Termination

1. Notice

An employee who commits an act of gross misconduct such as theft or assault may be terminated immediately. All other employees shall be given at least fourteen (14) days written notice in advance of termination. The ACLU may choose to provide the employee with one-half (1/2) month's pay in lieu of a fourteen (14) day notice. In all cases the employee shall receive a notice of termination stating the reasons for the termination and advising the employee of their appeal rights as set forth below.

2. Objection

(a) In the event a non-Senior Staff employee believes their employment has been terminated without just cause, they may object to the termination, by written notice to the Executive Director, within ten (10) days of receiving notice of termination.[6]

(b) The Executive Director or their Designee shall review the employee=s objection to the termination and will be authorized to either affirm or revoke the termination decision. In order to conduct such review the Executive Director or Designee may, in their discretion, meet with the employee and/or the employee's supervisor(s) and/or representatives of the Human Resources Department and may review any relevant documents relating to the termination decision. Within ten (10) days of receiving the employee=s objection, the Executive Director or Designee will inform the employee, in writing, whether the termination decision shall be affirmed or revoked.

3. Arbitration

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[6]Termination includes constructive discharge and suspension without pay for greater than seven (7) days as defined in footnote 2.

In the event the employee is not satisfied with the decision of the Executive Director or Designee, the employee may, within fourteen (14) days after receipt of that decision, request final and binding arbitration, in accordance with this policy. Within seven (7) days of receipt of the request for arbitration, an outside arbitrator shall be mutually selected by the employer and the employee. In the event the employer and the employee cannot agree on the arbitrator, then one shall be appointed by the American Arbitration Association (AAA). The arbitration shall proceed before a single arbitrator under the AAA Employment Arbitration Rules, and shall be conducted in the jurisdiction in which the employee primarily worked, unless the parties agree otherwise.

The arbitrator's fee and that of the AAA, if any, shall be borne by the ACLU.

The sole issue in the arbitration shall be whether grounds for termination under this policy exist. The ACLU shall have the burden of proof by a preponderance of the evidence. The arbitrator may not substitute his/her judgment for that of the employer as to the appropriateness of the ACLU's work rules or job standards. In the event that inadequate job performance is the stated ground for termination, the ACLU's determination may not be reversed unless the arbitrator determines that the ACLU's decision was arbitrary or capricious, or was a pretext for an impermissible reason for termination.

4. Arbitration Decision

If the arbitrator reverses the employer's decision to terminate the employee, the employee shall be reinstated with full back pay and benefits.

In all cases the decision of the arbitrator shall be final and binding, provided that the award shall be subject to judicial review to the extent provided by and in accordance with the law of the State of New York.

The decision of the arbitrator shall be reported to the Executive Committee.

Nothing in this policy shall be construed to limit or restrict an employee's right of action under any federal, state or local law, including laws prohibiting discrimination in employment. However, nothing in this policy shall preclude the employee and the employer from entering into a written agreement at the time of termination which provides for resolution of such a dispute pursuant to the arbitration procedures set forth above which provides that all claims, whether under federal, state or local laws, shall be forever barred.

C. Lay Offs For Budgetary Reasons or Staff Reorganizational Issues

An employee may be laid off for staff reorganizational or budgetary reasons, but such employee shall be entitled to advance notice of and priority consideration for rehiring in the position or a substantially similar one that becomes vacant within six (6) months. An employee who believes that the reorganizational or budgetary reason is pre-textual may challenge those reasons pursuant to the hearing procedures set forth in Section III. B. above. The hearing shall be for the sole purpose of determining whether the lay-off was, in fact, for staff reorganizational and/or budgetary reasons.

D. Severance Pay

An employee with a year or more of service who is laid off or whose employment is terminated for reasons other than misconduct shall be entitled to severance pay as follows: (a) one-half (1/2) week's regular base pay for each full year of ACLU service up to six (6) years; and (b) one (1) week's regular base pay for every year (or pro rata fraction thereof) of ACLU service beyond six (6 years), up to a maximum of twenty-four 24 weeks. Severance for a laid off employee shall be paid out pursuant to the regular pay periods and shall cease in the event the employee is rehired during the severance pay period.

In determining years of ACLU service, time accrued prior to a break in service of more than one (1) year shall not be counted, unless the employee was on an authorized leave of absence (for example: family leave or medical leave); and when an ACLU employee has previously received severance pay pursuant to this policy, the date of hire for determining years of service shall in no event be earlier than the date of termination for which severance was paid.

The employee whose employment is terminated for misconduct shall not be entitled to severance pay. The employee shall have the right to appeal the denial of severance pay, pursuant to the hearing procedures set out in Section III.B. The ACLU shall have the burden of persuading the arbitrator of the grounds for the denial of severance by a preponderance of the evidence.

E. Grievance Procedure

With respect to grievances concerning matters other than terminations, such matters should be raised in accordance with the following procedures:

Step 1. In the event a non-senior staff employee (other than an employee covered by a collective bargaining agreement) has a grievance relating to a matter other than termination, they should bring the matter to the attention of their immediate supervisor within thirty (30) days of its alleged occurrence. The immediate supervisor will give the matter prompt attention and address the matter with the employee within ten (10) days thereafter.

Step 2. If the employee is not satisfied with the determination of their Supervisor, they may submit the grievance, in writing within ten (10) days to the Director of Human Resources. The Director of Human Resources will give the matter prompt attention and will inform the employee, within ten (10) days of receipt of the grievance, of their disposition of the matter.

Step 3. If the employee is not satisfied with the determination of the Director of Human Resources, they may submit the grievance, in writing, within ten (10) days to the Executive Director. The determination of the Executive Director shall be final and binding.

Notwithsanding the foregoing, an employee whose grievance concerns a suspension without pay of greater than seven (7) days and who is not satisfied with the decision of the Executive Director may invoke the arbitration procedures pursuant to Section III.B.3.

IV. Other National Office Employment Policies

A. Benefits

The Executive Director shall propose what benefits shall be provided to staff. The Executive Committee shall approve benefit coverage or changes therein, reporting such in its minutes to the Board.

B. Relations Between Board of Directors and Employees

Members of the Board of Directors wishing to complain about or on behalf of an employee should go to the Board President. The President will discuss the issue with the Executive Director. If the issue is not resolved, then the President or Board Member may bring the issue to the Executive Committee.

V. Collective Bargaining Agreement

This policy does not apply to employees covered by a collective bargaining agreement. The Executive Director is responsible for negotiation and implementation of collective bargaining agreements with any labor organization(s) which is the duly-designated representative of ACLU employees.

(Updated May 15, 2020. See Executive Committee meeting minutes.)

GENERAL COUNSEL EXHIBIT 2

From: Emiliana Sparaco
Sent: Tuesday, July 19, 2022 6:21 PM
To: Terence Dougherty
Cc: ACLU Staff United; Kate Oh; Kenneth Margolis
Subject: Kate Oh - Request for Arbitration

Dear Terence,

Pursuant to ACLU Policy 527, we are requesting arbitration on behalf of Kate Oh regarding her termination. Please do not hesitate to contact me to discuss arbitrators.

Thank you,

Emiliana Sparaco (she/her)
National Field Director
Nonprofit Professional Employees Union

GENERAL COUNSEL EXHIBIT 3

proposed by the employer for the grievant, Katherine Oh, and whether those grounds existed under ACLU's board policy 527, and if the negative -- and this is the second half. The arbitrator will retain jurisdiction to determine an appropriate remedy.

The union disagrees with respect to the wording of the issue. And that is, the wording should not be whether grounds for termination, but whether there is just cause to terminate the grievant, Katherine Oh. And, again, this matter is bifurcated. So, if it's in the negative the arbitrator is again asked to retain jurisdiction to determine an appropriate remedy.

This matter has been -- is being recorded now per the request of the parties and will be made available to counsel in due course. At this point I am prepared to hear opening statements. And the first person to go would be Ken Margolis on behalf of the employer. Mr. Margolis.

MR. MARGOLIS: Yes. Just a couple more preliminaries, Mr. Arbitrator.

ALAN SYMONETTE/ARBITRATOR: Okay.

MR. MARGOLIS: First, just so you are aware, we anticipate that you will be provided with a transcript. The parties are still working out a couple of mechanics and issues relating to the expense of that, but we're

hopeful that we'll be in a position to provide you with a transcript.

Secondly, I think you overstated slightly the parties' agreement on proceeding as if this were a full blown labor arbitration. I think all we need to say at this point is that the ACLU has agreed to proceed first as it would in a labor arbitration, but that is not indicative of broader analogies to collect the bargaining agreements. Because, as we know, this matter is proceeding exclusively under ACLU board policy 527. So, I just wanted --

THE COURT: That's recognized. But I'm still just proceeding -- I know what I know. And this is what I'm comfortable with using as a format. And if there is any difference I anticipate you all will let me know.

All right. So, with that, are you ready to proceed, Mr. Margolis?

MR. MARGOLIS: I am. Would you like to have introductions of everyone who is present on the recording?

ALAN SYMONETTE/ARBITRATOR: That would be helpful given that it is recorded and you all are going to have a transcript, yes.

MR. MARGOLIS: So, why don't we start with the people here from the ACLU. And you folks can introduce

yourselves. Here in the room with me, we'll start with Sophie Kim Goldmacher. She is the chief people officer at the ACLU.

And why don't you go ahead and introduce yourselves?

AMBER HIKES: I'll go next. I'm Amber Hikes. I'm the deputy executive director of strategy and culture at the ACLU.

ALAN SYMONETTE/ARBITRATOR: Thank you.

TERENCE DOUGHERTY: Hi there. I'm Terence Dougherty. I'm the deputy executive director for operations and the general counsel at the ACLU.

CHRIS WILLIAMS: I'm Chris Williams. I'm the chief operating officer at the ACLU.

ALAN SYMONETTE/ARBITRATOR: Very good. And then?

BEN NEEDHAM: I'm Ben Needham, and I'm the deputy director and director of (unintelligible) division, ACLU.

ALAN SYMONETTE/ARBITRATOR: All right. Very good. Thank you.

Rick, if you can, could you introduce who you have on your side, please, for the record?

MR. BIALCZAK: I'm Rick Bialczak, counsel for NPEU. And I have Emiliana. You go first. And then Kate.

EMILIANA SPORACO: Good morning, everyone. Emiliana Sporaco (phonetic). I'm the national field director for the Non-Profit Professional Employees Union, also known as Local 70, of the International Federation of Professional and Technical Engineers.

And Kate?

KATHERINE OH: Hi. My name is Katherine Oh or Kate. My pronounces are she, her. And I am the former employee who requested this proceeding.

ALAN SYMONETTE/ARBITRATOR: All right. Very good. Thank you very much, Ms. Oh.

So, you can begin at this point. Is the company ready to begin?

MR. MARGOLIS: Yes, we are.

MR. BIALCZAK: I'm glad we did these introductions. I would request that the witnesses be sequestered. There is certain information that I think some folks know that other folks don't. And I think it would be valuable in the course of the proceeding for the non-party witnesses to be sequestered.

MR. MARGOLIS: Could I just suggest that we address that after the openings?

ALAN SYMONETTE/ARBITRATOR: The way I usually proceed, quite frankly, if there is a sequestration request, which we arbitrators normally grant, I like a

full and complete sequestration. I'll explain that to the parties later, but that means before the opening statements. All right. So, let me explain what we have here as a sequestration order. And sequestration, that means that the individuals who will be testifying being that they'll be excluded from the hearing venue. What's going to happen on a Zoom platform here basically I'm going to be putting you in the waiting room. And while you're in the waiting room basically you won't be able to communicate with anybody else but the only other thing is that I'm going to ask you not to share any of the testimony or information with your colleagues. This -- I like to remind people that I am not a court. I can't sanction. The only thing I can basically rely is on your word that you will not do this. If you are not going to testify you can remain but if you're testifying I'm going to have to put you in a waiting room.

The second question is who can remain who is going to be testifying? Of course the complainant or the grievant can remain in each side and is entitled to one representative who will also testify. So in this particular case the union is entitled to have Emiliana as the one representative along with the complainant. As far as Mr. Margolis, I know that you have an

individual in the room with you. I assume that's going to be your representative.

MR. MARGOLIS: It's going to be the representative and also a witness.

ALAN SYMONETTE/ARBITRATOR: Okay. So that person. Everyone else, Mr. Dougherty, Ms. Hikes, Ms. Williams, Mr. Needham, I'm going to put you in the waiting room.

MR. MARGOLIS: I'm sorry. Excuse me. We don't currently anticipate that Mr. Dougherty or Ms. Williams will be witnesses.

ALAN SYMONETTE/ARBITRATOR: Okay. So, if that's the case, then they can stay. But I always advise counsel that doesn't -- that means that your mind -- you can't change your mind on that.

MR. MARGOLIS: Can I suggest that if we change our mind, and the person ends up testifying, then that's something that can be taken into account in terms of their credibility? But, for example, one of these people might end up being a witness on something unrelated to what other people testified about, so that the fact that they heard testimony is really besides the point.

ALAN SYMONETTE/ARBITRATOR: Well, my whole purpose when there is a request for sequestration, I am very kind of hard on that. So, if they're going to testify,

they are. If they're not going to testify, they are not. And I'm not going to try to slice that. So what I suggest is if there is any possibilities, any whatsoever, that that person may testify, then it is probably more judicious to have that person excluded ahead of time.

MR. MARGOLIS: So, our view, Mr. Arbitrator, is that the policy does not provide for that and --

ALAN SYMONETTE/ARBITRATOR: Okay.

MR. MARGOLIS: -- and in any event even, if it does -- the policy does not provide for sequestration prior to openings. That said, obviously your ruling is your ruling.

ALAN SYMONETTE/ARBITRATOR: Yes.

MR. MARGOLIS: Could you put us very briefly in our breakout room?

ALAN SYMONETTE/ARBITRATOR: Sure. I'm going to pause the recording and I will open the breakout rooms. How much time do you need, Mr. Margolis?

MR. MARGOLIS: Just three minutes.

ALAN SYMONETTE/ARBITRATOR: All right. I'll give you five. I'm being generous. I'll give you five. All right. So, I'm going to pause the recording right now and, please, one thing that I'm going to look to you all to do is, you know, we're multi-tasking here so

if I forget to restart the recording, please remind me to make sure that I do that, okay? Thank you.

Okay. First, let's pause.

(Thereupon, a brief recess was had.)

ALAN SYMONETTE/ARBITRATOR: Mr. Margolis, who is going to remain in the room?

MR. MARGOLIS: I'm sorry. Before we continue the recording, can we -- I have one other issue about who is in the room that we should discuss without the recording, if we could.

ALAN SYMONETTE/ARBITRATOR: Okay. All right. Going off again. Going on pause.

(Thereupon, a brief recess was had.)

ALAN SYMONETTE/ARBITRATOR: All right. Now, okay, Mr. Margolis, you can go ahead.

MR. MARGOLIS: In light of your prior rulings about sequestration, Mr. Arbitrator, we're going to ask Mr. Needham, Mr. Dougherty and Ms. Hikes to leave the main session at this point. I understand that you're going to put them in the waiting room.

ALAN SYMONETTE/ARBITRATOR: Right.

MR. MARGOLIS: They won't physically be in any particular space, and when they're needed, we'll -- we have a quick way to contact them.

ALAN SYMONETTE/ARBITRATOR: That's right. That's

right. And I think I still have made counsel cohost so if they -- so, you know, you can bring them in at any point as well.

So, all right. Let me do this, Mr. Needham, I'm going to see yourself going to the waiting room and there you go. And Mr. Dougherty, you're going in the waiting room. There you go. And, Ms. Hikes, we're going to put you in the waiting room.

Okay. All right. That's it. We're good. Okay. So I guess I can now go to openings, if I may. Mr. Margolis.

MR. MARGOLIS: And the recording is on, right?

ALAN SYMONETTE/ARBITRATOR: Yes, it is.

MR. MARGOLIS: Okay. Thank you. Thank you, Mr. Arbitrator, and everyone else for your patience as we work through these technical issues in this new world, hearings by Zoom.

In this proceeding Katherine Oh mounts a frontal assault on the ACLU's fundamental policy and, indeed, its legal obligation to maintain a workplace that's free of harassment on the basis of race and other protected characteristics. And what's more, she asks the arbitrator to deny to the ACLU the ability to create and maintain a respectful and inclusive work environment, an environment that it properly deems

essential to the fulfillment of its mission.

Ms. Oh seeks to undo the legitimate termination of her employment and to compel her reinstatement even though, as she was informed at the time of her termination and it's essentially undisputed, she was terminated for violation of her obligation to maintain a workplace free of harassment, including in her engaging in repeated hurtful and inciteful conduct for colleagues that impugns their reputation and her demonstration of a pattern of hostility toward people of color, particularly black men, and her significant insubordination.

No principle of employee relations and nothing in ACLU's policy protects this kind of behavior nor compels the ACLU to tolerate it. And it's not the proper role of the arbitrator to condone or excuse this conduct. And this is exactly what Ms. Oh asks the arbitrator to do.

Now, as we've discussed, although Ms. Oh is represented in this proceeding by a labor organization, the NPEU, she and the ACLU are the sole parties to this proceeding. This dispute does not involve a collective bargaining agreement. No collective bargaining agreement has yet been negotiated by the union and the ACLU. The case arises solely under an employment

policy adopted by the ACLU decades ago, long before the union was recognized, called board policy 527. That policy allows for the termination of the employment of ACLU staff members for conduct falling into two broad categories, inadequate job performance or misconduct. This case involves misconduct, specifically an employee who cynically seeks to weaponize the ACLU's respect for employee free speech and to distort it into something beyond recognition, a license to harass the ACLU's employees of color and to undermine the fundamental values and mission of the organization itself. This is, most assuredly, not a case that should be the first one in history to result in reinstatement of a terminated employee under policy 527.

The ACLU is one of the most influential and impactful civil liberties organization in the United States. The primary mission of the organization is that of preserving the civil rights and civil liberties of all citizens, particularly if they apply to those who fall within legally protected and under-represented groups. Indeed, advancing the cause of racial justice is among the fundamental priorities of the organization and that exists both internally and externally.

For example, the ACLU maintains a rigorous and comprehensive non-discrimination and harassment free

workplace policy. This policy is only the centerpiece of the organization's broader commitments not merely to furthering racial justice, but to provide a respectful and an inclusive workplace, a work environment which the ACLU considers essential to fulfilling its mission.

Ms. Oh was employed by the ACLU for about five years. And at the time of her termination she held the position of senior policy counsel in the national political advocacy department, which is often called NPAD. The role of NPAD is to design and pursue campaigns to advance the policy priorities of the organization through public education, lobbying, advocacy campaigns and other similar activities. The ACLU fosters a culture of open feedback encouraging its employees to flag perceived issues to leadership and to share ideas regarding areas of the organization that may be ripe for improvement.

Throughout the course of her employment Ms. Oh, in fact, raised numerous complaints with management. All of which, in line with the organization's encouragement of such feedback, were received, investigated and addressed with no negative consequences to her.

In early 2022, however, Ms. Oh exhibited highly concerning conduct that went far beyond her earlier complaints. It was of a completely different nature.

It demonstrated a disregard for the wellbeing of other ACLU employees, particularly her black colleagues. And she persisted in that misbehavior and rejected the ACLU's efforts to help her correct it.

The ACLU's conducts monthly organization wide meetings called office hours. On February 23rd, 2022 Ms. Oh shocked the participants in an office hours session with comments that were highly offensive to members of that group, especially its black participants.

Ronald Newman had recently left the organization as the national political director, that is, the head of NPAD. He had previously been the subject of a number of complaints against him from Ms. Oh and other employees. During that meeting, during that office hours, Ms. Oh characterized the behavior of Mr. Newman, who had been the most senior black man in the organization, in language of physical violence asserting that even after Newman's departure, quote, the beatings will continue until morales improves. Now, a number of employees of color expressed distress over Ms. Oh's comments and they complained to Amber Hikes, who then was the ACLU's chief equity and inclusion officer.

Following the meeting, Ms. Hikes counseled Ms. Oh

about what had happened. Here in short is an excerpt from what Ms. Hikes wrote, "I want to name that while metaphorical, the insinuation that Ronnie Newman physically assaulted you or anyone, for that matter, is dangerous and damaging. On a personal note, I invite you to consider how that characterization may be experienced by black staff specifically. I understand that you are being hyperbolic for effect, but please consider the very real impact of that kind of violent language in the workplace.

The crux of your question, why should we trust that things will really change under new management, is a fair and welcomed question. In the future I'm hopeful that we can elevate the challenges and pain without exaggerated characterizations that risk losing the real message."

Thus, Ms. Hikes made it clear to Ms. Oh that questioning decisions of ACLU's management was, as she put it, fair and welcomed, but that the use of language that would harm in particular employees of color was not acceptable.

For her part Ms. Oh acknowledged the harm that she had caused with her shocking characterization of Newman. She replied to Ms. Hikes, "That language that I used contributes to harmful anti-black racist

stereotypes about black men and I apologize for it. And for the impact on you --" Ms. Hikes herself is black. "I apologize for the impact on you and other black co-workers. I was wrong to use it and I am deeply sorry."

Ms. Oh's apology, and her admission as the harmful impact of her conduct on black colleagues was welcomed. Had she honored and complied with it we would not be here today. However, Ms. Oh's recognition of the harm that she caused by her use of racist stereotypes was short-lived. She continued to demonstrate hostility toward colleagues of color. A primary target was her immediate supervisor, Ben Needham, the ACLU deputy political director for the democracy division.

In a telephone meeting on March 9th, 2022 Ms. Oh asserted she was, quote, afraid to raise certain issues with Mr. Needham. Ms. Oh's accusation was extremely disturbing to Mr. Needham, who viewed it as a racist trope involving fear of black men. He complained to senior ACLU officials, including Ms. Hikes and Kary Moss, the acting national political director regarding the impact of Ms. Oh's characterization. He wrote that, "As a black male language like 'afraid' generally is a code word for me. It's triggering for me."

Now, Newman and Needham were not the only

employees nor the only employees of color targeted by Ms. Oh. In the same March 9th meeting with Mr. Needham Ms. Oh took aim at her immediate supervisor, Lucinda Ware, deputy director for policy and campaigns, is a black woman. Ms. Oh's claims to Needham that Ms. Ware had lied to her when she identified the members of management who had ultimate responsibility over whether to proceed with a particular campaign. Ms. Oh was adamant that her interpretation of a communication from Lucinda Ware was not misleading or a miscommunication. She was adamant that it was a bold face lie.

Ms. Ware was extremely disturbed by this accusation. So much so that she was literally driven to tears after she heard about it and she considered whether to obtain a lawyer. Ms. Hikes, as part of her job as chief equity inclusion officer, again, attempted to counsel Ms. Oh about this intemperate language that had, again, caused harm to black employees.

As we saw, Ms. Oh previously admitted to her harmful conduct in the February office hours, but now -- now Ms. Oh belittled Ms. Hikes' efforts casting them off as mere chastising and reprimand. Ms. Hikes sent Ms. Oh a strongly-worded email on April 4th, 2022 about the harm that Ms. Oh was causing a myriad of people, like Mr. Needham and Ms. Ware, but to Ms. Hikes

herself.

Let's take a moment just to review a part of that very important email and Ms. Oh's response to it. Ms. Hikes wrote, "Kate, I'm deeply concerned by the characterizations in your March 28th and April 1st emails. It is a core function of my job, as chief equity and inclusion officer, to have difficult conversations with colleagues when their behavior has harmed another colleague. You have engaged in ways that harmed your black colleagues. On two separate occasions within one month's time you have used physical violence as a metaphor when referring to your black colleagues conjuring up images ripe with historically painful tropes that have caused deep general racial harm to black people in this country. It's up to each of us how we choose to respond to harm we've caused. But, regardless, of that response I will continue to do my job of having difficult conversations with the aim of building up a culture of accountable anti-racism at the ACLU.

You reference the conversation we had about harm you were causing your black colleagues as me chastising and reprimanding you. I had conversations every week with ACLU staffers about unintentional harm they have caused one of their colleagues. We now have an entire

training in our EDIV department for staff on how they can call in colleagues when they notice harm being caused. Calling my check-in chastising or reprimanding feels like a willful mischaracterization in order to continue the stream of anti-black rhetoric you've been using throughout the organization.

Kate, I'm hopeful you'll consider the lived experiences and feelings of those you work with. I'm hopeful you'll receive this feedback and all of the feedback you received from Sophie and I as our earnest attempt to supporting your collegial relationships and your work as a member of our anti-racist community at the ACLU."

One might have hoped that after receiving this message from a senior leader of the organization, the chief equity and inclusion officer, coming on the heels of Ms. Oh's two incidents of using racist tropes, that that would cause her to recognize the seriousness of the path she was going in. But here is what Ms. Oh wrote in response to Ms. Hikes, "I decline to engage further with you on these matters except to reject and deny your accusations. I decline to engage further with you on these matters, except to reject and deny your accusations." This did not go well.

The ongoing turmoil arising from Ms. Oh's attacks

on her two black managers, Needham and Ware, coupled with Ms. Oh's attempts at justifying her behavior prompted the ACLU's chief people officer, Sophie Kim Goldmacher, to undertake an investigation with respect to Ms. Oh's conduct towards Needham. Goldmacher concluded that Ms. Oh had put forth no persuasive grounds for Ms. Oh to be afraid of engaging with Mr. Needham, and she took note in her investigation of the harmful impact of Ms. Oh's words on a black man. With respect to Ms. Oh's accusation against Lucinda Ware, Ms. Goldmacher concluded that Ware did not lie and that making such an accusation against someone, particularly if untrue, was extremely damaging.

Ms. Goldmacher and Ms. Hikes met with Ms. Oh on April 25th, 2022 to share the conclusions reached in the investigation and to, again, counsel her to be mindful of the language she used and the serious and harmful impact she was having on her colleagues. Again, after Ms. Oh received this message, this time not from one but from two senior leaders of the organization, the chief equity and inclusion officer and the chief people officer, after receiving this message one would have thought or at least hoped that Ms. Oh would make some effort to moderate her behavior. If that's what someone thought, they would be very,

very wrong. Ms. Oh's conduct on the very next day, the very next day after her meeting with Ms. Hikes and Ms. Goldmacher, revealed that she had wholly rejected the direction of Ms. Goldmacher and Ms. Hikes to avoid the type of hyperbolic and exaggerated rhetoric that was causing harm to others.

The very next day she left no doubt that she had no intention of complying with ACLU policies and its culture, and that she was intent on destroying. Specifically on April 26th, 2022, again the day after her meeting with Ms. Hikes and Ms. Goldmacher, Ms. Oh was an attendee in a meeting of the ACLU's democracy division or resume (phonetic) led by its director, Mr. Needham.

The meeting was highly interactive in nature with Mr. Needham, the leader of the meeting, soliciting comments, suggestions and viewpoints from the participants regarding certain aspects of the division's work. Ms. Oh, however, refused to participate. She remained silent throughout. This is a Zoom meeting. She remained silent throughout with her camera turned off. Moreover, during the meeting, instead of fulfilling her role as a participant, she was busy posting abusive messages on her public Twitter account.

First, during the course of this meeting she posted this message, "I can't overstate just how physically repulsed I feel working under incompetent/abusive bosses. Just the waves of physical repulsion washing over me and making me nauseous." Immediately following that she posted this obviously sarcastic followup, "Why don't we all start doing this extremely time intensive thing that would be a total waste of our time, because it sounds good to me someone with zero expertise on those issue, areas and apparently zero understanding of this process."

These Tweets were brought to Mr. Needham's attention by several other employees, who obviously recognized that they were directed at him. Mr. Needham readily recognized that he was the object of Ms. Oh's attack. And when interviewed, Ms. Oh later acknowledged that that was indeed the case.

Mr. Needham, again, complained to human resources about Ms. Oh's latest attack on him. In view of Ms. Oh's ongoing pattern of hostile behavior impacting, in particular, Mr. Needham and other black employees in violation of the ACLU commitment to maintaining a harassment free, respectful and collegial workplace, and because its efforts to help Ms. Oh ameliorate this behavior clearly had failed, indeed by her words, by

her deeds, Ms. Oh had flatly rejected those efforts, the ACLU concluded that her employment must end. Ms. Goldmacher met with Ms. Oh on May 5th, 2022 and told her that she was terminated.

Now, since the conduct that Ms. Oh engaged in is largely undisputed, we can anticipate that in this hearing she will try to justify or excuse her behavior. Truth be told, Ms. Oh's conduct is completely inexcusable and unjustifiable, at least in any workplace that has the slightest commitment to fostering a culture of mutual respect among employees.

So, we should probably anticipate that Ms. Oh will try to distract the arbitrator. And we anticipate she'll attempt to do that in a couple of different ways, and I want to address those head on right up front. Ms. Oh undoubtedly will harp on ACLU's commitment for freedom of speech and will assert that she was terminated for exercising that right. This is a red herring. Ms. Oh was not terminated for her speech, she was terminated for her persistent pattern of misconduct, a pattern of hostility towards colleagues of color that create a hostile work environment, plainly prohibited by ACLU policy. And for her rank insubordination in the face of the organization's efforts to cause her to correct her

misbehavior.

Now, to be sure, this case involves Ms. Oh's verbal and written expression in the form of her persistent use of violent and racist tropes or explicit dismissiveness of the organization's efforts to put her on the appropriate path. And, finally, her outrageous Tweets in a final abusive ad hominem attacks on her supervisor. And to be sure, the ACLU's commitment to free speech, including the speech of its employees is a strong one. But be that as it may, that commitment does not override and excuse violations of other core policies of the organization, such as its obligation to maintain a respectful workplace and one that's free of discrimination and harassment. It does not override or excuse an employee's obligation to uphold the mission of the organization, including its internal commitment to racial justice and equity, to diversity, to inclusiveness and belonging.

We will also probably hear Ms. Oh complain she was terminated without progressive discipline. This is another red herring. First of all, as we have discussed, this is not a union management arbitration under collective bargaining agreement. It arises solely under ACLU policy 527 and it's solely that policy, not general or implied notions of just cause or

progressive discipline that might exist under a collective bargaining agreement. Policy 527 provides, quote, that the sole issue in the arbitration shall be whether grounds for termination under this policy exist. A ground for termination here is misconduct, and the policy which expressly allows for termination for misconduct says nothing at all about progressive discipline in such cases. It simply does not require it. So, the sole issue in the words of the policy is whether Ms. Oh engaged in misconduct.

And the arbitrator's authority, by the way, is further circumscribed when the policy further says that the arbitrator may not substitute his/her judgment for that of the employer as to the appropriateness of the ACLU work rules or job standards. So, the arbitrator can't substitute his judgment for what the policy says.

Second, and as important, any claim about a lack of progressive discipline should be disregarded for the simple reason that it's untrue. Ms. Oh was put on clear notice that the harm she was causing to colleagues, especially people of color was unacceptable. At first those warnings seemed to have some affect early on when she engaged in this kind of conduct, she acknowledged and apologized for it. But then her attitude changed. She began demeaning and

rejecting the organization's efforts to help her correct her misbehavior until the very day after she was told what she needed to do to come into compliance with the ACLU's policies and culture. She unleashed a vitriolic attack on her supervisor.

Now, Ms. Oh might say that the ACLU should have given her a formal written warning, that it should have suspended her and that termination was too precipitous a response, but it was not precipitous. It was anything but that. Having counseled and cajoled Ms. Oh over and over again about the harm she was causing to her colleagues, enough was enough. She chose to ignore the ACLU's efforts in the most egregious way, leaving in its wake more serious harm to her victims.

To suggest that the ACLU was required to engage in the formalities of more severe formal disciplinary action prior to termination reflects the most wooden view of progressive discipline that can be imagined.

Katherine Oh is a sophisticated professional, a holder of a law degree, whose work for the organization revolved around written and oral communications and advocacy. She understood full well what was expected of her and that's what progressive discipline is all about. And the ACLU followed and respected that principle here.

Lastly, we likely will hear Ms. Oh deny that she's a racist. She may assure us that she would have treated white colleagues in just an abusive of a way that she treated these black ones. These assertions are of no moment and, indeed, no relevance. We're not here to prove anything other than the impact of her actions was very real, that she caused harm, that she caused serious harm to black members of the ACLU community. She created a hostile work environment that flew in the face of the ACLU's culture of equity, he diversity, inclusiveness and belonging. And she was properly terminated as a result of that conduct and those impacts.

Now, the ACLU does not take employee terminations lightly. It takes those actions rarely, but simply put, no employer would tolerate what Ms. Oh did. The ACLU certainly cannot. And we urge the arbitrator to find that grounds for termination existed under policy 527.

ALAN SYMONETTE/ARBITRATOR: All right. Does that conclude your opening, sir?

MR. MARGOLIS: It does.

ALAN SYMONETTE/ARBITRATOR: All right. Does the representative have an opening?

MR. BIALCZAK: Yes, sir. Thank you, sir.

My name is Rick Bialczak and I represent the grievant and the union in this process. Ms. Oh was terminated in May 2022 for making statements and complaints about working conditions within her department at the ACLU. They do not constitute harassment, let alone racial harassment and cannot serve as just cause for termination.

I would note, and commend Ken for spending 40 minutes explaining why three discreet comments over a multi-month period of time constitutes serious harm to the ACLU members, black employees at the ACLU. What he fails to mention is that in late 2019 Ms. Oh filed a formal complaint with human resources at the ACLU alleging that the director of her department, of her department, Ronnie Newman fostered a bullying atmosphere and discriminated on the basis of sex. Human resources investigated it and ultimately agreed in early 2020 that the atmosphere in the department was adversarial, harsh and non-inclusive and that the problem was widespread across that department. Indeed human resources concluded that the problem was so widespread that it couldn't be concluded, that it was targeted specifically at Ms. Oh. And, thus, declined to find that there was discrimination against Ms. Oh in particular. But they promised -- this is in January of

2020 -- promised that they were now aware of the problems with Mr. Newman's managerial style and would work to address it. Unfortunately, whether they tried or not, it wasn't successfully addressed. Ms. Oh later filed a retaliation claim against Mr. Newman and numerous employees spoke up in multiple forums to express her concerns with the department.

By August 2021 at least three other women had filed complaints of sex discrimination and misogyny against Mr. Newman. Ultimately he was removed from his position on February 17, 2022, over two full years after Ms. Oh had made her initial complaint.

Now, about two months prior to -- the employer hasn't mentioned any of this. But about two months prior to Mr. Newman's removal, Mr. Needham, who the employer does mention, was hired as a manager within the department and serving as Ms. Oh's second line supervisor. In their very first one-on-one interaction Mr. Needham emphasized his aggression and his dis-concern for conflict. Two of the very issues that Ms. Oh and numerous members of her department had with Mr. Newman. In that meeting Mr. Needham acknowledges that he has visibly made her uncomfortable with his talk about how aggressive he is, about his lack of concern for conflict in the department and even

mentioning at times that he knew that his aggression was a problem. Ms. Oh didn't file an HR complaint after that. Ms. Oh put her head down, went to work and tried to make the best of the situation.

After Mr. Newman -- after Mr. Newman was removed from his position, after years of complaints from employees at the ACLU about his bullying behavior and about the toxic work environment in the department that she had been living through, after his removal, Mr. Needham in March of 2022 exclaimed for no reason whatsoever that he was friends with Mr. Newman, that he didn't want to hear complaints about Mr. Newman.

Ms. Oh didn't react well to that, understandably after suffering under years of abuse from Mr. Newman to find out that her new manager, Mr. Needham, was friends with him and didn't want to hear complaints about what she had had to suffer through, complaints widespread enough that the head of the ACLU, Anthony Romero, ordered an external investigation, had the man removed. And then two months after having him removed had an all-staff meeting to explain why he had had Mr. Newman removed and the results of the external investigation. That her new manager she now discovered was not only extremely aggressive, had already made her visibly uncomfortable during a meeting, but was, in fact,

friends with him.

The very next day Ms. Oh had another one-on-one meeting with Mr. Needham. And during that meeting, yes, she said that she was afraid to come talk to him about workplace matters. Is it any wonder? Beggars belief. Where the fact that Mr. Needham happens to be a black man. However, what we do -- should be the reason why Ms. Oh was afraid to talk to him. When we can look at the very obvious, and also admitted facts, that Mr. Needham was friends with Mr. Newman; that Ms. Oh had worked for years under Mr. Newman's toxic and bullying environment; and that Mr. Needham apparently took pride in his aggression in his management style with his employees. So, yes, of course Ms. Oh was afraid to talk to him about workplace matters, but she attempted to in that meeting.

Now, why would she be afraid? Was it because she had previously suffered retaliation from Mr. Needham's friend, Mr. Newman, back in 2020? Retaliation the ACLU did nothing to address. Yes, that's one reason. And did Mr. Needham retaliate? Yes, he did. Immediately after the meeting with Mr. Needham he reported her to HR. Within days after the meeting with Mr. Needham he put a halt to a transfer of Ms. Oh to a different department, doing an issue area that she felt more

comfortable doing, policy, federal policy. The next month Mr. Needham attempted to put her in a performance improvement plan, although he admitted that her performance wasn't really his problem with her, it was her attitude.

Now, during the employer's opening address I heard them mention that she didn't do what senior management had told her what she needed to do, that she didn't take the proper path, that she didn't listen to senior leadership twice, that she was insubordinate based on what senior leadership told her she needed to do. What I don't hear the employer acknowledging is that, yes, these were senior leaders at the ACLU monitoring a rank and file employee's complaints about her working conditions. One thing the employer didn't mention, and that you won't see in any of the evidence, is any reference by Ms. Oh to the race of any of the people involved in this matter.

It is true that her direct supervisor, when she was terminated, was a black woman. And it is true that a second level supervisor, when she was terminated, Mr. Needham, is a black man, but those were her supervisors. If she has complaints about her supervision, who is she supposed to complain about? The employer doesn't answer that question. At its

heart this case is about the fact that Ms. Oh was complaining about her treatment at the ACLU for years. Those complaints were validated when the ACLU finally removed Mr. Newman from his position as head of Ms. Oh's department.

Now, shortly within months after removing Mr. Newman, Ms. Oh, who, yes, had been complaining about Mr. Newman's behavior for years, was terminated. Why? The employer acknowledges it's because of her statements, complaints about your managers, stating that you're afraid to talk to your manager about workplace issues simply cannot be the basis of a termination. Certainly under labor standards it won't constitute just cause. In fact, it would be protected activity. But here we acknowledge there was no contracted issue. The ACLU's policy adopts just cause as the standard for termination.

Ms. Oh complained about her supervision at the ACLU. Many of those complaints were substantiated and then later the ACLU sought to terminate her. This cannot constitute just cause for termination. We ask the arbitrator to find that so. Thank you.

ALAN SYMONETTE/ARBITRATOR: All right. Thank you. All right. Is the employer ready to present evidence?

MR. MARGOLIS: Yes, but I -- maybe we could cease

the recording?

ALAN SYMONETTE/ARBITRATOR: Okay. Give me one second. I'll put it on pause. This is just to inform you that we are taking a recess at 12:45. Thank you.

(Thereupon, a brief recess was had.)

ALAN SYMONETTE/ARBITRATOR: All right. We have now reconvened at 1:08.

And, Mr. Margolis, do you have your witness?

MR. MARGOLIS: We do. The ACLU --

ALAN SYMONETTE/ARBITRATOR: Continue.

MR. MARGOLIS: The ACLU calls Sophie Kim Goldmacher.

ALAN SYMONETTE/ARBITRATOR: Okay. Ms. Goldmacher, I will -- Ms. Goldmacher, could you spell your last name for me, please?

MS. GOLDMACHER: Sure. G-O-L-D-M-A-C-H-E-R.

ALAN SYMONETTE/ARBITRATOR: M-A -- E-H-E-R?

MS. GOLDMACHER: M-A-C-H-E-R.

ALAN SYMONETTE/ARBITRATOR: C-H-E-R. Okay. Sophie Goldmacher.

Okay. Ms. Goldmacher, could you please stand and raise your right hand, please, ma'am?

MS. GOLDMACHER: Of course.

ALAN SYMONETTE/ARBITRATOR: Do you solemnly swear or affirm that the testimony you are about to give at

GENERAL COUNSEL EXHIBIT 4

P R O C E E D I N G S

THE ARBITRATOR: Okay, everyone. Good morning. This is the continuation of the matter between Ms. Katherine Oh and the ACLU. We finished -- we were in the midst of a cross-examination of Sophie Goldmacher.

Ms. Goldmacher, good morning, even I don't see you.

MR. MARGOLIS: Before we proceed, there's one preliminary.

THE ARBITRATOR: Okay.

MR. MARGOLIS: Which is a couple of weeks ago I sent an email following up the outstanding question of the issue for determination. We had a discussion about that the last time, and I refer to policy 527, which is the document that establishes the arbitration process, and I cited the language from policy 527 that specifically states what the issue should be. And at the point we had the discussion I think you had not had the opportunity to look at the policy yet. So before we proceed, we need to to get that nailed down.

THE ARBITRATOR: Okay.

MR. MARGOLIS: And just to reiterate the issue, as stated in policy 527 is whether grounds for termination of Katherine Oh existed under ACLU board

policy 527.

THE ARBITRATOR: All right. I understand that and I know that we discussed it also that the counsel for Ms. Oh had said that he proposed that the issue be one of whether Ms. Oh was terminated for just cause. And as I normally do, and this is the reason why I didn't answer the email, is that that is a question that can only be decided after I hear both sides of the case. So while I do accept that and I'm willing to continue to consider that, I usually do the determination of the issue if there is no stipulation or agreement by the parties, I usually hold that until deliberations, and that's what I plan to do.

MR. MARGOLIS: Can I ask, Rick, can we get past this because the policy is the sole source of the Arbitrator's authority, and it specifically says what the sole issue can be. So I don't think that it prejudices you in any way, Rick, if we proceed based on the issue that's in the policy.

MR. BIALCZAK: Yeah. I mean, a couple of things. I don't actually recall the email, and I don't recall Ken notifying me that he was going to be filing a motion, prehearing motion on this issue. I do recall on our first hearing date that we discussed this issue. I believe the difference of opinion here is that, you

know, one section of 527 says, you know, the grounds for termination. Another section of 527 says grounds for termination exists if there's just cause for termination. And so it feels to me as though the employer is attempting to excise the just cause termination, which is, in fact, in the policy. But I also, you know, I respect Arbitrator Simonette's determination that, you know, we'll just brief it. I don't think it'll be some heavy section of the brief if we file briefs or upon closing argument. I mean, you know, you'll refer to your section and I'll refer to mine and, you know, the Arbitrator make the determination.

THE ARBITRATOR: Well, let me propose this. You know, if I am to accept the policy 527 is determinative policy, then it's the whole policy. It's not any portion of it. So if that's a stipulation, then I can go with that. But if there is no stipulation, I will wait until after the briefs are received and I deliberate. Simple as that.

MR. MARGOLIS: Well, I'll just mention that I said in my email, which Rick didn't see, that if the issue is -- if the issue for decision issue that policy 527 is the issue for decision, that does not preclude miss from making arguments that, for example, there is

not grounds for termination if there was not just cause as the policy describes. In other words, miss is not precluded in any way. But in terms of the question that the Arbitrator has to answer, the policy says the sole issue for arbitration is, and it's about as clear as it could be. So I think there shouldn't be any impediment to just proceeding on the basis of the issue that the policy says is the sole.

MR. BIALCZAK: Yeah. Again, you know, I don't want to delay these proceedings any longer. I mean, you know, the policy then goes on -- my recollection -- I'm doing this off the fly. My recollection is that the policy then defines, you know, the grounds for termination as just cause. That's my recollection. Again, I'm doing it on the fly here because I didn't realize that we were going to revisit this issue. But, you know, we talked about it on the first day of hearing.

You know, generally speaking in my experience the parties, you know, take a shot at agreeing to the issue statement at the beginning of the arbitration. If they're not able to agree, then, you know, then Arbitrator Simonette says well, I'll hear the case, and then the parties will argue it, and I'll decide what the issue statement is. Generally, in my experience, that's

what happens and sort of revisiting it on the second day of hearing, you know, I'm happy to do it if you give me some time. Well, you know what, let me take that back. I would not be happy to do it. But if we do want to revisit this now, if you give me some time and I can relook at 527, I'm pretty sure I'm going to say exactly what I said on the first day of hearing, and I think that I'm accurately conveying what the policy says and it just seems to me, you know, to get to the Arbitrator's point, I'm willing to, you know, stipulate that, you know, policy 527 exists and it is there and that it says what it says and, you know, beyond that right now I wouldn't be able to to stipulate anything further.

THE ARBITRATOR: Well, if I can be of any help, I just forwarded the original email from Mr. Margolis to you, Rick. You can take a look at it, and if you want to stick with where you are, you know, I'll decide at that point, and I'm ready to move on.

MR. BIALCZAK: Yeah. Why don't we over -- I assume we'll take a lunch at some point. Maybe I can look this over at lunch, and then for now let's just move on if that makes sense to everybody else. And thank you. I did just get the email you forwarded, Mr. Arbitrator.

MR. MARGOLIS: I think what Mr. Arbitrator said a few minutes might solve it. I think what you said was that the entirety of policy 527 is before you, and certainly that's the case. So if we have the issue for decision stipulated as I said, certainly I agree that that does not exclude or preclude any aspect of policy 527, and that the parties can rely upon anything that's anywhere in the policy in support of an argument that grounds for termination did exist or that they didn't exist.

MR. BIALCZAK: Correct. I understand what the Employer is attempting to do here. They're attempting to remove the burden of showing just case in favor of simply grounds. My recollection of the policy is that policy 527 defines grounds for termination as just cause, and so to me it's somewhat circular here. But again, I am happy to look at this over lunch. I apologize I did not see the email. Again, Ken did not notify me that he was sending what appears to be a prehearing motion, you know, so I apologize. That's why I'm not ready to discuss it.

I'm happy to look it over over lunch. It seems as though this hearing probably isn't going to be concluded today either, so I'm also perfectly happy to to, you know, look at the issue after today so I can

give a more reasoned response that's not just quick and on the fly. I have a feeling I'm going to say what I said on the first day of hearing, which is that while grounds are, in fact, defined in 527 as just cause, and so the burden is on the Employer to show just cause. And what I understand the Employer is arguing that no, we have to show grounds, and then there's some sort of, you know, the Employee then has the burden of showing well those grounds are not just cause and I would disagree with that. That's what I understand the argument to be mainly here is. Yeah.

MR. MARGOLIS: That's not the case. And so first of all, I have to take exception to the implication that you're not informed of something because I sent you an email laying this out. But more importantly, the policy is very clear where the burden of proof lies. It says that the burden of proof lies upon the Employer to prove that the existence of grounds -- to prove the existence of grounds for termination, so there's no trying to get out from under anything. It's just that when you have a governing document that specifies the issue, that is the issue for the Arbitrator to decide. It's not a matter of getting out from under anything, it's not matter of avoiding anything. It's just that's the rule that governs us and

that's the rule that should be applied. And of course, you and I can argue whatever we like out of policy 527. But in terms of the issue, it says what the issue is.

THE ARBITRATOR: Well, you know, I made my point on this. And as I said, to the extent that I consider the issue is 527, that I am going to be looking at the entire policy and not just one part of it.

Now, if you all can't reach a stipulation, I'm ready to just go on and what I really want to do is just start hearing evidence today.

MR. BIALCZAK: Okay.

MR. MARGOLIS: And it's not satisfactory to you, Rick, that it's clearly stated on the record that the entirety of policy 527 will be considered by the Arbitrator in deciding the merits of the issue?

MR. BIALCZAK: Ken, honestly, you know what, I've said what I have to say on this. You know, I'm happy to look at this over lunch. I'm happy to look at this after the conclusion of today's hearing. If you had, you know, said hey, Rick, you know, I'm restarting the argument about the issue statement ahead of time, you know, I don't make it a habit to ignore emails, you know. So, you know, I didn't see this email. You know, I trust that you sent it. I'm not making accusations or anything. I just, you know, I get a lot of emails. You

know, I didn't see this email, you know. So my preference, I think, would be to follow the Arbitrator's lead here and just deal with it later. But I'm happy to take a look over lunch or after today's hearing and, you know, we're always we're always able to agree later on.

MR. MARGOLIS: And let's proceed. I just want to be clear on the record that the ACLU is reserving all rights with respect to the -- an issue that is not the issue that's in policy 527. And we think that any decision of an issue that is not the sole issue as stated in policy 527 is not within the authority of the Arbitrator as the policy specifically states. On that basis, Let's proceed.

THE ARBITRATOR: All right. Now, we were in the middle of cross-examination of Ms. Goldmacher. And again, Ms. Goldmacher, I started to greet you this morning. So I think as soon as you all get set up, Ms. Goldmacher, you can come back over here. I see you now. And so with that, and let's let Mr. Margolis get settled. And when we're ready, Mr. Bialczak, you can continue your questioning, please.

MR. BIALCZAK: Great. Thank you. And just, Ken and Ms. Goldmacher, just let me know when you're ready.

MR. MARGOLIS: Give me one second. Okay.

MR. BIALCZAK: Great.

CONTINUED CROSS-EXAMINATION

BY MR. BIALCZAK:

Q. Good morning. Thanks for coming back for a second day testimony. We appreciated, you know, when we had finished off, and I apologize for the long intro here, Mr. Arbitrator, but it's been a little while. When we had finished off last time I had been asking you questions about Mr. Ronnie Newman.

I'm going to switch gears a little bit and I'll come back to to Mr. Newman, but I kind of want to start fresh. I think that would be in everybody's best interest here. Now, on direct examination you had explained what the word triggered meant when used by Mr. Needham. Do you recall that testimony?

A. I don't recall specifically.

Q. Okay. Now, I can have the transcript given to you. I think Mr. Margolis has it, you know, if you want it. I want to leave it up to you. I'm going to quickly provide the definition that I think you provided. And if you would prefer to look at the transcript yourself, that would be totally fine. Is that acceptable to you, Ken or --

MR. MARGOLIS: Yeah, if you want her to read or whatever you like.