**Amentum Services, Inc. f/k/a AECOM Management Services, Inc. *and* Eric L. Downs.** Case 28–CA–276524

December 16, 2024

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND WILCOX

On May 26, 2022, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings,[2] findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

## I. BACKGROUND

The Respondent is a government contractor providing fire protection services to the U.S. Air Force. The fire chief and assistant chiefs are employees of the U.S. Government; captains and lieutenants are employees of the Respondent. Firefighters work on either A shift or B shift. These shifts last either 96 or 72 hours, with a 6-day shift every other month to balance weekend work. One firefighter serves in a logistics role and is responsible for ordering, maintaining, distributing, and disposing of equipment, with a dedicated office from which to do so. For approximately 5 years before 2021, the firefighter holding the logistics role had a "detached schedule" of either Monday through Thursday or Tuesday through Friday, with no weekend work. The role also required direct and regular communication with the Fire Chief. Employee Craig Cusenz held the logistics position for about 1 year prior to 2021; employee Landon Shakespeare held the position for the 3 to 4 years before Cusenz. Both Cusenz and Shakespeare worked detached schedules while in the logistics position, and there is no evidence that anyone else covered the position when Cusenz was away from work.

In February 2021,[4] Cusenz notified the Respondent that he was leaving the company. On February 3, Protective Services Manager Quentin Mulholland emailed unit employees to solicit interest in the extra duty of "detached logistics firefighter." The Respondent considered employee-applicants Joshua Tully and Charging Party Eric Downs for the role, selecting Tully based on what managers perceived as his stronger communication skills and rapport with the Fire Chief.[5] Tully trained for the position for approximately 6 weeks with Cusenz, but Tully was the sole employee assigned to the logistics role during that time.

On March 9, the Union filed a grievance on Downs's behalf under Article 20 of the collective-bargaining agreement governing the filling of "open positions" based on qualifications and seniority. Specifically, the grievance alleged that Downs should have been selected for the logistics position based on his seniority over Tully. The Respondent's Labor Relations Director, Connie Moore, considered the issue a "gray area" and settled the grievance. Per the settlement, the Respondent agreed to apply Article 20 and assign Downs to the logistics duty based on his

[1] There are no exceptions to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(3) and (1) of the Act by issuing a verbal counseling email to Downs, and that it violated Sec. 8(a)(1) by disparaging the Union, threatening employees that filing grievances was futile, threatening employees with unspecified reprisals, threatening employees by inviting them to quit their employment, and threatening employees with discharge.

[2] The Respondent, for the first time on exceptions, raises several constitutional challenges to the Board's authority to hear this case, including extant "statutory removal restrictions for NLRB ALJs." The Board has previously found that a respondent waives such arguments when, as here, it fails to raise them before filing its post-hearing brief with the judge. See *Pain Relief Centers, P.A.*, 371 NLRB No. 143, slip op. at 1 fn. 1 (2022). We therefore reject the Respondent's constitutional arguments as untimely.

[3] We shall modify the Order in accordance with our decision in *Paragon Systems, Inc.*, 371 NLRB No. 104, slip op. at 3, 4 fn. 8 (2022), and to conform to the Board's standard remedial language for the violations found. We shall also substitute a new notice to conform to the Order as modified. Because the Respondent moved Downs to a detached schedule after Tully's resignation, we find it unnecessary to order an affirmative remedy to this effect.

We reject as meritless the Respondent's exceptions asserting that the Board lacks authority to issue a cease-and-desist order addressing the unlawful conduct in this matter or to issue an affirmative order requiring the Respondent to post a notice at the affected facilities. Contrary to the Respondent, nothing in the Order interferes with the Respondent's ability to discharge its contractual obligations with the United States Department of Defense or imposes obligations on the Department of Defense. We also reject as meritless the Respondent's argument that the cease-and-desist language impinges on its management rights to schedule and assign extra duties to employees. The Order requires the Respondent to cease and desist from unlawfully changing employees' schedules because they engage in protected concerted activity (such as filing a grievance). This Order does not restrict or impinge on the Respondent's lawful, nondiscriminatory authority to schedule and assign work.

[4] All dates are in 2021 unless otherwise noted.

[5] Tully applied for the logistics duty in part due to its detached schedule that would not require weekend work.

seniority.[6] Tully's subsequent status was not addressed in the settlement.

On April 5, Mulholland notified Tully and Downs that Tully would train Downs in the logistics role; both employees would perform the duty. Mulholland also stated that he might put both of them on the same rotating shift or assign one to each shift so a logistics employee would be available on weekends. At this point, Mulholland said he might assign Downs to B shift, despite the fact that Downs had previously worked on A shift as a regular firefighter. During the same meeting, Mulholland asked Tully and Downs to give him their projected leave schedules for the next year so that he could make shift assignments; Mullholland wanted the schedules within the next 2 weeks or as soon as possible.[7] Tully immediately provided his leave schedule; Downs had no leave planned after April 12 and did not provide his schedule.

Upon Downs's return from leave on April 12, he spoke again with Mulholland. Crediting Downs, the judge found that, during this call, Mulholland told Downs that Downs would be given a written warning for failing to provide his leave schedule and that Mulholland would be moving him from A to B shift. Mulholland stated that he was making the change so that Downs could work with Shakespeare, who had previously performed the logistics duty. At this time, Mulholland also asked Downs if he still wanted the role if it were not on a detached schedule. As the judge found, Downs objected to this change to his shift assignment and asserted that he should be able to choose his shift due to his seniority over Tully. Mulholland responded that he had the right to determine which shift Downs would work.[8] Downs asked for this to be put in writing.

Two hours later, Mulholland called Downs and said he would change the aforementioned written warning regarding the leave schedule to a verbal counseling, which is outside the Respondent's formal disciplinary structure. At Downs's request, Mulholland sent a written email confirming that verbal counseling.

On April 29, Downs asked Mulholland's permission to deliver uniform patches to a Las Vegas location about an hour away from the duty station. The judge credited Downs's testimony that Mulholland came to Downs's office and asked if he and Tully would "pay somebody for ten seconds of work," and then stated that it could be "timecard fraud" if Downs and Tully sought to be paid for travel time in addition to the time it took to transfer the patches, and that he (Mulholland) was "looking to fire anyone for timecard fraud."[9] Downs also testified that, at some point, admitted supervisor Captain Phillip Geary came in the area and told Downs and Tully to record the hours they worked, as they should be paid for that time. Geary then looked at Downs and added, "especially in your situation." According to the credited testimony, approximately thirty minutes later, Downs went to Geary's office and asked what Geary had meant by his remark. Geary then gestured to Fire Chief Wilson's office and stated that "some individuals weren't happy with [Downs] filing and winning a grievance" and that "when it comes to the customers or the assistant chiefs, if they want you gone they'll find a way to make you gone."[10]

The judge found that the Respondent, through admitted supervisor Geary, violated Section 8(a)(1) by making statements to Downs that threatened him that his job might be in danger because he filed and prevailed on his grievance regarding the logistics role. The judge further found that the Respondent violated Section 8(a)(3) and (1) by placing Tully and Downs on regular firefighters' rotating shifts rather than a detached schedule in retaliation for Downs's grievance. We affirm the judge's findings of both violations for the reasons he states and as further explained below.

[6] The merits of Downs's grievance and the Respondent's settlement under the collective-bargaining agreement are not before the Board.

[7] As a general policy, the Respondent asked for no more than 2 weeks' notice for leave. Mulholland testified that he asked for projected leave at this meeting as part of making shift assignments.

[8] Mulholland's testimony was not inconsistent with the judge's findings. Mulholland agreed that he told Downs that he was not happy that Downs did not provide his leave projections. He also testified that he sent Downs an email after the call documenting a verbal counseling, stating his expectations and how he planned to proceed. Mulholland further testified that, by the April 12 meeting, he had been leaning toward putting Downs on B shift, at least in part because Downs had not done as he was told regarding providing leave projections. Finally, Mulholland confirmed that he told Downs that Downs would be assigned to B shift, although he testified that assignment was made on April 13. Captain Phillip Geary also testified to these general events.

[9] Downs testified that this conversation began when he and Tully suggested to Mulholland that they could leave around 3 p.m. to drop off the patches, and Mulholland said: "well, I'm not going to pay you guys for just dropping off patches, which takes like ten seconds of time." Mulholland then asked if Downs and Tully would pay someone for ten seconds of work, to which Tully responded that they would continually be working on company time for the entirety of the excursion and should be paid accordingly, referencing the collective-bargaining agreement. At that point, Mulholland remarked on timecard fraud.

Both Geary and Mulholland testified that Mulholland had raised the issue of timekeeping and timecard fraud generally multiple times, and Mulholland further testified that he had discussed timecards when Downs and Tully approached him regarding the delivery of uniform patches to the Las Vegas location.

[10] The judge credited Downs's testimony regarding these events. As the judge recognized, Geary testified that he remembered only one conversation with Downs on April 29 regarding properly recording his working time. When asked about the additional events Downs described, Geary testified that he did not remember anything like that conversation, or the remark Downs attributed to him.

II. THE APRIL 29 THREAT BY GEARY TO DOWNS

We find, in agreement with the judge, that the Respondent, by admitted supervisor Geary, violated Section 8(a)(1) by threatening employee Eric Downs that his job might be in jeopardy due to his filing and prevailing on his grievance. The Board's standard for determining whether an unlawful threat was made is "'whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.'" *Cintas Corp. No. 2*, 372 NLRB No. 34, slip op. at 4 (2022) (quoting *Double D. Construction Group, Inc.*, 339 NLRB 303, 303-304 (2003)). The test is an objective one; it is not based on subjective coerciveness. *Sunbelt Rentals, Inc.*, 370 NLRB No. 102, slip op. at 3 (2021). It is well established that even friendly warnings from supervisors that an employee's protected activities would put them in jeopardy are unlawful threats in violation of the Act. E.g., *Challenge Manufacturing Co., LLC*, 368 NLRB No. 35, slip op. at 1, fn. 3, 10–11 (2019) (supervisor's statement that employee should watch his back because managers were after him because of his union activity reasonably tended to interfere with employee's exercise of Section 7 rights), enfd. 815 Fed. Appx. 33, 38-39 (6th Cir. 2020); *Long Island College Hospital*, 327 NLRB 944, 945 (1999) (when advice to proceed with caution was coupled with the statement that union spokesperson was "getting a reputation with management," warning gave clear implication that the respondent's "management did not look favorably upon union activity"); *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462–463 (1995) (citing cases). Even if Geary's statement was meant as a helpful warning or made without animus, he clearly conveyed that management viewed Downs in an unfavorable light because of his protected activity and that Downs's job could be in jeopardy.[11]

On exception, the Respondent principally challenges the judge's credibility determinations. The Respondent asserts that the judge's finding should be reversed because no witnesses or documents corroborated Downs's credited testimony. The Respondent also excepts generally to the judge's failure to credit Geary's testimony.[12] We find the Respondent's arguments lack merit.

Our established policy is not to overrule an administrative law judge's credibility determinations unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). This policy is grounded in the fact that the judge can observe and evaluate factors of appearance and demeanor of witnesses at a hearing. *Valley Steel Products Co.*, 111 NLRB 1338, 1345 (1955). Here, the judge stated that he relied on demeanor "little, if at all." Where, as here, credibility resolutions are not based on demeanor, the Board may make an independent evaluation of credibility, based on the weight of evidence, established facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Capstone Logistics LLC and Associated Wholesale Grocers, Inc.*, 372 NLRB No. 124, slip op. at 1 fn. 4 (2023) (internal citations omitted). In making his credibility conclusions, the judge stated that he "credited conflicting testimony based upon the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." We have carefully examined the record, independently evaluating the judge's credibility determinations with a view to the above considerations, and we find no basis for overturning the judge's credibility resolutions.

In arguing that the judge improperly discredited Geary's testimony denying that he made the alleged statements, the Respondent offers little more than generalities, asserting that the judge displayed a lack of evenhandedness.[13]

[11] In adopting the judge's finding, we clarify that Geary's statement would have a reasonable tendency to coerce an employee in the exercise of Sec. 7 rights, regardless of its actual effect or the speaker's intent. *Boar's Head Provisions Co.*, 370 NLRB No. 124, slip op. at 16 (2021); *KSM Industries, Inc.*, 336 NLRB 133, 133 (2001) (citing *Concepts & Designs*, 318 NLRB 948, 954, 955 (1995)); *Sunnyside Home Care Project*, 308 NLRB 346, 346 fn. 1 (1992); *Puritech Industries*, 246 NLRB 618, 622–623 (1979).

[12] The Respondent also excepts to the judge's finding that Fire Chief Wilson, to whose office Geary had gestured when making his statement, bore significant animus toward Downs for protected concerted activity. However, as stated above, the standard for determining whether an unlawful threat took place is an objective one; it is not based on subjective coerciveness and does not require animus.

The Respondent further excepts to the judge's failure to draw adverse testimonial inferences from the General Counsel's failure to call particular witnesses or ask particular corroborating questions. However, the judge was not obligated to draw any such adverse inferences. See *International Automated Machines*, 285 NLRB 1122, 1123 (1987) ("[W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference *may* be drawn regarding any factual question on which the witness is likely to have knowledge.") (emphasis added; citations omitted), enfd. 861 F.2d 720 (6th Cir. 1988); cf. *Iron Workers Local 75 (Defco Construction)*, 268 NLRB 1453, 1456 fn. 8 (1984) (adopting judge's decision and observing that "even where an adverse inference is otherwise proper, it is permissive and not mandatory"). We therefore conclude that the judge did not abuse his discretion in this regard.

[13] In discrediting Geary and Tompkins, the judge pointed to coordination among the Respondent's witnesses, but did not explain the basis for that finding. Having independently evaluated the credibility of the witnesses, we find no reason to overturn the judge's credibility determinations, but in doing so we do not rely on the judge's unexplained assertions regarding coordination among the Respondent's witnesses.

As discussed below, we further find that the judge properly distinguished between any animus Wilson held toward Downs based on Downs's performance or conduct and animus based on Downs's protected activity. We also note that corroborating documents or witnesses

Our dissenting colleague provides his own justification for concluding that Geary did not make statements regarding the unhappiness with Downs succeeding in his grievance and the ways that management would find to get rid of an employee, largely based on his view that Geary was an "experienced manager" with a particular type of "care and mindset." We find that these assertions provide no basis to overrule the judge's credibility findings. That Geary may have been an experienced manager does not mean that he could not make inappropriate remarks or threats.[14] Our dissenting colleague also describes Geary's testimony denying making the statements to Downs attributed to him as "convincing" and asserts that "Geary persuasively explained" why he could not have made the statements.[15] But other than offering his own subjective views, our colleague has not explained, in light of the weight of the evidence or reasonable inferences based on the record, why Geary's testimony should be credited.[16]

### I. THE CHANGE TO THE SCHEDULE FOR THE LOGISTICS POSITION

We also adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by putting employees Downs and Tully on regular firefighters' rotating A and B shifts, rather than a detached schedule, in retaliation for Downs's grievance.[17] We agree with the judge that the General Counsel satisfied her initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), of establishing that an employee's union or other protected activity was a motivating factor in the employer's adverse employment action. The General Counsel meets this burden by showing (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) animus against union or other protected activity on the part of the employer. See, e.g., *Intertape Polymer Corp*., 372 NLRB No. 133, slip op. at 6 (2023), enfd. 2024 WL 2764160 (6th Cir. May 9, 2024). An employer's motivation is a question of fact that may be inferred from direct and circumstantial evidence on the record as a whole. Id. Circumstantial evidence of a discriminatory motive may include, but is not limited to, the timing of the adverse action in relation to the union or other protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from past practices; and disparate treatment of the employee.[18] Id. at 6–7. Once the General Counsel sustains this initial burden under *Wright Line*, the burden shifts to the employer to show that it would have taken the same action even in the absence of the protected activity.

Here, the protected union activity (Downs pursuing his grievance) and the Respondent's knowledge of that activity (having itself settled the grievance) are not in dispute. In addition, we agree with the judge that there is sufficient evidence of the Respondent's animus to that protected

are not required for a favorable credibility determination; while such evidence may be one part of that determination, a judge may also rely on established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole.

As explained above, the judge credited Downs's testimony. The Respondent and our dissenting colleague assert that in doing so the judge improperly ignored Downs's earlier, unrelated security infractions when crediting his testimony in this case. We reject such a sweeping generalization. Without minimizing Downs's security infractions, we find that they do not warrant overturning the judge's credibility resolutions. The Board has long been willing to credit witnesses with less than perfect histories of truth-telling "if their testimony can be judged reliable under all the circumstances." *Double D. Construction Group*, supra, 339 NLRB at 305. We note that Downs's alleged security violations did not involve lies or provision of misleading information and as such they are not probative of his credibility in this case. See *Sunshine Piping, Inc.*, 351 NLRB 1371, 1375 (2007).

[14] See, e.g., *Cintas Corp. No. 2*, supra, 372 NLRB No. 34, slip op. at 3–4; *Wendt Corp.*, 371 NLRB No. 159, slip op. at 1, fn. 1, 3 (2022) (threats of job loss by highly-ranked western region director); *Double D. Construction Group*, 339 NLRB at 303-304 (unlawful threat by president).

[15] Geary testified that "I don't remember anything like that" and "No. I don't remember any specific one-on-one conversations with Mr. Downs later on that day." He offered no further explanations.

[16] In finding Geary's testimony credible, our dissenting colleague also points to Geary's statements that he was "trying to do what everybody else does in that place and move into the next position. So I'm careful about how I said things and just be supportive and try and make sure people are successful around me." As explained above, even assuming Geary acted in a friendly or supportive manner, he clearly conveyed that management viewed Downs in an unfavorable light because of his protected activity and that Downs's job could be in jeopardy.

[17] As an initial matter, we find without merit the Respondent's contention that the assignment of logistics duties on regular shifts rather than on a detached shift was not an adverse action. The record shows that, in contrast to regular shifts, detached schedules are fixed and do not require weekend work. The two prior logistics technicians worked detached schedules, and admitted supervisor Quentin Mulholland specifically advertised the schedule as "detached" in his email soliciting interest in filling the role. Indeed, both Downs and Tully applied for the logistics assignment at least in part because they wanted to be on a detached schedule, and Downs reverted to a detached logistics employee schedule after Tully's resignation. These facts clearly demonstrate that the post-settlement determination to assign Downs and Tully to regular shifts was an adverse action. Additionally, Downs was forced to switch from A shift to B shift as a condition of accepting the logistics duties, contrary to his stated preference to remain on A shift. This change would qualify as an adverse employment action even apart from the change from a detached to a shift schedule. See *Wal-Mart, Inc.*, 340 NLRB 220, 220–223 (2003).

[18] In determining whether circumstantial evidence supports a reasonable inference of discriminatory motive, the Board does not follow a rote formula and has relied on many different combinations of factors. *See Intertape Polymer Corp*., supra, 372 NLRB No. 133, slip op. at 7 fn. 27 (and cases cited therein).

activity.[19] The judge correctly found that the timing of the Respondent's decision to change the logistics position from a detached to a shift schedule—only a few weeks following the March 26 grievance settlement—demonstrated animus, particularly as there was no evidence it was considering such a change before Downs filed his grievance.[20] See *Absolute Healthcare d/b/a Curaleaf Arizona*, 372 NLRB No. 16, slip op. at 2–3 (2022) (discharge 2 months after employer learned of union activities supports finding of animus), enf. denied on other grounds 103 F.4th 61 (D.C. Cir. 2024); *Sears, Roebuck & Co.*, 337 NLRB 443, 444–445 (2002) (timing of adverse action, a few weeks after the employer learned of protected activities, supported finding animus). We also agree with the judge's finding of animus based on "Mulholland's statements to Downs on several occasions in April."[21] As found by the judge, these statements included: (1) the April 5 statement by Mulholland to Downs and Tully that he might put them both on the same shift or assign Downs to B shift, despite Downs's protests and assertions of seniority; (2) Mulholland's April 12 verbal counselling email (originally a written warning) to Downs for not providing his projected leave to Mulholland;[22] and (3) Mulholland's April 29 statement to Downs and Tully that they could be committing timecard fraud when Downs asked for permission to deliver uniform patches to a location in Las Vegas, and that he was looking to fire anybody for timecard fraud.[23]

In addition to the judge's animus findings, we note that animus is further demonstrated by the Respondent's contemporaneous violation of Section 8(a)(1), namely, Geary's April 29 unlawful statement to Downs that his job might be in jeopardy due to filing and prevailing on a contractual grievance, as discussed above. See *NCRNC, LLC d/b/a Northeast Center for Rehabilitation*, 372 NLRB No. 35, slip op. at 11 (2022), enfd. 94 F.4th 67 (D.C. Cir. 2024); *Midwest Terminals of Toledo International, Inc.*, 365 NLRB No. 138, slip op. at 1 fn. 1 (2017) (finding animus in threat by director of operations to employee who was denied placement on the skilled list). Our finding of animus is also supported by the evidence, discussed below, that the Respondent's reason for putting the logistics

[19] In view of Mulholland and Geary's statements, discussed below, we find that the Respondent's animus was directed specifically at Downs and the outcome of his grievance settlement. There is, therefore, sufficient evidence to sustain the finding that the General Counsel satisfied her initial burden of demonstrating that the protected activity precipitated the Respondent's adverse action.

Our dissenting colleague contends that the judge improperly considered general, personal hostility between Downs and Mullholland or Wilson that was unrelated to Downs's protected concerted activity. Contrary to the dissent, the judge explicitly stated that "whatever issues existed between management and Downs prior to his filing the grievance are irrelevant to the issues before me." The judge further explained that "Downs's relationship with Fire Chief Jeffrey Wilson apparently had not been a particularly good one. This is irrelevant to the instant case other than in determining whether Geary made the statement attributed to him." We find no basis for discounting the judge's statements in this regard.

[20] The Respondent contends that the timing of its action does not demonstrate animus because it had only one employee in the logistics position prior to the settlement of Downs's grievance and so could not have contemplated how to schedule two employees until that situation arose after the grievance settlement. We agree with the judge that the timing of the Respondent's decision to change the logistics position from a detached schedule (with no weekend work) to a rotating schedule (which would require weekend work) and then to assign that role to both Downs and Tully only a few weeks after the March 26 grievance settlement constitutes evidence of animus. But even absent this timing-based animus, we would still find that the General Counsel met her burden of demonstrating animus for the other reasons set forth by the judge and the further reasons explained in this decision.

[21] The Respondent again claims that the judge erred by crediting Downs's testimony regarding Mulholland and Geary's statements. As discussed above, we find no grounds to reverse the judge's credibility determinations. See footnote 14, above.

We further reject our dissenting colleague's critique of the judge's credibility determinations in favor of Downs and against Mulholland based on his view that the judge ascribed "nefarious motives" to Mulholland where none existed. Our colleague asserts that Mulholland should be credited over Downs because Mulholland was, as the dissent casts it, "positively mystified" as to what Downs was charging and what Mulholland could have done wrong. For this reason, he claims, the judge improperly inferred that Mulholland sought to defend his actions related to this case and that he bore animus towards Downs because of Downs's grievance. We disagree. First, Mulholland's testimony that management "didn't understand what charges were being brought forward" does not equate to a statement that he did not understand what he might have done wrong. Second, even if Mulholland was unclear as to the nature of the legal charges, this does not preclude him from, as the judge found, wanting to defend his own actions related to this case even if he had since retired. As such, we find insufficient grounds to overturn the judge's credibility findings.

[22] We additionally note that the fact that other employees were not warned for similar transgressions supports finding the warning to Downs demonstrates animus. See, e.g., *Affinity Medical Center*, 362 NLRB 654, 654 fn. 4, 669 (2015), enfd. 944 F.3d 934 (D.C. Cir. 2019). The fact that the written warning was later reduced to a verbal counselling does not change Mulholland's initial reaction and the animus he displayed by it.

We reject the Respondent's contention that Mulholland's and Wilson's attitudes toward Downs were based solely on his job performance, communication skills, and security violations. In support of its position, the Respondent points to the fire captains' and Mulholland's lower ratings of Downs when evaluating the candidates for the logistics position. While it is true that the chiefs and Mulholland rated Downs below Tully, the allegations here do not concern the Respondent's choice of Tully over Downs. Nor do they concern the merits of Downs's grievance regarding that choice. Rather, the issue here are the Respondent's actions *after* that grievance was settled, actions which demonstrate its animus toward Downs because of the outcome of that settlement.

[23] In concluding that it would be "intrinsically implausible" that Mulholland would make comments regarding firing staff for timecard fraud, our dissenting colleague cites Mulholland's position as a "seasoned, professional manager" with contractual staffing obligations, asserting that such a person would not make a such bald threat. We find these arguments are insufficient to reverse the judge's findings. As noted above, a manager's experience does not mean that they cannot make inappropriate remarks or threats.

employees on rotating shifts was pretextual. See, e.g., *Affinity Medical Center*, supra, 362 NLRB at 654 fn. 4; *Lucky Cab Co.*, 360 NLRB 271, 274 (2014) ("Persuasive evidence that the Respondent's reasons for the discharges were pretextual further supports our finding of animus.") (citing cases).

Having found that the judge correctly concluded that the General Counsel has met her initial *Wright Line* burden, we turn to the Respondent's defense burden. The Respondent bears the burden of establishing that it would have taken the same action even absent the employee's union or other protected concerted activity. *Wright Line*, 289 NLRB at 1089. However, the employer's burden in this regard cannot be satisfied by proffered reasons that are found to be pretextual, i.e., false reasons or reasons not in fact relied upon. See *Intertape Polymer Corp*., 372 NLRB No. 133, supra, slip op. at 7; see also *CSC Holdings, LLC*, 368 NLRB No. 106, slip op. at 3 (2019). Contrary to the Respondent's contention, the defense burden is one of persuasion, not production. See *NLRB v. Transportation Management Corp.*, 462 US 393, 400 (1983). The Respondent correctly notes that the judge failed to analyze its defense burden in his decision. We do so here and conclude that the Respondent failed to sustain its burden.

We first find that the Respondent's proffered explanation for the change from a detached to a shift schedule for the logistics employees is pretextual. The Respondent assigned Downs to B shift rather than applying seniority and assigning him to his preferred A shift or allowing him to choose his shift. The Respondent asserts that it did so because employee Landon Shakespeare, who had done the logistical work in the past, was on B shift and could assist Downs if needed. However, the judge did not credit the Respondent's witnesses who testified to this motive, and the Respondent has produced no evidence to otherwise support its assertion. While the Respondent proffers a plausible reason for its actions after the fact, this is insufficient to demonstrate that it was the Respondent's genuine reason at the time it made the decision to assign the logistics employees to shifts in light of the evidence as a whole. See *Lucky Cab Co.*, supra, 360 NLRB at 276 ("[A]n employer does not carry its *Wright Line* burden merely by asserting a legitimate reason for an adverse action, where the evidence shows it was not the real reason and that protected activity was the actual motivation.") (citing cases); see also *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (3d Cir. 1969) ("[T]he policy and protection provided by the National Labor Relations Act does not allow the employer to substitute 'good' reasons for 'real' reasons when the purpose of the discharge is to retaliate for an employee's concerted activities.").

Even absent this evidence of pretext, we would nevertheless find that the Respondent has failed to meet its burden to prove that it would have made the same scheduling change absent Downs's protected activity. The Respondent suggests that it might have decided to use two employees (Downs and Tully) on regular shifts in the logistics role even absent Downs's grievance. Absent supporting evidence, this suggestion by the Respondent fails to satisfy its burden to show that it would have made the same decision even absent the protected activity. See *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007) (*Wright Line* defense burden not met by employer merely showing a legitimate reason). As the judge recognized, the Respondent presented no evidence that it had planned to assign logistics employees to a shift or considered using a logistics employee on each shift prior to the filing of Downs's grievance. We additionally note that the Respondent did not present evidence that it was concerned about shift coverage in the past, as there is no evidence that anyone else covered the logistics duties when Cusenz held the role but was away from work. Rather, the Respondent only began discussing such a plan after, and in response to, Downs's grievance, and it only implemented the plan after Downs was awarded the logistics duties in the grievance settlement. Importantly, as noted, Mulholland had advertised the logistics role as "detached," two consecutive employees (Shakespeare and Cusenz) performed the logistics role on a detached schedule for at least the previous 4 years, and both Downs and Tully had applied for the role based in part on their anticipation of a detached schedule. The grievance settlement did not specify how it would be implemented or what would happen to Tully. Thus, the schedule the Respondent chose and implemented after the grievance settlement was not something the Respondent had previously considered or planned to implement, nor was it something imposed on the Respondent by the terms of the grievance settlement.

The Respondent's remaining assertions in support of its rebuttal burden are credibility based. As discussed above, we find no ground for reversing the judge's credibility determinations. We therefore find that the Respondent failed to sustain its burden of proving by a preponderance of the evidence that it would have made the same decision absent Downs's protected activity.

## ORDER

The National Labor Relations Board orders that the Respondent, Amentum Services, Inc. f/k/a AECOM Management Services, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Modifying employees' work schedules because of their support for and activities on behalf of the Union, including the filing and pursuit of contractual grievances.

(b) Threatening employees with discharge if they engage in activities on behalf of the Union, including the filing and pursuit of contractual grievances.

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

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

(a) Post at all affected facilities within the Nellis Test and Training Range where the Respondent's unit employees perform fire services pursuant to its Range Support Services contract with the United States Department of Defense copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 5, 2021.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 16, 2024

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting.

Today, my colleagues reflexively affirm a judge's decision that strains to find violations of the Act that are neither supported by the record nor consistent with plain reason. Importantly, my colleagues and I are not bound to follow the judge's unreasonable, verisimilitude-defying credibility determinations because the judge expressly stated that he was not relying on witness demeanor in crediting witnesses and testimony but rather that he relied exclusively on derivative record inferences such as "inherent probabilities" and "reasonable inferences drawn from the record as a whole." As a result of his specious credibility resolutions, the judge reached the even more specious legal conclusions that the Respondent (1) unlawfully discriminated against a contractual grievant despite demonstrating no animus whatsoever against his protected activity, and (2) unlawfully threatened that grievant for "prevailing" on a grievance that the Respondent itself voluntarily settled in his favor. This was clear error. However, rather than enforce the boundaries of reason within which the application of law to facts must be circumscribed, my colleagues compound the judge's error, finding violations of the Act based on fallacy rather than fact. Although I realize that the alleged discriminatee has already essentially obtained from the Respondent the relief he sought by filing his charge with the Board (i.e., assignment to a detached schedule to perform the firefighter logistics duties), I cannot countenance the judge's unjust and indefensible findings, nor can I join my colleagues' uncritical acceptance of those erroneous findings. For the reasons that follow, I dissent.

[24] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

*The Judge's Factual Findings*[1]

The Respondent, a government contractor, has provided fire protection services to the U.S. Air Force at the Nellis Test and Training Range for years under various corporate names and successive collective-bargaining agreements, including the Agreement relevant to this case that ran from October 2018 to September 2021.

Fire Chief Jeffrey Wilson and his assistant chiefs are U.S. Government employees, whereas less senior management officials, including captains and lieutenants, and unit firefighters work for the Respondent. The Respondent's firefighters work on an A shift and a B shift, which are rotating shifts of either 96 hours (4 days) or 72 hours (3 days) with a 6-day shift every other month to distribute weekend work equitably. The Respondent has historically designated one or two firefighters to serve in a logistics position.[2] For the 5 years prior to this case, the Respondent assigned this role to one firefighter and put that firefighter on a "detached schedule," meaning they worked either Monday through Thursday or Tuesday through Friday rather than A or B shift.[3] From approximately 2016 to early 2020, the logistics position had been occupied by employee Landon Shakespeare; in early 2020, employee Craig Cusenz took over the logistics position.

On February 3, 2021,[4] Cusenz informed the Respondent that he was leaving the company. Later that day, Respondent Protective Services Manager Quentin Mulholland[5] emailed unit firefighters to solicit interest in the "extra duty" of replacing the "detached logistics firefighter." Of those who responded, the Respondent considered employee Joshua Tully and Charging Party Eric Downs for the logistics work, ultimately selecting Tully based principally on his perceived superior communication skills and positive rapport with the Fire Chief, with whom the logistics employee must communicate directly and regularly. As the judge noted, Tully had applied for the position in part to avoid working weekends in contrast to the firefighters assigned to the A and B shifts. For about six weeks thereafter, Tully trained for the logistics position with Cusenz. Tully did not work with anyone else in the logistics role, and he expected that to continue; because Tully had worked for the Respondent for fewer than 5 years, the logistics position had been held by only one person during his tenure.

Relying on Article 20 of the collective-bargaining agreement governing the filling of "open positions" based on qualifications and seniority, the Union on March 9 filed a grievance on Downs's behalf, asserting that he should have been awarded the logistics position based on his seniority over Tully. Respondent Director of Labor Relations Constance "Connie" Moore considered the contractual dispute a "gray area" and therefore voluntarily settled the grievance with the Union by agreeing to apply Article 20 and assign Downs to the logistics duty based on his seniority. Although the settlement did not contemplate Tully's status in the logistics role post-grievance, the Respondent decided to retain both Tully and Downs in that role after the settlement. Upon learning of the award to Downs, Mulholland started planning to put the logistics employees on a regular firefighter shift rather than a detached shift.[6] He also sought and received authorization to offer 25 cents per hour in premium pay for logistics employees, which was memorialized in a Memorandum of Understanding between the Respondent and the Union on June 24.

At a meeting on April 5, Mulholland notified Tully and Downs that Tully would train Downs in the logistics role. Mulholland said that after the training, he might keep them both on regular rotating schedules to perform their logistics duties, possibly with Tully on A shift and Downs on B shift, rather than assign them to detached schedules. Mulholland asked Tully and Downs to give him their projected leave schedule for the next year to help him make that determination. Crediting Tully and Downs, the judge found that Mulholland said he wanted that schedule within the next couple of weeks, or as soon as possible.[7] Tully gave his projected leave schedule to Mulholland immediately after the April 5 meeting. Downs did not provide a leave schedule, nor did he inform Mulholland of the fact that he did not have any leave planned beyond his vacation scheduled to run from April 6 through April 12.[8]

[1] To the extent that the judge's findings of fact are not based on his unreasonable credibility determinations, I accept those findings.

[2] The logistics employee's job was to order, maintain, distribute, and dispose of equipment, and such employee receives a dedicated office from which to perform those duties.

[3] Prior to that 5-year period, this position had at times been assigned to two firefighters serving on separate rotating (not detached) shifts.

[4] All further dates are in 2021 unless otherwise indicated.

[5] Mulholland retired in January 2022, prior to the hearing. The Respondent admitted that Mulholland was a statutory supervisor.

[6] It further appears that even before the grievance settlement, Mulholland began considering how the logistics role might possibly be shared by two logistics firefighters simultaneously on separate (A and B) shifts, as had been done in years past. According to Tompkins, Mulholland "had been discussing, you know, maybe I need to make it more of an extra duty and not like a position how it was, a Monday through Thursday with its own office. And so he had been thinking of different ways to do that, and one of them was having an extra duty for a firefighter on a shift, one on each shift." This is precisely how Mulholland handled the situation once Downs was awarded the duties that Tully had already begun performing.

[7] The Respondent's witnesses consistently testified that Mulholland asked Downs for his projected leave schedule within a day, i.e., before Downs left for vacation on April 6.

[8] As a general matter of policy, the Respondent did not require employees to provide more than a 2-week notice for vacation leave.

The day Downs returned from vacation, he had another meeting with Mulholland. The judge found that Mulholland told Downs that he was getting a written warning for failing to provide him with his projected leave. Mulholland also informed Downs that he had decided to move Downs from the A shift, where he had been a regular firefighter, to the B shift in light of his new logistics duties. Mulholland also said he was making this change so that Downs could work with employee Shakespeare, who had performed the logistics job for several years before recently-departed employee Cusenz. The judge found that Downs objected to this change, asserting that he should be able to choose his shift due to his seniority and that, in turn, Mulholland asserted that he had the right to determine on which shift Downs would work. Two hours later, Mulholland called Downs and stated that he had changed the written warning to a verbal counseling.[9] After Downs requested a copy of the discipline, Mulholland sent him an email reflecting a verbal counseling.

On April 29, Downs asked Mulholland for permission to join Tully in delivering some patches to be worn on uniforms to a location nearby in Las Vegas. Crediting Downs over the denials of the Respondent's witnesses, the judge found that Mulholland came into Downs's office and asked both Downs and Tully if "they"[10] would pay someone for the entire roundtrip, when it only required "ten seconds of work." He further found that Mulholland stated that they could be committing timecard fraud and that he was "looking to fire anybody for timecard fraud." Later, Captain Philip Geary came into the room and told Downs and Tully to put the hours they worked on their timesheet, as they should be paid for the work they performed. Geary looked at Downs and said, "especially in your situation." Still crediting Downs, the judge found that Downs went to Geary's office a half-hour later and asked him what he meant. Gesturing to the office of Fire Chief Wilson, Geary responded that some people weren't happy with Downs winning his grievance and being in the logistics position. Geary added that when customers or assistant fire chiefs wanted to get rid of somebody, they would find a way to do so.

Since Tully left the Respondent's employ in September 2021, Downs has worked a detached schedule.[11]

*The Judge's Unreasonable Credibility Determinations Should Be Rejected*

1. Applicable Legal Principles

The Board's established policy is not to overrule a judge's credibility resolutions unless the "clear preponderance of all the relevant evidence convinces [it] that [they are] . . . incorrect." *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). The *Standard Dry Wall* Board so held because judges, and not the Board, have the benefit of observing witnesses as they testify at a hearing. Id. It is therefore the Board's "policy to attach great weight" to a judge's credibility findings "*insofar as they are based on demeanor*." Id. (emphasis added). Consistent with *Standard Dry Wall*, the Board in *J. N. Ceazan Co.* observed: "The Board has consistently held that where credibility resolutions are not based *primarily* upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility." 246 NLRB 637, 638 fn. 6 (1979) (emphasis added) (internal quotation marks and citations omitted). Accordingly, the Board may independently evaluate, de novo, a judge's "derivative inferences," defined as those based on the "weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole." *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (citing *Panelrama Centers*, 296 NLRB 711, 711 fn. 1 (1989)); see also *E.S. Sutton Realty Co.*, 336 NLRB 405, 407 fn. 9 (2001) (overturning a credibility determination where documentary evidence proved a witness's testimony inaccurate).

Here, although the judge began his decision with boilerplate language traditionally relied on by administrative law judges—referring to his "observation of the demeanor of the witnesses"—he later expressly concedes that he considered demeanor "little, if at all" in drawing his actual credibility resolutions in this case. Instead, the judge acknowledges that he relied on derivative inferences: "I have credited conflicting testimony based upon the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole . . . I have relied on demeanor little, if at all." Because the judge's credibility determinations were not primarily based upon witnesses' demeanor, and because the Board is as well positioned as the judge to make findings of fact when witnesses' demeanor is not at issue,

However, managers would request leave projections further into the future when an employee's schedule or shift was changing, as was the case when Downs took on the logistics position.

[9] Verbal counseling is not considered formal discipline, but is more akin to coaching an employee on a particular matter. A verbal counseling—which in this context ostensibly means oral counseling—does not result in documentation being placed in the employee's personnel file despite Downs receiving the follow-up email here. Further, verbal counseling is not part of the applicable progressive discipline framework.

[10] Presumably, if Downs and Tully were in Mulholland's position.

[11] There is no allegation that the circumstances of Tully's departure were unlawful in any way.

I will independently evaluate the credibility of witnesses' testimony based on the record evidence.

2. The Judge's Erroneous Credibility Resolutions

Applying the derivative inferences on which the judge claims to have relied, he initially asserts that "the record strongly suggests coordination by Respondent's witnesses close to trial," and that, for this reason, the testimony of Captains Brett Tompkins and Geary in corroborating Mulholland is "unreliable." Regarding Mulholland specifically, the judge baselessly "infer[s] [that Mulholland] would like to defend his actions related to this case and that he bears animus towards Downs as a result of Downs' grievance and its aftermath" despite having retired before the hearing took place. None of the judge's suppositions here withstand scrutiny. Indeed, as demonstrated below, the judge merely *presumes* Mulholland's untruthfulness and animus rather than *inferring* it based on actual record evidence. There is a difference between presuming untruthfulness or animus in the absence of record evidence and inferring untruthfulness or animus based on actual record evidence. The judge plainly confuses and conflates these related concepts both in his evaluation of credibility and in his weighing of the virtually nonexistent evidence of an unlawful motive in this case.

To begin, there is no evidence supporting a finding of "coordination" among the Respondent's witnesses.[12] The record establishes that Geary and Mulholland met with the Respondent's lawyer within a few weeks of the hearing to prepare.[13] As Geary explained, they did not discuss the "subject of [their] testimony," but "just information and allegations or the brief of what was presented from Mr. Downs." Contrary to the judge, the mere fact that a routine pre-hearing meeting with counsel occurred to go over allegations based on events that were more than a year old at the time does not intimate, let alone "strongly suggest[]," coordination of testimony.

The judge also seemingly finds coordination of testimony based on his presumption that Tompkins learned of the existence of the verbal counseling to Downs shortly before trial. But the judge improperly presumes a fact not in evidence. Tompkins made clear in his testimony that he was, in fact, privy to the verbal (oral) counseling that Downs received at the time; he testified that he was unaware of the *email* memorializing that counseling until Mulholland told him about the email the week before the hearing.

Finally, Mulholland testified to having brief interactions with Geary and Tompkins weeks before the hearing at the Respondent's offices, but the record does not establish that these interactions were different from the innocuous conversations discussed above. Accordingly, the judge's conclusion that the testimony of Geary, Tompkins, and Mulholland resulted from improper coordination is not supported by record evidence.

Mulholland likewise testified to speaking with Fire Chief Wilson, a government employee, in the weeks before the hearing "about how we didn't understand what charges were being brought forward." The judge is quick to ascribe nefarious motives to Mulholland, "infer[ing] [that Mulholland] would like to defend his actions related to this case and that he bears animus towards Downs as a result of Downs' grievance and its aftermath," even as Mulholland's testimony suggests that he was positively mystified as to what Downs was charging and what Mulholland could have done wrong. Yet the judge offers no evidentiary basis for his supposed inferences here.

Next, in crediting Downs over Mulholland, the judge found that "Mulholland made all the statements attributed to him by Downs, or made statements that were substantially similar." The judge bases this credibility resolution favoring Downs on his unsupported supposition that Mulholland was "very unhappy that Downs filed and prevailed in his grievance" and likewise was "very unhappy" that Downs objected to being placed on B shift rather than a detached schedule upon being awarded the logistics duties. Citing General Counsel Exhibit 8, the judge claims that Mulholland "had some degree of animus towards Downs before Downs filed his grievance" and found it "highly likely that Mulholland expressed his anger as Downs [had] testified."

Here again, the judge makes presumptions based on speculation rather than drawing reasonable inferences from actual record evidence. Indeed, the only time Mulholland testified regarding being unhappy with Downs pertained to Downs's failure to promptly provide his projected future leave when asked, not to his successful pursuit of a grievance. Downs himself only used the word "happy" when incredibly testifying that Geary had told him that "some individuals weren't happy with me [Downs] filing and winning a grievance" while Geary allegedly motioned toward Fire Chief Wilson's office and further explained that "when it comes to the customers [i.e., the U.S. Government and Fire Chief Wilson] or the assistant chiefs, if they want you gone they'll find a way

[12] Indeed, my colleagues necessarily disclaim reliance on the judge's findings in this regard, dismissing them as "unexplained assertions regarding coordination among the Respondent's witnesses."

[13] Tompkins ostensibly did not attend this meeting with the Respondent's counsel.

to make you gone," all without any mention of Mulholland.[14]

The only time Downs testifies that Mulholland was allegedly "angry" was when Downs questioned whether Mulholland needed to check with the Union before implementing the managerial decision to place Downs and Tully on separate, regular firefighter shifts.[15] Even assuming, arguendo, the veracity of Downs's testimony here, Mulholland potentially bristling at Downs's questioning of his managerial authority does not establish that Mulholland was "very unhappy" or "angry" that Downs prevailed on his grievance. Indeed, Mulholland was doing everything in his authority to grant Downs the logistics duties pursuant to the grievance settlement while permitting Tully to retain the logistics duties he had lawfully been assigned. Mulholland even successfully obtained a raise for persons performing the logistics role, including Downs.

The judge's reliance on General Counsel Exhibit 8 is equally misplaced. In fact, this exhibit contains Mulholland's notes documenting the process by which Tully was initially selected over Downs for the logistics duty assignment. Those notes compile the views and ratings of not only Mulholland, but also all captains, who unanimously agreed with Mulholland that Tully should be selected for the logistics duties over Downs based on their relative "work, professionalism, communication and motivation," as well as their anticipated performance in the logistics role. Although it is true that Mulholland gave Downs lower ratings than the captains, he clearly and transparently explains in the notes that he was considering the "wishes of the Fire Chief." Specifically, as recounted in Mulholland's notes, Fire Chief Wilson opposed Downs's candidacy because he felt that Downs's "poor communication would create many problems" were he selected for the logistics role.[16] Given that the logistics duties entail regular communication between the logistics technician and the Fire Chief, Mulholland reasonably concluded that Tully would likely be more successful in the role.

Meanwhile, the judge, in deciding to credit Downs, dismissed Downs's history of security infractions—including visiting conspiracy websites on a Federal Government-owned computer—and failed to even consider his evasive and inconsistent testimony initially denying such infractions.[17] Indeed, after finally admitting to all his security infractions, Downs acknowledged that violating his confidentiality obligations by disclosing classified information was not only a serious issue but also a good reason for Fire Chief Wilson and the government not to have confidence in him. Nevertheless, the judge baselessly speculated that Wilson personally "bore significant animus towards Downs as a result of previous interactions, particularly those involving security violations by Downs," without regard to any protected activity.[18]

### 3. The Respondent's Witnesses Should Be Credited Over Downs

Considering the clear analytical infirmities in the judge's rationale for his wholesale discrediting of the Respondent's witnesses, coupled with his determination to eschew consideration of witness demeanor, the traditional deference that the Board affords to a judge's credibility resolutions is unwarranted here. Instead, I find that the judge erred in crediting Downs over the Respondent's witnesses, and I would credit the testimony of Mulholland, Geary, and Tompkins over that of Downs.

Based on the record evidence, I would first find that Mulholland never said that he was "looking to fire anybody for timecard fraud" and that Geary never said to Downs, "especially in your situation," after reasonably telling Downs that he should be paid for the work he performs. Downs's self-serving testimony in this regard is incompatible with the "inherent probabilities" in the testimony, as well as any "reasonable inferences which may be drawn from the record as a whole." It is intrinsically implausible that a seasoned, professional manager like Mulholland would make such a ham-handed threat that he was "looking to fire anybody for timecard fraud." Downs's version of events also makes no sense in context. The notion that Mulholland would want to fire anyone possible—not even necessarily Downs—for a trumped-up charge of timecard fraud defies reason. Downs's

[14] As further discussed below, Geary credibly and effectively denied making the statements Downs attributed to him.

[15] Tompkins specifically testified that Mulholland "didn't get angry" in response to Downs's suggestion that Mulholland needed to check with the Union.

[16] For context, the record reflects that Downs had a poor relationship with Fire Chief Wilson and generally refused to acknowledge or speak to him, stemming from prior incidents where Downs committed security infractions. First, Downs visited conspiracy websites on his federal government computer, resulting in his computer being confiscated for more than a year and a suspension of his workplace computer privileges, ostensibly without any apology on his part. Second, Downs's wife disclosed classified information on her Facebook account, which she presumably learned from Downs. Finally, Downs disclosed classified information in a barroom conversation.

[17] Remarkably, the judge claimed to "see no relationship between Downs'[s] prior transgressions at work and his veracity."

[18] I am inclined to agree with the Respondent that the judge should have drawn adverse inferences from the General Counsel's failure either to call Union Steward Roman Stern to potentially corroborate Downs's version of events, or to ask Tully—whom the judge generally credited—about the statements Downs attributed to Mulholland and Geary on April 29. Regarding Tully specifically, the General Counsel admits that her failure was "unintentional" and "inadvertent." Nevertheless, my reasoned rejection of the judge's specious credibility resolutions, standing alone, is enough to reject his factual findings.

testimony does not explain why a manager with contractual minimum staffing obligations would seek to fire quality personnel for apparent sport. Further, there is ample record testimony from the Respondent's witnesses explaining that the federal government scrutinized timecards for accuracy and for how paid time is spent—including on trips to Las Vegas to run work-related errands as occurred here—and that a past employee had been fired for actual timecard fraud. Mulholland "[q]uite often" discussed timecard fraud and the need to avoid it (at least five times in a typical month) in response to repeated timecard errors by unit employees. The result of Mulholland's scrutiny of Downs's timecard here was to *pay him for two additional hours* that Downs had worked on April 29 but had erroneously shorted himself on his timecard. This would seem to be a strange development if, as Downs claimed, Mulholland told him that Mulholland was "looking to fire anybody for timecard fraud." Under these circumstances, the substance of Downs's testimony is inherently improbable and cannot be supported with any reasonable inference drawn from the record. Rather, reasonable inferences support Mulholland's and Geary's denials of Downs's assertions.

Next, I would find that Geary did not state that "some individuals weren't happy with [Downs] filing and winning a grievance" or that "when it comes to the customers or the assistant chiefs, if they want you gone they'll find a way to make you gone." Again, Downs's testimony is self-serving, improbable, and incompatible with any reasonable inferences that can be drawn from the record. Geary flatly and convincingly denied saying "especially in your situation," and had no recollection of a subsequent conversation with Downs thirty minutes later. Geary persuasively explained that he would not have made the statements that Downs attributed to him because he was "trying to do what everybody else does in that place and move into the next position. So I'm careful about how I said things and just be supportive and try and make sure people are successful around me." As with Mulholland, it is difficult to imagine an experienced manager with Geary's care and mindset making the obviously problematic statements that Downs attributed to him.

My colleagues repeatedly claim to have "independently evaluated the credibility of the witnesses" in affirming the judge. But, if they had actually made independent credibility determinations, they would have provided independent analyses and explanations regarding why they were, or were not, crediting one witness's testimony over another; providing these explanations would satisfy the requirements of the Administrative Procedure Act. That is not, however, what my colleagues have done. Instead, they merely adopt wholesale the judge's baseless acceptance of Downs's improbable assertions, uncritically adopt the judge's credibility determinations, and rubber stamp his legal conclusions. For instance, my colleagues are content to simply ignore the likelihood that Geary's lack of recollection of a subsequent conversation with Downs thirty minutes later means that no such conversation occurred. They also fail to adequately grapple with the significance of the judge's baseless "coordination of testimony" assumption, which even my colleagues reject, and the extent to which it drove the judge's unreliable credibility determinations. Indeed, the judge's invalid assumption is this regard is the basis for his clearly flawed credibility determination that the testimony of Tompkins and Geary "in corroborating Mulholland [is] unreliable." Furthermore, my colleagues are too quick to dismiss Downs's history of untrustworthy behavior, including committing security infractions, and his testimonial acknowledgement that his disclosure of classified information was a good reason for Fire Chief Wilson and the government not to have confidence in him. Downs's record stands in stark contrast to that of the Respondent's seasoned managers, who went out of their way to accommodate both Downs and Tully in the logistical role and to ensure that Downs was paid for all of his time even as he baselessly claimed that Mulholland in particular did not want to pay him for his time.

Realizing that a truly independent evaluation of the judge's credibility determinations effectively forecloses the result they reach here, my colleagues resort to knocking down straw men. Indeed, they falsely suggest that I find the Respondent's witnesses to be more trustworthy than Downs merely based on their experience as managers, or on Downs's past security infractions, or on several other of my observations they misleadingly take out of context. Relatedly, the majority's contention that I have not objectively explained why the Respondent's witnesses should be credited "in light of the weight of the evidence or reasonable inferences based on the record" strains credulity. *On balance*, the veracity of the Respondent's witnesses' testimony is far more probable than that of Downs based on the record as a whole for the objective reasons I explain in detail above. It is my colleagues who have failed to justify adopting the judge's dubious credibility determinations "in light of the weight of the evidence or reasonable inferences based on the record" despite their hollow assurances that they have independently evaluated credibility.

*A Review of the Record Evidence Establishes that the Respondent Did Not Violate the Act as Alleged and that the Complaint Should Be Dismissed.*

Initially, I would reverse the judge and dismiss the allegation that the Respondent, through Geary, threatened

Downs in violation of Section 8(a)(1) by stating as follows: "some individuals weren't happy with me [Downs] filing and winning a grievance" and "when it comes to the [non-Respondent-employee] customers or the assistant chiefs, if they want you gone they'll find a way to make you gone." Because I have rejected the judge's relevant credibility resolutions favoring Downs over Mulholland and Geary, I find that Geary never made the allegedly offending statements. It follows, therefore, that the Respondent did not violate the Act by making such statements.

Next, I would reverse the judge and dismiss the allegation that the Respondent violated Section 8(a)(3) and (1) by placing Downs and Tully on regular firefighter rotating (A and B) shifts, rather than a detached schedule, in retaliation for Downs's grievance. As noted, the genesis of this allegation is Respondent Director of Labor Relations Moore's decision to voluntarily and in good faith settle the grievance with the Union by agreeing to apply Article 20 of the collective-bargaining agreement and assign Downs to the logistics duty based on his seniority, despite the Respondent having already assigned those duties to Tully based on merit. To be fair to Tully and to ensure that Downs had someone to train him how to perform the logistics role, the Respondent reasonably decided to retain both Tully and Downs in the logistics role on opposite regular firefighter shifts—a scheduling system that the Respondent had previously used during times when two employees had shared the logistics role—rather than on the detached schedule that had been used for solitary logistics technicians in recent years.

Moreover, the Downs grievance settlement left the Respondent with only three potentially viable options for how to proceed: (1) bump Tully back to his regular firefighter duties and award the logistics position solely to Downs; (2) have both Downs and Tully on detached shifts; or (3) place them on separate rotating shifts to provide logistics coverage at all times, as the Respondent decided to do here. Given that the Respondent effectively applied Article 20 of the collective-bargaining agreement to Downs's pursuit of the logistics position, Option 1 would have been problematic for the Respondent, as Article 20, Section 1 states that "[i]t is not the intent of this Article for one Employee to bump another Employee unless there is a layoff in which case bumping will be by seniority." Option 2 would have led to a duplication of efforts between Downs and Tully, which arguably would have been imprudent from a business standpoint. Option 3, by contrast, provided "full coverage" of all firefighter hours with logistical support while being fair to Tully, who had been lawfully selected for the logistics role based on merit. Further, Mulholland reasonably decided to put Downs on B shift in his new logistics role so he could work with employee Shakespeare, who had prior experience performing the logistics duties. Accordingly, Downs's new shift assignment was substantially motivated by a desire to support him in his new role, a role that, once again, the Respondent voluntarily conceded to him. And on top of that, as noted, Mulholland had successfully obtained a raise for persons performing the logistics role, including Downs.

Against this backdrop, the majority utterly fails to demonstrate any meaningful evidence of animus against Downs's protected activity of pursuing his grievance.[19] To begin, the majority countenances the judge's improper reliance on what he perceived as a general, personal animus against Downs predicated on his history of security infractions discussed above (e.g., visiting conspiracy websites on a government-owned computer) and his related poor rapport with Fire Chief Wilson. Board law is clear that we are concerned only with whether a respondent "bore animus toward the employee's protected activity," not whether the respondent or its supervisors personally disliked the employee. See *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011) (citation omitted). Accordingly, the judge's consideration of Mulholland's and Fire Chief Wilson's supposed personal animus against Downs predating his protected grievance is irrelevant.[20]

Further, both the judge and my colleagues greatly overstate the significance of the timing evidence as it pertains to animus. The judge found that the "timing of the switch of the logistics position to a shift schedule and Mulholland's statements to Downs on several occasions in April" support an animus finding. For their part, my colleagues emphasize the facts that, on April 5, Mulholland told Downs and Tully that he might put them both on the same shift or assign Downs to B shift, despite Downs's protests and assertions of seniority, and that, on April 12, Mulholland told Downs that he was giving him a written warning

[19] Considering the General Counsel's initial showing under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), the facts of union activity in the form of Downs pursuing his grievance and the Respondent's knowledge of that activity from settling the grievance are not in dispute.

[20] My colleagues fail in their attempt to rescue the judge's faulty analysis here by citing his assurances that he was neither considering Fire Chief Wilson's poor relationship with Downs, nor "whatever issues existed between management and Downs prior to his filing the grievance," because those facts were "irrelevant." Yet, the judge betrayed his own assurances by expressly finding that "Wilson's testimony establishes that he bore significant animus towards Downs as a result of previous interactions, particularly those involving security violations by Downs," and that "Mulholland had some degree of animus towards Downs before Downs filed his grievance." In light of these findings, it is incredible that my colleagues can somehow "find no basis for discounting the judge's statements in this regard."

for not providing his projected leave to Mulholland. The majority also faults the Respondent for having "chose[n] and implemented" the plan to assign Downs and Tully only after Downs's grievance, a plan that was not specified in the grievance settlement. Each of these arguments misses the mark.

First, as a practical matter, the events at issue in this case logically could not have occurred in a different order or at a different time given that the Respondent could not have implemented the grievance settlement until after the grievance was filed. Similarly, it was only after the grievance settled that the Respondent had two employees assigned to perform the logistics duties, rather than just one. And it was not until after the grievance settled that Mulholland would have reason to meet with Tully and Downs to discuss how the Respondent was going to train and schedule both employees. These circumstances, and the Respondent's rational use of its managerial rights in response to them, do not portend unlawful discrimination against Downs's use of the contractual grievance machinery merely because the grievance settlement necessarily preceded its reasonable implementation. Rather, the record establishes that the timing of Downs's assignment to a regular shift to perform his new logistics duties was based on the fact that the staffing of the logistics position had changed from one to two employees following the settlement and, therefore, was a result of changed circumstances rather than invidious discrimination. See *Volvo Group North America, LLC*, 372 NLRB No. 27, slip op. at 3 & fn. 12 (2022) (disregarding timing evidence as "inconclusive" where the timing of a discharge in relation to protected activity, "[w]ithout more," was "mere coincidence"); see also *Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672, 675 (2004) (finding that where discipline is issued close in time to disciplined-for misconduct, the fact that it was also issued close in time to protected activity is "too weak a foundation upon which to base a finding of pretext").[21]

Second, the majority erroneously relies on Mulholland's statement that he was issuing Downs a written warning for failing to timely provide his leave projection as evidence of animus. Just 2 hours later, Mulholland called Downs and said he had changed the written warning to a verbal counseling and, in response to Downs's request, sent an email memorializing this verbal counseling. As noted, verbal counseling is not considered formal discipline and is not part of the applicable progressive discipline policy but is more akin to employee coaching. Meanwhile, the judge found neither the counseling nor the email memorializing it to independently violate the Act. Mulholland clearly communicated to Downs both Mulholland's expectations and the fact that Downs was not actually being disciplined. There is no meaningful relationship between this counseling and Downs's protected grievance.

Finally, the majority relies on Geary's alleged threat to Downs that his job might be in jeopardy due to his filing and prevailing on his grievance to support the judge's animus finding. Remarkably, the judge does not himself rely on this purported threat in his animus analysis despite finding such threat to be an independent violation of Section 8(a)(1). Because I have rejected the judge's credibility resolutions and found that no such threat was uttered, however, I similarly reject it as a basis for finding animus against Downs's protected grievance activity. Accordingly, my colleagues' attempt to prop up the judge's analysis here falls short.[22]

## CONCLUSION

Because the judge affirmatively chose to base his credibility determinations on the record, rather than on the demeanor of the witnesses, the Board does not owe any deference to those credibility determinations. Having reviewed the record evidence, I conclude that the judge's credibility determinations were not reasonable. As a result of relying on those indefensible credibility determinations, both the judge and my colleagues err in finding that the Respondent violated the Act. Indeed, contrary to the Act's purpose of fostering industrial stability and peace, the judge and majority here punish the Respondent for agreeing to settle Downs's grievance and for lawfully retaining both employees Tully and Downs in the logistics role. If the Board is going to reward an employer's good-faith compliance with its bargaining obligations with a baseless violation of the Act, one is left to wonder whether future employers will be incentivized to litigate rather than settle contractual grievances and unfair labor practice charges alike.

Because I would find that the General Counsel has failed to establish that the Respondent's actions bore any causal connection to antiunion animus, I would dismiss the complaint in its entirety.

Dated, Washington, D.C. December 16, 2024

[21] My colleagues rely heavily on supposed "pretext" in their animus analysis, which does little more than build on their house of cards composed of the uncritical adoption of dubious credibility determinations and their irrational analysis of the timing issues that I discuss extensively above. Because their credibility and timing premises fail, so too do their conclusions about pretext, leading the house of cards to collapse.

[22] Although I agree with my colleagues that the judge erred in failing to analyze the Respondent's rebuttal burden under *Wright Line*, I would dismiss the complaint based on the General Counsel's failure to carry her initial evidentiary burden. Accordingly, I need not reach the Respondent's rebuttal burden.

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT modify your work schedules because of your support for and activities on behalf of the Union, including the filing and pursuit of contractual grievances.

WE WILL NOT threaten you with discharge if you engage in activities on behalf of the Union, including the filing and pursuit of contractual grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

AMENTUM SERVICES, INC. F/K/A AECOM MANAGEMENT SERVICES, INC.

The Board's decision can be found at https://www.nlrb.gov/case/ 28-CA-276524 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

*Judith E. Davila, Esq.,* for the General Counsel.
*Paul T. Trimmer* and *Lynne K. McChrystal, Esqs. (Jackson Lewis P.C. Las Vegas, Nevada),* for the Respondent.

## DECISION

### STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried via Zoom video technology on March 30 and 31, 2021. Eric Downs filed the initial charge in this case on May 3, 2021. The General Counsel issued the complaint on December 21, 2021.

The General Counsel alleges that Respondent, by Quentin Mulholland, then Respondent's functional area manager, violated Section 8 (a)(1) on or about April 5, 2021, in the following respects:

Disparaging the Union (Teamsters Local 631, which represents the Charging Party) in telling the Charging Party that he did not have to tell the Union anything.

By telling employees that he would not discuss their terms and conditions of employment with the Union, threatening them that it would be futile to file grievances.

Threatening employees with unspecified reprisals because they engaged in concerted activities.

Inviting the Charging Party on April 12, 2021, to quit his employment.

On April 29, by threatening employees with discharge because they raised claims under Respondent's Collective-Bargaining Agreement with the Union.

On April 29, by Captain (Supervisor) Phillip Geary, threatening employees with discharge because they engaged in union activities.

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by:

Assigning 2 employees, rather than one, to the logistics position.

Changing the logistics position from a detached schedule (detached from regular fire fighters' shifts) to an extra duty on the fire-fighters' 72 and 96 hour shifts

Reassigning the Charging Party to the B-Shift from the A-Shift

Issuing the Charging Party a verbal counseling.

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

*Findings of Fact*

I. JURISDICTION

Respondent, a limited liability company, has a contract with the United States Government to provide fire-fighting services at. Nellis Air Force Base in Nevada. In the year ending on May 3, 2021, Respondent provided services to the U,S. Government valued in excess of $50,000. It has performed services valued in excess of $5000 in States other than Nevada in that year, and has a substantial impact on the national defense of the United States of America. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Teamsters Local 631 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent has provided fire-fighting services to the U.S. Government at Nellis Air Force Base for a number of years under various names, including URS Federal Services (Tr. 31–32). It has had a number of collective-bargaining agreements with Teamsters Local 631 covering the fire-fighters at Nellis Air Force Base. Relevant to this case is the Agreement that ran from October 2018 to September 2021 and the current agreement effective October 1, 2021.

Respondent's fire fighters work on an A shift and a B shift which are rotating shifts of either 96 hours (4 days) or 72 hours (3 days) with a 6-day shift every other month to distribute weekend work equitably. For about 5 years prior to 2021, one fire fighter had a logistics or supply position which worked a "detached schedule," meaning they were not assigned to either shift. The logistics employee worked either Monday through Thursday or Tuesday through Friday and did not work weekends. That employee's job was to order, maintain, distribute and dispose of equipment. In the year prior to February 2021, Craig Cusenz held the logistics position. For about 3–4 years prior to Cusenz, Landon Shakespeare occupied the position. Neither was assigned to a shift while they held the logistics position. There is no evidence that anyone covered the logistics position for Cusenz when he was on vacation or otherwise not at work (Tr. 240-41).

In February 2021, Cusenz informed Respondent that he was leaving the company. Quintin Mulholland was at that time an upper-level supervisor for Amentum's fire fighters at Nellis. He retired in January 2022. Mulholland's title was Protective Services Manager. He worked with the Fire Chief, Jeffrey Wilson, who was a U.S. Government employee.

On February 3, 2021, Mulholland sent a mass email to Respondent's firefighters, stating:

> We are looking to replace the detached logistics firefighter
> If you are interested in this extra duty please send me an email stating your interest. Please send message by 19 Feb 2021.
>
> If you have any questions about these extra duties please get with me or your Capt.

(GC Exh. 7.)

Initially, 4 firefighters responded. Two were considered, the Charging Party Eric Downs and Joshua Tully. Respondent awarded the position to Tully. Tully applied for the position in order not to work weekends as did the firefighters assigned to a shift (Tr. 165).

On March 9, 2021, the Union filed a grievance on Downs' behalf, asserting that he should have been awarded the logistics position. The grievance asserted that under Article 20 of the existing collective-bargaining agreement, Downs should have been selected due to his seniority compared to that of Tully.

For about 6 weeks, Tully trained for the logistics position with his predecessor, Craig Cusenz. Tully did not work with anyone else and was not told he would be doing so. He expected to work alone because the logistics employee had worked alone at least since January 2017 when Respondent hired Tully, Tr. 171.

The Downs grievance was not resolved at step 1 of the grievance procedure set forth in the collective-bargaining agreement (the supervisor level). On March 26, 2021, a step 2 grievance meeting was held between Respondent and the Union. Connie Moore, Respondent's Director of Labor Relations was Respondent's principal spokesperson. Business Agent Darrin Bradburn represented the Union. Downs and 2 union stewards attended this meeting virtually. Respondent agreed to award the logistics position to Eric Downs. The parties did not discuss what would happen to Joshua Tully.[1]

After learning of the award to Downs, Mulholland started planning to put the logistics employees on a regular firefighter shift rather than a detached shift. At the same time Mulholland asked Respondent's Labor Relations Director, Connie Moore, for authorization to give the occupants of that position 25 cents per hour in premium pay. This was instituted between Respondent and the Union in a Memorandum of Understanding entered into on June 24, 2021.[2]

On April 5, 2021, Tully attended a meeting with Mulholland and Captains (Supervisors) Phillip Geary and Brett Thompkins. Eric Downs participated by telephone. Mulholland discussed Downs' grievance.

Mulholland told Tully and Downs that he was unsure what he would do about their schedules once Downs was fully trained. He said he might put both on the same shift or one on each shift so he would have a logistics person available on weekends (Tr. 175–176). Mulholland stated further that he might assign Downs to the B shift (Tr. 111). Mulholland's decision to assign the logistics person(s) to a shift was clearly a reaction to Downs' grievance and his prevailing with his grievance, (Tr. 191.)[3]

[1] Whether or not Downs' grievance was meritorious or whether Respondent should have granted it is not before me. Also, whatever issues existed between management and Downs prior to his filing the grievance are irrelevant to the issues before me.

[2] I find that Mulholland's request for premium pay for the logistics employees in no way supports the proposition that putting Downs and Tully on shifts was nondiscriminatory. The change in schedules was a material change from the position for which Downs and Tully thought they were applying. The increase could have been proposed to placate the Union, Downs and Tully. It may have been contemplated even earlier in response to a request for a wage increase from Craig Cusenz, Tr. 191.

[3] Tr. 191 is testimony from Captain Brett Thompkins, a witness called by Respondent.

On April 5, Tully had finished training with Craig Cusenz and had been working alone in the logistics position for about a week. Mulholland told him he would be training Downs in the duties of the logistics job. Downs asked Mulholland if he had "run this by Mickey," a reference to union steward Michael Gutierrez.

Mulholland responded that he was exercising management rights and that he did not have to run personnel decisions by the Union (Tr. 169).

At this meeting Mulholland asked Tully and Downs to give him their projected leave schedule for the next year in order to determine shift assignments (Tr. 111)[4]. He said he wanted that schedule within the next couple of weeks, or as soon as possible (Tr. 174).[5] Tully gave his vacation schedule to Mulholland immediately after the April 5, meeting. Downs did not. He did not have any leave planned yet beyond April 12. As a general matter of policy, Respondent requires no more than 2 weeks-notice for vacation leave.

Downs went on vacation on April 6 and returned to work on April 12. On that date, Downs had another telephone conversation with Mulholland. Captain/Supervisor Brett Thompkins and union steward Roman Sturn were also party to this call. According to Downs, Mulholland told him he was giving him a written warning for failing to provide him with his projected leave and that he was moving Downs from the A shift to the B shift (GC Exh).[6] Mulholland also said he was making this change so that Downs could work with Landon Shakespeare, who had performed the logistics job for several years before Craig Cusenz. At some point in the April 12 conversation, Mulholland asked Downs if he still wanted the position even if it were not on a Monday-Thursday schedule (Tr. 198, 200).

Downs objected to this change, stating that given his seniority, he should be able to choose his shift. Mulholland told Downs that he, Mulholland, had the right to determine on which shift Downs would work. Two hours later, Mulholland called Downs and said he had changed the written warning to a verbal counseling. He also said he would decide which shift Downs would work depending on his progress during his training by Joshua Tully.

Mulholland sent Downs a verbal counseling via an email for not providing Mulholland with his vacation schedule (GC Exh. 11).

Starting on about April 13 or 14, Downs and Tully worked together on an 84 hour shift, Monday through Thursday, Tr. 170.

In September 2021, Tully left his employment with Amentum. Since then Downs has worked a detached schedule.

*Alleged statements by Respondent that it denies making*

Downs testified that after he asked Mulholland on April 5 if he had run his plan for the logistics employees by the Union, Mulholland became angry. According to Downs, Mulholland asked, "Who do you work for?" in addition to telling him that he did not need to consult the Union over the work schedule for the logistics employees.[7]

Downs also testified that he asked Mulholland why he characterized the logistics job as an "extra duty logistics position" in Mulholland's March 4, 2021 response to Downs' grievance (GC Exh. 10). Mulholland responded by telling him that he was not going to argue semantics with Downs.[8] At the end of the April 5, meeting, Downs testified that Mulholland told him and Tully that if they were dissatisfied with his decisions they could resort to any legal means they desired (Tr. 137).[9]

Downs testified that on April 29, 2021, he asked Mulholland for permission to deliver (with Tully) some patches (to be worn on uniforms) to a location in Las Vegas. According to Downs, Mulholland came into his office and asked them both if they would pay for 10 seconds of work.[10] Then, according to Downs, Mulholland stated they could be committing timecard fraud and

[4] Mulholland also asked Downs for a common access card before he left for vacation. Downs provided the card promptly as requested.

[5] Downs testified that Mulholland asked him for his leave on the morning of April 6. Based on Tully's testimony, I find this request was made on April 5.

As I repeat later in this decision, where there is any conflict between Tully's testimony and the testimony of other witnesses, I credit Tully, the only completely disinterested witness in this case. Thus, I credit Tully rather than Respondent's witnesses as to when Mulholland asked for projected leave from Tully and Downs. Moreover, while Thompkins testified that Mulholland asked for vacation plans by the end of the day (April 5), Gear testified Mulholland asked for this before Downs left for vacation on the morning of April 6, Tr.193, 219. Mulholland's testimony on this point is a response to counsel's leading question, "Did you give a deadline…" While somewhat minor points, these issues with Respondent's testimony is all the more reason to credit Tully. Downs testimony on this point is consistent with Tully's.

[6] Captain Brett Thompkins testified that Mulholland did not tell Downs he was getting a written warning or written verbal warning in the conversation to which he was a party, Tr. 205. Given the fact that Thompkins and Mulholland discussed this warning/counseling a week prior to trial, I discredit Thompkins' testimony on this matter. He was unaware that Downs received a verbal counseling until talking to Mulholland a week before trial.

Geary testified that he was present when Mulholland told Downs on April 12 that he was going to get a verbal counseling, Tr. 225. Geary did not testify that he never heard Mulholland tell Downs he was going to get a written warning or written verbal counseling. It is unclear whether Geary was present for all discussions between Mulholland and Downs regarding discipline/counseling.

Mulholland denied making this remark, Tr. 262.

[8] Brett Thompkins testified that he did not **recall** Mulholland saying this or that he was not going to argue semantics with Downs, not that Mulholland did not say these things, Tr. 195.

Similarly, Captain/Supervisor Phillip Geary testified that Mulholland did not ask "who he worked for" **to his recollection**, Tr. 224. I regard this as different than testimony that Mulholland did not ask this question.

Geary, however, testified that Mulholland did not tell Downs that he was not going to argue semantics.

Mulholland denies this remark as well, Tr. 262–263.

[9] Thompkins did not recall this, Tr. 205. Mulholland did not address this contention.

[10] Captain Geary testified that he does not recall this statement, Tr. 235. However, he may not have been privy to the entire conversation between Mulholland, on the one hand, and Downs and Tully, on the other. Thus, his testimony does not directly contradict Downs.

Mulholland testified that he did not tell Downs and Tully that he would not pay them for the time they spent traveling downtown to perform the tasks on their timecards, Tr. 293. I do not consider this a direct contradiction of Downs' testimony.

that he was looking to fire anybody for timecard fraud (Tr. 90–91).[11] Downs also testified that Captain Geary came into the room and told Downs and Tully to put the hours they worked on their timesheet, that they should be paid for the work they perform. Then, Downs testified that Geary looked at him and said, "especially in your situation."

Further, Downs testified that he went to Geary's office a half-hour later and asked him what he meant. Downs testified that Geary told him, gesturing to the office of Fire Chief Wilson, that some people weren't happy with Downs winning his grievance and being in the logistics position. In response to further inquiry from Downs, Geary added that when customers or assistant fire chiefs wanted to get rid of somebody, they would find a way to do so (Tr. 92).[12]

Downs claimed 10 hours of work on his timesheet for April 29. Mulholland revised that to give him credit for 12 hours of work.

Credibility determinations, analysis and conclusions

*Alleged Section 8(a)(1) violations*

I have credited conflicting testimony based upon the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Panelrama Centers,* 296 NLRB 711 fn. 1 (1989). I have relied on demeanor little, if at all.

In this regard, I credit Joshua Tully's testimony in its entirety. Tully no longer works for Respondent and thus, unlike every other witness in this case, has no stake in its outcome.

On the other hand, the record strongly suggests coordination by Respondent's witnesses close to trial. This makes the testimony, particularly of Thompkins and Geary, in corroborating Mulholland unreliable. Mulholland retired in January 2022. However, he, like Eric Downs, is not a disinterested witness. I infer he would like to defend his actions related to this case and that he bears animus towards Downs as a result of Downs' grievance and its aftermath.

I find that Mulholland made all the statements attributed to him by Downs, or made statements that were substantially similar.[13] Mulholland was very unhappy that Downs filed and prevailed in his grievance. He was also very unhappy when Downs challenged his decision not to put Downs on a detached schedule and to put him on B shift. General Counsel Exhibit 8 indicates that Mulholland had some degree of animus towards Downs before Downs filed his grievance.

I find it highly likely that Mulholland expressed his anger as Downs testified. I therefore credit Downs' testimony about statements made to him. I find it highly unlikely that his testimony is fabricated. I see no relationship between Downs' prior transgressions at work and his veracity.

The basic test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed by the Act, *Mediplex of Danbury,* 314 NLRB 470, 472 (1994).

Respondent admits that Mulholland told Downs that he did not have to consult with the Union over his decision to assign Downs and Tully to shifts. However, it contends that this statement did not violate Section 8(a)(1). I agree. This statement was neither a threat, nor disparagement of the Union. It was merely a statement by Mulholland as to what he thought were the company's rights under the collective-bargaining agreement. I conclude this statement did not violate Section 8(a)(1).

Likewise, I conclude that Mulholland's statements, "who do you work for" and "I am not going to argue semantics" are neither threats nor disparagement of the Union. They were merely more pointed expressions of his view of management's rights. I thus find that these statements also did not violate Section 8(a)(1).

Mulholland admits that he asked Downs if he was still interested in the logistics position if it was not detached from the shifts. That is not quite the invitation to quit alleged in the complaint. This is particularly true since Downs had been working on a shift ever since he was hired. Thus, I dismiss this complaint allegation.

Mulholland's discussion of timecard fraud on April 29, clearly was coercive. However, I find it to be insufficiently tied to Downs' protected activity to constitute an 8(a)(1) violation. Mulholland brought up timecard fraud in circumstances in which he suspected that Downs and Tully were asking to be paid for activities that did not warrant it.[14]

On the other hand, Captain Geary's "friendly warning" to Downs on April 29, 2021, violated Section 8(a)(1). Board law is clear that a "friendly warning" from a supervisor suggesting discrimination on account of an employee's protected activities violates the Act, *Hanes Hosiery, Inc.,* 219 NLRB 338 (1975), *Trover Clinic,* 280 NLRB 6 fn. 1 (1986), *Jordan Marsh Stores,* 317 NLRB 460, 462–463 (1995), *Long Island College Hospital,* 327 NLRB 944, 945 (1999). This is so because such warnings are clearly coercive in that they are likely to inhibit the employee from exercising his or her statutory rights.

The fact that Geary may have indicated that it was Government employees who were "out to get" Downs is irrelevant, the statement had a coercive effect regardless. That is particularly so given Fire Chief Wilson's testimony which establishes the constant contact between the Government Fire Chief and Amentum's logistics person. Furthermore, Wilson's testimony establishes that he bore significant animus towards Downs as a result of previous interactions, particularly those involving security violations by Downs.

[11] Captain Geary confirmed that Mulholland brought up the subject of timecard fraud and the possibility of somebody being terminated for timecard fraud, Tr. 233–234. Mulholland also testified that he brought this up, Tr. 293.

[12] Downs' relationship with Fire Chief Jeffrey Wilson apparently had not been a particularly good one. This is irrelevant to the instant case other than in determining whether Geary made the statement attributed to him. Geary testified that he doesn't recall more than one conversation with Downs on April 29, Tr. 237–238.

[13] I credit Joshua Tully's testimony that he never heard Mulholland say that he was looking to fire someone for timecard fraud. That does rule out the possibility that Mulholland made this statement.

[14] Complaint paragraph 5(g) alleges that Mulholland threatened employees with discharge because they raised claims related to the collective-bargaining agreement.

I find there is no evidence to support paragraph 5(e)(2) that Mulholland threatened employees that it would be futile to file grievances.

*Alleged 8(a) (3) and (1) violations*

To establish an 8(a) (3) and (1) violation based on an adverse employment action where the motive for the action is disputed, the General Counsel has the initial burden of showing that protected activity was a motivating factor for the action, *Wright Line,* 251 NLRB 1083 (1980).

The General Counsel satisfies that burden by proving the existence of protected activity, the employer's knowledge of the activity, and animus against the activity that is sufficient to create an inference that the employee's protected activity was a motivating factor in his or her discharge or other adverse action. If the General Counsel meets his burden, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

I conclude that Respondent violated Section 8(a)(3) and (1) by changing the logistics position from a detached schedule to one assigned to a regular fire fighters' rotating shift.

By filing a grievance to enforce the terms of his union's collective-bargaining agreement with Respondent, Eric Downs engaged in activity protected by the Act even though the grievance was filed only on his behalf, *Marketing Assn.,* 145 NLRB 1 (1963).

Respondent was obviously aware of the filing of the grievance and its resolution. Animus towards Downs on account of his union activity is established by the timing of the switch of the logistics position to a shift schedule and Mulholland's statements to Downs on several occasions in April. The timing and Mulholland's hostile statements also establish a causal connection between Downs' union activity and the change in his and Tully's schedules.

At page 26 of its brief, Respondent argues that complaint paragraph 5(i) should be dismissed because it could not have violated the Act by settling Downs' grievance and implementing it. This is a "straw man." The General Counsel is alleging no such thing. The settlement of the grievance did not address the issue of whether Downs was to get the logistics position on a detached schedule or on a regular shift. I conclude that Respondent's decision to put him and Tully on a shift was motivated by a desire to retaliate against Downs for filing the grievance and prevailing.

Respondent argues that animus towards Downs' protected activity is negated by the fact that Respondent began discussing assigning the logistics employees to shifts before Downs' grievance was resolved (R. Br. at 29 and fn. 3). I reject this argument. No plans to assign logistics employees to a shift occurred prior to the filing of Downs' grievance. Its implementation shortly after he prevailed on his grievance strongly suggests a causal relationship. Moreover, as stated before, there could be reasons for Mulholland to seek a premium for the logistics employees other than his concern for Downs' welfare. One reason was that Craig Cusenz had been asking for a raise before deciding to leave Respondent's employment as the logistics employee.

The verbal counseling email (GC Exh. 11), sent by Mulholland to Downs does not constitute an adverse action or a violation of the Act because there is no evidence that it was placed in Downs' personnel file or that it could be used as the basis for future discipline, *Promedica Health Systems, Inc.,* 343 NLRB 1351 (2004). However, I find that it is evidence of Mulholland's animus towards Downs' union activity.

Although this principle comes up primarily in mass discharge cases, discrimination is not negated simply because an employee who was not engaged in protected activity is collateral damage in an employer's discrimination against another, *Majestic Molded Products v. NLRB*, 330 F.2d 603, 606 (2d Cir. 1964). I conclude that Tully so suffered as a result of the discrimination against Downs.

## CONCLUSIONS OF LAW

Respondent violated Section 8(a)(3) and (1) by putting Eric Downs and Joshua Tully on regular fire fighters' rotating shifts rather than a detached schedule substantially similar to that worked by the logistics employee for at least the 4 years prior to February 2021.

Respondent, by Phillip Geary, violated Section 8(a)(1) by advising Eric Downs that his job might be in jeopardy due to his filing and prevailing on his grievance.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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

## ORDER

The Respondent, Amentum, Nellis Air Force Base, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the logistics position from a detached schedule to a schedule on the regular firefighters' shift or in any other way changing the schedule of the logistics employee because he or she engaged in protected activity by filing a grievance

(b) By giving a "friendly warning" to an employee suggesting that he or she may suffer retaliation due to their protected activities, such as filing a grievance.

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

(d) Within 14 days after service by the Region, post at its Nellis Air Force Base facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the

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

16 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 5, 2021.

Dated, Washington, D.C. May 26, 2022

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT Change the logistics position from a detached schedule to a schedule on the regular firefighters' rotating 96 or 72 hour shifts.

WE WILL NOT or in any other way change the schedule of the logistics employee because he or she engaged in protected activity by filing a grievance

WE WILL NOT give a "friendly warning" to an employee suggesting that he or she may suffer retaliation due to their protected activities, such as filing a grievance.

WE WILL NOT In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

AMENTUM SERVICES, INC. F/K/A AECOM MANAGEMENT SERVICES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-276524 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.