

**M.V.M., Inc. and Marcial Rodriguez.** Case 24–CA–10681

August 29, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAMBER AND MEMBER LIEBMAN

On April 25, 2008, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed a brief in opposition to the Respondent's exceptions, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board<sup>1</sup> has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions<sup>3</sup> and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, M.V.M., Inc., San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup> In adopting the judge's finding that the Respondent unlawfully interrogated employee Marcial Rodriguez, we find it unnecessary to rely on the fact that Rodriguez was not given a copy of his letter to review before the interrogation or that Rodriguez did not expect the United States Marshals Service to reveal the letter to the Respondent. Considering the remaining circumstances, thoroughly described by the judge, the Respondent's interrogation of Rodriguez had a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of protected activity.

*Maria M. Fernandez, Esq.* and *Efrain Rivera Vega, Esq.*, for the General Counsel.

*Jason M. Branciforte, Esq. (Littler Mendelson, P.C.)*, of Washington, D.C., for the Respondent.

*Harold Hopkins, Esq.*, of San Juan, Puerto Rico, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in San Juan, Puerto Rico, on November 8, 2007. I reopened the record on discovering that the court reporter had irretrievably lost, without transcribing, almost all the trial testimony given on November 8 by Freddie Barreto, one of the witnesses for the General Counsel. On January 22, 2008, the trial was reconvened by video conference so that Barreto could be recalled and his testimony made a part of the record.<sup>1</sup>

Marcial Rodriguez, an individual, filed the original charge on June 22, 2007, and an amended charge on September 21, 2007. The Regional Director for Region 24 of the National Labor Relations Board (the Board) issued the complaint and notice of hearing on September 21, 2007. The complaint alleges that MVM, Inc. (the Respondent or MVM) violated Section 8(a)(1) of the National Labor Relations Act (the Act) when it interrogated Rodriguez about his union and/or concerted activities, and violated Section 8(a)(3) and (1) by suspending, discharging, and refusing to reinstate Rodriguez because he engaged in union and/or other protected activities. The Respondent filed a timely answer in which it denied committing any of the violations alleged in the complaint.

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

<sup>1</sup> None of the parties objected to conducting the resumed trial by video conference. The Respondent did, however, object to Barreto's testimony being retaken at all—whether by video conference or otherwise. The Respondent argued that it would be prejudiced because Barreto “already had the benefit of hearing [the Respondent's] cross examination,” and therefore could “change his answers.” After considering the matter, I concluded that concern that Barreto would intentionally alter his sworn testimony was speculative, and that any harm to the integrity of the record that was raised by that possibility was outweighed by the harm that would necessarily follow from the near total exclusion of Barreto's testimony from the record. I considered, *inter alia*, that Barreto was a significant witness, a current employee of the Respondent, see *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977) (testimony of a current employee that is adverse to his employer is “given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false”), and that no remedy is sought for him in this proceeding. At any rate, the substance of his testimony was generally not disputed by the Respondent's witnesses. In the interests of creating a complete record, and due process, I overruled the Respondent's objection to the re-taking of Barreto's testimony. See *Kentucky River Medical Center*, 340 NLRB 536, 549 fn. 21 (2003) (witnesses recalled to repeat lost portions of their testimonies) and *BI-LO*, 303 NLRB 749, 753 fn. 7 (1991), enfd. 985 F.2d 123 (4th Cir. 1992) (same).

## FINDINGS OF FACT

## I. JURISDICTION

The Respondent, a corporation, with its corporate headquarters in McLean, Virginia, and an office and place of business in San Juan, Puerto Rico, provides security guard services to the United States Government at different posts and locations in Puerto Rico. In conducting these operations during the 12 months preceding issuance of the complaint, the Respondent purchased and received at its San Juan, Puerto Rico facility goods valued in excess of \$50,000 directly from points outside the Commonwealth Puerto Rico. I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7).

The Respondent admits, and I find, that at all material times the United Government Security Officers of America, Local 72, (Local 72) and the United States Court Security Officers (USCSO) were labor organizations within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

*A. Background Facts*

The Respondent, a Virginia corporation, provides security personnel for Federal court facilities in Puerto Rico pursuant to a contract with the United States Marshals Service (Marshals Service or USMS). The duties performed by the Respondent's security officers include operating checkpoints, screening visitors, assisting court personnel and visitors, transporting inmates, and monitoring cameras and other security equipment.

Before the Respondent terminated his employment in February 2007, Marcial Rodriguez had worked as a security officer at Federal court facilities in Puerto Rico for approximately 10 years. In January 2005 he became the president of Local 72, which was, at that time, the collective-bargaining representative of the Respondent's security officers in Puerto Rico.<sup>2</sup> Prior to 2005, Rodriguez served as the organization's vice president. Local 72 and the Respondent were parties to a collective-bargaining agreement that became effective on June 13, 2003. The agreement provided that it would remain in effect until September 30, 2006, and would continue in effect thereafter unless either party gave notice of an intention to discontinue the contract in advance of the September 30 date.<sup>3</sup> In September 2006, the bargaining unit employees replaced Local 72 with a new bargaining representative—the USCSO. After the change,

<sup>2</sup> The job title for security officers in the bargaining unit is "court security officer" or "CSO." The collective-bargaining agreement defines the unit as:

All full-time and regular part-time court security officers assigned to the federal courthouses or other judicial facilities within the jurisdictional boundaries of the United States District Court for the District of Puerto Rico, employed by the Employer pursuant to its contract(s) with the Federal Government (Government) for the provision of security at said courthouses, but excluding all managers, supervisors, office and/or clerical employees temporarily assigned employees, substitute employees, lead court security officers [LCSOs], and all other non-court Security Officer employees of the Employer.

<sup>3</sup> Rodriguez gave uncontradicted testimony that the collective-bargaining agreement remained in effect subsequent to September 30, 2006.

Rodriguez continued to be active in union matters, serving on the negotiating committee for a new collective-bargaining agreement.

In late 2006 or early 2007, Rodriguez wrote a letter to the Marshals Service in which he complained about the Respondent's management in Puerto Rico. The Respondent interrogated Rodriguez about the letter, and suspended and discharged him because of it. The General Counsel alleges that Rodriguez' involvement with the letter was protected concerted and union activity, and that the Respondent acted unlawfully by interrogating and disciplining him. The Respondent contends that Rodriguez' involvement with the letter was not protected activity because the letter did not relate to an ongoing labor dispute and contained allegations that were maliciously untrue. The Respondent does not claim, and the record does not show, that Rodriguez had any performance or discipline problems unrelated to the letter.

*B. Disputes Between Local 72 and the Respondent*

Because the Respondent's defense hinges on the contention that Rodriguez' letter to the Marshals Service contained allegations that did not relate to any ongoing labor dispute and were maliciously untrue, it is necessary to survey the record evidence that relates to the existence of ongoing labor disputes and the allegations in the letter. The purpose of this is not to determine whether the management misconduct Rodriguez referred to in the Marshals Service letter actually occurred or was, in fact, a violation of law or contract, but to provide a basis for determining whether or not Rodriguez' allegations of misconduct were related to an ongoing labor dispute and where maliciously false.

The record shows that the Respondent and its employees in Puerto Rico had a variety of longstanding and habitual labor disputes. One subject that gave rise to recurring controversy was the Respondent's handling of payroll and leave matters. Security officers frequently complained to Rodriguez about this subject. Rodriguez testified that the Respondent was denying security officers their vacations without explanation. In addition, Rodriguez testified that he personally was denied leave to which he was entitled under the Family and Medical Leave Act (FMLA). Barreto, who preceded Rodriguez as the president of Local 72 and later served as a union delegate, testified that the Respondent did not post the security officers' leave balances, or report them in pay statements and that, as a result, the security officers never knew how much accrued leave they had. Beginning in 2004, Rodriguez repeatedly brought the Respondent's purported misconduct regarding payroll and leave to the attention of the Company's site supervisor, Luis Comas.<sup>4</sup> Barreto also spoke to Comas about the necessity of providing the security officers with quarterly reports of their accrued leave. Both Barreto and Rodriguez testified that the Respondent was required, under the collective-bargaining agreement, to provide employees with quarterly statements of their leave balances,

<sup>4</sup> The collective-bargaining agreement provides that the first step in the grievance process is an "informal" one of discussion between the employee and the immediate supervisor. U. Exh. 1, art. VI, sec. 3(A).

and the agreement confirms the existence of that obligation.<sup>5</sup> Comas agreed that the Respondent was required to report employees' leave balances, but testified that he "[d]idn't know what happened up there" in the Respondent's offices regarding Local 72's requests for the missing information. According to Comas, he referred Rodriguez' complaints to the Respondent's office and "figured the problem would be handled at that point." However, Rodriguez testified that the problem was not handled; rather than provide the information, the Respondent offered various reasons for failing to do so—e.g., that the Company's computers were down, or the corporate offices were moving.

On May 9, 2006, Rodriguez, in his capacity as president of Local 72, made a written information request to Comas for employees' rates of pay, changes in rates, hours worked weekly since completing probation, and dates of completion of probation. The May 9 letter stated that the information had previously been requested on June 14, 2005, and on February 28, 2006, but had not been provided to Local 72. According to Local 72's vice president, Eduardo Soto, the May 9 letter was sent because the Respondent was failing to comply with contract provisions regarding the probationary period for new employees, and because security officers were complaining about the way the Respondent was applying pay differentials. As with all letters that Rodriguez or Soto sent on behalf of Local 72, this one was reviewed by both Rodriguez and Soto.<sup>6</sup>

In December 2006, the Respondent made unexpected deductions from the pay of security officers. A number of the security officers complained to Barreto that money had been taken from them without explanation. Barreto discussed this problem with Rodriguez and Soto. Eventually, Barreto confronted Comas about the deductions and Comas stated that an audit of the Respondent's payroll office determined that security officers had been overpaid and that the Respondent was remedying the mistake by deducting the past overpayments from security officers' current pay. In a letter to the Respondent's payroll office, Soto sought further explanation of the deductions, but he did not receive a response.

There were also controversies between the Respondent and Local 72 over the firings of a number of security officers. The facts regarding these discharges are not well developed, but the record does reveal the following. In 2004 or 2005, Local 72 filed an unfair labor practices charge regarding the firing of Juan Salgado, a bargaining unit employee. The Respondent apparently took the position that Salgado was lawfully discharged for distributing business cards on which he improperly identified himself as a "U.S. Marshal." Both Rodriguez and Soto disputed this claim of wrongdoing, and Soto testified that the business cards identified Salgado as a "Special Deputy Marshal," something that Soto said was an accurate designation under regulations. During his testimony, Barreto identified a number of other employees who used business cards, but were

not union delegates, and were not terminated. He did not describe how those individuals identified themselves on their business cards.

At the time that Rodriguez' letter was drafted and sent to the Marshals Service, a charge was pending regarding the Respondent's 2006 termination of a union delegate named Jose Padilla.<sup>7</sup> Rodriguez discussed Padilla's firing with Comas, and Comas forwarded Rodriguez' comments about the matter to the Respondent's headquarters. The Respondent apparently took the position that Padilla was terminated for using a cell phone at work. Barreto testified that other individuals, who were not union officials, used their cell phones at work and were not terminated. Barreto also testified that a hearing date regarding Padilla's case was approaching.

There was also testimony that a union officer named Marisol Rosario was terminated in about late 2005. The testimony of Barreto indicated that the circumstances leading to the termination had to do with Rosario's claim that she had been sexually harassed by Comas. According to Barreto, the matter went to "court," and the result was a settlement under which Rosario "was granted some money and asked to quit."

In 2006, Local 72 filed an unfair labor practice charge alleging that the Respondent had unlawfully refused to provide it with information regarding disciplinary actions, payroll/leave matters, health and welfare payments, seniority, and other subjects.<sup>8</sup> On July 27, 2006, Local 72 and the Respondent reached an agreement to settle that charge. Before the charge was closed, however, Local 72 complained to the Board that the Respondent was failing to comply with settlement terms regarding the provision of certain information and the posting of notice. Barreto testified, without contradiction, that the Respondent had not provided the Union with the information sought. On April 12, 2007, the Regional Director for Region 24 of the Board closed the case, stating that further proceedings were not warranted because the Respondent had provided "a point of contact to coordinate a date for the Union to review the requested information and clarify any existing doubts regarding data previously provided" and because there had "been substantial compliance" with the notice posting requirement.

<sup>7</sup> Rodriguez testified that an unfair labor practice charge was filed regarding Padilla's termination. Soto stated that Padilla's termination was the subject of a pending arbitration proceeding. The brief of counsel for the General Counsel states that an unfair labor practices charge regarding the discharge of Jose Padilla had been deferred to arbitration and was pending at the time of the hearing.

<sup>8</sup> The amended charge in that case, which Rodriguez signed on behalf of Local 72, stated that the information the Respondent failed to provide about bargaining unit employees included: number of hours worked weekly; employment status; date of completion of probation; time and attendance records; payroll records; weekly work schedules; comp time payments; annual leave records; sick leave records, and quarterly reports of sick, and annual leave balances; name, address, duty station, date of hire, rate of pay of employees; name, address, date of termination, and reasons for termination of all discharged employees; disciplinary information and reasons for discipline of employees Jose Padilla and Alfredo Velez; seniority list for the years 2004 to 2006; and health and welfare payments made to employees from January 2005 forward. GC Exh. 8-B.

<sup>5</sup> The collective-bargaining agreement states: "The Company shall provide to each Employee a statement of accrued vacation and sick leave . . . each quarter." U. Exh. 1, p. MVM 0168, art. XII, sec. 4.

<sup>6</sup> Rodriguez also reviewed correspondence that Local 72 received at a post office box.

In addition to disputing management's actions in the ways discussed above, Rodriguez delivered a letter to Dario Marquez, the Respondent's president and CEO, in which Local 72 accused Comas and the Respondent's management in Puerto Rico of improper activities. More specifically, the letter complains that management had, inter alia, been: denying security officers overtime pay and encouraging them to accept compensatory time instead; failing to give security officers a health and welfare pay increase that was due; denying security officers rest periods; denying security officers vacation time that was due; failing to inform employees of their sick leave balances and denying them sick leave; failing to update the employee seniority list; violating the seniority clause of the collective-bargaining agreement; giving newly hired personnel preference regarding shift and duty locations;<sup>9</sup> and retaliating against security officers who asserted their rights. (U. Exh. 2.) The letter was dated January 31, 2006, and was signed by Rodriguez, Soto, and Padilla. The record does not reveal whether Local 72 received a response from Marquez, or anyone else affiliated with the Respondent.

A final management action that Rodriguez disputed concerned the automatic deduction of union dues from employee's paychecks after Local 72 ceased to represent the bargaining unit. During the period when Local 72 was representing the unit, a number of bargaining unit employees signed dues-checkoff cards authorizing such deductions, as provided for by the collective-bargaining agreement. (See U. Exh. 1, art. XVI, sec. 5.) In September 2006, the bargaining unit employees elected to replace Local 72 with another labor organization, the USCSO. In a memorandum, dated January 23, 2007, from Rodriguez to Comas, Rodriguez argued that the Respondent could not rely on the Local 72 dues-checkoff cards to justify deducting dues for the USCSO. The memorandum also asked the Respondent to provide employees with copies of the collective-bargaining agreement that the Respondent was negotiating with the USCSO so that employees could "vote intelligently to accept or not to accept" it. Rodriguez gave this memorandum to Comas.

At trial, Rodriguez stated that the Respondent was also violating the Marshals Service contract by failing to fill vacancies and by hiring individuals who were not fluent in English. Regarding the duty to fill vacancies, the collective-bargaining agreement states that the Respondent "is obligated under its contract with the USMS to fill a designated number of shared positions in order provide full staffing level coverage, increase security levels as needed and avoid unnecessary overtime." (U. Exh. 1, art. V, sec. 2.)<sup>10</sup> Rodriguez testified that the Respondent, nevertheless, failed to fill vacancies and forced security officers to work large amounts of overtime—sometimes consecutive double and triple shifts. Regarding the purported violation of an English proficiency rule, Rodriguez testified, without contradiction, that such a rule was set forth in the Marshals

Service contract and that the Respondent had hired a security officer named Epifanio Fernandez who needed to use an interpreter when interviewing for the position. The testimony at trial also established that the Marshals Service contract incorporated the terms of the collective-bargaining agreement in whole, or in part,

*C. Letter to Marshals Service*

In December 2006 or January 2007, Rodriguez, frustrated with the responses that employees had received when they raised their concerns with the Respondent, drafted the letter to the Marshals Service. In the letter, Rodriguez complains about various actions by the Respondent's management. The letter—which I set forth without attempting to correct or individually identify errors in grammar, style, and spelling—reads as follows:

Mr. Marcial Rodriguez  
[Address]

U.S. Marshals Service  
Judicial Security Contracts  
[Address]

Attention contracting officer:

One of the major responsibilities of the United States Marshals Service (USMS) is to ensure the safety of all Federal Courts and Court employees against unauthorized, illegal and potentially life threatening activities for more than a decade. The USMS has sought the services of the private sector to provide highly qualified individuals are traditional known as Court Security Officers (CSO) the description (above) is exactly what M.V.M., Inc., obtained/found when they took over the contract in Puerto Rico. As the years went by M.V.M., Inc. started to violate not only the contract with the USMS MS-03-D-0001, but also the Court Security Officers Collective Bargaining Agreement whom proudly negotiated at the bargaining table. The Court Security Officers in Puerto Rico are highly Skill, professional and take pride protecting the Federal Enclave in Puerto Rico.

We have filed complaint after complaint with the United States National Labor relations Board an agency of the United States Government and yet M.V.M. Inc. keeps violating the labor laws and our rights with impunity.

Federal Law give us the right to form, Join or assist a Union, choose representation to bargain on our behalve, act together with others employees lawfully for better benefits and protection. It appears that M.V.M., Inc. forgot that Puerto Rico is part of the United States, protected by the constitution, Federal Law and Local Law. The contractor (MVM) through their managers in Puerto Rico and Virginia have done exactly that, an employee who dares complaint will be Harrass, threaten with progressive discipline. The Union Officers representing its members are constantly receiving threats of being fired.

We believe that the United States Marshall Service, Judiciary Security Contract Division should investigate M.V.M. per-

<sup>9</sup> Previously, in a November 4, 2004 memorandum to Comas, Rodriguez had complained that the Respondent was violating the seniority provision in the collective-bargaining agreement.

<sup>10</sup> The Respondent's contract with the Marshals Service was not produced at trial by any party.

formance in Puerto Rico before allowing them to bid for further contracts. They conducted self serving investigations and did nothing to eliminate and correct the wrong doings of its staff.

The Court Security Officers in Puerto Rico are protecting the greatest institution in the United States and we are seeking the same protection. "Is that too much to ask?"

Rodriguez signed the letter and gave it to Soto, who also signed it. Either Rodriguez or Soto gave the letter to Barreto. Barreto took the letter home with the understanding that he was "supposed to mail it." Rather than mail the letter immediately, Barreto read it over a number of times and waited for approximately 1 week. At some point, Barreto "whited out" his name and Soto's name from the signature block, so that only Rodriguez' name remained. After doing this, Barreto mailed the letter to Manuel Varela,<sup>11</sup> the Government official responsible for overseeing the Marshals Service contract. Barreto testified that he removed his and Soto's names from the letter because he feared retaliation by the Respondent in light of what he characterized as the prior retaliation against Rodriguez, Padilla, Rosario, and Salgado. According to Barreto, he left Rodriguez' name on the letter to the Marshals Service because "somebody" had to sign it and Rodriguez was Local 72's president. Before mailing the letter, Barreto did not warn Rodriguez that he was removing the other names from the signature block.

The record does not establish the exact dates when Barreto took possession of and mailed the letter, but it is clear that these events happened sometime between December 2006 and February 5, 2007. It is also not clear when Varela received the letter, although it must have been no later than February 5, because that was the date when Varela provided a copy to Comas.

*D. Respondent Prohibits Security Officers from Contacting Marshals Service Directly About Personnel Matters*

In January 2007, Varela told Comas that security officers were "running" to Marshals Service officials to discuss "corporate employee matters" and that "he wanted it stopped." Comas told James Dolan (the Respondent's project manager) what Varela had said. Dolan, in a January 23, 2007 letter addressed to "all Court Security Officers," stated as follows:

It has come to my attention that several employees have been going to the employees of the United States Marshal Service to intervene in MVM INC personnel matters. This is in direct violation of both MVM INC and United States Marshal Service policy. As contract employees we are prohibited from engaging the Marshal Service in MVM personnel matters. We remain employees of MVM INC and any employee having an issue is to discuss the issue with their immediate supervisor. If a resolution cannot be achieved the employee should file a grievance. I assure you that as your Project Manager I am your advocate and will resolve any issues as defined by policy.

<sup>11</sup> This individual's last name is sometimes spelled "Barela" in the record. He is also referred to as the "COTR"—an acronym for "Contracting Officer's Technical Representative."

In closing I would state that employees that violate this policy will be subject to disciplinary action.

The record indicates that Rodriguez received a copy of this letter on January 25. It is not clear whether Rodriguez received Dolan's letter before Rodriguez' letter to the Marshals Service was drafted and mailed.<sup>12</sup>

Neither Dolan's letter, nor the Respondent's brief, identify the specific policy provisions that Dolan was claiming prohibited security officers from contacting the Marshals Service about personnel matters. At trial, the Respondent submitted a copy of the Marshals Service performance standards for security officers, and I have reviewed that document. It identifies 39 types of misconduct. Those performance standards do not make any reference to employees contacting the Marshals Service about personnel matters, or any other subject. There is one provision which states that security officers should:

Not disclose any official information, except to the COTR,<sup>13</sup> or other officials having a need to know, or make any news or press releases. Press inquiries must be brought to the attention of the COTR. This does not prohibit protected whistle blowing activities or protected union activities.

(MVM Exh. 6, sec. C-13, par. (c)(13).) Another provision directs security officers to "[r]efrain from discussions concerning duty assignment, particularly manpower, weapons, security precautions, or procedures, except with those persons having a need to know." *Id.* at section C-13, paragraph (c)(14). The Respondent also submitted a company document titled "Standards of Conduct" that it distributed to security officers. That document identifies 28 types of conduct that are "inappropriate." It makes no mention of a prohibition on employees contacting the Marshals Service about personnel matters or any other subject. The document does, however, state that it is inappropriate to "Communicat[e] orders or information to any person not authorized to receive them." (MVM Exh. 4.)

*E. Respondent Suspends and Interviews Rodriguez*

As stated above, on February 5, Varela provided Comas with a copy of the letter, signed by Rodriguez, that the Marshals Service received. That same day, Dolan brought the letter to the attention of Dina Evans, a human resources manager based at the Respondent's corporate offices in Virginia. It was not apparent from the copy of the letter that was seen by Comas, Dolan, and Evans, that the names of employees other than Rodriguez had initially appeared in the signature block. Evans examined Rodriguez' letter and also Dolan's January 23 letter prohibiting security officers from contacting the Marshals Service. Then, on February 6, Evans instructed Comas to suspend Rodriguez.

<sup>12</sup> The record does not establish whether it was after January 25, when Rodriguez transmitted the letter to Soto and/or Barreto. Moreover, although the record evidence shows that Varela gave the letter to Comas on February 5, it does not show how much earlier Varela received the letter.

<sup>13</sup> COTR is an acronym for the "contracting officer's technical representative." In this case, the COTR was Varela.

When Rodriguez appeared for work on February 6, Comas informed him that he was suspended. Rodriguez asked Comas to give him something in writing, and Comas produced a memorandum that stated, “CSO Marcial Rodriguez, this is to inform you that you are suspended indefinite pending an investigation and disposition to be determined at corporate office.” Before Rodriguez left that day, he was required to surrender his pistol, uniforms, and identification cards. As Rodriguez was leaving the work location, Carlos Borges, a lead security officer, asked Rodriguez whether he had written the letter, and Rodriguez said that he had. Borges asked, “[H]ow come?” and Rodriguez responded that “MVM failed to comply.”

A memorandum, dated February 12, from Dolan to Rodriguez, stated that Rodriguez was suspended effective February 6. The memorandum stated that shortly after receiving Dolan’s January 23 directive regarding contacts with the Marshals Service Rodriguez had violated that directive and the Respondent’s standards of conduct by sending a letter to the Marshals Service. The February 12 suspension memorandum did not state that there were any defamatory/slanderous statements in Rodriguez’ letter to the Marshals Service.

In a letter dated February 9, Soto, vice president of Local 72, asked the Respondent to revoke “the suspension and termination action” against Rodriguez, and immediately reinstate him. On February 14, Rodriguez and his attorney, Harold Hopkins, met with officials of the Respondent regarding the suspension and investigation. Evans was not physically present at the meeting, but participated by telephone. At the outset of the meeting, Evans barred Hopkins from further participation, stating that Rodriguez did not have the right to have counsel present since the meeting was part of an internal investigation. At that point, Rodriguez and Hopkins asked to reschedule the meeting so that arrangements could be made to have a union representative accompany Rodriguez. The meeting ended. In a February 22 letter to Rodriguez, Evans stated that the Respondent needed to interview Rodriguez as part of the investigation into whether he had violated Marshals Service directives and written instructions from Dolan by writing a letter to the Marshals Service about personnel issues. Evans told Rodriguez that if he did not report for the interview the Respondent would “adjudicate the matter” without his “input.”

On February 27, Rodriguez met again with the Respondent’s officials. This time Rodriguez was accompanied at the meeting by Yolanda Alvarez, another security officer, rather than by Attorney Hopkins, although Hopkins was waiting outside the meeting room. Once again, Evans conducted the meeting by telephone. Present in person for the Respondent were Comas, an administrative assistant named Dorcas Parilla, and a quality control manager named Edwin Burgos. Comas presented Rodriguez with a copy of the letter to the Marshals Service. Unlike the version of the letter that had been entrusted to Barreto, the one shown to Rodriguez on February 27, did not also include the names of Soto and Barreto in the signature area. In addition, the print on the copy of the letter that was shown to Rodriguez on February 27, was somewhat smaller than on the original—a result of a facsimile and/or reproduction process that occurred after the letter left Rodriguez’ possession. (Compare GC Exh. 4 and MVM Exh. 1.) The Respondent also presented

Rodriguez with a copy of Dolan’s January 23 letter prohibiting direct communications with the Marshals Service. Evans asked Rodriguez whether he had previously received the letter from Dolan. Rodriguez responded that he did not recall. Evans asked Comas whether he had given Rodriguez a copy of Dolan’s letter. Comas stated that he had done so on January 25, but that Rodriguez had refused to sign an acknowledgement of receipt. One of the Respondent’s officials asked Rodriguez whether he had seen the letter to the Marshals Service. Rodriguez said that he did not recall and asked to talk to his attorney. Evans denied Rodriguez’ request to consult his attorney. At that point, Rodriguez refused to answer any further questions and left the meeting. Rodriguez testified that he believed it was important to consult his attorney because the letter he was being shown was “90 percent” the same format as—in other words, not identical to—the one he was familiar with.

#### *F. Respondent Terminates Rodriguez*

The Respondent terminated Rodriguez’ employment effective February 27—the same day that Evans interviewed him. Evans was the official who made the decision to terminate Rodriguez. She informed Rodriguez of his termination in a letter dated March 1. Regarding the reasons for the termination, Evans’ letter states:

This action is predicated on your continued violation of MVM and USMS policies, procedures, rules, regulations or contract requirements. By communicating directly with the USMS you not only violated the USMS directive but also MVM’s Standards of Conduct. Additionally on February 27, 2007 you refused to answer questions related to an internal investigation conducted by the Human Resources Manager.

In the termination letter, Evans does not discuss the substance of the allegations in the letter that Rodriguez drafted to the Marshals Service, or claim that any of those allegations were false. She asserts that Rodriguez has “continued” to violate “MVM and USMS policies, procedures, rules, regulations or contract requirements,” but does not specifically identify any provision.

The change of employment status form completed by the Respondent regarding Rodriguez’ termination states:

On February 27, 2007, CSO Marcial Rodriguez was present during a phone interview with Ms. Evans in reference to an internal investigation regarding his disparaging memo to the USMS Contracting Officer. . . . Marcial Rodriguez refused to answer questions related to the investigation. Mr. Rodriguez knew communicating with the USMS directly was a violation of USMS directive. This directive had been communicated to him numerous times. Mr. Rodriguez terminated from employment on this date.

As with the termination letter, this form does not state that any of the allegations in Rodriguez’ letter to the Marshals Service were false.

At trial, Evans gave a different explanation for terminating Rodriguez than the one set forth in the termination letter and the termination form. She testified that Rodriguez was terminated because the comments in the letter to the Marshals Ser-

vice “were deemed to be defamatory, and not proven.” She pointed to a number of statements in the letter that she said were false. Evans stated that Rodriguez’ refusal to answer questions during the meeting of February 27, was a “very small factor” in his discharge and was mentioned in the termination letter to make the point that the Respondent had offered him opportunities to answer questions related to the investigation. Evans testified that the evidence she considered in making her decision included: the letter that Rodriguez wrote to the Marshals Service; the January 23 letter from Dolan to security officers; a signed statement from Borges in which he reported that Rodriguez had admitted to writing the letter to the Marshals Service; and Comas’ and Parilla’s notes regarding the February 27 meeting. Evans also compared Rodriguez’ signature on other documents with the signature on the letter to the Marshals Service, and concluded that Rodriguez had signed the letter.

While Evans pointed to evidence that supported her conclusion that Rodriguez had written the letter to the Marshals Service, she did not identify any evidence to support her conclusion that allegations in that letter were false. The record does not show that, prior to terminating Rodriguez, Evans, or the Respondent completed any investigation into the truth or falsity of the allegations in the letter to the Marshals Service. When asked by the Respondent’s counsel to testify about what was false in the letter, Evans identified four subjects. First, she noted that the letter stated that the Respondent violated the Government contract with the Marshals Service. Regarding her basis for concluding that this was false, she stated: “I believe that was inaccurate.” Second, she testified that the letter falsely alleged that the Respondent was violating the collective-bargaining agreement. As to why she concluded that allegation was false, Evans stated: “I had no information with regards to our violating the collective-argaining agreement.” Third, she cited language in the letter alleging that the Respondent was violating labor laws, including the National Labor Relations Act. To explain why she concluded that this was false, Evans stated: “I have no information that would lead me to believe that that information was true.” The fourth, and last, “falsehood” that Evans says she found in the letter was the statement that the Respondent’s managers were harassing and threatening employees who made lawful complaints. Regarding her basis for concluding this was false, Evans stated only: “I have no information to support that allegation.”

While, as recounted above, Evans repeatedly testified that she had no information showing that the statements she claimed were falsehoods were *true*, her testimony indicates that she also had no information showing that those statements were *false*. Indeed, on cross-examination, Evans conceded that at the time she decided to terminate Rodriguez she had *no information* about violations of the Government contract, the collective-bargaining agreement, labor law, or about company officials harassing/terminating employees who complained. Although Evans testified that she now knows there were one or more union grievances pending when she terminated Rodriguez, she admitted that she was unaware of those grievances at the time she terminated Rodriguez. She stated that she was not involved with handling employee grievances that had not progressed beyond the informal step and the first written step. When Ev-

ans terminated Rodriguez, she also did not know that there were two or more open unfair labor practices charges that had been filed by employees in Puerto Rico against the Respondent. She explained that “deal[ing] with” such charges was not part of her job, but rather was handled by the Respondent’s general counsel. She did not claim to have interviewed the Respondent’s general counsel about pending unfair labor practices charges before terminating Rodriguez.<sup>14</sup> Evans also had no knowledge of the allegations in Local 72’s January 31, 2006, letter to the Respondent’s CEO, Marquez, or in Local 72’s May 9, 2006 letter to Comas complaining that prior information requests had not been complied with. Similarly, Comas disavowed knowledge of outstanding labor disputes, stating that whenever he received anything “that has to do with labor related problems,” he forwarded them to Evans or the Respondent’s legal staff without even opening them.

#### *G. Disciplinary Procedures Under the Collective-Bargaining Agreement*

The section of the collective-bargaining agreement that deals with disciplinary practices states that employees may be terminated either by determination of the U.S. Government, or by the Respondent. (U. Exh. 1, art. VII.) That section states that “progressive discipline generally shall be applied,” but that “offenses may occur for which progress [sic] discipline is not applicable.” The three examples that the contract provides of offenses for which progressive discipline is not applicable are fraud, gross misconduct, and theft. All discipline is subject to the grievance and arbitration procedures, except for discipline issued by the U.S. Government pursuant to its rights under the Marshals Service contract with the Respondent. The collective-bargaining agreement also states that security officers are required to comply with the performance standards set forth in the Marshals Service contract. The testimony indicated that some, or all, of the employment terms set forth in the collective-bargaining agreement are incorporated by the Marshals Service contract.

#### *H. Complaint Allegations*

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminating against Marcial Rodriguez because of his union and concerted activity: on about February 6, 2007, when it suspended him; on about March 1, 2007, when it discharged him; and since the discharge by failing and refusing to reinstate him.<sup>15</sup> The complaint also alleges that the Respondent unlawfully interfered with employees in violation of Section 8(a)(1) on about February 27, 2007, when it interrogated Rodriguez about his union and/or concerted activities.

<sup>14</sup> In one, somewhat obscure, portion of her testimony, Evans did, however, state, “It was my understanding from the people that I spoke to that there was nothing outstanding.”

<sup>15</sup> In the portion of its brief setting forth the violations it is seeking to prove, the General Counsel does not include the claim that the Respondent violated the Act by failing to reinstate Rodriguez. I conclude that the General Counsel is pressing the allegations that Rodriguez was unlawfully interrogated, suspended, and terminated, but has abandoned the allegation that Rodriguez was unlawfully refused reinstatement.

## Analysis and Discussion

## I. WAS RODRIGUEZ' CONDUCT PROTECTED?

The protection afforded to employees by the mutual aid and protection clause of Section 7 of the Act extends to employee efforts to improve their terms and conditions of employment, or their "lot as employees," through channels outside the immediate employee-employer relationship. *Eastex v. NLRB*, 437 U.S. 556, 565 (1978); *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007). The third parties to whom employees have a protected right to raise concerns about terms and conditions of employment include the employer's clients. *Handicabs, Inc.*, 318 NLRB 890 (1995), *enfd.* 95 F.3d 681 (8th Cir. 1996), *cert. denied* 521 U.S. 1118 (1997). Such communications are protected even if they will negatively impact on the employer's business. *Tradesman International, Inc.*, 332 NLRB 1158, 1160 (2000), *enf. denied* on other grounds 275 F.3d 1137 (D.C. Cir. 2002); *Sacramento Union*, 291 NLRB 540, 546 (1988), *enf. sub nom. Sierra Publishing Co.*, 889 F.2d (9th Cir. 1989). An employee's "right to appeal to the public is not dependent on the sensitivity of the [employer] to his choice of forum." *Allied Aviation Service*, 248 NLRB 229, 231 (1980), *enf. mem.* 636 F.2d 1210 (3d Cir. 1980).

In the instant case, Rodriguez' letter seeks the assistance of the Marshals Service to improve the Respondent's treatment of employees. According to Rodriguez' letter, the Respondent had been violating labor law, the terms of the collective-bargaining agreement and the terms of the contract between the Respondent and the Marshals Service. He references employees' rights, under Federal law, to engage in union activity and "act together . . . lawfully for better benefits and protections," and complains that the Respondent has been acting as if it "forgot" that these rights apply to its employees. Rodriguez states that the employees filed "complaint after complaint" but that the Respondent continued to violate employee rights and retaliate against employees who complained. In the letter, Rodriguez requests "protection" and asks the Marshals Service to assist the security officers by investigating the matter since the Respondent had done "nothing to eliminate and correct the wrong doings of its staff." Rodriguez' letter to the Marshals Service letter clearly falls within the generally protected category of employee communications that are made to a client of the employer for the purpose of improving the "lot" of employees.

Not all employee complaints to third-parties, however, are protected. Employee conduct that disparages an employer's product, rather than publicizes a labor dispute, is not protected. *NLRB v. Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953); accord: *Five Star Transportation, Inc.*, 349 NLRB 42, 48 (2007), *enf. d.* 522 F.3d 46 (1st Cir. 2008). The Board is careful, however, to "distinguish between disparagement of an employer's product and the airing of what may be highly sensitive issues." *Professional Porter & Window Cleaning Co.*, 263 NLRB 136, 139 (1983), *aff. mem.* 742 F.2d 1438 (2d Cir. 1983). The Respondent contends that Rodriguez' letter falls into the category of conduct that is unprotected because it disparages the Company's services and does not relate to an ongoing labor dispute. This contention is contrary to the record

evidence. Rodriguez' letter criticizes the Respondent's treatment of security officers, not the quality of the security services the Respondent is providing, or the safety of the facilities it has contracted to protect. The general allegations stated in the letter are part of, and relate to, a number of longstanding labor disputes between the Respondent and security officers.<sup>16</sup> Those labor disputes include controversies over the Respondent's alleged: failure to post leave balances and grant legitimate leave requests; improper assignment of overtime shifts and attempt to avoid overtime payments for such shifts; unauthorized deduction from security officers' pay of purported overpayments and union dues; failure to provide health and welfare pay increases that were due; violation of the seniority provision in the collective-bargaining agreement; and improper discipline and discharge of a number of security officers. The Respondent's employees created "labor disputes," as defined by the Act, when they brought these issues to the attention of company officials, including the site supervisor (Comas) and the Company's CEO (Marquez).<sup>17</sup> In addition, Local 72 and/or security officers created labor disputes by filing multiple unfair labor practices charges against the Respondent. At least two of those charges were open at the time of Rodriguez' letter to the Marshals Service. One was a charge regarding the Respondent's firing of Jose Padilla, a union delegate. The other was a charge involving the Respondent's response to Local 72's information requests. That charge sought information regarding the Respondent's handling of payroll, leave, overtime, a health and welfare pay increase, seniority, and the discipline and discharge of security officers—all of which were subjects of labor disputes discussed above.

I do not believe that anything in Rodriguez' letter, including the sentence that alleges violations of the Marshals Service contract, disparages the services provided by the Respondent. In this connection, it is important to remember that the Marshals Service contract has provisions that concern the terms and conditions of security officers. It incorporates some, or all, of the employment terms in the collective-bargaining agreement, and also requires the Respondent to fill vacancies in order to avoid assigning unnecessary overtime to security officers. The Board evaluates the question of whether a written statement relates to an ongoing labor dispute about terms and conditions

<sup>16</sup> The letter to the Marshals Service does not repeat the specific allegations made by Local 72 or employees in those labor disputes, but such repetition is not necessary. As the Board has stated, the "touchstone [is] not whether the communication constitute[s] a virtual carbon copy of the specific arguments raised with the respondent, but [is], rather, whether the communication was a part of and related to the ongoing labor dispute." *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 231 (1980), *enf. mem.* 636 F.2d 1210 (3d Cir. 1980) (emphasis in original).

<sup>17</sup> The Act defines "labor dispute" very broadly to include "any controversy concerning terms, tenure, or conditions of employment." Sec. 2(9) (emphasis added). Thus the labor disputes at issue here include not only those controversies raised through formal grievances or charges to the Board, but also those raised by the oral and written statements made by Local 72 and individual employees to officials of the Respondent. See *Emarco, Inc.*, 284 NLRB 832, 833 (1987) (the definition of "labor dispute" encompasses employees' individual complaints to employer).

of employment by considering that communication in its entirety and in context. *Five Star Transportation, Inc.*, supra at 45. When considered in its entirety, and in the context of the record as a whole, it is clear that Rodriguez' letter is an attempt to improve the lot of employees, not harm the Respondent. Allegations of violations of the Marshals Service contract, when read in context, are a criticism of the Respondent's treatment of security officers, not of the Respondent's product. At any rate, the Board recently noted that even if a communication to third parties contains some criticism of the services provided by the employer, that communication retains its protected status if the criticism is "closely tied" to the employees' working conditions and the intention was to force the employer to take heed of employees' complaints about terms and conditions of employment. *Valley Hospital Medical Center*, supra, slip op. at 4 and 3 fn.7. Any criticism of the Respondent's services that one might argue exists in the letter is closely tied to working conditions and intended only to force the Respondent to take complaints about employees' terms of employment seriously. *Id.*

The Respondent also raises the defense that Rodriguez' conduct lost the protection of the Act because the letter to the Marshals Service contained statements that were maliciously untrue. In *Valley Hospital Medical Center*, the Board discussed the standards that govern consideration of such a defense. The Board stated:

Statements are also unprotected if they are maliciously untrue, i.e., if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity. . . . The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue. . . . Where an employee relays in good faith what he or she has been told by another employee, reasonably believing the report to be true, the fact that the report may have been inaccurate does not remove the relayed remark from the protection of the Act. . . . In addition, in the context of an identified, emotional labor dispute, the fact that an employee's statements are hyperbolic or reflect bias does not render such statements unprotected.

*Id.*, slip op. at 3–4 (internal citations to authority omitted); see also *El Mundo Broadcasting Corp.*, 108 NLRB 1270, 1278–1279 (1954) (Board holds that inaccurate and defamatory statements uttered in the course of otherwise protected activity cause that activity to forfeit the protection of the Act only if the remarks are "deliberately or maliciously false.").

The Respondent bears the burden of proof on the question of whether the employee's statements are maliciously untrue. *Diamond Walnut Growers*, 316 NLRB 36 (1995) (citing *Springfield Library & Museum*, 238 NLRB 1673 (1979)), *enfd.* in part, *revd.* in part 113 F.3d 1259 (D.C. Cir. 1997), *cert. denied* 523 U.S. 1020 (1998); see also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990) (in action for defamation, burden of proof on issue of truth or falsity of statement is on the part alleging falsity). On the record of the instant case, I conclude that the Respondent has not even succeeded in showing that the allegations in the letter to the Marshals Service were untrue,

much less carried its burden of proving that those allegations were *maliciously* untrue. The only testimony that the Respondent presented that went to the supposed falsity of those allegations was that of Evans—the human resources manager who made the decision to terminate Rodriguez. However, when asked to explain why she concluded that the allegations made to the Marshals Service were false, she answered that she had no information on the subject or no information that the allegations were *true*. She did not identify any evidence showing those allegations to be *false*. Moreover, Evans did not claim that she performed an investigation into the truth or falsity of what was alleged in the letter. Indeed, she conceded that when she reached her conclusion that those allegations were false she had not even looked into the matter far enough to discover that there were open unfair labor practices charges and grievances filed by the security officers in Puerto Rico. Nor was she aware of the January 2006 letter to Marquez in which Local 72 enumerated many of the specific violations that security officers alleged were being committed by the Respondent's operation in Puerto Rico. This is not surprising since the record shows that during the period leading up to Rodriguez' discharge, Evans was concerned with, and investigated, whether Rodriguez had directly communicated with the Marshals Service, not whether the allegations in the letter were true or false. The Respondent's subsequent focus in this litigation on the supposed falsehoods in the letter to the Marshals Service is, the record suggests, an after-the-fact rationalization contrived because the relevant case law disallows the Respondent's real reason for discharging Rodriguez—i.e., that he had directly communicated with the Marshals Service about the lot of security officers. The Board has held that employees engaged in protected activity "do not lose the protection of the Act simply because their activity contravenes any employer's rules or policies." *Valley Hospital Medical Center*, above, slip op. at 5. "[A]n employer may not interfere with an employee's right to engage in Section 7 activity by requiring that the employee take all work-related concerns through a specific internal process." *Id.*

Assuming for purposes of argument that Rodriguez' letter contained false allegations, the Respondent has still failed to meet its burden of showing that those statements were maliciously false or made with reckless disregard for the truth. The Respondent presented no evidence that Rodriguez had a malicious intent. Rather, the evidence showed that Rodriguez' purpose was to pressure the Respondent to heed what he believed were legitimate employee complaints that had been ignored or brushed aside. I also conclude that Rodriguez did not make the allegations in the letter with reckless disregard for their truth. Reckless disregard for the truth of a statement is defined as a "high degree of awareness of probable falsity." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); see also *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 fn. 30 (1984) (The party asserting actual malice is required "to demonstrate with clear and convincing evidence that the [accused party] realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement."). Untrue employee statements are protected whether or not the employees are reasonable or correct in their good-faith belief that what they are

saying is true. *Titanium Metals Corp.*, 340 NLRB 766, 772 (2003), citing *Fredericksburg Glass & Mirror*, 323 NLRB 165 (1997).

On the record of this case, the Respondent has not shown that Rodriguez had a high degree of awareness—or any awareness—that allegations in the letter to the Marshals Service were probably false. To the contrary, the evidence showed that Rodriguez and other officials of Local 72 had received reports from security officers that the Respondent was denying them leave and vacations, failing to post leave balances that were required under the collective-bargaining agreement, and making unauthorized deductions from employee pay. It is not reckless for an employee to rely on reports from other employees even if that employee did not investigate the truth of the reports and they turn out to be untrue. *HCA/Portsmouth Regional Medical Center*, 316 NLRB 919 fn. 4 (1995); *KBO, Inc.*, 315 NLRB 570, 571 fn. 6 (1994); see also *Valley Hospital Medical Center*, 351 NLRB No. 88, slip op. at 4 and 12. (“Where an employee relays in good faith what he or she has been told by another employee, reasonably believing the report to be true, the fact that the report may have been inaccurate does not remove the relayed remark from the protection of the Act.”) Moreover, Rodriguez testified that he himself had been denied leave to which he was entitled under the FMLA, a claim that was not rebutted by the Respondent’s witnesses. Also unrebutted by the Respondent’s witnesses was Rodriguez’ testimony that he himself witnessed the Respondent violating the Marshals Service contract by hiring security officers who were not fluent in English and by failing to fill vacancies. Regarding Rodriguez’ allegation that the Respondent was violating the collective-bargaining agreement by failing to provide employees with leave balance statements, even Comas conceded that the Respondent was required to provide the information and stated that he did not know “what happened” to the security officers’ requests for such statements.

Rodriguez and/or Local 72 filed multiple unfair labor practices charges alleging that the Respondent had discharged union officials for discriminatory or otherwise improper reasons, and at least one of those charges was pending at the time of the letter to the Marshals Service. The pending charge concerned the Respondent’s discharge of a union official, purportedly for using a cell phone while on duty. Moreover, there was testimony that other security officers who were not union officials had used their cell phones and not been discharged. Another union official apparently lost her job with the Respondent after she complained of sexual harassment. In a third case, a member of the bargaining unit was terminated, purportedly for using a business card that misrepresented his position with the Respondent. There was unrebutted testimony, however, that the business card had accurately identified the individual’s position. The record evidence regarding these charges, while not establishing whether the charges were true, supports the conclusion that Rodriguez’ allegation about retaliation was not made recklessly or with a “high degree of awareness of probable falsity.” *St. Amant v. Thompson*, supra; see also *Delta Health Center, Inc.*, 310 NLRB 26, 36 (1993), enf. 5 F.3d 1494 (5th Cir. 1993) (even if an employee’s perceptions about

working conditions turns out to be incorrect, action based on those perceptions is not removed from protection of the Act).

In addition, the record also shows that a charge signed by Rodriguez in July 2006—and still open at the time of the Marshals Service letter—sought information regarding the Respondent’s handling of annual leave, sick leave, payroll, time and attendance, seniority, health and welfare pay, discipline, and terminations. That information is facially relevant to labor disputes encompassed by the allegations in the letter to the Marshals Service. Barreto testified, without contradiction, that information the Respondent had agreed to provide to resolve the charge had not been turned over as of the time of Rodriguez’ letter. The fact that Rodriguez and Local 72 were seeking this information supports the view that Rodriguez was attempting to gather information that would allow him to further assess the accuracy of the employee complaints and other information he already possessed.

Moreover, it is reasonable under the circumstances here to infer that when Rodriguez drafted the letter he was aware, at least in general, background, terms not only of unit member complaints that he personally received or acted on, but also of the other information that Local 72 received during the years when Rodriguez was a union official. The record shows that in his capacity as the president of Local 72 Rodriguez consulted with other union officials regarding employee complaints, letters to the Respondent, and union matters in general. He also reviewed documents, such as those relating to Board charges, that were delivered to Local 72’s post office box. At any rate, when Rodriguez drafted, and passed along, the Marshals Service letter, it was his understanding that the letter was to come not just from him, but from Union Officials Barreto and Soto as well. Thus, information supporting the allegations that was known to Barreto and Soto is relevant to the question of whether the allegations in the letter were made with reckless disregard for their truth or falsity.

What the Respondent primarily relies on to support its defense that the letter included statements that were maliciously or recklessly false is Rodriguez’ difficulty at trial recounting specific evidence to support the general allegations. Although Rodriguez’ testimony, and the record as a whole, demonstrates his awareness of facts supporting the allegations in the letter to the Marshals Service, it is also true that when the Respondent’s counsel challenged Rodriguez to set forth his “proof” in detail, Rodriguez had difficulty answering. The issue, however, is not whether Rodriguez was capable—at a trial taking place over 10 months after he drafted the letter and almost that long since he last worked for the Respondent—of stating from memory the specific names, dates, contract provisions, and other details that support the allegations in the letter. The question is whether, on the record as a whole, the Respondent has met its burden of showing that when Rodriguez drafted and signed the letter he included falsehoods for malicious reasons or with a “high degree of awareness of probable falsity.” As discussed above, the evidence shows that Rodriguez through his personal experience, the reports he received from security officers, his consultations with other Local 72 officials, and his layman’s acquaintance with the contracts and labor law, had knowledge supporting a good-faith belief in the truth of the allegations in

the letter. The Respondent has failed to show not only falsity, but also malice or reckless disregard. Rather, the record shows that Rodriguez, and the other Local 72 officials whose names he thought would appear on the letter, had substantial information supporting the allegations set forth in that letter. Even if that evidence was not sufficient to establish that the alleged violations actually occurred, it certainly was sufficient to show a good-faith basis for the allegations. For the reasons discussed above, I conclude that Rodriguez engaged in protected concerted and union<sup>18</sup> activity by drafting the letter to the Marshals Service, signing that letter, and passing it on to Soto and Barreto with the expectation that it would be mailed.

## II. INTERROGATION

On February 27, 2007, the Respondent questioned Rodriguez about the letter received by the Marshals Service. As discussed above, Rodriguez' involvement with that letter was activity protected by the Act. The Board has held that it is unlawful to coercively interrogate employees concerning such activity. *TNT Logistics North America, Inc.*, 347 NLRB 568, 576 (2006) (citing *TPA, Inc.*, 337 NLRB 282 (2001)), revd. regarding other issue sub nom. *Jolliff v. NLRB*, 513 F.3d 600 (6th Cir. 2008). In this case, the questioning was coercive. At the time he was summoned for the questioning, Rodriguez was in a precarious position since he had already been suspended and was awaiting the Respondent's decision about whether he would be permitted to return to work. The purpose of the questioning was to determine who was responsible for the letter so that appropriate discipline could be imposed. Prior to the meeting, Rodriguez was not allowed to review the version of the Marshals Service letter that the Respondent presented to him during the questioning, and which was not identical to the version that Rodriguez was familiar with. The meeting was conducted by Evans, a high-level company official who was based at the Respondent's corporate offices in Virginia, not at the facility in Puerto Rico where Rodriguez was employed. Although Rodriguez openly signed the letter to the Marshals Service, the record does not show that he intended, or expected, that the Marshals Service would reveal his participation to the Respondent. At any rate, his understanding was that he would be among a group of individuals who signed the letter, not that his name alone would appear on it. The Respondent gave Rodriguez no assurances that the purposes of the inquiry were benign or that his answers would not result in adverse consequences for himself or others. In light of the totality of the circumstances, I conclude that the Respondent's interrogation of Rodriguez was coercive. See *Millard Refrigerated Services*, 345 NLRB 1143, 1146 (2005) (totality of the circumstances are considered in determining whether interrogation is coercive); see also *Rossmore House*, 269 NLRB 1176, 1177-1178 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) (relevant factors include whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information

sought, the identity of the questioner, and the place and method of the interrogation).

Any defense that the Respondent was simply investigating a possible violation of Dolan's prohibition on direct communications to the Marshals Service fails since that prohibition was itself invalid. As discussed above, an employee's communications to a third party "do not lose the protection of the Act simply because their activity contravenes an employer's rules or policies" and an employer "may not interfere with an employee's right to engage in Section 7 activity by requiring that the employee take all work-related concerns through a specific internal process." *Valley Hospital Medical Center*, supra, slip op. at 5. An employer's defense that it was investigating a violation of one of its policies is without merit when that policy was itself invalid. *United Services Automobile Assn.*, 340 NLRB 784, 785 (2003), enfd. 387 F.3d 908 (D.C. Cir. 2004).

For the reasons discussed above, I conclude that the Respondent coercively interrogated Rodriguez on February 27, 2007, in violation of Section 8(a)(1).

## III. SUSPENSION AND DISCHARGE

The Respondent states, and the record confirms, that the company suspended and discharged Rodriguez because of his involvement with the letter to the Marshals Service. That involvement was protected concerted and union activity, and the Respondent violated Section 8(a)(3) and (1) by suspending and discharging Rodriguez because of it. See *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001). Even assuming that the Respondent had a good-faith belief that the letter contained statements that were unrelated to an ongoing labor dispute or were maliciously untrue, and therefore unprotected by the Act, the discharge was unlawful, since Rodriguez did not in fact make any statements that deprived his activity of the Act's protections. See *Tri-County Mfg. & Assembly, Inc.*, 335 NLRB 210, 219 (2001), enfd. 76 Fed. Appx. 1 (6th Cir. 2003) (discharge of employee unlawful even though employer believed in good faith that employee made statements that deprived his union activity of the Act's protection where employee was, in fact, innocent of making such statements); *Bituma Corp.*, 314 NLRB 36, 36 fn. 3 (1994) (employer violated the Act by discriminating against employee who employer believed in good faith had maliciously, deliberately, or recklessly lied in the course of protected activity, where employee did not engage in such misconduct); *Veeder-Root Co.*, 237 NLRB 1175, 1177 (1978) ("[I]t is immaterial to a determination that an employer has unlawfully discharged an employee for giving currency to inaccurate information in the course of concerted activity that the employer acted a good-faith belief that the information was deliberately or maliciously false if such were not the case."). As the U.S. Supreme Court has observed, "A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964).

In its posthearing brief, the Respondent does not raise Rodriguez' unwillingness to answer questions at the February 27 interrogation as a justification for his termination. As discussed above, however, Evans mentioned that unwillingness in her March 1 letter advising Rodriguez of the basis for the discharge

<sup>18</sup> The Respondent has not contested the union and concerted character of Rodriguez' involvement with the letter, although, as discussed above, it contends that his activity was not protected.

decision. At any rate, as discussed above, the Respondent's February 27 interrogation of Rodriguez itself violated Section 8(a)(1). The Board has held that a discharge is unlawful when it is based on an employee's failure to respond during an unlawful interrogation. *United Services Automobile Assn.*, above at 786, 794; *Hertz Corp.*, 316 NLRB 672, 692 (1995). Thus assuming that Rodriguez' failure to answer questions on February 27 played a part in the Respondent's decision to discharge him, that discharge is still unlawful.

The Respondent violated Section 8(a)(3) and (1) of the Act when it suspended and then discharged Rodriguez for engaging in protected concerted and union activity.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Government Security Officers of America, Local 72 (Local 72) and the United States Court Security Officers (USCSO) are labor organizations within the meaning of Section 2(5).

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

4. The Respondent violated Section 8(a)(1) by coercively interrogating Charging Party Marcial Rodriguez about his protected concerted and union activities.

5. The Respondent violated Section 8(a)(3) and (1) by suspending and then discharging Charging Party Marcial Rodriguez because he engaged in protected concerted and union activities.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Respondent be required to offer Rodriguez reinstatement and make him whole for any loss of earnings and other benefits he suffered as a result of his unlawful suspension and discharge, computed on a quarterly basis from the date when the Respondent ceased to pay Rodriguez until the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>19</sup>

#### ORDER

The Respondent, M.V.M., Inc., McLean, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

<sup>19</sup> 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.

(a) Coercively interrogating any employee about protected concerted and/or union activities.

(b) Suspending, discharging, or otherwise discriminating against any employee for engaging in protected concerted and/or union activities.

(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) Within 14 days from the date of the Board's Order, offer Marcial Rodriguez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension and discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Make Marcial Rodriguez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

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

(e) Within 14 days after service by the Region, post at its facility in Puerto Rico, copies of the attached notice marked "Appendix."<sup>20</sup> Copies of the notice, on forms provided in both English and Spanish languages by the Regional Director for Region 24, 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. 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, in both English and Spanish languages, to all current employees and former employees employed by the Respondent in Puerto Rico at any time since February 6, 2007.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

<sup>20</sup> 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."

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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 on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you for engaging in protected concerted and/or union activity.

WE WILL NOT coercively question you about your protected concerted and/or union activities.

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

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

WE WILL make Marcial Rodriguez whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and discharge of Marcial Rodriguez, and WE WILL, within 3 days thereafter, notify him that this has been done and that the suspension and discharge will not be used against him in any way.

M.V.M., INC.