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July 27, 2009

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th St. NW
Washington, DC 20570

RE: Knight Protective Services, Inc
Cases GR-7-CA-51139
GR-7-CA-51388

Dear Mr. Heltzer:

Please be advised that the Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision and Brief in Support of Exceptions, with Certificate of Service has been filed with the Board and served on the parties electronically.

Sincerely yours,

Colleen J. Carol
Counsel for the General Counsel

CJC:bk
Enclosures

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

KNIGHT PROTECTIVE SERVICE, INC.
Respondent

and

Cases: GR-7-CA-51139
GR-7-CA-51388

LOCAL 206, UNITED GOVERNMENT
SECURITY OFFICERS OF AMERICA (USGOA)
Charging Union

COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel excepts to the Administrative Law Judge's decision, conclusions of law and recommended dismissal as specified below:

1. The Administrative Law Judge (ALJ) erred in finding that Union Vice President Dennis O'Brien was the primary contact between the Union and the Respondent and that he had the lead role in discussions with management. (ALJD p. 4, lines 25-35, p. 12, line 30). The ALJ failed to consider or find that O'Brien had as much contact with management personnel as did the Union President Hopkins and many of the Union stewards. (Tr. 139-140)

2. The ALJ erred in finding that O'Brien and management representative Captain Ronald Umbarger spoke about the change on September 24, 2007 and that the conversation took place before Umbarger posted a notice to employees announcing the change. (ALJD p. 8, lines 16-17, p. 17, line 40) The findings are unsupported by the record evidence.

3. The ALJ erred in making a definitive finding that Umbarger posted the notice to employees announcing the elimination in lunch break pay on September 25 when the record evidence failed to support such a finding. (ALJD p.17, line 42)

4. The ALJ erred when he found that the Counsel for the General Counsel failed to prove that the Respondent made a "final, unalterable decision before it communicated the

change to the Union and because it never had any intention of bargaining with the Union about the change, it presented the Union with a *fait accompli* and thus violated Section 8(a)(5) of the Act", inasmuch as the findings are contrary to the clear preponderance of the evidence. (ALJD p. 22, lines 47-51, fn. 35).

5. The ALJ erred in finding that the September 24, 2007 email between Umbarger and HR Director Donna Snowden was evidence of Umbarger's intent to bargain with the Union. (ALJD p. 18, line 15, GC 16) That finding is contrary to the actual content of the email, which indicates not only that the Respondent intended on announcing the change to the Union, but also that it considered its duty to do so a "mere courtesy." (GC 16)

6. The ALJ erred in finding that that the ten day lapse between the initial announcement of the change and the implementation date of the change was a crucial factor in finding that the Respondent acted in good faith (ALJD p. 14, lines 9-16, p. 15, lines 12-13) The ALJ failed to properly consider the objective evidence of the Respondent's intent, regardless of the timing of the announcement.

7. The ALJ erred in finding that the fact that the Respondent notified the Union of the change before the unit employees was evidence of lawful behavior. (ALJD p. 15, lines 22-24) Board law looks to the intent of the Respondent when determining whether or not a decision was a *fait accompli*, not only the order in which notice is given. (ALJD p. 14, lines 18-40, p. 15, lines 21-24)

8. The ALJ erred by failing to consider the fact that the Respondent never contacted any union official about the change prior to announcing it to the employees. (T. 52, 162, 178)

9. The ALJ erred in finding that there was nothing improper in the Respondent informing the Union that the decision to eliminate lunch breaks had already been made. (ALJD p. 16, line 29-30) The ALJ also failed to consider, in conjunction with similar statements, that the Respondent had repeatedly told the Union that there was "nothing that it could do" about the decision. (ALJD p. 6, 15-18, p. 9, lines 12-13, GC 16)

10. The ALJ erred by not considering or finding that the Respondent misled the Union officials into thinking that the decision was mandated by the Federal Protective Service instead of being a decision made by Respondent. (ALJD p. 6, lines 16-17, T. 49, T. 233)

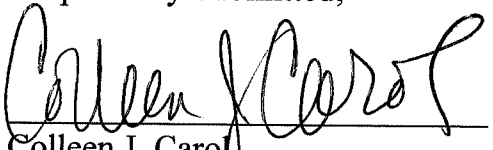
11. The ALJ erred by finding that the conversation between O'Brien and Umbarger constituted "meaningful bargaining." (ALJD 21, lines 29-30)

12. The ALJ erred in finding that O'Brien clearly and unmistakably waived the Union's right to bargain over the change. (ALJD p. 21, lines 3-5)

13. Because the ALJ erroneously failed to find a violation, he also failed to require the Respondent to pay the employees the amounts in the Compliance Specification, with any additional amounts that have accrued since the dates specified. (ALJD p. 22, line 30)

Dated this 27th day of July, 2009.

Respectfully Submitted,



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Attachment

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
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KNIGHT PROTECTIVE SERVICE, INC.
Respondent

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LOCAL 206, UNITED GOVERNMENT
SECURITY OFFICERS OF AMERICA (USGOA)
Charging Union

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS

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I. Facts

Respondent is a Maryland corporation that provides security services for federal buildings throughout the United States[1]. (ALJD 2, line 31) At the relevant time period, it provided security services for several such buildings in the state of Michigan, including the Hart-Inouye-Dole Center in Battle Creek, Michigan. (ALJD 2, line 33) Respondent was contracted through Federal Protective Services, a subsidiary of the United States Department of Homeland Security[2]. (ALJD 2, line 36)

There are approximately 37 guards who work for Respondent at the Battle Creek facility, and those employees, as well as about 13 other guards at other locations, are all part of a bargaining unit represented by the Union. (ALJD 3, line 8) The Union has represented the employees in the unit since about 2004, and negotiated a contract with the Respondent in 2005 which was effective until 2008. (ALJD 3, lines 5-13) The contract contained language that codified the Respondent's responsibility to notify and bargain with the Union over any changes to working conditions, but limited that statement by another paragraph that obviated the Respondent's duty to engage in decisional bargaining over any decisions that were mandated by the FPS. (ALJD 3, lines 18-30)

The Battle Creek facility and most of the other facilities in Western and Northern Michigan are overseen in their daily operations by Captain Umbarger. Umbarger reports to his supervisor Sidney Bogan, a contract manager who works in the Detroit office. Finally, the company's human resource manager is Donna Snowden, who works in the corporate offices in Maryland. (ALJD 4, line 106)

During the relevant time period, the Union President was William Hopkins, who worked at the Battle Creek facility and the Union Vice President was Dennis O'Brien, who worked in the Lansing facility. The Chief Steward at the time was Jeff Miller, who also worked in the Battle Creek facility. (ALJD 4, line 8-14)

The CBA mandated that employees receive breaks, but neither specified how long the breaks are or whether those breaks are paid.[3] (GC 3) Before September 2007[4], all bargaining

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[1]References to the Administrative Law Judge will be "ALJ" and cites to the ALJ's decision will be "ALJD page, line". General Counsel and Respondent Exhibits will be references as "GC#" and "R#" respectively. All transcript citations will be "T. page number".

[2] Federal Protective Services will be referred to as "FPS".

[3] GC 2, Article XIII, GC3, Article XIV, "Subject to contractual requirements or rules or scheduling needs, employees will receive breaks, as available."

unit employees were paid for a 30 minute lunch break. (T. 43, 67, 194, ALJD 5, line 14) After that date, all employees except the employees working the day shift at the Battle Creek center have continued to receive pay for their lunch breaks. (T. 43, 61, 67, 194)

Before September, each of the three main entrances to the Battle Creek facility was manned by multiple guards: two were manned by two guards each and one was manned by three guards. (ALJD 2, 43, T. 135) Accordingly, each guard at the main entrances was able to relieve the other for a lunch break without the need to utilize a rove guard. (ALJD 5, lines 14-24, T. 153, 238) In the summer of 2007, there was some indication that the FPS was going to eliminate the redundant posts on the main entrances, but nothing official was decided or communicated to Respondent until September. (ALJD 5, lines 6-13, T. 138)

On September 18, the FPS, and the other tenants of the facility decided to request that Respondent eliminate the additional guards at those three posts - meaning essentially that they would no longer pay Respondent for those additional guards. (ALJD 5, line 14, R. 4, T. 49, 134, 135, 155) The request was communicated to Capt. Umbarger some time between on about September 20.[5] (ALJD 5, line 16 at fn. 9, T. 136) Nothing in the request from FPS made any mention of lunch breaks, pay or any issues other than the elimination of the posts. (R. 4)

After hearing about the decision, Respondent became aware that it would no longer be reimbursed for those additional guards, and as a result would have to utilize, *and pay* rove guards to relieve those posts for lunch. (ALJD 5, lines 25 -34, GC 16, T. 232, 233) Umbarger first contacted FPS to attempt to work out an assignment schedule that would both honor the FPS contract and allow the unit employees to remain receiving payment for lunches. (ALJD 5, line 34) Umbarger ultimately decided to confer with Bogan at the Detroit facility and determine how they handled a similar situation. (ALJD 6, line 1, GC 16, T. 152) The managers in Detroit informed Umbarger that they had simply eliminated the lunch pay for employees to make up for any costs that would otherwise be lost by utilizing a roving guard. (ALJD 6, line 7, T. 152) While Umbarger's testimony was not clear as to when the conversations with management officials in Detroit took place, he states they were within "probably a few days" of the initial

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[4] All dates are 2007 unless otherwise indicated.

[5] Umbarger testified that he received word of the decision "couple of days...within a week" after the official decision was made on September 18. (T. 136) Given the paucity of his memory, the totality of the circumstances must be reviewed when determining an appropriate time line. Given that the uncontested testimony of Union President Bill Hopkins shows that Umbarger told Hopkins about the decision on September 20, Umbarger would have had to have received notice before that date. (T. 49, 136)

announcement[6]. (T. 136) Umbarger also consulted with deputy contract manager in Detroit Ky Mason and with HR Director Snowden about the change. It was decided at that time to eliminate the pay for the first shift guards at Battle Creek as they had done in Detroit. (ALJD 6, line 6)

On September 20, Umbarger communicated his decision to the Union President, Bill Hopkins. (ALJD 6, line 6, T. 49) Umbarger told Hopkins that FPS had decided to eliminate the three posts in question and that the day shift guards would no longer be paid for their lunch breaks. (ALJD 6, line 11, T. 49) Hopkins immediately protested, and stated that the Union had never been given an opportunity to bargain over the change. (T. 49) Umbarger then stated to Hopkins that it "was FPS's decision and there's nothing you could (sic) do about it." (ALJD 6, lines 14-18, T. 49-50)

Despite Umbarger's statement of futility, Hopkins submitted a written demand for bargaining to Umbarger the very next day, Friday, September 21. (ALJD 6, line 22, GC 5, T. 50, 138) Umbarger didn't respond other than to say that it was "FPS's decision". (ALJD 6, line 37, T. 51) The demand for bargaining specifically quoted the contract, and asked if there were other options, whether the previously bid upon posts should be re-bid or if the company could absorb any of the costs. (ALJD 6, line 31) At the end of the request, Hopkins specifically stated that he awaited a reply from the company. (ALJD 6, line 34, GC 5)

Umbarger never contacted Hopkins for bargaining. (T. 52-53) In fact, he did not contact anyone from the Union before he contacted HR Director Snowden in the corporate office. (T. 53, 162, GC 16) On September 24, the Monday following Hopkins' demand for bargaining, Umbarger outlined his new plan for eliminating lunch periods in an email to Snowden. (GC 16) Specifically, Umbarger stated "I have developed a new procedure for our guards working at the Fed. Building in Battle Creek which mirrors the Detroit procedures for lunch breaks". (GC 16) He went on to say, "the attached procedure is the outcome that I *will* institute" (emphasis added). Umbarger did mention that he had been contacted by the Union President, and that he "had not been able to exchange any information with the Union as of yet, but will be *informing the Union President today of what this new procedure consists of.* (sic)" (emphasis added) (GC 16)

Snowden replied the same day in an email, indicating that "we notify the Union as a courtesy; however, they cannot dictate to the company how we run our business." (GC 16) She

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[6] The timing shows that Umbarger spoke with Detroit *before* he spoke with Hopkins, as he admits that he got the idea for the new policy that eliminated the pay for lunch breaks from Detroit management personnel. (T. 152-153)

went on to explain that the Union "...cannot impose a financial burden on the company by requesting we provide paid lunch breaks to the guards..." (GC 16)

Umbarger stated in his email to Snowden that he would inform the *Union President* of the new procedure but failed to do so apart from the Notice he posted in the break room for all employees on September 24. (GC 16, GC 6) The Notice stated that Respondent "will be instituting a change in procedure" and that day shift guards would have to sign in and out for lunch – meaning that they would no longer get paid for that time. (GC 6) Umbarger also posted the new schedule for the roving guards so that all employees would know who was being relieved by whom and when. (GC 6) The posting in the break room was the first time Hopkins was informed of the new procedure, when it would take effect and how it would be implemented. (T. 51, 52) No member of management consulted with, or spoke to him or any other union official before this date. (T. 52)

At some point, the date of which is disputed, Union Vice President O'Brien, who works at the Lansing facility, called Umbarger to find out more about the new policy. (ALJD 7, line 24, T. 178) Umbarger informed O'Brien that he had tried to come up with other ideas, but that the lunch breaks for the day shift employees at Battle Creek would no longer be paid. (ALJD 7, 28-31, T. 141-142, 164, 179) Umbarger informed O'Brien that the decision had already been made and that the plan he explained was 'what Knight was going to do". (ALJD 8, line 13, T. 180) He explained further that Respondent did not want to pay extra money to have a roving guard relieve the eliminated posts, so the only solution was to cut the pay of those employees. (T. 191, 193)

O'Brien immediately followed up on the issue with Snowden.[7] (ALJD 8, line 23, T. 181, 207) O'Brien called Snowden shortly after he spoke with Umbarger and told her that he believed that the paid lunch breaks were a matter of past practice. (ALJD 8, line 24, T. 182, 193) Snowden, told him that when the company has to pay out of its own pocket to cover the costs of the lunch breaks, past practice no longer applied. (ALJD 8, line 25, T. 181) O'Brien indicated that he "understood that"(T. 182).

On Friday of that same week, September 28, Umbarger approached Hopkins about the lunch break issue for the first time. (ALJD 9, line 8, T. 53) Umbarger announced to Hopkins that

[7] O'Brien's testimony directly contradicts Snowden's about the purpose of the call. Snowden indicates that O'Brien, despite not having any contact with her since February of that year, merely called to tell her how satisfied he was with his conversation with Umbarger. (T. 207, 209). However, O'Brien indicates that he followed up with Snowden to discuss past practice. (T.182).

the matter had been "negotiated" with O'Brien and that everything was "status quo" in that employees on day shift would not be paid for their lunches. (ALJD 9, line 11, T. 53) Hopkins protested that nobody had approached him or spoken to him about the issue. Umbarger reiterated that there was "nothing he could do about it." (ALJD 9, line 13, T.53)

The following Monday, October 1, the new procedure was officially implemented, meaning that day shift guards no longer received pay for their lunch breaks. (ALJD 9, line 18, GC 6, T. 143) The Union waited until the change was reflected in the paychecks of the unit employees, and filed a grievance with Respondent on October 26. (GC 7) In it, the Union grieved the change and the fact that it was not negotiated with the union. (GC 7) In his 10/31 response, Umbarger indicates that the union was "notified" of the change before it became effective, but did not state that the matter had been negotiated fully or that any agreement had been reached. (GC 8) Umbarger denied it as untimely, and forwarded it to the next step. (GC 8)

Respondent continued to maintain its position that the grievance was untimely at the next two steps. (GC 9-15) Only on January 15 did the Respondent indicate that it considered the brief, informational conversations between O'Brien and Umbarger to have been "negotiations" that rendered the Union's grievance moot. (ALJD 9, line 29, GC 14)

II. The ALJ Made Several Factual Findings That are Not Supported by the Record Evidence (Exceptions 1, 2, 3)

A. *O'Brien was Not the Main Contact for the Union in Dealing with the Respondent (Exception 1)*

While O'Brien testified that in early 2007 he informed HR Director Snowden that he would be the speaking on behalf of the Union, his statement to that effect and the ALJ's reliance on it is not supported by the evidence. (ALJD 4, line 29) The record evidence shows that O'Brien had not, as Vice President of the Union, taken any part in contract negotiations, filed or handled any grievances or discussed any workplace issues with Snowden. (T 188, 189) In fact, there had been no contact between O'Brien and Snowden between early 2007 and the phone call during the week of September 25. (T. 207-209) Umbarger's own testimony indicates that as the Captain in charge of day-to-day operations for the unit employees, that he had dealt with the former Union President Kukla, President Hopkins, various stewards as well as O'Brien when

dealing with Union issues. (T. 139-140) He also went on to say that he had spoken to O'Brien about union issues only "on a few occasions". (T. 140)

While the ALJ made much of the fact that Hopkins admitted that he was somewhat of a "figurehead", Umbarger's own testimony shows that he had dealt with Hopkins on Union issues on more than one occasion. (T. 138-140) Furthermore, Umbarger *went to Hopkins* when he informed the Union of the change to lunch procedures, not O'Brien. (ALJD 6, line 9) He accepted the demand for bargaining from Hopkins and further referenced Hopkins as the contact person in his September 24 email to Snowden. (ALJD 6, line 22, GC 16) At no time did Umbarger or Snowden indicate that it was unusual for Hopkins to be the "face of the Union" or that they should, instead, deal with O'Brien.

In short, the preponderance of the evidence establishes that while O'Brien was a union officer, he was in no way the spokesman for the Union or was somehow the main Union contact to negotiate this dispute. In fact, the evidence shows that it was Hopkins who was regarded as the go-to Union representative by Umbarger.

B. *The Evidence Shows that Umbarger Posted the Notice of the Change to Employees on Either September 24 or September 25 (Exception 3)*

The ALJ found decisively that Umbarger posted the notice to employees, indicating that the first shift employees would lose their lunch pay, on September 25. (ALJD 8, line 45) However, that finding is not supported by the evidence. The notice itself is dated September 24, which indicates that it was prepared on that date. (GC 6) Furthermore, Umbarger's testimony is not definitive. He indicates that he "may have" posted it on September 25. (T. 143) Given that he is not sure in his testimony and it is dated September 24, it was improper for the ALJ to make a definitive finding that the notice was posted on September 25.

C. *The Evidence Shows that the Conversation Between Umbarger and O'Brien Could Not Have Taken Place Before September 25 (Exception 2)*

Neither Umbarger nor O'Brien was able to pin-point when their conversation took place, but the circumstantial evidence is clear that it took place after September 24, when the

employees were given official notification of the change.[8] (T. 141, 181) The documentary evidence, coupled with Umbarger's testimony shows that Umbarger had made the decision and prepared the notice on September 24. (GC 6, T. 143) GC 16 also shows that he emailed HR Director Snowden about the policy that same day. The ALJ correctly found that as Umbarger did not mention the conversation with O'Brien (and instead referenced how he intended to tell *Hopkins* about the change) he had not yet spoken with him at the time of the drafting of the message. (ALJD 17, line 25) What the ALJ did not consider or find, was that at 4:29 p.m., ostensibly the end of the workday, Snowden replied that they only had to notify the union as a courtesy. (GC 16) She made no mention of any conversation with O'Brien. She did not state that the matter was negotiated or that the Union was fully on board. In fact, at the end of that work day, Snowden appeared to be mostly unaware of the situation at all. It strains credulity to think that she would email Umbarger about the issue and not mention that she spoke to O'Brien. And, given that O'Brien's credited testimony indicates that he called her *immediately* after he spoke to Umbarger, it is clear he had not spoken to either individual at that time that day.(ALJD 8, line 22)

What is even more telling is that O'Brien's credited testimony indicates that he also attended a Union Executive Board meeting that same day. (ALJD 8, line 33) Again, it is not logical to make the finding that, at some point *after* 4:29 p.m., O'Brien had an hour long conversation with Umbarger, spoke with Snowden and THEN made the hour long trip to the Battle Creek facility from Lansing. The earliest this conversation could have taken place is September 25, either the day after or the day of the posting to employees. What is clear is that the notice had already been prepared and finalized by Umbarger on September 24, before he spoke with any union official.

Lastly, Umbarger did not notify Hopkins of the conversation until September 28. (ALJD 9, line 8) If Umbarger knew Hopkins was the point person and instead bargained the issue with O'Brien, why would he wait four days to speak to Hopkins? Why would he not immediately inform Hopkins of the conversation and put the issue to bed once and for all? A finding that the conversation took place on September 24 is just not supported by the evidence. The evidence

[8] O'Brien thinks the conversation took place around September 15, which is not possible as the Union was not informed of the change until September 20. Umbarger puts the conversation "within a week or so of that[FPS notifying him of the change]...a few days a week." (T. 141, 181)

clearly shows that the conversation between O'Brien and Umbarger had to have taken place sometime between September 25 and 28.

III. The Respondent's Decision to Eliminate Unit Employees' Lunch Pay was a *fait accompli*, and the ALJ's Findings to the Contrary Are in Error (Exception 4)

The ALJ erred in finding that "because the company provided adequate notice directly to the Union prior to implementation of the change, and engaged in discussions with the Union about that policy to the extent of soliciting suggestions from the union, I conclude...the circumstances...fail to establish the company violated Section 8(a)(5) of the Act. (ALJD 13, lines 11-16) The ALJ improperly relied on timing elements and failed to consider the only theory submitted by the Counsel for the General Counsel, which was that the notice to the Union was legally insufficient due to the fact that the Respondent had no intention of engaging in good faith bargaining with the Union on the subject. See, *Pontiac Osteopathic Hospital*, 336 NLRB 1081 (2001), *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013 (1982). Instead, the Respondent made a decision without the input of the Union and consistently displayed a fixed attitude when informing the Union of the change. There is no evidence that it ever intended to bargain with the Union in good faith and as such, the decision was presented to the Union as a *fait accompli* and a violation of Section 8(a)(5). *Pontiac Osteopathic Hospital*, supra.

A. *ALJ Erred in Finding that The Respondent Did Not Announce a Fait Accompli to the Union Because it Announced the Change Ten Days Before Implementation. (Exception 6)*

The ALJ placed much emphasis on the fact that the Respondent notified the Union of the elimination of the lunch wages ten days before the change was implemented. (ALJD 14, lines 9-16; ALJD 16, lines 12-13) What the ALJ failed to consider and failed to find is that despite the timing, the Respondent had already decided on a course of action and had no intent of altering that position regardless of the Union's attempts to bargain the issue.

The Counsel for the General Counsel conceded that the timing of the notice was adequate. The argument was not one of timing, but was one of intent. As stated in *Gannett Co.*, 333 NLRB 355 (2001) citing *Ciba-Geigy Pharmaceutical*, 264 NLRB 1013, 1017 (1982), "Where notice is given shortly prior to implementation of the change or *because of a lack of intent to alter its position*, then the notice is merely informational about a *fait accompli* and fails