

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

G4S SECURE SOLUTIONS (USA) INC.
Respondent

and

Case 28-CA-23380

INTERNATIONAL UNION, SECURITY, POLICE
AND FIRE PROFESSIONALS OF AMERICA (SPFPA)
Charging Party

Sandra L. Lyons, Esq. and
Christopher Doyle, Esq. for the General Counsel.

John D. McLachan, Esq. for the Respondent.

DECISION

Statement of the Case

Eleanor Laws, Administrative Law Judge. This case was tried in Phoenix, Arizona on October 18-20, 2011. The International Union, Security, Police and Fire Professionals of American (SPFPA or Union) filed the charge in February 24, 2011. The General Counsel issued a complaint and notice of hearing on April 29, 2011. Respondent filed a timely answer on May 13, 2011, denying all material allegations in the complaint.

The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by (1) maintaining and promulgating an overly-broad confidentiality rule; (2) maintaining and promulgating a rule that employees must engage in no unnecessary conversations; (3) maintaining and promulgating a rule that prohibits employees from talking about their discipline; (4) maintaining and promulgating a rule prohibiting employees from discussing the Union; (5) threatening employees with unspecified reprisals for speaking about the Union; (6) threatening employees with unspecified reprisals for Union and other protected concerted activities; (7) creating the impression that Union activities were under surveillance; (8) threatening to not re-hire employees who supported the Union; and (9) disciplining employee Debra Sterling for her protected concerted activities. The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by: (1) transferring employee Donald Rice to a different location and isolating him; and (2) suspending and subsequently discharging employee Donald Wickham. At the hearing, the General Counsel moved to amend the complaint to include an allegation that Respondent violated the Act by maintaining an overly-broad social networking policy. I granted the motion to amend because the allegation is closely related to the allegations in the charge and the original complaint, *Payless Drug Stores*, 313 NLRB 1220, 1221 (1994).

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

Findings of Fact

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I. Jurisdiction

Respondent, a Florida corporation, with places of business throughout the country, including the Phoenix, Arizona area, provides security services to clients in a variety of industries. During the past twelve months and at all material times it derived gross revenues in excess of \$500,000 and purchased and received goods valued in excess of \$50,000 directly from points outside the state of Arizona. Respondent admits, and I find, that Respondent is engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act. I further find, and it is uncontested, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. Facts

A. Background and Respondent's Operations

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Respondent provides security services throughout the country.¹ On a national level, its services include permanent manned security (both armed and unarmed), disaster response and emergency services, control room monitoring, special event security, security patrols, reception/concierge service, emergency medical technician (EMT) service, ambassador service, and transportation service. (GC 2; Tr. 34-35).²

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Larry Pablo is the General Manager of Respondent's Phoenix Area Office, and has held that position since June 2008. In this capacity, he oversees roughly 60-65 individual job-sites. His duties include oversight of existing accounts, as well as acquisition of new clients. Pablo's direct reports are the Operations Manager, Human Resources Manager, Manager of Business Development, and Training Manager. Pablo is also second or third-line supervisor to many other managers and supervisors. (Tr. 22-23). Respondent's clients in the Phoenix Area are varied. For example, Respondent provides control room monitoring for the Bank of America and Target headquarters buildings. Respondent also provides security services for Cricket retail stores and U.S. Immigration and Customs Enforcement (ICE), among other clients. (Tr. 25-26, 31-33).

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1. The Metro Light Rail

Many of the issues in this case involve Respondent's contracts with the City of Tempe and the East Valley Metro Light Rail ("Metro Light Rail"), a mass transit system that runs from Mesa to Phoenix. Under these contracts, Respondent provides security services, detailed more thoroughly below, for the parts of the Metro Light Rail that lie within the cities of Mesa and Tempe. (Tr. 37-38). To ride the Metro Light Rail, passengers purchase tickets from machines on platforms at the various stops. Unless a security officer is checking to see if passengers have

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¹ Respondent was previously called Wackenhut, and some documents in the record refer to this prior name.

² Abbreviations used in this decision are as follows: "Tr." for transcript; "R" for Respondent's exhibit; "GC" for General Counsel's exhibit; "GC Br." for the General Counsel's brief; and "R Br." for Respondent's brief.

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tickets, there is no mechanism to prevent a passenger from boarding the train without a ticket. (Tr. 324).

5 There are three park & rides, referred to as “kiosks,” that Respondent’s Metro Light Rail contract services. They are at (1) Sycamore and Main in Mesa; (2) McClintock and Apache in Tempe (“McClintock kiosk”); and (3) Apache and the 101 Price Freeway in Tempe (“Price & Apache kiosk”). Employees report to work and sign in at the McClintock kiosk, which is located within a parking garage.

10 A Project Manager, assigned the rank of Major, oversees security for the Metro Light Rail. The Project Manager, who reports to the Operations Manager, ensures proper scheduling and maintains a relationship with the client to make sure the client’s needs are being met.³ The Project Manager directly supervises three shift supervisors who are referred to as Lieutenants. (Tr. 290). Lieutenants oversee the jobsites in the Project Manager’s absence, and they directly
15 supervise the Security Officers. They can take disciplinary actions, other than suspensions and terminations, against their subordinate Officers. There is generally one Lieutenant per shift. (Tr. 44-45, 311-13). There are three shifts: day, swing, and night. (Tr. 24).

20 During the time period at issue, Security Officers could work one of four assignments, with some overlap among them: Patrol Officer, Fare Inspector, Kiosk Officer, or Passenger Assistant Agent.⁴ Patrol Officers ride in vehicles along the rail routes to ensure safety and security. They also monitor electrical boxes to make sure nobody has tampered with them. Fare Inspectors ride on the trains to ensure passengers have paid. If an individual who has not paid his or her fare is riding the light rail, Fare Inspectors issue citations but do not collect fines.⁵ If a
25 passenger refuses to get off the light rail, the Officers are to call the police. They can only forcibly remove a passenger if he or she is threatening physical harm. Until the Fall of 2011, Kiosk Officers staffed each of the kiosks. They were responsible for patrolling the park-n-ride, and monitoring the cameras in the kiosks. During the relevant time period, they were expected to be on the platform once an hour, for roughly three hours of a 10-hour shift. (Tr. 44-45, 294, 302-08). Passenger Assistant Agents (PAAs) work in the control room at the McClintock kiosk. They do not have contact with passengers or other members of the general public. (Tr. 36-37, 423). All of the Security Officers on the Metro Light Rail are unarmed, and they do not have
30 arrest authority. (Tr. 44-45, 308).

35 *2. Security Officer Uniforms*

Metro Light Rail Officers are uniformed. The uniform requirement originated from the City of Tempe’s June 10, 2008, Request for Proposal (RFP) for security services. Officers wear
40 white button-down shirts with name tags and arm patches identifying them as Metro Security, East Valley Sector. They wear dark pants with a duty belt to hold pepper spray, handcuffs, and radios. They also wear hats with pins depicting the Metro Light Rail logo, and black shoes. Majors wear gold leaf pins, roughly the size of a quarter, on their shirt lapels. (Tr. 310). The RFP directs that an individual wearing anything other than the items specified in therein will be considered out of uniform and subject to disciplinary action. (Tr. 71-73; GC 10-12; R 1).

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³ The Project Manager was Robert Thario until his termination in August 2010. The position was vacant until Jason Armstrong assumed it in October 2010.

⁴ The PAA qualification requirements are not as stringent as those for other security officers. (Tr. 39). As of late September/early October 2011, there are no longer Kiosk Officers because
50 the customer wanted more officers riding the rails to do fare inspection. (Tr. 293).

⁵ Fare Inspectors issue about 100-120 citations per month. (Tr. 329).

According to Pablo, permission from Respondent’s corporate office is required if employees want to wear pins or other insignia that are not part of a prescribed uniform. (Tr. 75).

3. *National Corporate Hotline*

5 Respondent maintains a national hotline system that allows employees to call a centralized 800 number to voice workplace complaints. The hotline employees receive the complaint, and then forward it to the appropriate General Manager for resolution, as long as the General Manager is not named in the complaint. The General Manager or his/her designee 10 investigates the allegations in the complaint, and reports his/her findings back to the referring hotline employee. Corporate headquarters, through the hotline staff, determines the final resolution of the complaint and conveys it to the complaining party and local management. An employee may make an anonymous complaint, or ask that a complaint remain confidential. (Tr. 120-22; GC 32).

4. *Disciplinary System and Offenses that are Grounds for Immediate Termination*

Respondent utilizes a progressive discipline system. Its Policy Manual, Standards of Employee Behavior (“Behavior Standards Manual”) applies to all employees, and describes the 20 forms of discipline Respondent uses in progressive order: (1) oral reprimand, (2) written reprimand, (3) suspension and (4) dismissal. The discipline system is reiterated in the Security Officer Handbook, discussed more fully below. (GC 7, 15). Employees in the Phoenix Area sometimes receive a “final warning” but this is not listed in the manual. (Tr. 65).

25 Respondent’s Behavior Standards Manual sets for the following non-comprehensive bullet-point list of infractions that are grounds for immediate dismissal:

- Refusal to work
- Extreme insubordination
- 30 • Fighting on the job
- Intoxication on the job or reporting to work un an intoxicated state (this applies to alcohol, drugs, narcotics, or any substance which alters perception/awareness and which inhibits normal human response)
- Theft
- 35 • Willful destruction of client and/or G4S Secure Solutions (USA) property
- Unauthorized or careless use of firearms or other weapons
- Malicious harassment of fellow employees, client employees, or members of the public
- “Horseplay” or any other activity with potentially serious consequences such as personal injury or property damage
- 40 • Any other acts which, by their nature and impact, severely limit the employee’s ability to perform the essential elements of the job

(GC 7). The Security Officer Handbook sets forth a more comprehensive numbered list of 45 prohibited conduct that may result in immediate dismissal, including but not limited to:

1. Refusal to work
2. Insubordination or other disrespectful conduct
3. Fighting or provoking a fight during working hours or on client or company property
- 50 4. Intoxication on the job or reporting to work in an impaired state (This applies to alcohol, drugs or any substance that alters perception or awareness and that inhibits normal human response.)

5. Theft, dishonesty, fraud or bribery
6. Removing or borrowing client or company property without prior authorization
7. Willful or reckless destruction of client or company property
8. Unauthorized or careless use of firearms or other weapons
- 5 9. Malicious harassment (including sexual or racial) of fellow employees, client employees or members of the public
- 10 10. Horseplay or other activity with potentially serious consequences such as personal injury or property damage
11. Unexcused no call, no show absence(s)
- 10 12. Job performance that is unacceptable
13. Conviction of or pleading guilty to any criminal act or engaging in criminal conduct
14. Falsification or fraudulent alteration of any company or client-provided document or record
- 15 15. Sleeping or gross inattentiveness while on duty
- 15 16. Failure to report immediately an arrest or conviction to your supervisor
17. Aiding a competitor or any other act that intends to inflict injury on the company or our clients
18. Unauthorized absence from assigned work area
- 20 19. Unauthorized use of telephone, cell phone, mail system, computer or other company or client-provided equipment
- 20 20. Any other acts which, by their nature and impact, severely limit the employee’s ability to perform the essential elements of the job
21. Any other reason that the company feels, in its sole discretion, warrants termination

25 (GC 16, p. 32 of Handbook). Pablo makes all termination and suspension decisions for the Phoenix Area office. (Tr. 60-61).

B. Rules and Policies

30 *1. Security Officer Handbook*

Respondent maintains a Security Officer Handbook (Handbook) that is distributed to its Security Officers nationwide.⁶ (GC 15). Each Security Officer receives a Handbook upon starting work. The Handbook was most recently revised in January 2011.⁷ Each time it is revised,
 35 Officers must sign to indicate they received a copy of revised version. (Tr. 134-36).

a. Professional Image Handbook Provision

40 On Pages 26-27, the Handbook sets forth its “Professional Image” rule, in pertinent part, as follows:

Professional Image

45 You must be neat and clean while on duty. You must wear only the complete uniform as prescribed by your supervisor. Any uniformed security personnel who become pregnant will be provided with appropriate uniform clothing to maintain a professional appearance.

50 ⁶ In addition to rules and policies that apply Company-wide, the Metro Light Rail employees also have so-called “Post Orders” that set forth their specific duties and responsibilities. (GC 9).

⁷ A copy of the March 2008 version of the Handbook appears at GC 16.

The area or branch office will be responsible for acquiring maternity pants and larger shirts through the Purchasing Department.

5 Due to the public nature of our business and the business necessity that uniformed personnel represent figures of authority, we have established the following rules for personal appearance.

...

- 10
- No insignias, emblems, buttons, or items other than those issued by the company may be worn on the uniform without expressed permission.

(GC 15).

15 Robert Inman is the Business Agent for the International Union Security Police and Fire (SPFPA), Locals 822, 827, 829 and 830. The SPFPA represents security guards at various facilities. Security guards at the Palos Verde Nuclear Facility in Tonopah, Arizona wear a union patch that has a diameter of three inches. (Tr. 447; GC 53). Inman has not received reports that the public failed to show respect or follow the directives of these security guards because of the union patch. (Tr. 447) Security guards at other facilities wear union pins that are approximately one inch by one inch. (GC 52). The type of pin or patch the guards wear is a matter negotiated between the companies and the union. Inman believed that some of the companies where union members worked did not authorize its employers to wear any pin, patch or other union insignia. (Tr. 449-50).

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b. *“No Unnecessary Conversations” Handbook Provision*

30 The Handbook contains a provision stating, in relevant part, that security personnel must “[e]ngage in no unnecessary conversations.” (GC 15). The provision is on Page 29 of the Manual, in a section entitled “Conduct While on Duty,” subsection “Enforcing Security Rules.” It is part of a bullet-point list that follows the lead-in phrase “*Security personnel must:*”. The list includes a variety of both required and impermissible items. For example, there are bullet items requiring Security Officers to be awake and alert, to perform their assigned duties, and to answer the phone and take messages. In addition to unnecessary conversations, listed prohibitions include accepting gifts or gratuities, using equipment for unauthorized purposes, borrowing money from coworkers, arguing controversial subjects, and removing, rearranging or reading materials left on desks or cabinets. (GC 15).

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c. *Handbook Confidentiality Provision*

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Page 31 of the Handbook depicts the confidentiality provision for the Security Officers. It provides:

Confidential Material

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The protection of confidential information, trade secrets, and company-specific operating procedures is vital to the interests and success of G4S Secure Solutions USA. Additionally, in the line of duty, you may come into contact with our customers’ confidential information.

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Employees who improperly use, reveal, copy, disclose or destroy G4S or client information will be subject to disciplinary action, up to and including termination of

employment. They may also be subject to legal action even if they do not actually benefit from the disclosure. Such information includes any information considered proprietary by G4S or the client organization.

5 Do not give interviews or make public statements about the activities or policies of the company or our client without written permission from G4S Secure Solutions USA.

(GC 15).

10 The Handbook in place prior to January 2011 specifically included “wage and salary information” as an example of confidential material that could not be disclosed. (GC 16).

2. *Social Networking Policy*

15 Respondent maintains a Social Networking Policy. The current version is effective as of November 22, 2010. The contested provisions state:

- 20 • Photographs, images and videos of G4S employees in uniform, (whether yourself or a colleague) or at a G4S place of work, must not be placed on any social networking site, unless express permission has been given by G4S Secure Solutions (USA) Inc.
- Do not comment on work-related legal matters without express permission of the Legal Department.

(GC 13).

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C. Debra Sterling Alleged Protected Concerted Activity and Discipline

1. Background and Protected Concerted Activity

30 Debra Sterling has been an Officer on the Metro Light Rail since approximately November 2009. (Tr. 494). During the Spring and Summer of 2010, her direct supervisor was Lieutenant Danny Rice and the Project Manager was Major Robert Thario. In March 2010, Sterling perceived that Thario began talking to her “very disrespectful with sexual comments.” Examples of his comments were, “I bet you’re very potent” and a reference to “deep throat”
35 when Sterling was eating a tootsie-pop. Sterling also stated that Thario had “smacked her backside” with a roll of paper. (Tr. 496).

40 Asucena Banuelos⁸ works for Respondent in Anaheim, California. She was previously assigned to the Metro Light Rail account, and worked with Sterling on the swing shift at the McClintock kiosk during the early part of Summer 2010. In June 2010, Sterling and Banuelos discussed that they both felt Thario mistreated them and sexually harassed them. According to Banuelos, she and Sterling discussed Thario's treatment of them on “pretty much” a daily basis. (Tr. 426, 497-98). Sterling and Banuelos met for lunch and coffee, and they went over notes Sterling had made to draft a letter to the Equal Employment Opportunity Commission (EEOC).
45 Banuelos assisted Sterling, encouraged her to go to the EEOC and file a hotline complaint, and told her that she intended to do the same.⁹ (Tr. 428, 498-500).

⁸ Banuelos is mistakenly referred to in the transcript as “Vanuelos.”

50 ⁹ Banuelos filed a complaint with the EEOC toward the end of June, 2010, and a hotline complaint on June 29, 2010. Her hotline complaint set forth how she felt Thario was mistreating her, and expressed concern for Sterling. (Tr. 428).

5 In June 2010, Sterling told Officer Donald Wickham she felt harassed by Thario. She described sexual innuendos and told Wickham that Thario had twice shown up to her house unannounced. Wickham encouraged Sterling to call the Company hotline. (Tr. 385). Sterling also shared her concerns about Thario with Officer Carol Taresh, who encouraged her to get legal counsel and talk to the EEOC. (Tr. 555).

10 On June 30, 2010, Sterling visited Human Resources Manager Janelle Kercher to complain about Thario's behavior. Sterling gave Kercher examples of how she believed Thario was sexually harassing her. Kercher told Sterling she was not the only one who had problems with Thario, and instructed Sterling to put her complaints in writing. Later that day, Sterling sent Kercher an e-mail detailing her problems with Thario. She stated that Thario had been lewd and disrespectful toward her, and recounted the comments, set forth above, that he had made. She also referenced that Thario had "smacked her backside" with a roll of papers and threatened to fire her without saying why. Sterling reported that Thario had come to her house uninvited, failed to issue her OC spray, and treated her poorly after she sustained a dog bite while on duty. She concluded the e-mail by stating that, while meaning no disrespect, she felt she must file a complaint with the EEOC. (Tr. 190-9, 496-500; GC 30).

20 Kercher showed Sterling's e-mail to Pablo, and instructed Sterling to come to meet with her and Pablo. (Tr. 84-86, 192). Sterling and Pablo met when he returned from a trip, and she told Pablo about her problems with Thario. She told him that she had shared her concerns with Banuelos, but that she wanted to keep the matter confidential. Pablo told Sterling not to worry and that her job was safe. He offered to move her to another detail, and she declined.¹⁰ (Tr. 25 502-03).

30 Sterling filed a complaint with Respondent's hotline on July 9, 2010. She alleged that Thario was sexually harassing her, as described above. She further stated that she had notified Pablo, and that no action had been taken. Donna Holder, a manager in Respondent's Corporate Human Resources, took the complaint and referred it to Pablo for investigation. Pablo interviewed Thario, who denied making the sexual comments or engaging in any inappropriate behavior. In Pablo's written response to Holder, he reported the only thing he could substantiate was that Sterling had commented to Thario that she wished he wasn't married. Pablo further noted that Thario said very positive things about Sterling's job performance. He concluded his report with a final paragraph labeled, "NOTE", stating that Thario was reluctant to discipline Sterling for unauthorized parking in a handicap spot for fear it would be perceived as retaliation. Pablo informed Thario he would discipline Sterling for this infraction.¹¹ (R 11).

40 The same day Sterling filed her hotline complaint, July 9, 2010, Banuelos met with Pablo about her own hotline complaint. (Tr. 428-29). The complaint involved issues with Thario, and also an issue with Respondent changing its standards to require greater law enforcement experience for Officers on the Metro Light Rail. In a July 15 e-mail to Pablo, Thario wrote that he had spoken with Jay Harper from the Metro Light Rail, who said that even if Respondent enforces a higher standard now, he did not see why individuals hired under the previous standards should be penalized, particularly if they were doing a good job. Thario concluded by stating if he could rehire Banuelos and Officer Jason Armstrong, he would ensure they were in

50 ¹⁰ Sterling believes Respondent had investigators follow her after this meeting. (Tr. 503, 524). She also believes Clemons hides between cars and watches her. (Tr. 527).

¹¹ Sterling apparently was not disciplined for this alleged infraction.

weapons class by the end of the month.¹² Pablo responded the same day, stating that Banuelos and Armstrong could be assigned back to the light rail, and instructing Thario to have Banuelos and Sterling work different shifts pending his investigation into the hotline complaints each had filed.¹³ (GC 14). Banuelos was assigned to a different shift than Sterling, and did not work the same shift as her thereafter. (Tr. 428-31).

Also on July 15, 2010, Sterling filed a charge with the EEOC.¹⁴ (R 14). A week later, on July 22, she sent Kercher a second e-mail expressing her dismay about Pablo's investigation.¹⁵ She stated that she was willing to keep the matter confidential, and explained that the only reason "Susie B"¹⁶ knew about it was because she had encountered her during a vulnerable moment. Sterling expressed her belief that she was being followed around, and that "they" were trying to fire her. She concluded by stating that she had filed an EEOC complaint. (GC 31).

During the July/August 2010 time period, Officer Carol Taresh began having problems with Thario. She testified that he would come behind her and rub her shoulders, and he made some comments she perceived as inappropriate. Taresh initially brought her complaints to Kercher, who told her to keep her apprised of any new incidents. (Tr. 555-56). In the second or third week of August 2010, Rice accidentally left the McClintock kiosk with his work cell phone. He called Thario, who was supervising that night, and told him he was on his way back with it. Taresh answered the phone, and conveyed the message to Thario. He responded, "He must've felt the bulge in his pocket and realized it wasn't from being happy." She wrote a memo on August 20, 2010 recounting this comment and other perceived inappropriate behavior, gave it to Rice, who in turn informed Pablo. (Tr. 455-56, 556-57; GC 55). Thario was subsequently terminated. (Tr. 558, 580). The Project Manager position was vacant for a couple of months until Jason Armstrong assumed it in October 2010. (Tr. 289-90).

2. Discipline

Sterling was scheduled to work overtime as a fare inspector on November 9, 2010. A few days before, Lieutenant Timothy Eggleston apologized and told her that he had to cancel all the overtime and redistribute it to part-time employees. The dry-erase board said all overtime

¹² At this point, Armstrong was a security officer, not a supervisor or manager.

¹³ I do not credit Pablo's testimony that he could not recall why he made the decision to separate Sterling and Banuelos. Both women came to him around the same time period with similar complaints about Thario. He was evasive during this testimony and seemed focused on Banuelos' complaint about the credentials rather than any complaint she made about Thario. (Tr. 88)

¹⁴ The EEOC issued a "right to sue" letter to Sterling, informing her that, after investigation, they were unable to conclude that the information submitted established a violation of the statues they enforce. Sterling filed a suit in U.S. District Court that was still pending at the time of hearing. (Tr. 273; R 15)

¹⁵ The e-mail is a rant of sorts, and touches on many topics, in a confusing manner, which are not directly relevant here.

¹⁶ This is an obvious reference to Susie Banuelos. (Tr. 194).

was canceled, and Sterling’s name did not appear on the typed schedule for November 9.¹⁷ (Tr. 460, 508-09). Sterling did not show for work on November 9.

5 The next day, Major Armstrong told Sterling that Operations Manager Ed Martini had wanted to fire her for missing her shift, but he had talked him out of it. Instead, at Armstrong’s direction, Lieutenant Eggleston issued Sterling a final warning. (Tr. 509-10; R 12). Sterling had no prior discipline. (Tr. 210). Sterling looked at the schedule and saw that her name had been penciled in for November 9. (Tr. 511). She met with Kercher to explain what had happened, and, though the testimony concerning the precise chain of events is somewhat confused, 10 Kercher investigated the complaint. (Tr. 213-14, 217). Sterling contacted the Company hotline, and spoke with Holder on December 2, 2010, alleging that the discipline was retaliation for her prior sexual harassment complaint. (Tr. 512-13; R 12).

15 Kercher met with Sterling after receiving the hotline complaint. Sterling told Kercher she had signed up for overtime on November 9, but thought it had been canceled. Kercher met with Lieutenants Rice, Eggleston, and Nick Dotter, Operations Manager Martini, and Major Armstrong. Armstrong stated the discipline was written as a final warning because Sterling was a no-call/no-show and it cost hours on the contract. Eggleston stated that he acted under 20 Armstrong’s direction. Rice told Kercher that there was a note on the whiteboard where overtime was posted that all overtime was canceled, and the names of the employees who had signed up for overtime were erased. (Tr. 460-62). Kercher initially reduced the final warning to a written warning on December 9, 2010 (Tr. 213). She changed the discipline to an oral warning on December 17, based on her determination that there had been a misunderstanding. Kercher noted in a December 14 “Memo to File” that Sterling never misses work and is always on time, 25 and therefore a final warning was not justified. (Tr. 316-18; GC 34-35; R 12). According to Kercher, Sterling conceded that some type of discipline was appropriate, and she was satisfied with the oral warning. (Tr. 247). Sterling testified that she did not agree to an oral warning. She believed she should not have been written up at all. (Tr. 516).

30 Juan Castro received an oral warning on March 10, 2010, for an unexcused absence, and a written warning on September 22, 2010 for another unexcused absence. (GC 36). On April 10, 2010, Keegan McManus received a discipline with the boxes for both oral and written warnings checked for an unexcused absence. (GC 37). Carlton Snead received a final warning on April 14, 2010, after failing to call or show for work the prior three consecutive days (GC 35 38).¹⁸

D. *The Union Organizing Campaign*

40 During the summer of 2010, Sterling talked to Lieutenant Rice and Officers Banuelos, Wickham and Taresh about bringing in a union because she felt the office was “out of control.” In October 2010, Sterling told Wickham that he would be a great choice to start communications with a union. (Tr. 516-18).

45 ¹⁷ Respondent contends that it was Eggleston’s view that overtime had been canceled only for patrol officers and not for fare inspectors. Respondent cites to a portion of Kercher’s testimony to support this contention, and Kercher’s testimony does not purport to rely on what Eggleston told her. (R Br. 14, citing to Tr. 209). Eggleston testified, but was not asked about Sterling’s discipline.

50 ¹⁸ Christopher Schemer was not disciplined for failing to show up for a shift, but he did receive progressive discipline, starting with an oral warning, for multiple instances of being late for work along with some other infractions. (GC 39).

In early October 2010, Wickham called the Union and spoke with Mary Mulvaney. She sent him sign-up cards, newsletters and information packets. Wickham received a box of material at his house in early November. He put the box in his truck, took it to work, and distributed the Union material to coworkers at the three kiosks.¹⁹ Rice saw the Union materials on the counter at the McClintock kiosk and told Wickham they could not stay there. Rice took the remaining materials, put them in his car, and told Wickham to take them home after his shift. (Tr. 382-84, 465). Wickham's main contact at the Union was Duane Phillips. Wickham and Phillips talked roughly once a week, often to have Phillips answer questions Officers had posed to Wickham about the Union. (Tr. 390-91). The Officers used the code name "Mickey Mouse Club" when referring to the Union. They tried to keep the organizing campaign confidential, and spoke of the Union in the hypothetical. (Tr. 482, 558-60).

Gilberto Robles, a Security Officer working on the Metro Light Rail, recalled that Union discussions started around November 2010. He recalled discussions with Wickham and Rice in the parking structure outside the McClintock kiosk. These usually took place during break time. (Tr. 364-65). Robles did not talk about the Union with others because Rice and Wickham had cautioned him against it. (Tr. 377). Banuelos also first heard about the Union campaign in November 2010. (Tr. 430).

Sean Nagler, who worked as a Security Officer on the Metro Light Rail from May 2010 through January 2011, recalled discussing the Union with coworkers in November 2010.²⁰ He learned of the organizing campaign when Wickham sent him a text asking him if he wanted to join the Union. Nagler recalled discussing the Union with Armstrong in mid-December 2010 at the McClintock kiosk. According to Nagler, Armstrong said, "I know you've been talking to several officers about joining a union." Nagler responded, "I talked to several officers, yes, and I had put a bug in their ear if they would like to join a union, here's the person you need to speak to." (Tr. 542-45). Armstrong replied that he could not join the Union in his position, but he had nothing against it. (Tr. 547-48).

Carol Taresh worked for Respondent on the Metro Light Rail from January 2010 through February 2011. She voluntarily resigned, and currently works for another company. She recalled discussions of the Union started in March or April 2010, and generally occurred outside the McClintock kiosk. The discussions waned, and then began again in August or September 2010. (Tr. 550). In the Fall of 2010, she discussed the Union with Rice, Sterling, Wickham and Officer Brett McAlister outside the McClintock kiosk. (Tr. 549-51). In November 2010, there was a discussion of the Union at the McClintock kiosk with Lieutenants Clemons and Rice, and Officers Joe Shipp, Taresh, and Sterling. According to Taresh, Clemons said he would take some literature, but the Union shouldn't be discussed at work. (Tr. 551-52). The following week, Clemons cautioned Taresh to be careful who she talked to about the Union, and where she did it, because it shouldn't be discussed at work. (Tr. 552). Clemons recalled that he told employees not to discuss the Union in the kiosk, because that was his office and he could not be privy to these discussions. He denied that he otherwise instructed anyone not to discuss the Union. (Tr. 572).

Rice spoke to the other supervisors about the Union. Lieutenant Tim Taylor asked Rice about the Union in October 2010. Rice informed Eggleston that there were "rumblings" about a union movement and he wanted him to be aware of it. (Tr. 467-68). In January 2011, Taylor

¹⁹ Wickham estimated the box was roughly 3'x3'. (Tr. 383).

²⁰ Nagler was terminated in January 2011 for having too many write-ups. (Tr. 543).

asked Wickham if he had heard anything from the Mickey Mouse Club. Wickham responded that he didn't know anything about it. (Tr. 392-93).

5 Pablo testified he first learned the Metro Light Rail Officers were looking into joining a union on January 31, 2011, when he received an e-mail notice from Respondent's corporate labor attorney.²¹ (Tr. 46-47). The Metro Light Rail supervisors discussed the Union at a meeting on February 1. (Tr. 570-71). Pablo sent a letter, dated February 4, 2011, addressed to the "Officers," stating the SPFPA had filed a petition and requested an election. He informed the Officers that they were not obligated to vote one way or the other. He also stressed that the election was an important decision for the Officers, their families, and the Company, and urged the Officers to be well-informed prior to voting.²² (GC 4). Pablo instructed the Project Manager, Major Armstrong, to distribute the letter to each employee and post it on the bulletin board at the McClintock kiosk. (Tr. 57).

15 Also on February 4, Pablo convened a meeting in his office with the supervisors and managers in his chain-of-command except for Rice and Taylor. He informed them of the dos and don'ts of management's involvement with Union organizing. Each attendee received a handout utilizing the acronym "TIPS" to explain that they cannot Threaten, Interrogate, Promise, or use Surveillance in connection with the upcoming election. The handout also contained tips for making unions unnecessary, using simple standards such as fairness, honesty, friendliness, 20 courtesy, openness, evenhandedness, and the like. (Tr. 95-96, R2, 3). Armstrong held a separate meeting with all of his direct reports, including Taylor and Rice, to convey the information he learned at the meeting. (Tr. 319).

25 On February 21, 2011, Pablo sent another letter addressed to the "Officers." He informed them of the March 1 election, including its time and location. He again stressed the importance of the decision to the Officers, their families and the Company. Pablo encouraged employees to do their own research rather than blindly accept information from any source. He encouraged everyone to vote, noting that with 15 Officers qualified to vote, one vote could make a difference. (GC 5). This letter was delivered to the employees in the same manner as the 30 previous one. (Tr. 58).

In an undated notice, the Officers were informed that they were required to attend a meeting on February 22, 2011 at the Comfort Inn, the same place the Union election was to 35 take place the following week. Each Officer was scheduled either at 12:00 p.m. or at 3:00 p.m. The notice did not indicate the meeting's topic. (GC 6). Pablo was the only person who spoke at the meeting. He read verbatim from a prepared script.²³ Pablo once again reminded employees of the importance of the election to them, their families and the Company. He described the election process, reminded employees that they had not obligated themselves even if they 40 signed a card or petition, and again stressed the importance of voting. Pablo then described what it would mean to be unionized, stating that employees would no longer be able to come directly to management with concerns, informing them of the requirement to pay dues, and encouraging employees to investigate the rules and obligations of being unionized. Next, Pablo

45 ²¹ Kercher also testified she learned of the Union activities at this point by viewing the same e-mail.

²² Robles perceived the references to effects on family, pay and the Company as "key words that really try to strike a nerve to try to discourage people into wanting to go to Union." (Tr. 378).

50 ²³ The script at R 4 contains a statement from "Larry" and a place for comments from "Dean," which refers to Dean Hemstreet, the former Metro Light Rail project manager. They did not speak at the meeting, however. (Tr. 101-102).

explained collective bargaining, and informed employees that the Company was not required to agree to any particular demand. He reminded them that if wages increase too much, clients will look elsewhere and the Company will lose contracts. Finally, Pablo urged the Officers to educate themselves before voting. (Tr. 98, R 4).

5

1. *Danny Rice Transfer and Isolation*

Respondent hired Danny Rice on October 6, 2008 to work on the Metro Light Rail contract. He worked as a Patrol Officer and was promoted to Lieutenant a year later. As Lieutenant, he supervised the swing shift, from 2:00 to 10:00 p.m. (Tr. 451-53).

On February 3, 2011, Officer Joe Shipp wrote a memo recounting that Rice had informed him earlier that day that the Union wanted to set things up as early as the following week. Shipp quoted Rice as saying “you didn’t hear this from me, because I’m a supervisor and I’m not supposed to be involved with this.” (R 6). On February 4, 2011, Clemons wrote a memo to Armstrong regarding the Union. He explained that Rice approached him and Shipp a few weeks prior and asked if they would be interested in signing a petition for Union representation. He recounted Rice’s description of the Union, and opined that Rice was the “driving force” behind the movement to organize.²⁴ (Tr. 573, R 5). Shipp and Clemons provided Pablo with their respective memos. Officer Robles also observed Rice asking employees to sign Union cards, and perceived that Rice was engaged in Union-organizing efforts. (Tr. 375). Rice denied being involved with Union organizing. (Tr. 482).

Pablo and Kercher met with Rice on February 7, 2011, and issued him a suspension. Rice signed the suspension, and stated in “comments” section that it would only be acceptable upon him being allowed to state his side of the story. (R 8, Tr. 108, 110). Pablo informed him that he could prepare a rebuttal letter. Rice did not submit any rebuttal or other comments regarding the suspension. (Tr. 110). According to Pablo, he instructed Rice not to communicate with any Officers assigned to the Metro Light Rail account while he was doing his investigation. (Tr. 125). Rice did not recall this instruction as limited to the time of the investigation, and testified that it had not been rescinded as of the hearing. (Tr. 480).

Pablo sent Armstrong an e-mail, dated February 10, 2011, instructing him to ask three or four Officers if Rice had approached them about Union activity, and to report back to him the following day. Pablo sent a follow-up e-mail, dated February 11, 2011, telling Armstrong to ask “Carol, Taylor, Dotter and one more person.” (Tr. 107; R 7). Armstrong recalled speaking with Officers Nick Dotter, Gilbert Robles, Carol Taresh, and Lieutenant Tim Taylor.²⁵ (Tr. 317). Armstrong responded to Pablo with an e-mail later that same day, informing Pablo that Taresh had stated Rice advocated the Union, Dotter and Robles had heard nothing, and he had not heard back from Taylor. (Tr. 554; R 7). Robles informed Armstrong that he had heard nothing about the Union, when in fact he had, because he wanted to protect Rice. (Tr. 369).

Armstrong informed Officers present at the McClintock kiosk on February 11, 2001, that Rice had been suspended and that nobody should make contact with him. (Tr. 370, 553). Armstrong also informed Wickham that Rice had been suspended and that he was to have no

²⁴ Clemons testified that he did not contemporaneously inform upper management about Rice approaching him regarding the Union in December 2010. (Tr. 571).

²⁵ Tim Taylor was a supervisor; the other employees were not.

contact with him. According to Wickham, Armstrong stated that if he found out employees had contact with Rice, they would be terminated. (Tr. 394).

5 On February 14, 2011, Pablo and Kercher met with Rice again. Pablo stated that, based on the information he received about Rice's Union activity, he was removing him from the Metro Light Rail account. (Tr. 112). Rice was demoted from his supervisory position, with an attendant loss in pay. Rice protested that he was never asked his side of the story. (Tr. 478). Operations staff initially assigned Rice to the Tempe Water Treatment facility. He was only scheduled part-time the first two weeks on the job. He called Pablo to complain, and was reassigned to a Cricket cell phone retail store on February 24, 2011. The assignment at Cricket was to armed position with better pay than the Tempe Water Treatment facility.²⁶ Rice was the only Security Officer assigned to that particular Cricket store. (Tr. 55-57, 452; GC 41). Rice made \$17.25 per hour at the Metro Light Rail, and he makes \$14.00 per hour at Cricket. (Tr. 480).

15 2. Donald Wickham Termination

Donald Wickham worked as a Security Officer for Respondent from April 2009 to February 2011. He began working on the Metro Light Rail contract in May 2010. He generally worked as a Kiosk Officer, and by the Fall of 2010, he worked at the McClintock kiosk all four of his regularly scheduled days. (Tr. 380-82).

25 As detailed above, Wickham became involved in the Union organizing campaign in October 2010. He contacted the Union, obtained and distributed Union informational material, and served as the liaison with the Union for purposes of answering employees' questions and conveying information about the Union.

30 In November 2010, Wickham wrote a memo to Major Armstrong requesting Christmas and New Years off in order to pick up his sick mother in Pahrump, Nevada and take her to his house for the week. Armstrong stated he did not receive the request. Wickham was scheduled for work that week, and wrote a second memo telling management to disregard the first request, since they apparently already had. Armstrong told Wickham he wished he would not have done this, since it left a paper trail. In late November or early December 2010, Armstrong cleared the McClintock kiosk except for Wickham, Clemons and himself. Armstrong told Wickham that if he wanted to keep his job, he would have to start working special events such as football games, the New Years' Eve party in downtown Tempe, the Fourth of July, etc. Wickham stated that Armstrong would have trouble getting Officers to volunteer for these events because they paid straight time rather than overtime if the holiday fell during the Officer's regularly-scheduled shift. (Tr. 386-90).

40 Wickham worked overtime on February 3 and 4, 2011 at the Price & Apache kiosk. He recalled that a cold-front had come through the area, and the temperature had dipped into the 30s. The heat was not working, and Wickham recalled it was very cold in the kiosk. (Tr. 397). Security Officers keep reports detailing what took place during their shifts. Wickham's Security Officer report for February 3, 2011, notes that upon arrival at 4:00 a.m., the heat was not working in the Price & Apache kiosk, and the computer would not recognize the memory stick.²⁷

50 ²⁶ Rice had the option to accept or decline this reassignment (Tr. 243).

²⁷ At the beginning of their shifts at the kiosks, officers plug memory sticks, or thumb-drives, into their computers. (Tr. 395).

Wickham emphasized, “EXTEMELY COLD IN KIOSK.” (GC 50). Eggleston did not look at this report. That same day, Wickham told Eggleston and Clemons the heat was not functioning.²⁸

5 Wickham was assigned to work 4:00 a.m. to 2:00 p.m. at the Price & Apache kiosk on February 4, 2011. At 7:00 a.m., Wickham recalled he was sitting in front of his monitors, bundled up in winter gear because the heat was still not working.²⁹ Lieutenants Eggleston and Clemons arrived at the kiosk at approximately 7:25 a.m. There is normally one Lieutenant per shift. Clemons stated that he had just finished graveyard shift the prior evening, and it did not make sense to go home before the meeting Pablo had scheduled for later that morning, so
10 Armstrong advised him to ride with Eggleston. (Tr. 565-66). Eggleston testified that Clemons was there because he was working overtime. Eggleston stated he did not find out about the Union meeting Pablo had scheduled until after his arrival at the G4S main office following his work shift.³⁰ (Tr. 339-42). Eggleston recalled that Wickham was wearing a jacket, and was seated in his chair facing out the window, not in the direction of his computer screen.³¹ (Tr. 15 355). Eggleston viewed him from the glass window on the entrance door. (Tr. 341, 355-56). He said to Clemons, “Look Dave. Come here. He is sleeping.” (Tr. 359). Clemons also viewed Wickham from the window on the door. According to Eggleston, Clemons then went around to the window adjacent and perpendicular to the door to view Wickham, which was the direction Wickham was facing. (Tr. 360-61; GC 49). Clemons testified that he was standing behind
20 Eggleston the entire time, and that he only looked into the kiosk from the door. (Tr. 577). Eggleston stated he beat on the door, at which point Wickham woke up, got out of his chair, and let him in the kiosk. (Tr. 361). According to Clemons, Eggleston jiggled the door’s handle, and Wickham slid over in his chair to open the door. (Tr. 577-78).

25 Wickham denied he was sleeping. Clemons asked Wickham if he needed an energy drink, and Eggleston asked if he needed to get coffee. Wickham responded that he did not feel well, he had a sinus infection, and it was freezing cold in the kiosk. Eggleston and Clemons left, and Wickham completed his shift. (Tr. 403-04, 568; GC 51). After leaving, Eggleston and Clemons attended Pablo’s Union meeting, described above. (Tr. 341).

30 Later that afternoon, Wickham called Eggleston because he was nervous that two Lieutenants had shown up at the kiosk when usually only one was on duty. Wickham asked Eggleston if there were going to be any repercussions based on what had occurred earlier, and Eggleston told Wickham “No, I wouldn’t think so.” Wickham finished his shift and worked four
35 more days after that (Tr. 404-06). Eggleston asked Wickham if he wanted to work two

²⁸ The security officer report for February 3 shows Eggleston, who has the code “711”, was in the kiosk from 11:59 a.m. until 12:28 p.m. (GC 50).

40 ²⁹ Eggleston testified that he did not perceive it as cold outside. (Tr. 339-40). Officer Robles visited the Price & Apache kiosk on February 4, and observed the heater wasn’t working, it was cold, and Wickham was dressed in winter gear, including a scarf, hat and heavy jacket. (Tr. 371-72). The General Counsel requests that I take administrative notice of historical weather data compiled by the U.S. Department of Commerce, National Oceanic and Atmospheric
45 Administration, National Climatic Data Center, showing a low temperature of 30 degrees on February 4, 2011. (R. Br. 22, footnote 16). I take administrative notice of this fact. Almanac.com likewise reports the temperature that day at Phoenix Sky Harbor ranged from a low of 30 degrees to a high of 54 degrees F. <http://www.almanac.com/weather/history/AZ/Tempe/2011-02-04>.

50 ³⁰ When a Lieutenant works overtime, he assumes the role of a non-supervisory officer. (Tr. 311).

³¹ This would have given Eggleston a side view of Wickham. (R 21; GC 49, Tr. 355-56, 360).

additional overtime shifts the following Thursday and Friday. Eggleston called Wickham back an hour later and told him he needed to go to the Corporate Office in Phoenix. (Tr. 407).

5 Eggleston wrote a memo dated February 4, 2011, reporting that, at approximately 7:25 that morning, he and Clemons had seen Wickham sleeping on duty at the Price/Apache kiosk. According to Eggleston, when he told Wickham he was not supposed to be sleeping, Wickham replied that he was resting his eyes and had not gotten much sleep. (R 9). On February 9, 2011, Clemons wrote a memo, per Armstrong's request, recounting the events on the morning of February 4. Clemons' memo states essentially the same thing as Eggleston's. (Tr. 567; R 10).

10 After consulting with Pablo, Kercher issued Wickham a three-day suspension on February 10, 2011 for sleeping on duty.³² She informed him of this in a meeting in her office, and told him to return the following Monday. (Tr. 407-08). Wickham wrote on the suspension that he did not say he was resting his eyes, but instead said he had been sick with a head cold. (Tr. 408-09; GC 17).

20 Kercher testified that she based the suspension on a review of the memos Clemons and Eggleston provided, as well as review of the security videotape at the Price & Apache kiosk. (Tr. 145-47; GC 17). The Price & Apache kiosk has light sensors that respond to body movement. (Tr. 373-74, 400). When she viewed the tape with Dustin Jiminez, supervisor at the Passenger Assistant Area (PAA), Jiminez was able to point out when the lights in the kiosk went off and on, but Kercher was not able to make this distinction on her own. (Tr. 242-43, 275). Kercher testified that at one point during the videotape, when the lights came on in the kiosk, she could see the word "security" on the back of Wickham's jacket. (Tr. 146). Upon reviewing the videotape at the hearing, Kercher was not able to see Wickham, Eggleston or Clemons, and she could not see Wickham's computer monitor. She also did not see the light go on at the Price & Apache kiosk at any point, including when Eggleston and Clemons entered it at approximately 7:25 a.m. (Tr. 235-40; GC 42).

30 Wickham was discharged effective February 14, 2011. Pablo made the decision, and Kercher signed the paperwork. Pablo did not view the videotape. In the "reason for disciplinary action(s)" section, the termination notice states:

35 Based on HR review of the taped footage of the Kiosk at Park and Apache on 2/4/11, it clearly showed that the kiosk was dark from 0657 until at least the end of the tape at 0714.³³

40 This tape clearly showed no movement inside the Kiosk for this duration of time indicating that the officer inside was asleep or not attending to his duties. The light should always be on in the Kiosk so Security presence is noted at all times.

45 (Tr. 84, 115, 147-149; GC 18). After viewing the video at the hearing, Kercher then testified that the video played very little role in the decision to terminate Wickham, and that the final decision had already been made before she viewed it. (Tr. 242).

Kercher and Armstrong met with Wickham to give him his termination notice. Kercher informed him that they had reviewed video evidence, and that the light did not come on in the

50 ³² Wickham testified it was a five-day suspension because he was told to return five days later. (Tr. 407).

³³ The tape ends after 7:29 a.m.

kiosk, which indicated that he was asleep or remiss in his duties. (Tr. 409). Wickham mentioned that other employees had been caught sleeping on duty and had not been terminated. Armstrong replied, “Well I guess now we are following the rules.” (Tr. 410). Kercher noted that Wickham was insubordinate during the meeting. She perceived him as angry. Wickham
 5 recalled he spoke in a louder voice than normal because he was blindsided. Both parties agree that Wickham did not make any threats. At the end of the meeting, Wickham said that Respondent was “dirty.” (Tr. 150-52, 272, 410-11; GC 18).

Pablo testified that he has never authorized a penalty shy of termination for sleeping on
 10 duty since he has been the General Manager of the Phoenix Area. (Tr. 115). He testified he did not know Wickham prior to February 4, he did not know about his Union activity, and was not aware of any complaints from Wickham about wages or working conditions. (Tr. 114-16). Kercher denied knowledge of Wickham’s involvement in any Union activities, and Wickham had not complained to her about wages or other working conditions. (Tr. 259, 271)

15 The General Counsel introduced evidence regarding the discipline of other employees who were caught sleeping on duty or engaging in other conduct that can be grounds for immediate termination, who received treatment more favorable than Wickham.³⁴

20 On November 12, 2009, Lieutenant Rice found Officer Gerald Hill sleeping on duty at the Sycamore kiosk. He called for a witness, and Officer Trueblood arrived, they woke Hill up, and Rice called Major Thario to ask what to do. Thario said to write Hill up and give him an oral warning, and Rice complied. Trueblood signed as a witness. The warning was in Hill’s personnel file. (Tr. 154, 472-74; GC 19). Kercher testified she was not aware of the warning until
 25 she reviewed Hill’s personnel file in preparation for Wickham’s unemployment compensation hearing.³⁵ (Tr. 256-57).

30 Timothy Causey was initially discharged for sleeping on duty on January 15, 2010. At the time, he was working at the McClane Sunwest jobsite. As of March 3, 2010, Causey still worked for Respondent at the Union Pacific Railroad jobsite. On March 3, two individuals filled out incident reports relating that Causey had an accident with his truck. He had said he was sleepy and could not drive. According to the reports, Causey had left the jobsite suddenly without telling anyone. Kercher changed Causey’s termination to a 90-day suspension on April 16, 2010, after learning that Causey had been prescribed pain medication for dental problems.
 35 Kercher instructed him not to take pain medication while on duty. (Tr. 165, 255; GC 21).

40 Brian Pike was terminated on January 25, 2010 for sleeping on duty. On January 20, the Back of America Team Manager, “Toni”, went to notify security that an associate had passed out and paramedics had been called. She saw the Security Officer, Pike, asleep, and she “literally walked out of the door and spoke to him before he opened his eyes.” In a January 22, 2011 e-mail, Colin Millan from Bank of America, sent a letter to Brandi Stokes,³⁶ copied to

45 ³⁴ The disciplinary action involving Nicholas Young is incomplete and does not appear to have been effectuated. The type of action contemplated by the disciplinary notice is not checked, and there is no employee or witness signature. Moreover, Kercher’s testimony that it was not in Young’s personnel file is unrefuted. I therefore find that it does not have sufficient evidentiary value to warrant consideration of Young as a comparative employee. (Tr. 254; GC 20).

50 ³⁵ Wickham had also stated Hill was not fired for sleeping on duty during his termination meeting with Kercher.

³⁶ Stokes’ job title was not identified.

Pablo, stating that this was the second time security had been found sleeping on day shift. Pike had initially received a final warning on January 22, but that was changed to a termination after Pablo reviewed videos from a security camera that clearly showed him sleeping. Kercher wrote a memo to file on January 25, stating that after reviewing photos from a security camera, the
5 decision was made to terminate him. Pike attempted to attribute his sleeping to having low blood sugar, but this medical condition was not substantiated. He had previously received a written warning on June 18, 2009 for using foul language and being disrespectful. (Tr. 253-54, 591; GC 22).

10 Jon D’Ancona was terminated effective January 29, 2010, for sleeping on duty. Prior to that, D’Ancona had been disciplined numerous times. He received a three-day suspension on January 23, 2010 for leaving his post of duty without authorization. He was issued a written warning on January 15, 2010 for putting out cat food on Bank of America’s property despite site
15 supervisor’s order to stop feeding the cats. The warning notes that further reprimand will be grounds for removal. D’Ancona received an oral warning on June 1, 2009, for wearing his badges in the incorrect place and refusing to correct the matter when first informed. On September 22, 2008, he received an oral warning for failing to follow access control procedures. On July 9, 2008, D’Ancona was issued a first written reprimand for violating Captain’s orders not to drive a cart on the street. He received a final warning on August 8, 2008 for dozing off while
20 sitting at his computer desk. In the comment section, it notes that “sleeping on duty is a most serious offense and cannot be tolerated anytime” and warns that termination may result if the issue is not corrected.³⁷ On March 30, 2008, he received a second written reprimand for failing to unlock all employee doors and arguing with the shift supervisor when she tried to help him. Three days prior, on March 27, 2008, D’Ancona received a first written reprimand for failing to
25 re-arm two emergency doors after contractors left the jobsite. (GC 23).

John Stone received an oral warning on March 24, 2010, for sleeping on duty after being observed on three occasions during the week of March 15 sleeping while sitting in his golf cart. At the client’s request, Stone was moved to a different jobsite. In the “supervisor’s remarks”
30 section, Kercher noted that the allegations were unfounded. (GC 24).

Marcus Oglesby was terminated on August 6, 2010 for sleeping on duty. He was suspended for three days pending investigation on August 3. On the suspension document, his supervisor remarked that while she had not received any negative reports about Oglesby, a
35 review of his file showed previous write-ups for sleeping on duty. (GC 25). Kercher was not aware Oglesby had received any prior write-ups for sleeping on duty, and she did not see any when she reviewed the file a week before the hearing. (Tr. 252-53).

40 Enoch Harmon was terminated on July 13, 2010 for sleeping on duty. He was suspended pending investigation on July 7. On the suspension document, his supervisor remarked that Harmon had received a corrective action notice for sleeping on duty in February 2008, and a suspension for no-call/no-show on November 2, 2009. As a result, he had been placed on probation through February 2010. (GC 26).

45 Benjamin Berry was terminated on July 16, 2010 for using abusive language and behaving disrespectfully. At the request of Ken Deist, the Bank of America Site Manager, Operations Manager Dean Hemstreet conducted a Career Development Review of Berry’s past discipline. The March 22, 2010 review notes that Berry had been late four times in the last eight
50 months, he had called off less than four hours prior to the start of his shift, he violated post

³⁷ Pablo was on vacation the first two weeks of August 2008. (Tr. 591).

orders twice, threatened to harm another Officer, and was caught sleeping on duty and given a second chance. Hemstreet warned that any further disciplinary actions would lead to termination. Pablo did not review or sign the Career Development Review (Tr. 593-94; GC 27).

5 Kalin Trotter was discharged on August 19, 2009, for taking an executive chair from an unauthorized location, plugging in an ipod, and putting his feet up on his desk. He had previously received a written warning on September 3, 2008, for sleeping on duty, in addition to other infractions between 2004-2006.³⁸ (GC 28).

10 Sheletha Randell was terminated on April 29, 2010.³⁹ On April 28, 2010, Ms. Randell had received an oral warning for taking a personal call and talking for several minutes while on duty two days prior. Also on April 28, she was issued a suspension pending investigation for sleeping on duty. She had previously received a final warning on April 6, 2010 for excessive tardiness. She was issued a written warning on April 5, 2010 for being tardy three times since
15 her assignment date of March 17, 2010. Major Amber Stewart had reported to Operations that her shift supervisor had observed Randell nodding off in March and April 2010. During February 2010, Randell had fallen asleep several times during training class. (GC 29).

20 Between September 1, 2008 and October 5, 2011, 32 Officers were terminated for sleeping on duty. (R 21).⁴⁰

3. *Alleged Threats, Surveillance & Interrogation*

25 Many of the allegations regarding surveillance and threats are discussed in context above. I will address the remainder in this section.

During Wickham's hearing for unemployment compensation, Kercher testified that Officer Hill and Young's discipline was confidential (Tr. 162).

30 Banuelos worked in the PAA from February through April 2011 because she was pregnant and could no longer work with the public. According to Banuelos, in March 2011, her supervisor at the PAA, Dustin Jiminez, told her that Pablo had stated that after expiration of the Light Rail contract, he was not going to re-hire anyone who supported the Union. (Tr. 432). Pablo denied every telling anyone that he would not re-hire employees who supported the
35 Union (Tr. 119-20).

40 According to Rice, in or around October 2010, he and Taresh found a tape recorder attached with duct tape under the corner of the desk where the computer sits at the McClintock kiosk. (Tr. 469-70). Taresh testified that in July/August 2010, she, Sterling, Rice and perhaps Brett McAlister, found what appeared to be fresh tape under the computers at the McClintock kiosk, impressed with "little bitty holes" consistent with a recorder. (Tr. 562-64).

45 Armstrong denied knowing about any Union activities in the December 2010 time period. (Tr. 335). He denied saying anything about Union activities being investigated or under surveillance, and denied threatening reprisals. (Tr. 335-36).

³⁸ Pablo testified he was unaware of the prior entry for sleeping on duty. (Tr. 594).

50 ³⁹ The Personnel Action Change states the termination is effective April 29, 2010. It lists her last day worked as April 25, 2010, which is clearly an error.

⁴⁰ It is unknown as to whether any of these officers had prior discipline.

III. Decision and Analysis

A. Rules and Policies

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Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right “to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”

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The General Counsel has the burden to prove that a rule or policy violates the Act. In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd* 203 F.3d 52 (D.C. Cir. 1999). Under the test enunciated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), if the rule explicitly restricts Section 7 rights, it is unlawful. If it does not, “the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Id.* at 647. A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. *Id.* The question of whether a rule or policy is on its face a violation of the Act requires a balancing between an employer’s right to implement certain legitimate rules of conduct in order to maintain a level of productivity and discipline at work, with the right of employees to engage in Section 7 activity. *Firestone Tire & Rubber*, 238 NLRB 1323, 1324 (1978).

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1. Professional Image Rule

For the reasons detailed below, I find the Professional Image rule set forth in Respondent’s Security Officer Handbook is overly-broad, and violates Section 8(a)(1).

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In *Republic Aviation Corp v. NLRB*, 324 U.S. 793, 801-03 (1945), the Supreme Court held that employees have a protected right to wear union buttons at work. This right is balanced against the employer’s right to maintain order, productivity and discipline. The Board has struck this balance by permitting employers to prohibit employees from wearing union insignia where “special circumstances” exist. *Id.* at 797-98; *see also Sam’s Club*, 349 NLRB 1007, 1010 (2007). “The Board has found special circumstances justifying the proscription of union insignia when its display may jeopardize employee safety, damage machinery or products, exacerbate employee dissention, or unreasonably interfere with a public image which the employer has established as part of its business plan, through appearance rules for its employees.” *United Parcel Service*, 312 NLRB 596, 597 (1993), *enfd denied* 41 F.3d 1068 (6th Cir. 1994)(citing *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982)). A rule based upon special circumstances must be narrowly drawn to restrict the wearing of union insignia only in areas or under circumstances which justify the rule. *Sunland Construction Co.*, 307 NLRB 1036 (1992). Customer exposure to insignia is not, by itself, a special circumstance, nor is the requirement that an employee wear a uniform. *United Parcel Service, supra.*

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In support of its position that its rule is valid, Respondent points to three Advice Memoranda: *Pinkerton’s Inc*, Cases 18-CA-16257-1 and 18-CA-16332-1 (January 3, 2003); *Allied Barton Security Services*, Cases 4-CA-34212, 1-CA-42870, 5-CA-32694, 19-CA-30048,

and 20-CA-32724 (March 3, 2006); and *Hannon Security Services*, Case 18-CA-18047 (August 11, 2006). In all three instances, the Associate General Counsel, Division of Advice, opined that special circumstances existed permitting the employer to bar on-duty security officers from wearing buttons or other insignia that deviated from the officers' uniforms. Advice Memoranda are not legal precedent, and are dependent on the specific factual circumstances presented by the cases they address. In all three cases cited above, however, it is worth noting that the rulings contemplated that the security guards would interface with the public.⁴¹ As discussed above, the Security Officers working in the Passenger Assistance Area do not have any face-to-face contact with the public. Any concerns about commanding authority with the public or presenting a certain public image would not apply to these employees. Respondent has pointed to no authority to establish a special circumstance with respect to the PAA Officers. I find, therefore, that the rule is overly-broad.

Moreover, the "no insignias, emblems, buttons" rule does not specify that it is limited to Officers who are on duty. Respondent argues that because the Professional Image section begins by stating "You must be clean and neat while on duty," the limitation to duty status may be inferred. Looking at the rule as a whole, it is within a section entitled "Duties, Personal Appearance and Conduct." Within this section is a prohibition on violating federal, state and local laws, and an employee's duty to inform his/her supervisor if arrested. Obviously, these rules apply to off-duty conduct. The Professional Image subsection delineates the type of haircuts Security Officers must have, as well as male facial hair parameters, which by their nature cannot be confined to duty hours. Moreover, with regard to facial jewelry, the Professional Image subsection states that these must not be worn during working hours or anytime when in uniform. The *Lutheran Heritage* principle provides that the Board must give the rule under consideration a reasonable reading, 343 NLRB at 647, and ambiguities are construed against the its promulgator. *Lafayette Park Hotel*, 326 NLRB at 828; and *Cintas Corp. v. NLRB*, 482 F.3d 463, 467-470 (D.C. Cir. 2007). Read in context and construed against Respondent, its promulgator, it is not clear the rule is restricted to on-duty Security Officers. Accordingly, I find it is overly-broad and it violates Section 8(a)(1) of the Act.⁴²

2. No Unnecessary Conversations Rule

I find the "No Unnecessary Conversations" rule violates Section 8(a)(1) for the reasons articulated below.

The rule does not explicitly restrict Section 7 rights. Accordingly, one of the other *Lutheran Heritage* criteria for establishing a violation must be present. My conclusion relies on

⁴¹ The *Pinkerton's* Memorandum stated that the rationale behind the employer's rule applied both to day security guards, who would more frequently interact with the public, and night security guards, who were less likely to interact with the public. It noted, "Since all of the Employer's security officers are in positions where they may need to assist or confront members of the public, the rule is not overbroad in its application to all officers."

⁴² Both parties' briefs address the rule as it pertains to Respondent's on-duty Officers on the Metro Light Rail who deal with the public. The complaint, however, is not restricted to these Officers, or even to the Officers within the Phoenix area. Given the many different types of security Respondent provides nationwide, I cannot speculate about which situations may involve special circumstances and which may not. The evidence presented shows that some Security Officers do not deal with the public, and the rule can be reasonably read to apply to off-duty officers. On this evidence, I find it is overly-broad, but I cannot, at this juncture, specify where special circumstances may apply throughout Respondent's operations.

the third criteria, *i.e.*, the rule has been applied to restrict the exercise of Section 7 rights. On this point, there is conflicting testimony. Officer Taresh testified that in November 2010, Lieutenant Clemons told a specified group of employees in the McClintock kiosk that the Union should not be discussed at work. She further testified that the following week, Clemons cautioned her to be careful talking about the Union because it shouldn't be discussed at work. (Tr. 551-52). Clemons recalled that, some time after February 4, 2011, he told some unspecified employees not to discuss the Union in the kiosk, because that was his office and he could not be privy to these discussions. He denied that he otherwise instructed anyone not to discuss the Union, and denied knowledge of any Union activity. (Tr. 568, 572). I credit Taresh over Clemons for a couple of reasons. First and foremost, Taresh's demeanor was confident, open and straightforward. Clemons, by contrast, was less straightforward, and his testimony at times seemed confused. In addition to her demeanor, I credit Taresh's testimony because she has nothing to gain or lose by being forthcoming and truthful. She left Respondent's employment voluntarily to pursue another job. There was nothing in her demeanor or in the evidence presented to indicate she harbored a grudge against Respondent.⁴³ Clemons, on the other hand, has a vested interest in keeping his job and maintaining his status as a Lieutenant.

Respondent contends that Clemons' testimony is more reliable because he wrote a memo to his boss, Armstrong, on February 4, 2011, informing him that Rice had approached him a few weeks ago about signing a petition for Union representation. (R 5). The memo, however, does not reference Taresh, and does not contradict her testimony. Significantly, February 4 is the same date that Pablo sent his first memo to the Officers notifying them of the petition; Pablo met with the managers and supervisors regarding the dos and don'ts of how management should be involved; and Wickham was caught sleeping. Clemons' memo is an after-the-fact recollection of Rice's involvement with the Union written to comport with the unfolding events. Under these circumstances, I do not find it to be very reliable.

The Board has held that it is unlawful to restrict conversation about union matters during work time while permitting conversations about other nonwork matters. *Emergency One, Inc.*, 306 NLRB 800 (1992); *Sam's Club*, 349 NLRB 1007, 1009-10 (2007). Taresh's testimony that employees regularly talked about things like "sports, buying cars, houses, what was on TV last night" at work is unrefuted.⁴⁴ (Tr. 562-63). Clemons' statements not to talk about the Union at work, as described by Taresh, whom I credit, were not limited to duty time or any particular work area. Based on the foregoing, I find the rule was applied to restrict Section 7 rights, and it therefore violates the Act.⁴⁵

3. Confidentiality Provision

I find the Confidentiality Provision violates Section 8(a)(1) for the reasons articulated below.

The Handbook's confidentiality provision that existed prior to January 2011 explicitly prohibited employees from disclosing wage or salary information, and threatened employees

⁴³ Respondent, in fact, took quick action to fire Thario after Taresh complained of unwanted touching and comments.

⁴⁴ Not only is Taresh's testimony unrefuted, it is a matter of undeniable collective experience that people talk about things other than work while at work.

⁴⁵ Because I find that the rule was applied to restrict Section 7 activity, I decline to address Respondent's argument that employee's would not reasonably construe the rule as restricting Section 7 activity.

with discipline, up to termination, for violating it. The Board has consistently held that a confidentiality provision that expressly prohibit employees “from discussing among themselves, or sharing with others, information relating to wages, hours, or working conditions, or other terms and conditions of employment” violates Section 8(a)(1) even if it was never enforced and was not unlawfully motivated. As such, the rule was unlawful under *Lutheran Heritage*. See *Waco, Inc*, 273 NLRB 746, 748 (1984); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004).

The Handbook provision in place effective January 2011 does not explicitly reference wage or salary information. Respondent contends that by removing this language, it brought the rule into compliance. The provision, however, still prohibits employees from disclosing confidential information and giving interviews or making public statements about the Company’s activities or policies without Respondent’s permission. The Handbook does not define “confidential information” or the “activities or policies” it references, nor does it affirmatively state that the rule will not be used to restrict Section 7 activity. I find it is very similar to the confidentiality provisions in *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999). There, the company prohibited employees from revealing confidential information regarding customers, fellow employees, or the hotel’s business. It further stated:

Much of the Hotel business is confidential and must not be discussed with any party not associated with the Hotel. You should use discretion at all times when talking about your work. The Hotel considers all information not previously disclosed to outside parties by official Hotel channels to be proprietary information. Questions or calls from news media should be immediately transferred and responded to by the Marketing Department or the President of the Hotel. At no time should you talk to the media about Hotel operations.

If you should discuss or disclose proprietary information, you may be subject to disciplinary action, up to and including termination.

Id. at 291-92. The Board found the rule in *Flamingo Hilton-Laughlin* would be reasonably construed as restricting employee’s from discussing terms and conditions of employment, and held it was overly-broad. The rule at issue here is similarly vague and overly-broad, and I therefore find it violates Section 8(a)(1).

4. Social Networking Policy

The General Counsel alleges that two provisions in Respondent’s Social Networking Policy violate the Act. I find that one contested part of the Social Networking Policy violates Section 8(a)(1), but the other does not.

Since November 22, 2010, Respondent has maintained a Social Networking Policy. The contested provisions prohibit commenting on work-related legal matters without permission from the legal department, and placing photographs of employees at work or in uniform on social networking sites. In its opening section, labeled “Discussion”, the policy recognizes employees’ rights to share work experiences, and sets forth rationale for imposing some restrictions on work-related social networking. The section concludes by stating, in bold print, “This policy will not be construed or applied in a way that interferes with employees’ rights under federal law.”

I will first address the provision that prohibits commenting on any legal matter without permission from the legal department. This rule does not expressly restrict Section 7 activity, nor was evidence presented that it was promulgated in response to it, or that it was applied to restrict the exercise of Section 7 rights. Accordingly, I must determine whether it would

reasonably be construed as prohibiting protected activity. For the reasons set forth below, I find that it would.

5 The term “legal matters” is not defined. It cannot be assumed that lay employees have the knowledge to discern what is a federal law, and thus permitted under the disclaimer, as opposed to what is a prohibited “legal matter.” I find the rule is reasonably interpreted to prevent employees from discussing working conditions and other terms and conditions of employment, particularly where the discussions concern potential legal action or complaints employees may have filed. Social network discussions can vary from postings everyone in the public can see, to messages between specific individuals only. The rule at issue here would reasonably be read to prohibit two employees, such as Sterling and Banuelos, from sending messages to each other about their issues at work and their EEOC and hotline complaints via a social networking site. Likewise, it would reasonably prohibit a discussion group among concerned employees on a social networking site. Because this part of the Policy is reasonably interpreted to thwart protected discussions, I find it violates the Act.⁴⁶

20 Regarding the prohibition on placing photographs on social networking sites, this rule does not expressly restrict Section 7 activity, nor was evidence presented that it was promulgated in response to it, or that it was applied to restrict the exercise of Section 7 rights. As such, I must determine whether it would reasonably be construed as prohibiting protected activity. For the reasons set forth below, I find that it would not.

25 In *Flagstaff Medical Center, Inc.*, 357 NLRB No. 65, slip op at 6 (2011), the employer adopted a rule prohibiting the “use of cameras for recording images of patients and/or hospital equipment, property, or facilities.” In finding that employees would not reasonably interpret the rule as restricting Section 7 activity, the Board noted that the hospital had significant privacy concerns, and found that employees would reasonably interpret the rule as legitimately protecting patient privacy. There are two key differences between the instant case and *Flagstaff Medical Center*. First, the prohibition here only applies to posting photographs of the worksite or uniformed employees on social networking sites, whereas in *Flagstaff Medical Center*, the rule banned all photography of hospital equipment and property. As the rule at issue here is less restrictive, this difference obviously weighs in Respondent’s favor.

35 Second, the Board found significant management’s legal duty at *Flagstaff Medical Center* to protect patient privacy, a concern largely unique to a hospital setting. While patient privacy is not as great a concern in this case, Respondent clearly has legitimate reasons for not having pictures of uniformed employees or employees who are at work posted on Facebook and similar sites. Starting with the worksite, Respondent does have patient privacy concerns for the EMT services it provides. Moreover, Respondent serves a variety of clients on a national basis. The various businesses and government agencies where its employees work can be presumed to have their own rules centered on privacy and legal concerns. I find the rule at issue here is reasonably construed as protecting Respondent’s clients. To read it as a prohibition on Section 7 activity strikes me a stretch, particularly considering the rule does not ban photographs but merely prohibits employees from posting them on social networking sites. As for the prohibition on posting pictures of uniformed employees, this would not reasonably seem to be an inherent component of the more generalized fundamental Section 7 rights. What readily

50 ⁴⁶ The prohibition’s venue, which is limited to social networking sites, does not render the rule valid. See, e.g., *Valley Hospital Medical Center*, 351 NLRB 1250, 1252-54 (2007), *enfd. sub nom Nevada Service Employees Union, Local 1107 v. NLRB*, 358 Fed. App’x 783 (9th Cir. 2009); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171-1172 (1990).

comes to mind is a desire to avoid broad dissemination of photos of uniformed employees engaging in unprofessional behavior. Again, this is not a ban on taking and using photographs; it is a prohibition on posting them on social networking sites that are potentially accessible to employees and non-employees alike.⁴⁷ This does not amount to “an unreasonable impediment to self-organization.” *Republic Aviation*, 324 U.S. at 803.

The General Counsel asserts that the rule would essentially bar an employee from posting a photograph about an unsafe working condition, concerns about uniform appearance and safety, as well as pictures of concerted activities such as handbilling or picketing in front of Respondent’s facilities. It is true that Respondent may not interpret the policy to prohibit employees from engaging in legitimate union-related activity such as, for example, taking photos unsafe working conditions or other concerted activities unless patient privacy or a similar privacy right is compromised. See *Lutheran Heritage Village-Livonia*, 343 NLRB at 646-47 (2004); *Lafayette Park Hotel*, 326 NLRB at 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). Because I find, however, this part of the Policy is not reasonably construed as a prohibition on Section 7 activity, I shall recommend dismissing the attendant part of the amended complaint.

5. Scope of Remedy

As a remedy for the rule/policy violations, the General Counsel requests nationwide posting and revocation of the unlawful rules. In *2 Sisters Food Group*, 357 NLRB No 168 (2011), the Board modified the judge’s recommended Order to conform with *Guardsmark, LLC*, 344 NLRB 809, 811-812 (2005). It ordered the company to rescind the unlawful provisions and republish its Rules of Conduct and employee handbook without them. The Board in *2 Sisters Food Group, supra*, recognized, however, that this could entail significant costs, and therefore ordered the following:

Respondent may supply the employees either with Rules of Conduct and handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the Rules of Conduct and handbook without the unlawful provisions. Thereafter, any copies of the Rules of Conduct and handbook that are printed with the unlawful rules must include the new inserts before being distributed to employees.

Id. slip. op. at fn 32, *Citing Guardsmark, supra* at 812, fn. 8. I find the *2 Sisters Food Group* remedy to be appropriate here. For the reasons set forth in *Fresh & Easy Neighborhood Market*, 356 NLRB No. 15 slip op p. 2 (2011), and *Technology Service Solutions*, 334 NLRB 116, 117 (2001), I also find a nationwide posting is appropriate in the manner detailed below.

B. Alleged Threats, Surveillance & Interrogation

The Board’s well-established test to determine if there has been a violation of Section 8(a)(1) of the Act is whether the employer engaged in conduct which might reasonably tend to interfere with the free exercise of employee rights under Section 7 of the Act. *American Freightways Co.*, 124 NLRB 146 (1959). It is the General Counsel’s burden to prove that a statement or conduct constitutes an unlawful threat, interrogation or act of surveillance.

⁴⁷ As in *Flagstaff Medical Center*, the General Counsel here does not argue, much less establish, that posting of any photographs predating the rule’s promulgation was protected by Section 7.

1. Lieutenant Danny Clemons

5 The General Counsel alleges that in November 2010, Clemons threatened unspecified reprisals and gave employees the impression their Union activities were under surveillance. As detailed below, I find Clemons' comments did threaten reprisals for Union activity but they did not create the impression of surveillance.

10 For the reasons discussed above in the *No Unnecessary Conversations* analysis, I credit Taresh's testimony that, in November 2010, Clemons told her and others at the McClintock kiosk not to discuss the Union at work. During the first conversation, in the presence of Officers Taresh, Shipp, and Sterling, Clemons told Rice he would take some Union literature, but said that the Union should not be discussed at work. (Tr. 551-52). About a week later, Clemons warned Taresh to be careful who she talked to about the Union and where she did it, because
 15 the Union should not be discussed at work. (Tr. 552). The General Counsel asserts that these comments were veiled threats that if Union discussions continued, employees could be disciplined. The comments, on their face and taken in context, are more cautionary than explicitly threatening. In fact, Rice testified that Clemons was an advocate for the Union, and that he had stated there was possibly a need for it. (Tr. 468). This does not, however, make
 20 Clemons' comments lawful. In *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462-463 (1995), the Board found that cautionary advice from a supervisor to an employee to watch her back "might have been all the more ominous" coming "from a friend sincerely concerned for the employee's job security." See also *Olney IGA Foodliner*, 286 NLRB 741, 748 (1987), *enfd.* 870 F.2d 1279 (7th Cir. 1989) (threats possibly intended as "friendly advice" found violative); *Trover Clinic*, 280
 25 NLRB 6 fn. 1 (1986) ("keep a low profile" and "be quiet about it"); *Union National Bank*, 276 NLRB 84, 88 (1985) ("watch yourself"). Clemons' comments to be careful about where and with whom to discuss the Union are very similar to the comments above, which were found to constitute threats of unspecified reprisals. Accordingly, I find these comments violate Section 8(a)(1) of the Act.

30 I find, however, that Clemons' comments did not create the impression of surveillance. The test for whether an employer's statement creates an impression of surveillance is whether the employee would reasonably assume from the statement that her union activities were under surveillance. *United Charter Service*, 306 NLRB 150 (1992). No evidence was presented that
 35 Clemons was in any way spying on employees' Union activity. The only evidence of activity that could arguably be labeled surveillance related to a possible recording device at the McClintock kiosk. Taresh testified that in July/August 2010, she and some others, including Rice, found what appeared to be fresh tape under the computers at the McClintock kiosk, impressed with "little bitty holes" consistent with a recorder." (Tr. 562-64). Rice recalled that in October 2010,
 40 he, Taresh and some others found a tape recorder attached with duct tape under the corner of the desk where the computer sits at McClintock & Apache. (Tr. 469-70). Regardless of the inconsistency between Rice and Taresh's testimony, Clemons has not been linked to any type of recording. He never stated employees were being monitored, nor do his comments, taken in context, imply such. The comments occurred when employees were voluntarily discussing the
 45 Union in Clemons' presence. It is clear from both Taresh's and Rice's testimony that they were not uncomfortable mentioning the Union to Clemons. This separates the instant situation from cases where a supervisor, unbeknownst to employees, gains knowledge about Union organizing efforts and confronts employees with it. Moreover, prior to Clemons' comments, employees used the code Mickey Mouse Club, spoke of the Union in the hypothetical, and
 50 cautioned potential members not to discuss the organizing campaign. Clemons' comments are in line with the general discretion employees already had determined was appropriate. Based

on the totality of the evidence, I find Clemons' comments did not create the impression of surveillance.

2. Major Jason Armstrong

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The General Counsel asserts that in December 2010, Armstrong created the impression of surveillance when he told Officer Nagler that he knew Nagler had been talking to several other Officers about joining a union. I must first address Armstrong's testimony, and Respondent's argument, that he did not know about the Union organizing campaign until 10 January 2011. In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950). I found Armstrong to be a credible witness on many points, based on his forthcoming and engaging demeanor. His testimony was more cautious and equivocal, however, when addressing his knowledge of the Union, and had characteristics of toeing the 15 company line. For example, he testified that he learned of the Union "[a]round maybe the middle of January 2011." (Tr. 315). Referring to himself and Pablo, he testified, "We received a letter and that is how Larry was actually notified that there was a union attempt to be started." Armstrong did not receive a letter, but rather Pablo received an e-mail. I don't find the semantic distinctions important, but instead find this testimony illustrative of how Armstrong's testimony at 20 times took on characteristics of being not only his own, but that of the Company.⁴⁸

Nagler's testimony was brief and very straightforward regarding his conversation with Armstrong at the McClintock kiosk in mid-December 2010. There was nothing in his voice or his 25 actions to indicate that he was fabricating the content or timing of the conversation. His testimony that Armstrong approached him and stated he knew Nagler had been discussing the Union is obviously more favorable to the General Counsel. On the other hand, Nagler's testimony that Armstrong, in this same conversation, stated he had nothing against unions, but as manager he could not join one, is more favorable to the Respondent. This is an indication that Nagler was not exaggerating or embellishing his testimony to make it more favorable to one 30 party's side.⁴⁹ On cross-examination, his recollection regarding a different conversation he had with Rice required refreshing, but this does not, in my view, diminish his overall credibility. Armstrong did not specifically deny having this conversation with Nagler, but rather gave a blanket denial as to his knowledge of Union activity prior to January 2011. Nagler is a 35 disinterested witness who worked for another employer at the time of the hearing. Armstrong, by contrast, is the Project Manager, with a vested interest in maintaining his position of power at the Metro Light Rail. Based on the foregoing factors, I credit Nagler's testimony over Armstrong's, and find the conversation in question took place in December 2010.

Turning to the question of whether the comment created the impression of surveillance, I 40 find that it did. The Board has found that employee would reasonably assume that his union activities were under surveillance when an employer reveals specific information about union activity that is not generally known, and does not reveal its source. As the Board stated in *Stevens Creek Chrysler Jeep Dodge, Inc*, 357 NLRB No. 132, slip op at 3 (2009), *affd* 357 NLRB No. 57 (2011):

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⁴⁸ See also Tr. 335, lines 12-15. The tone of Armstrong's voice noticeably changed when specifically asked if he had knowledge of Union activity in December 2010. Tr. 335, line 16.

⁴⁹ Nagler was terminated for having too many write-ups, but there was not evidence presented to establish that he thought this was unjust or that he otherwise held a grudge against 50 Respondent in general or Armstrong in particular. As of the hearing, he was working for a different employer.

5 When an employer tells employees that it is aware of their union activities, but fails to tell them the source of that information, the employer violates Section 8(a)(1). This is because employees are left to speculate as to how the employer obtained its information, causing them reasonably to conclude that the information was obtained through employer monitoring.

10 See also *North Hills Office Services*, 346 NLRB 1099, 1103 (2006) (employer's failure to identify employee source of information was the "gravamen" of an impression of surveillance violation); *Sam's Club*, 342 NLRB 620, 620-21 (2004) (store manager told employer he had heard the employee was circulating a petition about wages without revealing how he came by the information); *Conley Trucking*, 349 NLRB 308, 315 (2007); *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 254 (2006). In the instant case, Nagler's Union activity was not open or publicized. Under these circumstances, employees, including Nagler, would reasonably assume that their Union activities were under surveillance, and therefore Armstrong's statement violated Section 8(a)(1).

20 The General Counsel next alleges that on February 11, 2011, Armstrong told employees that Union activities would be investigated, threatened employees with reprisals for engaging in Union activities, interrogated employees about concerted protected activities, and threatened employees with discharge for speaking about discipline.

25 I will begin by discussing the alleged interrogations. Pablo instructed Armstrong to investigate whether Rice approached employees about Union membership. In assessing the lawfulness of an interrogation, the Board applies the totality of circumstances test adopted in *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), *affd. sub nom. HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). This test involves a case-by-case analysis of various factors, including those set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought, i.e., whether the interrogator appears to have been seeking information on which to base taking action against individual employees; (3) the identity of the interrogator, i.e., his or her placement in the Respondent's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. As to the fifth factor, employee attempts to conceal union support weigh in favor of finding an interrogation unlawful. See, e.g., *Sproule Construction Co.*, 350 NLRB 774, 774 fn. 2 (2007); *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 fn. 1 (2003), *affd. mem.* 121 Fed. Appx. 720 (9th Cir. 2005). The Board also considers whether the interrogated employees are open and active union supporters. See, e.g., *Gardner Engineering*, 313 NLRB 755, 755 (1994), *enfd. as modified on other grounds* 115 F.3d 636 (9th Cir. 1997). These factors "are not to be mechanically applied"; they represent "some areas of inquiry" for consideration in evaluating an interrogation's legality. *Rossmore House*, *supra*, 269 NLRB at 1178 fn. 20.

45 While some of the *Bourne* factors weigh against Respondent, the overwhelming evidence shows that Armstrong's inquiries were part of a narrowly-tailored and legitimate investigation to determine whether a supervisor was involved in Union organizing activities. The General Counsel asserts that by asking employees if they had discussed the Union with Rice, Armstrong also interrogated employees as to whether they discussed the Union. (GC Br. 42). This is not so. No evidence was presented that any of the employees were asked whether they discussed the Union with Rice, whether supported the Union, whether they accepted any material from Rice or anyone else, or any other information unrelated strictly to Rice's involvement. Evidence from Respondent, by contrast, shows that the inquiry was limited only to whether Rice approached the employees to advocate for the Union. (Tr. 554; R 7).

The General Counsel's reliance on *Campbell Soup Co.*, 225 NLRB 222, 226 (1976), is misplaced. In that case, the employer asserted it had a good faith belief that two individuals it questioned about union activities were supervisors. It provided no justification, however, for questions directed at determining which other employees were engaging in statutorily protected activities. Here, there were no questions asked whether any employees, other than Rice, a known supervisor, engaged in Union activities. The General Counsel also relies on *Lindsay Newspapers, Inc.*, 130 NLRB 680, 687 (1961). There, however, the company's attorney, in transcribed interviews, asked questions about who started the union's organizing campaign, who passed out union pamphlets and authorization cards, the extent to which each employee participated in passing out union authorization cards, and various other questions that ultimately revealed the identity of the principal employee union advocate. Nothing even approaching this type of interrogation took place here. Because I find that Armstrong's inquiries were not unlawful interrogations, but instead were part of a legitimate and narrowly-tailored investigation, I recommend dismissal of these complaint allegations.

The General Counsel alleges that on the same date, February 11, 2011, Armstrong threatened employees, under penalty of discharge, not to talk to Rice.⁵⁰ In determining whether statements amount to threats of retaliation, the Board applies the test of "whether a remark can reasonably be interpreted by an employee as a threat." The actual intent of the speaker or the effect on the listener is immaterial. *Smithers Tire*, 308 NLRB 72 (1992). The Board has held that employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees. See *Desert Palace, Inc., d/b/a Caesar's Palace*, 336 NLRB 271 (2001); see also *Verizon Wireless*, 349 NLRB 640, 658-659 (2007), (prohibiting employee discussion of workplace concerns relating to discipline abridges Section 7 rights). Armstrong's instruction to employees not to speak with Rice, which were not rescinded after Rice was demoted from supervisor to employee, explicitly interferes with that right and violates Section 8(a)(1).⁵¹ I also find that, given all that was going on with respect to the Union organizing campaign, employees, and particularly Wickham, would reasonably perceive the comment as a threat.

The last allegation related to Armstrong's February 11 conduct is that by telling employees Respondent was investigating Rice's Union activities, a reasonable employee would believe his or her Union activities were also being investigated. This allegation is not supported. Wickham, Robles, and Taresh all testified that Armstrong told them Rice had been suspended and they were not to have contact with him. (Tr. 370, 394, 553). No evidence was presented regarding an investigation. Accordingly, I recommend dismissal of this complaint allegation.

Finally, the General Counsel asserts that on March 2, 2011, Armstrong threatened Sterling for her Union and/or protected concerted activities by telling her he had an issue with her because each of the three times she used sick leave during the previous year and a half, she had overtime scheduled. Sterling had left her shift early the prior day, which was the day of the Union election. Sterling responded that she always worked overtime. (Tr. 520-21). Respondent does not dispute that Sterling engaged in protected concerted activity and that

⁵⁰ Wickham is the only employee who testified that this threat was under penalty of discharge. Taresh and Robles both testified that they were simply told not to have contact with Rice. For reasons discussed herein, however, this distinction is immaterial.

⁵¹ This finding explicitly does not address the General Counsel's allegation that Respondent maintained and promulgated a rule against discussing discipline. Instead, I find that Armstrong's statement interfered with the right of employees to discuss discipline or other Section 7 topics with their fellow employee Rice. I do not find it was a rule.

Armstrong knew about it. (R. Br. 12). While the comment alone is not inherently threatening, I find its timing would cause a reasonable employee to perceive it as such. Accordingly, I find the comment violates Section 8(a)(1) of the Act.

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3. PAA Supervisor Dustin Jiminez

The General Counsel alleges that on March 29, 2011, PAA Supervisor Jiminez threatened employees and created the impression of surveillance when he told Officer Banuelos that Pablo said he would not re-hire Union supporters. Jiminez was not called as a witness to refute this statement. Pablo denied he made any such comment. Regardless of whether Pablo made the comment, Jiminez conveying it to Banuelos is reasonably construed as a threat and creates the impression of surveillance.⁵² I found Banuelos to be a very credible witness based on her steady and open demeanor, and her clear recollection of the events at issue. Moreover, the Board has recognized that the testimony of a current employee which contradicts statements of her supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co., Inc.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries, Inc.*, 197 NLRB 489, 491 (1972). Accordingly, I credit Banuelos' testimony and I find Jiminez's comments violated the Act.

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4. Human Resources Manager Janelle Kercher

The General Counsel alleges that on April 7, 2011, Kercher promulgated and reinforced the unlawful confidentiality rule when she testified, at Wickham's unemployment compensation hearing, that information related to employee discipline was confidential.⁵³ Kercher explained that any documentation related to employee discipline is in the employee's personnel file, which is confidential. (Tr. 162-63). Kercher's comment must be viewed in light of her position as Human Resources Manager. In that capacity, she must maintain and secure employee personnel files which, as Respondent correctly asserts, are confidential. As a general rule, Kercher is not permitted to share information in employee personnel files with others. There is no allegation that she stated employees cannot discuss discipline with each other. Viewed in context, I find this comment was not promulgation or reinforcement of Respondent's overly-broad confidentiality provision.⁵⁴ I therefore recommend dismissal of this complaint allegation.

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40 ⁵² Banuelos' testimony is not hearsay as it is an admission of a party opponent under Fed.R.Ev. 801(d)(1). See *Kamtech, Inc.*, 333 NLRB 242, 242 fn. 4 (2001).

⁵³ The revised employee handbook, which removed employee discipline from the confidentiality policy, had been issued at this point in response to the charges filed. Kercher was clearly aware that employees were not prohibited from discussing discipline.

45 ⁵⁴ The General Counsel alleged that Kercher's testimony at Wickham's unemployment compensation hearing reaffirmed and enforced the confidentiality provision in the Security Officer Handbook (Complaint allegation 5(b)) and that it reaffirmed and enforced a rule prohibiting employees from speaking about their discipline (Complaint allegation 5(g)). Since there was not evidence of a separate rule prohibiting discussion of discipline (either oral or written), aside and apart from the Handbook confidentiality provision, I find the latter subsumes the former.

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C. Employee Discipline

1. 8(a)(1) Allegation: Debra Sterling Warnings

5 The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by issuing a final warning and then a written warning to Debra Sterling. The General Counsel has the burden to prove this allegation by preponderant evidence.

10 Respondent concedes, and I find, that Sterling engaged in protected concerted activity, which is detailed fully in the statement of facts. Once the activity is found to be concerted, the General Counsel can establish a *prima facie* case by proving the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue was motivated by the employee's protected concerted activity. *Meyers Industries*, 268 NLRB 493, 497 (1984); *Wright Line*, 251 NLRB 1083 (1980),
 15 enfd. 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2496, 97 LC ¶ 10,164 (1983). If the General Counsel is able to make such a showing, the burden of persuasion shifts to the employer “to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Wright Line*, *supra* at 1089; *See also Manno Electric*, 321 NLRB 278, 280 fn. 12
 20 (1996).

 Respondent concedes knowledge of Sterling's protected concerted activity. The first contested issue is whether the General Counsel has met its burden to prove that Respondent was motivated by Sterling's protected concerted activities. Improper employer motivation is
 25 often established by circumstantial evidence and may be inferred from several factors, including: the Respondent's known hostility toward unionization coupled with knowledge of an employee's union activities; pretextual and shifting reasons given for the employee's discharge; the timing between an employee's union or other protected activities and the discharge; and the failure to adequately investigate alleged misconduct. *Temp Masters, Inc.*, 344 NLRB 1188, 1193
 30 (2005); *Promedica Health Systems, Inc.*, 343 NLRB 1351, 1361 (2004). Discriminatory motive may also be established by showing departure from past practice or disparate treatment. *See JAMCO*, 294 NLRB 896, 905 (1989), *aff'd mem.*, 927 F.2d 614 (11th Cir. 1991), *cert. denied* 502 U.S. 814 (1991); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999). As stated in *Shattuck Denn Mining Corp. v. NLRB*, 366 F.2d 466, 470 (9th Cir. 1966), “it is seldom that direct evidence
 35 will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to lawful motive could be brought to book.”

40 Respondent asserts that evidence of animus is absent because, after looking into the matter, Kercher reduced Sterling's final warning to an oral warning. This explanation, however, does not show why Sterling received the final warning in the first place. It is clear, and Kercher conceded, there was confusion over whether all overtime was canceled for everyone, or
 45 whether it was canceled only for Patrol Officers during the week at issue. Sterling's testimony that Eggleston told her all overtime was canceled is un rebutted, despite the fact that Eggleston testified at the hearing. Rice's testimony that the whiteboard where overtime was posted had a notation stating “No overtime this week” for the week at issue is likewise un rebutted, as is his testimony that Sterling was not listed in the schedule book for the date in question.⁵⁵ Rice's

50 ⁵⁵ Sterling corroborates Rice's testimony about the whiteboard and schedule book. (Tr. 508-09).

testimony was very specific in this regard. He recalled that Clemons told him there was a new hire, and that was the reason the overtime was canceled. In addition, Rice informed Armstrong that he did not think Sterling was a no-call/no-show. (Tr. 459-61).

5 Notwithstanding the confusion over whether Sterling was scheduled to work, Respondent has not identified other employees who received a final warning for their first no-call/no-show. The General Counsel, by contrast, presented evidence of disparate treatment in that: (1) Juan Castro received an oral warning for his first unexcused absence and a written warning for his second; (2) Keegan McManus received either an oral or written warning for his 10 first unexcused absence; and (3) Carlton Snead received a final warning after three consecutive unexcused absences. (GC 38). Sterling's receipt of a final warning, when she previously had a clean record with no history of discipline, shows she was treated less favorably than comparative employees.

15 In addition, Rice testified that Armstrong told him Operations Manager Ed Martini was mad at Sterling and wanted her fired.⁵⁶ (Tr. 463). This is corroborated by Sterling, who testified that Armstrong told her Martini had wanted her fired for the no-call/no-show, but Armstrong had talked him out of it. (Tr. 509-10). Martini did not testify to rebut this, and Armstrong did not rebut this during his testimony. Respondent has presented no evidence as to why Martini would be 20 mad at her other than for her protected concerted activity, including the hotline complaint she had filed five months prior to her discipline, and her still-active sexual harassment lawsuit against Respondent. Based on the foregoing, I find the General Counsel has established, by preponderant evidence, the animus required to establish a *prima facie* case.

25 Respondent must now prove that it would have issued the warnings even absent Sterling's protected concerted activity. Armstrong's explanation for the discipline was that Sterling's no-call/no-show cost Respondent money on the contract. Given that other employees did not receive a final warning for this infraction, however, this explanation does not hold up. Respondent argues that no harm occurred because Sterling's discipline was reduced to a final 30 warning, to which Sterling agreed. There is no dispute that the discipline was reduced to an oral warning. Sterling does dispute that she agreed to it, however. Kercher testified that Sterling was satisfied with the oral warning. That may have been Kercher's impression at the meeting where she reduced Sterling's discipline. Regardless, the fact that charges ensued, a complaint was filed, and the issue of Sterling's discipline went to hearing, demonstrates that this could not 35 reasonably have remained Kercher's impression. In any event, the fact that the discipline was reduced does not provide an explanation as to the motivation behind the original discipline. *Airborne Freight Corp.*, 343 NLRB 580, 621 (2004), presented a similar issue and is instructive on this point. In that case, the employee was issued a letter of warning that was, upon further inquiry, rescinded. The Board upheld the judge's finding that the letter of warning violated the 40 Act despite its later rescission. Similarly, the later reduction of the discipline in Sterling's case does not negate it. Because Sterling's discipline was tainted by retaliatory animus, I find it violates the Act and should be rescinded.

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50 ⁵⁶ Martini's statements are not hearsay under Fed.R.Ev. 801(d)(2)(A). That it is hearsay within hearsay does not change this. Fed.R.Ev. 805. See *Kamtech, Inc.*, 333 NLRB 242, 242 fn. 4 (2001).

2. 8(a)(1) and (3) Allegations

a. Danny Rice Transfer and Isolation

5 The General Counsel alleges that Respondent violated Section 8(a)(1) and (3) of the Act when it transferred Rice away from the Metro Light Rail Account and isolated him from other employees. The *Wright Line* analysis, set forth above, applies to allegations of retaliation under Section 8(a)(3). Rather than protected concerted activity, however, the knowledge and motivation to establish a *prima facie* case for this allegation relate to union activity.

10 Because Rice was a supervisor when he was demoted from his Lieutenant position, the General Counsel concedes he was not, at that point, covered by the Act. The decision to transfer Rice away from the Metro Light Rail was contemporaneous with the decision to demote him, both occurring at the February 14, 2011 meeting with Pablo and Kercher. (Tr. 112). The transfer away from the Metro Light Rail therefore is likewise not covered by the Act because of Rice’s supervisory status at the time of the decision.

15 The remaining question is whether Respondent isolated Rice in response to his Union activity or in a manner that might reasonably tend to interfere with the free exercise of employee rights under Section 7. I find General Counsel has not met its burden of proof on either score. Rice was initially placed at the Tempe Water Treatment facility, and then when he complained he was not getting enough hours, he was transferred to a Cricket store where he is the only Officer on his shift.⁵⁷ Of the roughly 60 accounts in the Phoenix Metro Area, there was not evidence presented regarding how many accounts other than the Metro Light Rail have multiple Officers assigned per shift. Without this evidence, it is not possible to determine whether this decision was a retaliatory attempt to isolate Rice. There was likewise not evidence presented to show which assignments the Officers generally viewed as desirable, neutral or punitive. Such a showing would indeed be hard to make given the high degree of subjectivity involved. The Cricket Store Officers, unlike the Metro Light Rail Officers, are armed, which some may associate with greater status, but some may see as an unwanted added degree of responsibility. In any event, without evidence to show the Cricket Store assignment was objectively punitive or was generally subjectively viewed as punitive, Respondent’s assignment of Rice there does not send the message, as the General Counsel contends, that pro-Union employees will be dealt with adversely.

20 The General Counsel points to *Masiogale Electrical-Mechanical*, 331 NLRB 534 (2000), for support. In that case, the employee was removed from the jobsite, directed to work in a storage garage where there was no work station. The employee made his work bench from some sawhorses and plywood. The supervisor then approached him and said he “did not want him talking about the union to his employees, handing out literature, and did not want him to talk to his employees about the union on the job, in his office or on his property.” He also said, “that he did not want the union, they messed with me before.” The employee responded that he was going on strike, and when he returned to the garage, it was again being used as a storage facility. I need not belabor contrasting this with the Cricket Store assignment. The General Counsel also points to *Zimmerman Plumbing & Heating*, 325 NLRB 106, 114 (1997), where the employee was reassigned to the same jobsite as the owner’s son, who also became his supervisor. This is readily distinguishable from the instant case, as are the two other cases the General Counsel points to for support. *St. Regis Paper Company*, 255 NLRB 529 (1981)

25 ⁵⁷ The transfer to the Cricket store resulted in a pay raise, but Rice still made less than when he was a supervisor at the Metro Light Rail.

(personnel manager admitted he transferred two mechanics based on their union membership); *Triangle Publications, Inc.* 204 NLRB 651 (1973) (two employees transferred to another plant that shut down two months later).

5 Based on the foregoing, I find that Respondent did not violate the Act by transferring and isolating Rice, and I therefore recommend dismissal of these complaint allegations.

b. *Donald Wickham Termination*

10 The final allegation is that Donald Wickham was terminated because of his Union and/or protected concerted activity in violation of Section 8(a)(1) and (3) of the Act. I find the preponderant evidence shows Wickham’s termination was retaliatory for the reasons discussed below.

15 As noted, the elements commonly required to support a finding of discriminatory motivation are union or other protected activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), *enfd. mem.* 988 F.2d 120 (9th Cir. 1993).

20 I will first address the General Counsel’s assertion that Wickham’s statement to Armstrong and Clemons in late November/early December 2010, that Respondent would have trouble getting Officers to cover special events because of how they paid, was protected concerted activity. I find that it was not. The Board has held that activity is concerted if it is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Industries (Meyers I)*, 268 NLRB 493 (21984), *revd. sub non Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 948 (1985), *on remand Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), *affd. sub nom Prill v. NLRB*, 835 F. 2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988). Concerted activity also includes “circumstances where individual employees seek to initiate or to induce or to prepare for group action” and where an individual employee brings “truly group complaints to management’s attention.” *Meyers II*, 281 NLRB at 887. In this case, Wickham was not acting “with or on the authority of” other employees. He was responding to Armstrong’s statement that he needed to work special events. Wickham testified that he and other employees had discussed their disapproval of the pay scale for special events. The General Counsel has not shown, however, that Wickham expressed to Armstrong or Clemons that this was his fellow employees’ viewpoint or that he was acting on behalf of other employees when he told Armstrong that he would have trouble getting employees to work special events. There is no evidence that Wickham was seeking to initiate or to induce others to prepare for group action. Accordingly, I find that Wickham was not engaged in protected concerted activity when he told Armstrong and Clemons it would be difficult to find employees to work special events because of the pay.⁵⁸

40 Turning to Wickham’s Union activity, there is no dispute that Wickham was in charge of the campaign to unionize the employees at the Metro Light Rail. Respondent asserts, however, that Pablo, who decided to terminate Wickham, did not know of his Union activity. It is well settled that knowledge of an employee’s union activity may be established by reasonable

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50 ⁵⁸ I find, however, that the meeting in late November or early December, where Armstrong cleared the room and lectured Wickham about the need to work special events, is further evidence that Wickham was not, in management’s eyes, the innocuous employee he was claimed to be. Why Wickham, Eggleston’s “go to guy” for overtime, was singled out for this meeting is not explained.

inference. *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 983 fn. 36 (2007), *enfd. in relevant part* 570 F.3d 354 (D.C. Cir. 2009). See also *Clark & Wilkins Industries*, 290 NLRB 106 (1988), Circumstantial evidence, including the timing of the alleged discriminatory action and the submission of pretextual reasons in support of it will support a finding of employer knowledge even in the absence of direct evidence of such. See *Medtech Security, Inc.*, 329 NLRB 926, 929-930 (1999) (circumstantial evidence, including timing, general knowledge of union activity and pretext, supported finding of employer knowledge); *Darbar Indian Restaurant*, 288 NLRB 545 (1988) (finding of knowledge based on employer's general knowledge of Union activity, the timing of the discharge, the 8(a)(1) violations found, and pretext given). The Board has held that a supervisor's knowledge of union activities is imputed to an employer absent a credible denial of such knowledge. See, *State Plaza, Inc.*, 347 NLRB 755, 756-757 (2006); and *Dobbs International Services*, 335 NLRB 972, 973 (2001).

For the reasons detailed above, I find that Lieutenants Taylor and Clemons were aware of Wickham's Union activity, and that Major Armstrong was aware of the Union campaign in general. Eggleston, who testified, did not refute Rice's testimony that he had told him about the Union campaign prior to the time Respondent officially acknowledged it. The testimony that Lieutenant Taylor knew about the Wickham's Union activity, and asked Wickham if he had heard from the Mickey Mouse Club, is likewise unrefuted. Rice also obviously knew about Wickham's Union activity. Accordingly, the evidence establishes that three Lieutenants knew about Wickham's Union activity specifically, and two other Lieutenants and the Major knew about the Union organizing campaign generally.

As Respondent points out, Rice was clearly not acting on management's behalf with regard to the organizing campaign. There can be no doubt that Rice did not communicate Wickham's involvement to higher management. I find, nonetheless, that Pablo's denial of knowledge cannot be credited. Beginning with Armstrong, he knew about the Union campaign at least as of December 2010. As Pablo's Project Manager for the Metro Light Rail, this is plainly the type of information he would convey up the chain if he was minimally doing his job. The same holds true for the Lieutenants. If they were doing their jobs, they would have informed higher management of the Union organizing campaign. Clemons' February 4, 2011 memorandum to Armstrong is particularly troubling. It shows Clemons had known that Rice, a supervisor, has been involved in the Union campaign for the past few weeks. (R 5). Given that Rice was a supervisor, Clemons would have had a duty to report his involvement in Union organizing, as it amounted to misconduct.⁵⁹ His decision to wait four weeks to do so is not explained. Clemons wrote his memo on February 4, the same day he reported finding Wickham sleeping. That same day, Pablo sent the memo to the Officers about the Union petition and held his "TIPS" meeting with the supervisors. The timing of Clemons' memo is thus highly suspicious. The credible, specific and corroborated evidence of knowledge, detailed above, simply outweighs the many blanket denials of knowledge at all levels of management, particularly in light of the implausible lapses by supervisors and managers that would have needed to occur for Pablo to remain in the dark. Under these circumstances, I cannot credit Pablo's denial of the Union campaign in general or Wickham's involvement in particular.⁶⁰ Based on the foregoing, I find the General Counsel met its burden to prove that knowledge of Wickham's Union activity is properly imputed to Respondent.

⁵⁹ In his memo, Clemons notes that Rice was "taking the approach as if he's not involved because he is a supervisor." (R 5).

⁶⁰ As the General Counsel points out, the Union conversations and distribution of Union information took place at the kiosks, which have security cameras.

The General Counsel next must establish Union animus. The legal standards for proving animus based on circumstantial evidence, articulated above in the analysis of Debra Sterling's discipline, apply here.

5 Looking at the evidence as a whole, I find the General Counsel has persuasively established unlawful motivation. First, the timing of Wickham's termination occurred on February 4, 2011, just four days after Pablo received official word from the Corporate Legal department about the Union petition, and less than a month before the upcoming Union election. In addition, as the General Counsel points out, there are problems with Eggleston and Clemons' accounting of events.⁶¹ Most significantly, Eggleston testified that Clemons walked around to the front window where he had a direct view of Wickham sleeping. Clemons testified he only stood behind Clemons and looked in the window on the door, which was not a head-on view. They differed on their accounts of how Wickham came to the door. Did he slide over on his chair, as Clemons recalled, or did he stand up and walk over, as Eggleston recalled? 10 Wickham was wearing a winter jacket and a winter hat, and the Lieutenants viewed him from the side through a window. Given that Eggleston and Clemons differed on how Wickham answered the door, which would be much more discernible than whether he was sleeping, I find that the reliability of these eyewitness accounts is shaky. 15

20 There is also significant evidence of pretext. Pablo justified Wickham's termination by stating it was his policy, as General Manager, to terminate all employees caught sleeping on duty. This is problematic on several fronts.

25 First, the General Counsel pointed to evidence that other Officers were not terminated the first time they were caught sleeping on duty. Thus if Pablo's policy existed, it was either not effectively communicated, inconsistently enforced, or both. Lieutenant Rice and Major Thario apparently were unaware that sleeping on duty automatically meant termination as of November 12, 2009. On that date, Rice, at Thario's direction, issued Hill an oral warning for sleeping on duty.⁶² (Tr. 154, 472-74; GC 19). In the face of this evidence, Respondent points to Rice's testimony admitting that he knew only Pablo could authorize terminations. (Tr. 484). This argument is off point, however. Rice's immediate supervisor, Thario, instructed him to issue the oral warning. There was no testimony that either Rice or Thario, despite knowing only Pablo could authorize terminations, perceived Hill's infraction of sleeping on duty as warranting or requiring termination. 30

35 John D'Ancona's supervisor (whose signature is illegible) issued him a final warning on August 8, 2008 for sleeping at his desk. (GC 23). Kalin Trotter's supervisor issued him a written warning for sleeping on duty on September 3, 2008. (GC 28). Sheletha Randell and Benjamin Berry were also caught sleeping on duty but not terminated for it on the first offense. (GC 27, 40 29). Even if Pablo was somehow not aware of these incidents, there is no evidence that any of these supervisors were disciplined for failing to abide by Pablo's policy once the infractions were

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⁶¹ The General Counsel points to testimony at Wickham's unemployment compensation that contains details not set forth in the reports. Presumably the testimony was responsive to specific questions asked, and therefore would tend itself to be more specific. I therefore don't find this evidence persuasive in and of itself. 50

⁶² Rice was not yet involved in Union organizing at this point in time.

discovered. I therefore infer that they did not know about it, or they knew it was amenable to selective enforcement.⁶³

5 The evidence also shows that Eggleston did not think Wickham's sleeping on duty would result in automatic termination. The afternoon of February 4, Wickham asked Eggleston if there were going to be any repercussions based on what occurred earlier, and Eggleston told Wickham "No, I wouldn't think so." Wickham worked four more regular shifts. A few days after the February 4 events, Eggleston called Wickham and offered him two more overtime shifts, which Wickham accepted. Eggleston's actions are not those of a supervisor operating under a
10 belief that his employee is facing certain imminent termination.⁶⁴

15 With regard to Brian Pike, he was given a final warning after the client sent a letter, copied to Pablo, that he had twice been seen sleeping on duty. Pike received a final warning initially, as opposed to Wickham's suspension. He was only removed after Pablo investigated and reviewed videos from a security camera that clearly showed Pike sleeping. Here, Pablo never reviewed the video camera footage, and that footage did not show Wickham at all, much less clearly establish that he was sleeping. In addition, unlike Wickham, Pike had a prior infraction for using foul language and being disrespectful, and was seen sleeping twice. Pike's situation is therefore meaningfully distinguishable from Wickham's.

20 Some of the explanations about why certain employees were not terminated for sleeping on duty also indicate pretext. Timothy Causey was initially discharged on January 15, 2010 for sleeping on duty while working at McClane Sunwest. For reasons unexplained, as of March 3, he was working for Respondent at the Union Pacific Railroad jobsite. That day, he had an
25 accident with his truck, said he was sleepy and could not drive, and left the jobsite without telling anyone. Causey's termination was changed to a 90-day suspension because Kercher learned he was taking pain medication for dental problems. This chain of events makes no sense. Causey slept on duty on January 15, ostensibly due to being medicated. He therefore committed infractions that are grounds for termination under the Security Officer Handbook for sleeping or gross inattentiveness while on duty, as well as intoxication on the job or reporting to
30 work in an impaired state. Then, on March 3, he got in an accident, said he was too sleepy to drive, and left the jobsite without authorization. The explanation for treating Causey, who had several infractions, including sleeping on duty, more favorably than Wickham, who had a single infraction, seriously strains credibility.

35 John Stone was observed sleeping on duty on three occasions during the week of March 15, 2010, and the client, Lowes, asked that he be removed from the jobsite. Under supervisor's remarks, the typewritten note states "Removed from the site and given a written warning. Any violations of the rules will cause your termination from the company." Beneath the
40 typewritten remarks, Kercher wrote, in pen and ink, "Allegations were unfounded – No proof." (GC 24). Clearly, the initial discipline contemplated was removal from the site and a written warning, not suspension pending investigation as in Wickham's case. As for Kercher's comment that there was no proof Stone was sleeping, this introduces an inconsistency with Wickham's situation, and casts a highly suspicious light on Respondent's shifting explanations for
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⁶³ Kercher's testimony that she had trouble getting operations to follow policies pertaining to personnel actions does not negate this inference. Had Respondent been serious about ensuring compliance, there would logically have been consequences for noncompliance.

⁶⁴ At the time of the hearing, Eggleston was still employed by Respondent, but had been
50 removed from his duties for alleged insubordination. At the time he offered Wickham the overtime shifts, however, this had not yet occurred.

Wickham's termination. Kercher wrote that she did not have proof that Stone was sleeping on duty, despite the notation that he was observed sleeping on duty three times. The individual who observed him either was a supervisor or had reported it to one of Respondent's supervisors, hence the write-up. This report was sufficiently believable to have Stone removed from the jobsite. Yet Stone was not terminated.

The explanation Respondent provided contemporaneous with Wickham's termination was that the security videotape at the Price & Apache kiosk showed him sleeping. Specifically, the termination notice, in the section entitled "Reason(s) for Disciplinary Action", states "This tape clearly showed no movement inside the Kiosk for this duration of time indicating that the officer inside was asleep or not attending to his duties. The light should always be on in the Kiosk so Security presence is noted at all times." (GC 18). It was clear, however, after viewing the tape at the hearing, that the lighting never changed in the kiosk, even when Clemons and Eggleston entered it.⁶⁵ Thus the reliance on the light sensors' failure to activate the lights to prove Wickham's lack of movement no longer held up. Kercher then testified that, contrary to the reason stated on the termination notice, the video played very little role in the decision to terminate Wickham. Such shifting of rationales is evidence that the Respondent's proffered reasons for terminating Wickham are pretextual. *See Approved Electric Corp.*, 356 NLRB No. 45, slip op. at 2-3 (2010) (citing *City Stationery, Inc.*, 340 NLRB 523, 524 (2003) (nondiscriminatory reasons for discharge offered at the hearing were found to be pretextual where different from those set forth in the discharge letters); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where ... an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive."). Kercher's testimony after viewing the videotape at the hearing was that she based Wickham's termination on Clemons' and Eggleston's accounts of what occurred. Other individuals, including Stone, were given the benefit of the doubt absent objective proof. The failure to accord Wickham the same, particularly in light of the other evidence discussed above, amounts to disparate treatment.

Another factor to consider is the adequacy of the Respondent's investigation. *A/style Apparel*, 351 NLRB 1287, 1287-1288 (2007). The General Counsel conclusively proved that the videotape at the Price & Apache kiosk did not show Wickham sleeping, and Kercher's most recent testimony is that the decision to terminate Wickham was made before she even viewed the videotape. Therefore analysis of the investigation turns to Respondents' other actions. Kercher issued Wickham's suspension before giving him an opportunity to give his side of the story. He was then given his termination notice in a meeting with Kercher and Armstrong on February 14, 2011. He was not interviewed about what happened that day. Respondent solicited statements from Clemons and Eggleston for statements, but did not solicit one from Wickham. Pablo, the decision-maker, did not speak with Clemons, Eggleston, or Wickham, nor did he review the videotape. Respondent merely accepted as fact the Lieutenants' reports, one

⁶⁵ Kercher testified that Jiminez had pointed out to her where the light came on when the two of them viewed the tape together. At the hearing, there was no change in lighting discernable to the naked eye, and Kercher testified she and Jiminez did not use any enhanced equipment. Jiminez did not testify at the hearing, and therefore could not corroborate this testimony. When relevant evidence which would properly be part of a case is under the control of the party whose interest it would be to produce it and this party fails to do so without satisfactory explanation, the trier of fact may draw an inference that such evidence would have been unfavorable to that party. *See Martin Luther King, Sr. Nursing Center*, 234 NLRB 15 (1977).

of which was solicited five days after the fact. I find, therefore, that the investigation was not adequate.

5 Finally, Pablo offered no explanation as to why he singled out sleeping on duty as the infraction that would, as a matter of his own policy, result in automatic dismissal. The Behavior Standards Manual and Security Officer Handbook set forth at least 21 types prohibited conduct that can lead to immediate dismissal. The General Counsel has established that, during Pablo's tenure as General Manager beginning in June 2008, other Officers were not terminated for engaging in conduct that per Company policy is grounds for immediate dismissal. These are 10 detailed below, followed by reference to the corresponding number assigned to the violation in the Security Officer Handbook (SOH).

15 Brian Pike received a written warning on June 18, 2009 for using foul language and being disrespectful. (SOH #2). John D'Ancona was disciplined for numerous offenses that could be grounds for immediate termination prior to his termination in January 2010. He had slept on duty (at a time when Pablo was on vacation), disobeyed orders multiple times both from Respondent's supervisors and the Bank of America site supervisor (SOH #2), and left his post of duty without authorization (SOH # 18). Enoch Harmon received a suspension for a no-call/no show (SOH #11). Benjamin Berry was given three warnings for unacceptable job performance 20 (SOH #12), threatening to harm another officer (SOH #3); a warning for dishonesty by attempting to call off on the first four hours of his shift (SOH #5); a final warning for unacceptable job performance and unauthorized opening of drawers/cabinets (SOH # 12), and a suspension for another no-call/no-show (SOH #11). Sheletha Randell received a written warning for taking a personal call and talking on the phone for several minutes (SOH #15). 25 Respondent did not explain why strict termination attached to sleeping on duty but not to other offenses listed as grounds for immediate dismissal in the Handbook and Behavior Standards Manual.

30 Based on the foregoing, I find the General Counsel has established a *prima facie* case. The burden of persuasion now shifts to the Respondent to prove, by a preponderance of the evidence, that it would have discharged Wickham even in the absence of his union activity. *Senior Citizens Coordinating Council of Riverbay Community Inc.*, 330 NLRB 1 100, 1105 1106 (2000); *Monroe Mfg.*, 323 NLRB 24, 27 (1997). In order to meet this burden, the Respondent is required to do more than show that it had a legitimate reason for its actions. *Black's Railroad Transit Service*, 342 NLRB 549, 557 (2004); *Hicks Oil & Hicksgas, Inc.*, 293 NLRB 84, 85 35 (1989), *enfd.* 942 F.2d 1140 (7th Cir. 1991). The employer must also prove, by a preponderance of the evidence, that it would have taken the same actions even in the absence of the employee's protected activity. *Peter Vitalie Co., Inc.*, 310 NLRB 866, 871 (1993).

40 I find that Respondent has not met its burden under *Wright Line*, 251 NLRB 1083 (1980), of showing by a preponderance of the evidence that the discharge would have taken place even absent Wickham's Union activity. The discussion on pretext above, in support of the General Counsel's *prima facie* case is hereby incorporated. Respondent introduced evidence that, as of October 3, 2011, 32 employees had been terminated for sleeping on duty since Pablo became 45 General Manager of the Phoenix Area Office in June 2008. Respondent points out that 24 of these terminations occurred prior to Wickham's. (R 21). There is no information, however, regarding whether or not these employees had prior infractions and/or whether their sleeping was objectively verified. Without this information, it is not possible to compare these employees to Wickham in any meaningful way. Moreover, the evidence shows that employees were 50 terminated or chose to leave Respondent's employment for a variety of reasons. Finally, many of the infractions that led to termination in Respondent's Exhibit 21, such as unexcused absence, insubordination, unacceptable job performance, led to lesser discipline for other

Officers, as discussed above. Accordingly, I find Respondent has failed to meet its burden to prove that it would have terminated Wickham absent his Union activities.

Conclusions of Law

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

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2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining overly-broad rules as set forth herein; threatening and interrogating employees, and giving them the impression that their Union activities were under surveillance; and by disciplining Debra Sterling.

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4. The Respondent violated Section 8(a)(1) and (3) of the Act by terminating Donald Wickham.

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5. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

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

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As I concluded that the contested parts of the Security Officer Handbook's professional image rule, "no unnecessary conversations" provision, and confidentiality provisions, as well as the social networking policy are unlawful, the recommended order requires that the Respondent revise or rescind it, and advise its employees in writing that said rules have been so revised or rescinded.

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Further, the Respondent having unlawfully disciplined Debra Sterling will be ordered to restore the status quo ante and make appropriate changes to her personnel files and/or other supervisor-maintained files.

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The Respondent having unlawfully terminated Donald Wickham will be required to restore the status quo ante by making him whole for any loss of earnings he may have suffered and offering to reinstate him to the position he held before their unlawful termination or, if this position no longer exists, to a substantially equivalent position without prejudice to seniority and other rights and privileges. Backpay shall be based on earnings which each such employee would have earned from February 10, 2011, the date of his suspension preceding his termination. The backpay will be less net earnings during such period and shall be computed on a quarterly basis, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), *enf. denied on other grounds sub.nom.*, *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶⁶

ORDER

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The Respondent, G4S Secure Solutions (USA), its officers, agents, successors, and assigns, shall

1. Cease and desist from:

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(a) Maintaining or enforcing the contested provisions of the Security Officer Handbook and the Social Networking Policy;

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(b) Coercively interrogating any employee about the union support or union activities of that employee or any other employee;

(c) Giving employees the impression employees' union activities are under surveillance by management;

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(d) Threatening employees with unspecified reprisals for engaging in union activity;

(e) Disciplining employees for engaging in protected concerted activity;

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(f) Terminating or otherwise disciplining employees for engaging in union organizing efforts or other union activities.

(g) 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.

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

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(a) Rescind and give no effect to the rules described above, furnish employees nationwide with inserts for the current edition of the G4S Security Officer Handbook that advise that these unlawful rules have been rescinded, or provide the language of lawful rules; or, alternately, publish and distribute to all current employees employed by us nationwide a revised G4S Security Officer Handbook that does not contain the unlawful rules, or provides the language of lawful rules; and take the same action with regard to the Social Networking Policy.

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(b) Within 14 days from the date of the Board's Order, offer Donald Wickham 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.

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(c) Make Donald Wickham whole for any loss of earnings and other benefits suffered as a result of the discrimination against her as specified in the remedy portion of this decision.

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⁶⁶ 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.

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

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(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Debra Sterling and within 3 days thereafter notify her in writing that this has been done and that the discipline will not be used against her in any way.

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(f) 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

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(g) Within 14 days after service by the Region, post at all its Phoenix, Arizona Area facilities copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 24, 2010. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

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(h) Within 14 days after service by the Region, post at all of its facilities copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 any stores outside the Phoenix area, the Respondent shall duplicate and mail, at its own expense, a copy of the appropriate notice to all current employees and former employees employed by the Respondent at such facilities at any time since August 24, 2010.

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

5 Dated, Washington, D.C, March 29, 2012.

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Eleanor Laws
Administrative Law Judge

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APPENDIX 'A'

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

You have the right to join with your fellow employees in concerted activities. These activities include, but are not limited to: discussing wages, hours, and other working conditions with one another; discussing concerns about the way you are treated at work with one another; discussing our discipline policies and practices with one another; and making concerted complaints about supervisors and supervisors' treatment of employees to outside agencies such as the United States Equal Employment Opportunity Commission.

WE WILL NOT do anything that interferes with these rights. More particularly:

WE WILL NOT try to stop you from forming, joining, or assisting a union.

WE WILL NOT try to stop you from engaging in concerted activities.

WE WILL NOT terminate or discipline you because you engage in union and/or protected concerted activities.

WE WILL NOT threaten you with unspecified reprisals because you engage in union and protected concerted activities.

WE WILL NOT tell you that you cannot speak about a union while at work.

WE WILL NOT create the impression that we are watching your union and concerted activities.

WE WILL NOT threaten to not re-hire you because you engage in union and concerted activities.

WE WILL NOT maintain in our G4S Security Officer Handbook, or anywhere else, the following rule:

Page 31: Confidential Information

The protection of confidential information, trade secrets and Wackenhut-specific operating procedures is vital to the interests and success of the G4S Secure Solutions (USA) Inc. Additionally, in the line of duty you may come in contact with our customer's confidential information. Employees who improperly use, copy or disclose or destroy

G4S or client information will be subject to disciplinary action, up to and including termination of employment.

They may also be subject to legal action, even if they do not actually benefit from the disclosed information. Such information includes any information considered proprietary by G4S or the client organization.

Do not give interviews or make public statements about the activities or policies of the company or our client without written permission from the G4S Secure Solutions (USA) Inc.

WE WILL NOT threaten you with discipline and discharge for speaking with your fellow employees or anyone else about wages and salaries, work processes and systems, labor relations strategies, and personal data on employees and others.

WE WILL NOT maintain in our G4S Security Officer Handbook, or anywhere else, the following rule:

Pages 26-27:

Professional Image

You must be neat and clean while on duty. You must wear only the complete uniform as prescribed by your supervisor. Any uniformed security personnel who become pregnant will be provided with appropriate uniform clothing to maintain a professional appearance. The area or branch office will be responsible for acquiring maternity pants and larger shirts through the Purchasing Department.

Due to the public nature of our business and the business necessity that uniformed personnel represent figures of authority, we have established the following rules for personal appearance.

No insignias, emblems, buttons, or items other than those issued by the company may be worn on the uniform without expressed permission.

WE WILL NOT maintain in our G4S Security Officer Handbook, or anywhere else, the following rule:

Page 29: Security Personnel must:

Engage in no unnecessary conversations.

WE WILL NOT discriminatorily enforce this rule by telling you that you cannot speak about a union while at work.

WE WILL NOT maintain in our G4S Wackenhut Social Networking Policy, or anywhere else, the following rule:

Do not comment on work-related legal matters without express permission of the Legal Department.

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

WE WILL immediately rescind and give no effect to the rules described above, and WE WILL furnish you and your fellow employees employed by us nationwide with inserts for the current edition of the G4S Security Officer Handbook that advise that these unlawful rules have been rescinded, or provide the language of lawful rules; or, alternately, publish and distribute to all current employees employed by us nationwide a revised G4S Security Officer Handbook that

does not contain the unlawful rules, or provides the language of lawful rules. WE WILL take the same action with regard to the Social Networking Policy.

WE WILL make whole DONALD WICKHAM for the losses he suffered as a result of our unlawful suspension and discharge of him; WE WILL, reinstate DONALD WICKHAM to the position of employment he held on February 10, 2011 or, if such a position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges that he enjoyed as of February 10, 2011.

WE WILL expunge from our files any reference to DONALD WICKHAM'S discharge, and WE WILL notify him in writing that this has been done and that the removed material will not be used against him in any way.

WE WILL expunge from our files any reference to DEBRA STERLING'S discipline, and WE WILL notify her in writing that this has been done and that the removed material will not be used against her in any way.

G4S SECURE SOLUTIONS (USA) INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

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

2600 North Central Avenue, Suite 1800

Phoenix, Arizona 85004-3099

Hours: 8:15 a.m. to 4:45 p.m.

602-640-2160.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.

APPENDIX 'B'

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT do anything that interferes with these rights. More particularly:

WE WILL NOT maintain in our G4S Security Officer Handbook, or anywhere else, the following rule:

Page 31: Confidential Information

The protection of confidential information, trade secrets and Wackenhut-specific operating procedures is vital to the interests and success of the G4S Secure Solutions (USA) Inc. Additionally, in the line of duty you may come in contact with our customer's confidential information.

Employees who improperly use, copy or disclose or destroy G4S or client information will be subject to disciplinary action, up to and including termination of employment. They may also be subject to legal action, even if they do not actually benefit from the disclosed information. Such information includes any information considered proprietary by G4S or the client organization.

Do not give interviews or make public statements about the activities or policies of the company or our client without written permission from the G4S Secure Solutions (USA) Inc.

WE WILL NOT maintain in our G4S Security Officer Handbook, or anywhere else, the following rule:

Pages 26-27:

Professional Image

You must be neat and clean while on duty. You must wear only the complete uniform as prescribed by your supervisor. Any uniformed security personnel who become pregnant will be provided with appropriate uniform clothing to maintain a professional appearance. The area or branch office will be responsible for acquiring maternity pants and larger shirts through the Purchasing Department.

Due to the public nature of our business and the business necessity that uniformed personnel represent figures of authority, we have established the following rules for personal appearance.

No insignias, emblems, buttons, or items other than those issued by the company may be worn on the uniform without expressed permission.

WE WILL NOT maintain in our G4S Security Officer Handbook, or anywhere else, the following rule:

Page 29: Security Personnel must:

- Engage in no unnecessary conversations.

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Do not comment on work-related legal matters without express permission of the Legal Department.

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

WE WILL immediately rescind and give no effect to the rules described above, and WE WILL furnish you and your fellow employees employed by us nationwide with inserts for the current edition of the G4S Security Officer Handbook that advise that these unlawful rules have been rescinded, or provide the language of lawful rules; or, alternately, publish and distribute to all current employees employed by us nationwide a revised G4S Security Officer Handbook that does not contain the unlawful rules, or provides the language of lawful rules. We will take the same action with regard to the Social Networking Policy.

G4S SECURE SOLUTIONS (USA) INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

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

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Phoenix, Arizona 85004-3099

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602-640-2160.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

G4S SECURE SOLUTIONS (USA) INC.
Respondent

and

Case 28-CA-23380

INTERNATIONAL UNION, SECURITY, POLICE
AND FIRE PROFESSIONALS OF AMERICA (SPFPA)
Charging Party

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