

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

IN THE MATTER OF:

G4S SECURE SOLUTIONS (USA) INC.,

Respondent,

CASE NO. 28-CA-23380

and

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

Charging Party.

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ALJ'S DECISION

Jonathan P. Pearson
jpearson@laborlawyers.com
Reyburn W. Lominack, III
rlominack@laborlawyers.com
Fisher & Phillips LLP
Post Office Box 11612
Columbia, South Carolina 29211
(803) 255-0000 (telephone)
(803) 255-0202 (facsimile)

Attorneys for Respondent

April 26, 2012

SUBJECT INDEX

| | | |
|-------------|--|----|
| I. | STATEMENT OF THE CASE | 1 |
| A. | OVERVIEW | 1 |
| B. | EAST VALLEY METRO LIGHT RAIL | 1 |
| C. | SUPERVISOR HIERARCHY | 2 |
| D. | SECURITY OFFICERS | 2 |
| E. | GENERAL COUNSEL’S ALLEGATIONS | 2 |
| F. | ALJ’S CONCLUSIONS AND G4S’S EXCEPTIONS | 3 |
| II. | QUESTIONS INVOLVED | 5 |
| III. | ARGUMENT | 6 |
| A. | G4S’S SECURITY OFFICER HANDBOOK DOES NOT INCLUDE RULES THAT UNLAWFULLY RESTRICT EMPLOYEES IN THE EXERCISE OF THEIR SECTION 7 RIGHTS | 6 |
| 1. | Professional Image Rule | 6 |
| a. | PAA Security Officers have contact with the public..... | 7 |
| b. | The rule only applies to on-duty Security Officers..... | 8 |
| c. | The ALJ ignores the client’s uniform requirement..... | 9 |
| d. | The ALJ’s proposed order is overbroad..... | 10 |
| 2. | “No Unnecessary Conversations” Rule | 12 |
| 3. | Confidentiality Policy | 15 |
| B. | G4S’S SOCIAL NETWORKING POLICY DOES NOT UNLAWFULLY RESTRICT EMPLOYEES IN THE EXERCISE OF THEIR SECTION 7 RIGHTS | 17 |
| C. | LIEUTENANT CLEMONS’ ALLEGED STATEMENT TO EMPLOYEES NOT TO DISCUSS THE UNION AT WORK DID NOT UNLAWFULLY THREATEN EMPLOYEES | 20 |

| | | |
|-----------|---|----|
| D. | ARMSTRONG DID NOT CREATE THE IMPRESSION OF SURVEILLANCE OR THREATEN EMPLOYEES | 22 |
| 1. | Armstrong did not create the impression of surveillance when he allegedly told Nagler he knew he had been talking to other officers about joining a union | 22 |
| 2. | Armstrong’s alleged instruction to employees not to speak to Rice did not unlawfully threaten employees | 23 |
| 3. | Armstrong’s alleged statement to Sterling about overtime did not unlawfully threaten her. | 24 |
| E. | LIEUTENANT JIMINEZ DID NOT UNLAWFULLY THREATEN SECURITY OFFICER BANUELOS OR CREATE THE IMPRESSION OF SURVEILLANCE BY ALLEGEDLY TELLING HER THAT GENERAL MANAGER PABLO STATED THAT ONCE THE LIGHT RAIL CONTRACT EXPIRES, HE WAS NOT GOING TO REHIRE ANYONE WHO HE FOUND OUT WAS IN FAVOR OF THE UNION | 24 |
| F. | G4S DID NOT UNLAWFULLY DISCIPLINE STERLING FOR FAILING TO REPORT TO WORK | 25 |
| 1. | Factual Background | 25 |
| a. | Sterling’s complaints | 25 |
| b. | Sterling’s discipline | 26 |
| 2. | Legal Framework | 27 |
| a. | Armstrong was not aware of the concerted nature of Sterling’s complaints | 27 |
| b. | There is no causal connection between Sterling’s complaints and the two challenged disciplinary actions | 28 |
| i. | Armstrong’s Final Written Warning..... | 28 |
| ii. | Kercher’s Written Warning..... | 29 |
| c. | The ALJ’s proposed order is moot..... | 30 |
| G. | G4S DID NOT UNLAWFULLY TERMINATE WICKHAM | 31 |
| 1. | Factual Background | 31 |

| | | |
|------------|---|-----------|
| 2. | Legal Framework | 34 |
| a. | Pablo had no knowledge of Wickham’s union activity | 34 |
| b. | Pablo had no union animus against Wickham | 38 |
| c. | Wickham would have been terminated even in the absence of his union activity. | 45 |
| IV. | CONCLUSION | 46 |

TABLE OF AUTHORITIES

AlliedBarton Security Services, 4-CA-34212 (March 3, 2006)10

Arrow Photo Service, Inc., 108 NLRB 1424, 1429 (1954).....22

Goldtex, Inc., 309 NLRB 158, fn. 3 (1991)40

Gravure Packaging, 321 NLRB 1296, 1308 (1996).....30

Guardsmark, LLC, 344 NLRB 809, 810 (2005).....14

Inland Container Corporation, 240 NLRB 1298, 1300 (1979).....41

Lafayette Park Hotel, 326 NLRB 824, 826 (1998), *enf. mem.* 203 F.3d 52
(D.C. Cir. 1999)14, 16

Lucky Stores, 275 NLRB 1438, 1439 (1985).....28, 29

M&M Backhoe Serv., Inc. v. NLRB, 469 F.3d 1047, 1052 (D.C. Cir. 2006).....11

Marquez v. Screen Actors Guild, Inc., 525 U.S. 33 (1998)19

Mediaone of Greater Florida, Inc., 340 NLRB 277 (2003)16

NLRB v. News Syndicate Co., Inc., 365 U.S. 695 (1961)18

Paintsville Hospital Co., 278 NLRB 724 (1986).....13, 14, 21

Pinkerton’s Inc., 18-CA-16257-1 (January 3, 2003)7

Pro-Tec Fire Services, 351 NLRB 52, 58 (2007).....40

River Ranch Fresh Foods, LLC, 351 NLRB 115, 117 fn. 16 (2007).....30

Royal Coach Sprinklers, 268 NLRB 1019, 1026 (1984)24, 38

Royal Sound Co., 287 NLRB 989, 990 fn. 1 (1988).....41

Satilla Rural Electric Membership Corp., 129 NLRB 1084, 1091 (1960).....13

SKD Jonesville Division L.P., 340 NLRB 101, 103 (2003)18, 22

Stevens Creek Chrysler Jeep Dodge, 357 NLRB No. 57, slip op. 3 (Aug. 25, 2011)13

Style of Liberty Pavilion Nursing Home, 254 NLRB 1299 (1981).....29

TIC – The Industrial Company Southeast, Inc. v. NLRB, 126 F.3d 334 (D.C. Cir. 1997)21

Wal-Mart Stores, Inc., 352 NLRB 815, 815 n.5 (2008)27, 34

Wright Line, 251 NLRB 1083, 1088 (1980).....27, 29, 34, 45

I. STATEMENT OF THE CASE

A. OVERVIEW

The Respondent, G4S Secure Solutions (USA) Inc. (“G4S” or “the Company”), provides security services to clients throughout the United States. The International Union, Security, Police and Fire Professionals of America (“the Union”) filed a representation petition on January 31, 2011, seeking to represent a unit of G4S Security Officers assigned to work on a portion of the Metro Light Rail System, a mass transit system servicing the greater Phoenix, Arizona area.

On February 24, 2011, prior to an election, the Union filed the instant unfair labor practice charge alleging G4S violated Section 8(a)(1) of the National Labor Relations Act (“NLRA” or “the Act”) before the representation petition was filed, and Section 8(a)(1) and 8(a)(3) after the petition was filed. The Region delayed the processing of the petition pending resolution of the Union’s charge.

On April 29, 2011, the General Counsel issued a complaint and notice of hearing. A hearing was held on October 18-20, 2011, in Phoenix before Administrative Law Judge Eleanor Laws. Judge Laws issued a Decision on March 29, 2011, to which G4S has timely filed exceptions. Pursuant to Section 102.46(a) of the Board’s Rules and Regulations, G4S submits this brief in support of its exceptions.

B. EAST VALLEY METRO LIGHT RAIL

G4S contracts with Valley Metro Rail, Inc. (“Metro”), to provide security services along a portion of the Metro Light Rail that runs between Tempe and Mesa (“East Valley Metro Rail”). (Transcript (“Tr.”) 37-38). Larry Pablo is the General Manager for G4S’s Phoenix office, which covers the East Valley Metro Rail. (Tr. 21). Pablo oversees approximately 60 to 65 accounts in

the Phoenix area. (Tr. 21). There are approximately 20-23 Security Officers on the East Valley Metro Rail contract. (Tr. 39).

C. SUPERVISOR HIERARCHY

The Project Manager, also referred to as the “Major,” is the direct manager over the East Valley Metro Rail contract. (Tr. 40). The Project Manager reports to the Operations Manager, who oversees operations throughout Nevada. (Tr. 22-23, 40). The Operations Manager, as well as the Human Resources Manager for the area, report to Pablo. (Tr. 23). Reporting to the Project Manager are Shift Supervisors, also referred to as “Lieutenants.” (Tr. 41). Lieutenants directly supervise Security Officers. (Tr. 42).

D. SECURITY OFFICERS

At the time the petition was filed, Security Officers assigned to the East Valley Metro Rail contract worked one of four assignments: Patrol Officer, Fare Inspector, Kiosk Officer, or Passenger Assistant Agent (“PAA”).¹ Patrol Officers ride vehicles along the Metro Light Rail route, patrol the parking lots, and assist with fare enforcement. (Tr. 38, 305-306). Fare Inspectors ride the trains, checking whether riders have tickets. (Tr. 307). If a rider does not have a ticket, a Fare Inspector is authorized to issue the rider a citation. (Tr. 307). Kiosk Officers were responsible for patrolling the Park-and-Ride kiosk and platform areas. (Tr. 301-305). PAA Security Officers are responsible for control room monitoring, which involves monitoring video cameras and controlling access to various areas of the client’s property. (Tr. 29).

E. GENERAL COUNSEL’S ALLEGATIONS

The complaint alleges that G4S violated Section 8(a)(1) of the Act by: (1) maintaining an overly broad and discriminatory confidentiality rule in its Security Officer Handbook; (2)

¹ As of October 2011, there are no longer Kiosk Officers because Metro wanted more officers riding the trains. (Tr. 293).

maintaining an overly broad and discriminatory “Professional Image” rule in the Handbook; (3) maintaining an overly broad and discriminatory “No Unnecessary Conversations” rule in the Handbook; (4) maintaining an overly broad Social Networking Policy²; (5) maintaining an overly broad rule that prohibits employees from speaking with each other about their discipline; (6) orally promulgating a discriminatory rule prohibiting employees from speaking about the union and threatening employees for speaking about the union; (7) threatening employees for union activity and protected concerted conduct; (8) creating the impression that union activities were under surveillance; (9) threatening to not re-hire employees who support the union; and (10) disciplining an employee because of her protected concerted activity.

The complaint alleges G4S violated Sections 8(a)(1) and 8(a)(3) by: (1) transferring a supervisor to a different location and “isolating” him; and (2) suspending and subsequently discharging an employee because of his union activity.

F. ALJ’S CONCLUSIONS AND G4S’S EXCEPTIONS³

The ALJ first concludes that G4S’s Professional Image rule, “No Unnecessary Conversations” rule, and Confidentiality policy in the Security Officers Handbook are unlawful. (Administrative Law Judge’s Decision (“ALJD”), pp. 20-23). G4S excepted to the ALJ’s findings of fact and conclusions of law on these issues. (Respondent’s Exceptions (“R. Exs.”) 5-17, 93, 96, 103, 104, 110-112).

The ALJ next concludes that G4S’s Social Networking Policy is unlawful. (ALJD, pp. 23-25). G4S excepted to the ALJ’s findings of fact and conclusions of law on this issue. (R. Exs. 18-23, 93, 96, 110-112).

² Counsel for the General Counsel moved to amend the complaint and add this allegation during the hearing, and the ALJ granted the motion. (Tr. 82-83, 281-288, GC Exh. 43).

³ Additional facts related to each of G4S’s exceptions are discussed in more detail in the argument section below.

The ALJ next concludes that Lieutenant D.J. Clemons unlawfully threatened employees but did not unlawfully create the impression of surveillance by allegedly instructing them not to discuss the union at work. (ALJD, pp. 26-27). G4S excepted to the ALJ's findings of fact and conclusions of law that Clemons unlawfully threatened employees. (R. Exs. 24-27, 97).

The ALJ next concludes that Major Jason Armstrong unlawfully created the impression of surveillance by allegedly informing Officer Sean Nagler he knew Nagler had been talking to employees about the union. (ALJD, pp. 27-28). G4S excepted to the ALJ's findings of fact and conclusions of law on this issue. (R. Exs. 28-32, 98).

The ALJ next concludes that Armstrong did not unlawfully interrogate employees with respect to his investigation of Lieutenant Danny Rice's alleged union involvement. (ALJD, pp. 28-29).

The ALJ next concludes that Armstrong unlawfully threatened employees by allegedly instructing them not to speak to Rice. (ALJD, p. 29). G4S excepted to the ALJ's findings of fact and conclusions of law on this issue. (R. Exs. 33-34).

The ALJ next concludes that Armstrong did not unlawfully tell employees that G4S was investigating Rice's union activities. (ALJD, p. 29).

The ALJ next concludes that Armstrong unlawfully threatened Officer Deborah Sterling for her union and/or protected concerted activities by allegedly 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. (ALJD, pp. 29-30). G4S excepted to the ALJ's conclusion of law on this issue. (R. Ex. 35).

The ALJ next concludes that Lieutenant Dustin Jiminez unlawfully threatened Officer Asucena Banuelos and created the impression of surveillance by allegedly telling her that Pablo

stated that once the Metro Light Rail contract expires, he was not going to rehire anyone who he found out was in favor of the union. (ALJD, p. 30). G4S excepted to the ALJ's findings of fact and conclusions of law on this issue. (R. Exs. 36-37, 99).

The ALJ next concludes that Human Resources Manager Janelle Kercher did not unlawfully promulgate and reinforce G4S's Confidentiality rule when she testified, at Officer Donald Wickham's unemployment hearing, that information related to employee discipline was confidential. (ALJD, p. 30).

The ALJ next concludes that Armstrong unlawfully retaliated against Sterling by issuing her a Final Written Warning for failing to report to work, and that Kercher unlawfully retaliated against Sterling by issuing her a Written Warning. (ALJD, pp. 31-32). G4S excepted to the ALJ's findings of fact and conclusions of law on this issue. (R. Exs. 38-44, 94, 100, 108).

The ALJ next concludes that G4S did not unlawfully transfer or isolate Rice in retaliation for his union activity. (ALJD, pp. 33-34).

The ALJ next concludes that Pablo unlawfully terminated Wickham because of his union activity but not because of his alleged protected concerted activity. (ALJD, pp. 34-40). G4S excepted to the ALJ's findings of fact and conclusions of law that Pablo unlawfully terminated Wickham because of his union activity. (R. Exs. 45-89, 95, 100-101, 105-107).

II. QUESTIONS INVOLVED

- 1. Whether the Professional Image rule, "No Unnecessary Conversations" rule, and Confidentiality policy in G4S's Security Officer Handbook unlawfully restrict employees in the exercise of their Section 7 rights.**
- 2. Whether G4S's Social Networking Policy unlawfully restricts employees in the exercise of their Section 7 rights.**
- 3. Whether Lieutenant Clemons' alleged instruction to employees not to discuss the union at work unlawfully interfered with employees' Section 7 rights.**

4. **Whether Major Armstrong unlawfully created the impression of surveillance by allegedly informing Officer Nagler he knew Nagler had been talking to employees about the union.**
5. **Whether Major Armstrong unlawfully instructed employees not to contact Lieutenant Rice while Rice was under suspension for engaging in pro-union activity.**
6. **Whether Major Armstrong unlawfully threatened Officer Sterling for her union and/or protected concerted activity by allegedly 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.**
7. **Whether Lieutenant Jiminez unlawfully threatened Officer Banuelos and created the impression of surveillance by allegedly telling her that General Manager Pablo stated that once the Light Rail contract expires, he was not going to rehire anyone who he found out was in favor of the union.**
8. **Whether Major Armstrong and Human Resources Manager Kercher unlawfully retaliated against Officer Sterling when they disciplined her for failing to report to work.**
9. **Whether Wickham was unlawfully retaliated against for his union activity when he was discharged for sleeping on the job.**

III. ARGUMENT

A. G4S'S SECURITY OFFICER HANDBOOK DOES NOT INCLUDE RULES THAT UNLAWFULLY RESTRICT EMPLOYEES IN THE EXERCISE OF THEIR SECTION 7 RIGHTS.

G4S distributes a Handbook to all Security Officers upon hire. (Tr. 133). The most recent version of the Handbook was distributed in January 2011. (General Counsel's Exhibit ("GC Exh.") 15). The Handbook contains three rules that the ALJ finds unlawfully restrict employees in the exercise of their Section 7 rights: (1) the Professional Image rule; (2) the "No Unnecessary Conversations" rule; and (3) the Confidentiality policy. G4S excepts to the ALJ's findings of fact and conclusions of law as to each of these rules for the reasons set forth below.

1. Professional Image Rule

The ALJ finds that the following sentence in G4S's Professional Image rule is unlawful: "No insignias, emblems, buttons, or items other than those issued by the company may be worn

on the uniform without expressed permission.” (GC Exh. 15, p. 27). According to the ALJ, the rule is unlawful because Security Officers working in the Passenger Assistance Area (“PAA”) do not have face-to-face contact with the public and because it is not clear the rule is restricted to on-duty Security Officers.⁴ (ALJD, pp. 20-21). As identified in Exceptions 1-2, 5-11, 90, 93, 96, 103-104, and 110-112 and argued below, the ALJ’s findings of fact, conclusions of law, and proposed order are erroneous and should be rejected by the Board.

a. PAA Security Officers have contact with the public.

First, the ALJ incorrectly finds as a matter of fact that Security Officers in the PAA have no contact with the public. Pablo testified that PAA Security Officers are responsible for control room monitoring, which involves monitoring video cameras and controlling access to various areas of the client’s property. (Tr. 29). While they do not regularly interact with passengers, Security Officers in the PAA do regularly interact with the client’s employees. (Tr. 35-36). Moreover, as Pablo explained, all locations, including the PAA, are subject to being visited by tour groups. (Tr. 35).

Most significantly, however, because the PAA Security Officers must control access to certain areas, they *may have to encounter members of the public* attempting to access a controlled site without authorization. And it is those members of the public from whom the Security Officers must command the most respect.

Indeed, the ALJ even acknowledges that the mere possibility of security personnel having to assist or confront members of the public justifies a strict uniform policy. In footnote 41 of her Decision, the ALJ cites General Counsel Advice Memorandum regarding *Pinkerton’s Inc.*, 18-CA-16257-1 (January 3, 2003), in which the General Counsel concluded that “[s]ince all of the

⁴ The ALJ presumably acknowledges that the rule is lawful to the extent it applies to Security Officers who interact with the public and who are on-duty.

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.” (ALJD, p. 21, fn. 41 (emphasis added)).

Accordingly, the ALJ’s conclusion that the Professional Image rule is overbroad because PAA Security Officers do not normally interact with the public is entirely inconsistent with her acknowledgment that the mere potential for customer contact in the security industry justifies a strict uniform policy. Additionally, her conclusion ignores record evidence that PAA Security Officers do come in contact with non-G4S employees.⁵

b. The rule only applies to on-duty Security Officers.

The ALJ next erroneously finds it is unclear whether the uniform rule is restricted to on-duty Security Officers. Contrary to the ALJ’s finding, the Professional Image Policy manifestly applies only to on-duty Security Officers as evidenced by the first line of the policy, which reads, “You must be neat and clean while on duty.” (GC Exh. 15 (emphasis added)). The ALJ’s attempt to discount this fact is unavailing.

First, the ALJ reasons that the uniform rule cannot reasonably be read as applying only to on-duty Security Officers because it is part of the “Duties, Personal Appearance and Conduct” section of the Handbook, which also includes rules that govern certain off-duty conduct.⁶ (ALJD, p. 21, ll. 17-24). The ALJ merely assumes, without evidentiary support, however, that the rules prohibiting Security Officers from violating the law and requiring them to report arrests “[o]bviously . . . apply to off-duty conduct.” (ALJD, p. 21, ll. 19-20). Counsel for the General

⁵ The ALJ’s interpretation of this rule, particularly in the context of Security Officers, does not allow G4S to place any type of limitation on the wearing of buttons or insignia on the officers’ uniforms. As a result, if the ALJ is correct, Security Officers could cover their uniforms with buttons, pins, etc. until it could no longer be discerned they are even wearing a uniform.

⁶ The ALJ alludes to the rule prohibiting Security Officers from violating federal, state and local laws, the rule requiring Security Officers to inform their supervisor if they are arrested, and the rule delineating the type of haircuts/facial hair Security Officers must have as examples of rules that apply to off-duty conduct. (ALJD, p. 21, ll. 18-20).

Counsel produced no evidence that those rules apply to off-duty conduct, and the policy does not explicitly state as much. Thus, the ALJ erred in making that assumption.

Second, the ALJ's observation that, by their nature, haircuts and facial hair cannot be confined to on-duty hours (ALJD, p. 21, ll. 21-22) proves nothing. G4S – or, for that matter, any employer that maintains a standard grooming policy – does not care how employees appear when not on duty. That those appearance standards cannot be quickly or easily changed to meet G4S's on-duty rules, however, does not mean the rule necessarily applies to off-duty appearance.

Finally, the ALJ overlooks the fact that Security Officers are only authorized to wear their uniforms while on duty, as evidenced by the rule that reads, "Security personnel must . . . [n]ot conduct outside business . . . while in company uniform." (GC Exh. 15, p. 29). Because Security Officers should not be in uniform unless they are on-duty or are reporting for duty, it is illogical to assume the rule was intended to apply to off-duty conduct. Moreover, if Security Officers are at the site in uniform but not yet on duty, they are obviously subject to being called to act any time there is a disturbance, which further justifies the rule.

c. The ALJ ignores the client's uniform requirement.

A fundamental flaw in the ALJ's analysis of G4S's Professional Image rule is her failure to consider that G4S's uniform standards are dictated by Metro, for whom G4S provides security services along the Metro Light Rail. According to Pablo, the Request for Proposal ("RFP") to which G4S responded to secure the contract outlines the uniform requirements to which G4S is obligated to adhere. (Tr. 92-93). The RFP provides that "No unauthorized uniforms or accessories are permitted." (Respondent's Exhibit ("R. Exh.") 1, p. 9). It further provides, "Any individual wearing any item other than the items specified in this specification will be considered out of uniform and subject to disciplinary action." (R. Exh. 1, p. 10).

Clearly then, G4S's client desires that security personnel working along the Metro Light Rail wear standard uniforms that convey the impression of authority. Any deviation from this standard by G4S Security Officers would result in G4S not adhering to its contractual obligation to Metro.⁷

In General Counsel Advice Memorandum regarding *AlliedBarton Security Services*, 4-CA-34212 (March 3, 2006), the General Counsel found it was likely "the Employer's business would suffer if its clients determined that its officers did not adequately convey a presence of authority[.]" and therefore, "[u]nder [the] circumstances, [the General Counsel] conclude[d] that the Employer may lawfully prohibit on-duty security officers from wearing any buttons or insignia, including Union insignia, on their uniforms." Likewise, here, Metro plainly set forth the requirements for its security contractor working on the Metro Light Rail. (R. Exh. 1). As in *AlliedBarton*, had G4S not maintained those requirements, its business would have suffered.

d. The ALJ's proposed order is overbroad.

Assuming, *arguendo*, that the challenged portion of G4S's Professional Image rule is overbroad in that it applies to Security Officers who have no contact with the public and off-duty Security Officers, the ALJ erred in ordering G4S to rescind the entire rule. The ALJ further erred by requiring G4S to post a notice to employees at its other sites advising them that G4S will not maintain the following rule:

Professional Image

⁷ Counsel for the General Counsel called a business agent for the union to testify about uniform standards/requirements at other employers represented by the union. (Tr. 441-450). The agent testified that security guards at some other facilities wear union pins or patches. (Tr. 446-447). This testimony is entirely irrelevant to the General Counsel's complaint. In fact, the testimony only proved further that wearing union insignia on security officer uniforms has the potential to create significant safety concerns and challenges to authority. Certainly, if no "special circumstances" existed to justify a broad prohibition on non-approved union insignia on security officer uniforms, the union would not have had to secure it as a contractual right during the collective bargaining process, as testified to by the union agent. (Tr. 448). Further, the fact that the union had to negotiate a contractual right in this regard demonstrates the employees had no inherent right to wear such insignia on their uniforms in the first place.

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.

(ALJD, Notice A & Notice B).

The Board may not make findings or order remedies on issues not charged in the complaint or litigated in the subsequent hearing. *M&M Backhoe Serv., Inc. v. NLRB*, 469 F.3d 1047, 1052 (D.C. Cir. 2006). Here, however, the ALJ's order excessively requires G4S to inform all employees that the above rules will not be maintained, even though the rule was only found unlawful to the extent it prohibits PAA Security Officers and off-duty Security Officers from wearing "insignias, emblems, buttons, or items other than those issued by the company." The General Counsel did not allege – and the ALJ did not find – that it is unlawful to require, for example, Security Officers to be "neat and clean while on duty" or to state that "[a]ny uniformed security personnel who become pregnant will be provided with appropriate uniform clothing to maintain a professional appearance." Indeed, there is clearly nothing unlawful about such policies.

Moreover, the parties stipulated at the hearing that the Security Officer Handbook only applies to Security Officers, and not G4S's other employees. (Tr. 584). Thus, to the extent the ALJ's proposed order requires G4S to post a notice for employees other than Security Officers to see, it is overbroad and should not be adopted in the event the Board finds it unlawful.

Additionally, if the Board finds the rule unlawful, it should not adopt the ALJ's notice posting requirement beyond the East Valley Metro Rail location. There is no evidence in the

record as to whether special circumstances might exist to justify the rule with respect to Security Officers working on other contracts. Indeed, the ALJ even expressly acknowledges in footnote 42 of her Decision that she “cannot, at this juncture, specify where special circumstances may apply throughout Respondent’s operations.” (ALJD, p. 21, fn. 42). Consequently, the ALJ’s area- and nation-wide posting order does not comport with her observation that special circumstances may support the rule elsewhere.⁸

2. “No Unnecessary Conversations” Rule

The ALJ next finds that G4S’s rule prohibiting on-duty Security Officers from engaging in “unnecessary conversations” is unlawful. Acknowledging that the rule does not explicitly restrict Section 7 rights, the ALJ concludes that the rule was nevertheless applied by Lieutenant Clemons to restrict Section 7 rights. (ALJD, pp. 21-22). As identified in Exceptions 12-15, 90, 93, 96, 103, 104, and 110-112 and argued below, the ALJ’s findings of fact, conclusions of law, and proposed order are erroneous and should be rejected by the Board.

G4S’s Security Officer Handbook includes a provision that Security Officers must, among other things, “Engage in no unnecessary conversations.” (GC Exh. 15, p. 29). The rule is set forth in a section of the Handbook titled, “**CONDUCT WHILE ON DUTY.**” (GC Exh. 15, pp. 28-29). According to the ALJ, Lieutenant Clemons unlawfully applied this rule when he allegedly cautioned Officer Carol Taresh and others⁹ in a group in November 2010 that the union should not be discussed at work and when he allegedly cautioned Taresh the following week to be careful talking about the union because it should not be discussed at work. (ALJD, p. 22).

⁸ A contrary outcome would require employers to present evidence on all operations in the nation when confronted with such a challenge. In this case, G4S would/should have presented evidence regarding “special circumstances” surrounding its 40,000 employees throughout the nation. Obviously, the Board does not want to force every hearing on such an issue to become national in its scope, unnecessarily extending otherwise routine hearings.

⁹ According to Taresh, those individuals were Lieutenant Rice and officers Joe Shipp and Deborah Sterling. (Tr. 551).

Even if these conversations occurred,¹⁰ the ALJ incorrectly assumed that Clemons was acting pursuant to the “No Unnecessary Conversations” rule.

There is absolutely no evidence in the record that Clemons referenced or cited the rule when allegedly cautioning Taresh and others not to discuss the union, nor did he discipline anyone for violating the rule. This is not surprising given the context in which the conversation allegedly occurred. Taresh testified as follows:

The conversation was Lieutenant Rice had asked about the union because we were people short and asked if they would be interested in joining the union, referring to Shipp and Clemons. Clemons said he would take some literature but that the union shouldn't be discussed at work.

(Tr. 551-552).

Given this context, and in light of Rice's unequivocal testimony that Clemons was an “advocate” for the union (Tr. 468), it is entirely unreasonable for the ALJ to presume – in the absence of direct testimony on the issue – that Clemons was applying the rule in G4S's Security Officer Handbook that employees are to engage in no unnecessary conversations *while on duty*.

In *Paintsville Hospital Co.*, 278 NLRB 724 (1986), the Board rejected the ALJ's finding that two supervisors who allegedly warned employees not to wear buttons and cautioned them not to reveal their sympathies to management acted unlawfully. According to the Board:

Webb and Tackett [were not] acting on behalf of management, much less at management's direction. Rather, both were acting in their own interest and in

¹⁰ The ALJ credits Taresh's testimony that Clemons made these statements (Tr. 551-552) over Clemons' testimony that he did not (Tr. 572), offering generic and vague clichés such as Taresh was “confident, open and straightforward” while Clemons was “less straightforward” and at times seemed “confused.” (ALJD, p. 22, ll. 9-12). The Board does not lightly overturn credibility findings, but “even demeanor based credibility findings are not dispositive when the testimony is inconsistent with the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.” *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57, slip op. 3 (Aug. 25, 2011) (internal quotations omitted). Here, it is entirely unreasonable for the ALJ to credit Taresh's testimony over Clemons, especially with respect to the first statement he allegedly made to Taresh, Rice, Shipp, and Sterling, given that Counsel for the General Counsel had an opportunity to question these other witnesses about the issue but chose not to despite the direct conflict between Taresh's and Clemons' testimony. See *Satilla Rural Electric Membership Corp.*, 129 NLRB 1084, 1091 (1960) (observing that the failure of a party to call a witness to testify on its behalf is evidence that if they had testified, their testimony would have been adverse to that party).

accordance with their own sympathies which were plainly contrary to those of management. Their unquestioned goal was to assist and protect the employees from management, not to coerce them. Thus, in warning employees not to wear buttons and cautioning them not to reveal their sympathies to management, it is clear that Webb was only trying to protect the employees from retaliation.

Id. at 725.

Here, as in *Paintsville*, if Clemons cautioned Taresh and others not to discuss the union, he was not doing so on behalf of management or pursuant to any written rule in the Security Officer Handbook. The ALJ's findings to the contrary completely ignore the context of the situation.

Moreover, even if Clemons made the statement and even if it was pursuant to the "No Unnecessary Conversations" rule, the rule does not violate the Act. Security Officers have a responsibility to be attentive at all times while on duty. G4S's rule explicitly applies only to on-duty conduct. (GC Exh. 15, pp. 28-29). In *Guardsmark, LLC*, 344 NLRB 809, 810 (2005), the Board found that a "no fraternization" rule for security guards was "designated to provide safeguards so that security will not be compromised" According to the Board, "Given those heightened security concerns, we think the Respondent's justification for its fraternization rule is even stronger than that of the employer in *Lafayette Park Hotel*, where we concluded that a fraternization rule was a proper means for preventing the 'appearance of favoritism, claims of sexual harassment, and employee dissension created by romantic relationships in the workplace.' 326 NLRB at 827 fn. 14."

Similarly, G4S's "No Unnecessary Conversations" rule – applicable only while Security Officers are on-duty – is justified by the heightened security concerns inherent in the industry.¹¹

¹¹ The ALJ relies on Taresh's testimony that other topics were discussed at work and "undesirable collective experience that people talk about things other than work while at work" as further support for her conclusion that the rule is unlawful. Taresh's testimony and the ALJ's unsupported observation confuse the issue, which is whether Clemons applied the rule to restrict Section 7 activity. The ALJ cannot merely presume that Clemons never

Consequently, no reasonable Security Officer would believe this rule prohibits them from discussing union activity at work.¹²

3. Confidentiality Policy

The ALJ next finds that G4S's Confidentiality Policy is unlawful. (ALJD, pp. 22-23). Prior to January 2011, G4S maintained a confidentiality policy in its Security Officer Handbook that defined confidential information as including, among other things, "wage and salary information." (GC Exh. 16, p. 31). Following charges filed by the union and two employees at a G4S location in Region 14 (14-CA-30046, 14-CA-30108, 14-CA-30118), G4S revised its confidentiality policy to remove the explicit reference to wage or salary information. Region 14 approved of the revisions and refused to issue a complaint upon settlement.¹³

Despite Region 14's approval of the revised policy, the ALJ finds that G4S's confidentiality policy is unlawful because, she claims, it does not define "confidential information" and does not define what "activities or policies" employees are prohibited from discussing in public without G4S's permission. (ALJD, pp. 22-23). As identified in Exceptions 16-17, 90, 93, 96, 103-104, and 110-112 and argued below, the ALJ's findings of fact and conclusions of law are erroneous and should be rejected by the Board.

Contrary to the ALJ's finding, the revised policy does not fail to define "confidential information." In fact, the revised policy does not even prohibit the disclosure of "confidential information." Rather, the revised policy expressly prohibits employees from "improperly us[ing], reveal[ing], copy[ing], disclos[ing], or destroy[ing] *G4S or client information.*" (GC Exh. 15, p. 31 (emphasis added)). In contrast, the former language prohibited employees from

instructed employees not to discuss other topics at work in the absence of evidentiary support. That Taresh and others talked about other topics means nothing in the absence of evidence that they talked about other topics in Clemons' presence and without him doing anything about it.

¹² A contrary finding also disregards the record evidence that employees frequently discussed union activity at work. (Tr. 518, 544)

¹³ G4S requests that the Board take administrative notice of that settlement agreement.

“compromis[ing], destroy[ing], improperly us[ing], copy[ing] or disclos[ing] *confidential company or customer information . . .*” (GC Exh. 16, p. 31).

More importantly, however, the revised policy specifically defines the prohibited information as “any information considered proprietary by G4S or the client organization.” (GC Exh. 15, p. 31). By way of comparison, the former policy defined “confidential information” as including, among other items, wage and salary information. (GC Exh. 16, p. 31).

The Board has recognized that employers “have a substantial and legitimate interest in maintaining the confidentiality of private information, including [customer] information, trade secrets, contracts with suppliers, and a range of other proprietary information.” *See Lafayette Park Hotel*, 326 NLRB 824, 826 (1998), *enf. mem.* 203 F.3d 52 (D.C. Cir. 1999). In *Mediaone of Greater Florida, Inc.*, 340 NLRB 277 (2003), the Board held that a policy prohibiting employees from misusing “proprietary information” of the company and third parties was not unlawful. According to the Board in that case, the ALJ “found [the policy] to be reasonably read as prohibiting only disclosure of the Respondent’s information assets and intellectual property, which is private business information that the Respondent has a right to protect.” *Id.* at 278. Thus, Board law plainly supports G4S’s restriction on employee disclosure of “proprietary information.”

G4S’s revisions to its policies to remove the restriction on “confidential information” and replace it with G4S or client “proprietary information” not only render this policy lawful under current Board law, it illustrates G4S’s good faith effort to promulgate a rule that carefully balances the confidentiality requirements of the security industry with employees’ Section 7 rights to discuss the terms and conditions of their employment. While it may be reasonable for employees to believe that a restriction on discussing confidential “wage and salary” information

encompasses their Section 7 rights, no reasonable employee could read the revised restriction on employees improperly using, revealing, copying, disclosing, or destroying G4S or client proprietary information as so far reaching.¹⁴

The ALJ also erred in finding that the prohibition on employees giving interviews or otherwise making public statements about the activities or policies of the Company or its clients is unlawful. This restriction in no way limits an employee's right to discuss the terms and conditions of his or her employment with co-workers or a union. Moreover, employees would reasonably construe this provision in light of the remainder of the confidentiality policy only as a restriction on discussing proprietary information in public. Thus, the ALJ's conclusion is unsupported and should be rejected.

B. G4S'S SOCIAL NETWORKING POLICY DOES NOT UNLAWFULLY RESTRICT EMPLOYEES IN THE EXERCISE OF THEIR SECTION 7 RIGHTS.

The ALJ next finds that the following provision in G4S's Social Networking Policy violates the Act: "Do not comment on work-related legal matters without express permission of the Legal Department." (GC Exh. 13). According to the ALJ, the rule does not expressly restrict Section 7 activity, it was not promulgated in response to Section 7 activity, and it has not been applied to restrict Section 7 activity. (ALJD, p. 23). Nevertheless, the ALJ finds the rule is unlawful because employees could reasonably construe it as restricting Section 7 activity. (ALJD, pp. 23-25). As identified in Exceptions 18-23, 90, 93, 96, 103, and 110-112 and argued

¹⁴ For the ALJ to misread the revised policy and casually disregard that it was changed pursuant to a settlement agreement approved by Region 14 illustrates precisely why the General Counsel has ordered all regions to submit to advice all cases involving allegations of unlawful rules in employers' social media policies. *See* Memorandum GC 11-11. There is a growing inconsistency among the Regions as to whether certain rules are lawful or unlawful, and employers are in a precarious position when drafting policies they deem essential to the secure and productive operation of their business. Notably, the other provisions found unlawful by the ALJ were also included in the revised Security Officer Handbook, which Region 14 reviewed and approved of. This Region raised additional issues with the Handbook *sua sponte*.

below, the ALJ's findings of fact and conclusions of law that employees could reasonably construe the policy as restricting their rights is erroneous and should be rejected by the Board.

Contrary to the ALJ, the rule prohibiting employees from discussing "work-related legal matters" is not an unlawful restriction on employees' Section 7 rights. The Board has held that a "blanket prohibition" on employees' rights to discuss "work-related matters" is unlawful. *See SKD Jonesville Division L.P.*, 340 NLRB 101, 103 (2003). G4S's policy, however, is not a "blanket prohibition." Rather, the restriction is narrowly tailored to address "legal matters," and it specifically references the "Legal Department" as the source for permission to comment on such matters. (GC Exh. 13). It defies logic to presume that any reasonable employee would (1) think that the terms and conditions of their employment are "legal matters," and (2) think that they must get permission from the "Legal Department" to discuss their terms and conditions of employment.

This is particularly true given the conspicuous disclaimer in the policy, which reads, **"This policy will not be construed or applied in a manner that interferes with employees' rights under federal law."** (GC Exh. 13). The ALJ attempts to discount the disclaimer by opining that "[i]t cannot be assumed that lay employees have the knowledge to discern what is a federal law." (ALJD, p. 24, ll. 4-5). The ALJ's finding in this regard, however, ignores the fact that G4S is a federal contractor, and as such, is required to post a notice of employee rights under the NLRA, pursuant to Executive Order 13496, as implemented by the Department of Labor. *See* 29 C.F.R. Part 471.

Not giving credence to G4S's disclaimer also stands in stark contrast to the United States Supreme Court's recognition in *NLRB v. News Syndicate Co., Inc.*, 365 U.S. 695 (1961), that a similar disclaimer in a collective bargaining agreement was sufficient to clarify for employees

that a discriminatory closed-shop rule was inapplicable. In that case, the union’s “General Laws” were incorporated into the CBA unless inconsistent with “federal or state laws.” *Id.* at 697. “Federal or state laws” were not specifically defined. Nevertheless, the Supreme Court held that “[a]ny rule or regulation of the union which permitted or required discrimination in favor of union employees would, therefore, be excluded from incorporation in the contract, since it would be at war with the Act.” *Id.* at 700.

Similarly, in *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33 (1998), the Supreme Court unanimously held that a union does not breach its duty of fair representation by negotiating a union security clause that tracks the language in Section 8(a)(3) because that language is deemed to incorporate all prior court holdings refining that language. According to the Court, “Petitioner’s argument that the failure to explain all the intricacies of a term of art in a contract is bad faith has no logical stopping point; that argument would require that all the intricacies of *every* term used in a contract be spelled out.” *Id.* at 326 (emphasis in original).

Because no reasonable employee could construe G4S’s Social Networking Policy as a restriction on the right to discuss the terms and conditions of their employment, and because there is a clear disclaimer confirming that fact, the ALJ erred in finding the policy unlawful.

As explained in detail above, the ALJ engaged in a tortured interpretation of handbook provisions and a policy to find interference with Section 7 rights were none appeared. Neither the Charging Party nor any employees complained that any of these provisions or policies were unlawful. Rather, the Region, and then General Counsel, went looking for possible allegations. While G4S does not dispute their legitimate role in attempting to protect employees’ Section 7 rights, they and the ALJ go too far when they find unlawful provisions that no reasonable person would interpret in the tortured way necessary to find a violation in this matter. Such

interpretations of handbook provisions and employer provisions do nothing to protect employees and serve only to make it difficult, if not impossible, for an employer to provide any type of structure governing employee behavior while working. Particularly in the security industry, employers must have that ability, and the ALJ's Decision substantially interferes with that ability, without doing anything to further any real Section 7 concerns.

C. LIEUTENANT CLEMONS' ALLEGED STATEMENT TO EMPLOYEES NOT TO DISCUSS THE UNION AT WORK DID NOT UNLAWFULLY THREATEN EMPLOYEES.

The ALJ next finds that Lieutenant Clemons unlawfully threatened employees when he allegedly cautioned Officer Taresh and others that the union should not be discussed at work and when he allegedly cautioned Taresh the following week to be careful talking about the union because it should not be discussed at work. (ALJD, pp. 26-27). As discussed above with respect to the "No Unnecessary Conversations" rule, even assuming the ALJ properly credited Taresh's testimony that these conversations occurred (Tr. 551-552) over Clemons' testimony that they did not (Tr. 572), as identified in Exceptions 24-27, 90, and 102 and argued below, the ALJ's findings of fact and conclusions of law are erroneous and should be rejected by the Board.

According to Taresh, Rice asked Clemons and Shipp if they would be interested in joining the union because the union was a few employees short of having enough cards signed to file a petition. (Tr. 551-552). Taresh testified that in addition to her, Clemons, and Shipp, Sterling was present during the conversation. (Tr. 551-552). Taresh further testified that Clemons replied to Rice that he would take literature but that the union should not be discussed at work. (Tr. 552). In concluding that Clemons' alleged statement was an unlawful threat to employees, like her conclusion that the alleged statement was an unlawful application of the "No Unnecessary Conversations" rule, the ALJ wholly ignores the context surrounding the allegation.

The Board does not consider alleged unlawfully threatening statements in a vacuum. *See TIC – The Industrial Company Southeast, Inc. v. NLRB*, 126 F.3d 334 (D.C. Cir. 1997) (finding that a supervisor’s isolated comment that the employer preferred non-union hiring was insufficient to establish Section 8(a)(1) violation where there was no evidence the supervisor had authority to establish hiring decisions or that the employee could have been coerced by the statement). This is not a typical situation where a supervisor is alleged to have instructed employees not to discuss the union with the intention of stymieing union activity. On the contrary, Clemons, like Rice, was cautioning Tareh and others to be careful discussing the union so that management would not discover what was going on. Assuming Clemons made the statement, then, his intention was to *protect* further union activity, not restrict it.

As discussed above, in *Paintsville Hospital Co.*, 278 NLRB 724 (1986), the Board rejected the ALJ’s finding that two supervisors who allegedly warned employees not to wear buttons and cautioned them not to reveal their sympathies to management acted unlawfully. Here, as in that case, Clemons was “acting in [his] own interest and in accordance with [his] own sympathies which were plainly contrary to those of management.” *Id.* at 725.

The ALJ acknowledges that Clemons’ alleged statements were more “cautionary” than “explicitly threatening” (ALJD, p. 26, ll. 17-18) and relies on cases holding that a supervisor’s cautionary advice can still be deemed unlawful. The ALJ’s reliance on those cases, however, is misplaced because none of them involved a similar stealth campaign with supervisor participation, and certainly none of them arose in the context of the supervisor allegedly telling employees he would “take some literature.” (Tr. 552).

Accordingly, the ALJ’s conclusion that Clemons unlawfully threatened employees by “cautioning” them to not discuss the union at work should be rejected.

D. ARMSTRONG DID NOT CREATE THE IMPRESSION OF SURVEILLANCE OR THREATEN EMPLOYEES.

1. Armstrong did not create the impression of surveillance when he allegedly told Nagler he knew he had been talking to other officers about joining a union.

The ALJ next finds that Armstrong created the impression of surveillance when he allegedly told Nagler, “I know you’ve been talking to several officers about joining a union.” (ALJD, p. 27). As identified in Exceptions 28-32, 90, 98, and 102 and argued below, the ALJ’s findings of fact and conclusions of law are erroneous and should be rejected by the Board.

Even accepting her credibility resolution that Armstrong made the comment, the ALJ once again turns a blind eye to context. *See Arrow Photo Service, Inc.*, 108 NLRB 1424, 1429 (1954) (“Aside from the [supervisor’s] denial of any such [unlawful] conversation, to rely on his [alleged unlawful] statement as interference is to take it out of context . . .”). First, contrary to the ALJ’s finding, Nagler did not testify that Armstrong “approached him.” (ALJD, p. 27, l. 25). Rather, Nagler testified that Armstrong allegedly made the statement after Nagler had another discussion with him – about what we do not know. (Tr. 545). Regardless, it is clear that, contrary to the ALJ’s suggestion, Armstrong did not single Nagler out.

Second, Nagler confirmed that Armstrong stated he had nothing against the union, he just could not join one. (Tr. 547-548). The ALJ completely disregards the mitigative impact such a statement has. Moreover, it strains credulity to believe Nagler felt coerced by Armstrong’s alleged statement, given that he openly replied to Armstrong, “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. 544).

The General Counsel’s allegation is similar to an allegation dismissed by the Board in *SKD Jonesville Division L.P.*, 340 NLRB 101 (2003). In that case, the Board found that a

supervisor's statement to an employee that he had heard he was going to organize did not create an impression of surveillance. The Board explained that a statement regarding what someone heard could be based on what they heard through the "grapevine" or what they heard by spying, and employees cannot reasonably infer the latter over the former.

Similarly, here, it cannot reasonably be inferred that Armstrong learned about Nagler's alleged involvement with the union by spying any more than it can reasonably be inferred he learned about it through the "grapevine." Consequently, the ALJ erred in finding Armstrong engaged in unlawful surveillance.

2. Armstrong's alleged instruction to employees not to speak to Rice did not unlawfully threaten employees.

The ALJ next finds that Armstrong's alleged instruction to employees not to speak with Rice was an unlawful threat. (ALJD, p. 29). As identified in Exceptions 33-34, 90, 99, and 102 and argued below, the ALJ's findings of fact and conclusions of law are erroneous and should be rejected by the Board.

Three union witnesses (Wickham, Taresh, and Robles) testified that Armstrong instructed them not to have any contact with Rice.¹⁵ (Tr. 370-371, 394, 553). Each of those witnesses testified that Armstrong made the statement in the context of announcing that Rice had been suspended. No one testified that Armstrong instructed employees not to contact Rice after he was demoted. Moreover, according to Rice, Pablo told him not to contact employees *during his suspension*. (Tr. 483). Clearly, then, the ALJ is reaching to find that the alleged instruction extended beyond Rice's suspension.

Because instructing employees not to contact a supervisor during an investigation of his pro-union conduct does not violate the Act, the ALJ's conclusion should be rejected.

¹⁵ Interestingly, Counsel for the General Counsel did not question Armstrong about whether he instructed employees not to contact Rice.

3. Armstrong's alleged statement to Sterling about overtime did not unlawfully threaten her.

The ALJ next finds that on March 2, 2011, Armstrong unlawfully 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. (ALJD, p. 29). As identified in Exception 35, 90, 99-100, and 102 and argued below, the ALJ's findings of fact and conclusions of law are erroneous and should be rejected by the Board.

The ALJ offers absolutely no basis to support her conclusion that such a comment was in retaliation for any union or protected concerted activity of Sterling other than to state that the "timing would cause a reasonable employee to perceive" it was inherently threatening. The Board has made clear, however, that "[t]iming alone is insufficient to establish a causal connection." *Royal Coach Sprinklers*, 268 NLRB 1019, 1026 (1984). Thus, the ALJ's conclusion should be rejected.

E. LIEUTENANT JIMINEZ DID NOT UNLAWFULLY THREATEN SECURITY OFFICER BANUELOS OR CREATE THE IMPRESSION OF SURVEILLANCE BY ALLEGEDLY TELLING HER THAT GENERAL MANAGER PABLO STATED THAT ONCE THE LIGHT RAIL CONTRACT EXPIRES, HE WAS NOT GOING TO REHIRE ANYONE WHO HE FOUND OUT WAS IN FAVOR OF THE UNION.

The ALJ next finds that Lieutenant Jiminez unlawfully threatened Banuelos and created the impression of surveillance by allegedly telling Banuelos that Pablo stated that once the Light Rail contract expired, he was not going to rehire anyone who he found out was in favor of the Union. (ALJD, p. 30). As identified in Exceptions 36-37, 90, 98-99, and 102 and argued below, the ALJ's findings of fact and conclusions of law are erroneous and should be rejected by the Board.

At the hearing, Pablo expressly denied making any such statement. (Tr. 119-120). Counsel for the General Counsel presented no evidence to prove that Pablo actually made the statement. The ALJ concludes that, regardless of whether Pablo actually made the statement, Jiminez conveying to Banuelo that he did is an unlawful threat and creates the impression of surveillance. The ALJ's conclusion is based on unsupported allegations and should be rejected.

F. G4S DID NOT UNLAWFULLY DISCIPLINE STERLING FOR FAILING TO REPORT TO WORK.

The ALJ next finds that G4S unlawfully disciplined Sterling for failing to report to work in November 2010 when she was scheduled for overtime. (ALJD, pp. 31-32). According to the ALJ, the discipline was "tainted by retaliatory animus" for her earlier alleged protected concerted activity and therefore violates the Act. (ALJD, p. 32). As identified in Exceptions 38-44, 90, 94, 100, 102, and 108 and argued below, the ALJ's findings of fact, conclusions of law, and proposed order, are erroneous and should be rejected by the Board.

1. Factual Background

a. Sterling's complaints

The record reflects that between March 2010 and June 2010, Officer Sterling believed her former Project Manager, Robert Thario, was mistreating and sexually harassing her. (Tr. 496-498). The record further reflects that Sterling complained about Thario both internally through Human Resources and externally with the Equal Employment Opportunity Commission ("EEOC"). (Tr. 498-499, R. Exhs. 11 & 14).

Human Resources Manager Kercher and General Manager Pablo initiated an investigation into Kercher's allegations. (Tr. 190-199, 498-500). During the course of the investigation, according to Sterling, Pablo told her "not to worry, there would be no retaliation, your job is safe, we're going to take care of this, we're going to talk to him and everything will

be alright.” (Tr. 503). Sterling testified that Kercher similarly explained that “everything would be alright.” (Tr. 500). Sterling further testified that she sent Kercher an email after the meeting “thanking [her] for making me feel comfortable” and stating that she was “very happy with [the] meeting” and “felt really good.” (Tr. 503).

While Pablo concluded following his investigation that Sterling’s allegations against Thario were “unsubstantiated” (Tr. 123), he later discovered that Thario admitted to inappropriate conduct with another female officer (Tr. 580). Consequently, in August 2010, Thario was terminated. (Tr. 580). His replacement, Major Armstrong, took the position in October 2010. (Tr. 289-290).

b. Sterling’s discipline

Sterling was originally issued a Final Written Warning by Armstrong for not reporting to work on November 9, 2010. (Tr. 210). Sterling’s testimony was that she thought all overtime had been cancelled on November 9, 2010, which is why she did not report to work that day. (Tr. 507-508). There was disputed testimony about whether or not overtime had been cancelled for all Security Officers or only for Patrol Officers. (Tr. 209, 460, 508-509). Ultimately, overtime was only cancelled for Patrol Officers. Sterling was not scheduled to work as a Patrol Officer; consequently, she was disciplined for not reporting to work.

Sterling was not pleased with the discipline, so she contacted G4S’s employee hotline to complain. (Tr. 512). Shortly thereafter, Human Resources Manager Kercher called Sterling to discuss her complaint. (Tr. 514). After speaking with Sterling, Kercher initiated an investigation. (Tr. 214, 217). Following her investigation, but before meeting with Sterling, Kercher decided to change the Final Written Warning to a Written Warning. (Tr. 246-247). Kercher made that

change on December 9, 2010.¹⁶ (Tr. 246). On December 17, 2010, Kercher met with Sterling to discuss the discipline and then decided to change the Written Warning to an Oral Warning.¹⁷ (Tr. 246-247).

2. Legal Framework

To establish that an employee was unlawfully disciplined because of her protected concerted activity, the General Counsel must first make a *prima facie* showing sufficient to support an inference that the employee's protected conduct motivated the decision. *See Wright Line*, 251 NLRB 1083, 1088 (1980). The elements the General Counsel must establish are: (1) the existence of protected concerted activity; (2) employer knowledge of that activity; (3) adverse employment action suffered by the employee; and (4) a link, or nexus, between the employee's protected concerted activity and the adverse employment action. *See Wal-Mart Stores, Inc.*, 352 NLRB 815, 815 n.5 (2008). Once the General Counsel has established a *prima facie* case, the burden shifts to the employer to show that it would have disciplined the employee in the absence of protected activity.

a. Armstrong was not aware of the concerted nature of Sterling's complaints.

The ALJ finds that Sterling engaged in protected concerted activity in discussing her complaints about Thario to a co-worker, Asucena Banuelos; in speaking with Kercher and Pablo about her concerns; and in filing a hotline complaint and EEOC charge. (ALJD, pp. 7-9). All of these events occurred in June-July 2010. The General Counsel alleged – and the record supports – that Sterling was issued the Final Written Warning on November 10, 2010. (Complaint, ¶ 5(r); Tr. 210, 246).

¹⁶ The General Counsel mistakenly alleged in the complaint that Kercher issued the Written Warning on November 13, 2010. (Complaint ¶ 5(s)).

¹⁷ The General Counsel does not allege the Oral Warning was unlawful.

Counsel for the General Counsel produced absolutely no evidence to support the ALJ's presumption that Armstrong was aware of the concerted nature of Sterling's complaints.¹⁸ The record makes clear that Armstrong became Project Manager in October 2010. (Tr. 289-290). Prior to that, he had been removed from the East Valley Metro Rail contract entirely because he did not meet certain qualifications established by Metro. (Tr. 585-586). Thus, Armstrong was not even working in the area prior to becoming Project Manager, which further undermines the ALJ's assumption that he had knowledge of Sterling's protected concerted activity.

Consequently, the ALJ erred in finding the General Counsel established the "knowledge" element of the *prima facie* case with respect to the Final Written Warning.

b. There is no causal connection between Sterling's complaints and the two challenged disciplinary actions.

To properly analyze this issue, it is necessary to distinguish between Armstrong's issuance of the Final Written Warning and Kercher's issuance of the Written Warning, because the General Counsel explicitly separated the two adverse actions in the complaint. (Complaint ¶¶ 5(r) and (s)). The result for both, however, is the same – neither was retaliatory.

i. Armstrong's Final Written Warning

Assuming, *arguendo*, that Armstrong had knowledge of Sterling's protected concerted activity, there is absolutely no evidence of a causal link between that activity and the Final Written Warning. First and foremost, the 5-month time lapse between the two events dispels any inference of retaliation. *See Lucky Stores*, 275 NLRB 1438, 1439 (1985) (finding the "remoteness in time" (3 months) between the protected concerted activity and the discharge demonstrates the employer did not act unlawfully).

¹⁸ In contrast, G4S acknowledges that Kercher was aware of Sterling's protected concerted activity because Sterling informed Kercher she had spoken to Banuelos about Thario. (Tr. 500). As explained in the next section, however, there is no evidence Kercher issued the Written Warning in retaliation for Sterling's protected concerted activity.

Second, the record demonstrates that Armstrong “stood up” for Sterling when Martini allegedly wanted to fire her for not reporting to work.¹⁹ (Tr. 509). If Armstrong truly wanted to retaliate against Sterling for engaging in protected concerted activity, it hardly seems reasonable to believe he would have argued with his superior to reduce the proposed discharge.

ii. Kercher’s Written Warning

As with the allegation against Armstrong, the allegation against Kercher fails for want of a causal connection given the 5-month time lapse between the events. *See Lucky Stores*, above.

There are also many other facts undermining the ALJ’s finding of animus with respect to Kercher. For instance, Kercher’s reduction of the Final Written Warning to a Written Warning (and ultimately an Oral Warning), like Armstrong’s reduction of Martini’s alleged intended termination to a Final Written Warning, is highly indicative that no retaliatory animus exists.

Additionally, Kercher participated in conducting a prompt and thorough investigation of Sterling’s harassment complaints. According to Sterling’s own testimony, “She began to assure me that everything would be alright, that we would have a meeting with Mr. Pablo.” (Tr. 500). Sterling further testified that she sent Kercher an email after the meeting, “thanking [her] for making me feel comfortable” and stating that she was “very happy with [the] meeting” and “felt really good.” (Tr. 503).

Moreover, other employees complained about Thario, yet they were not retaliated against, which suggests that Sterling was not “singled out” for her protected concerted activity.

See Style of Liberty Pavilion Nursing Home, 254 NLRB 1299 (1981) (finding employer did not

¹⁹ The ALJ mistakenly relies on hearsay testimony that Martini allegedly wanted Sterling fired as further evidence of animus. (ALJD, p. 32). However, Martini did not make the decision being challenged by the General Counsel – Armstrong did. Thus, the ALJ’s observation that “Respondent has presented no evidence as to why Martini would be mad at her other than for her protected concerted activity” (ALJD, p. 32, ll. 19-20) is irrelevant. Moreover, the ALJ’s observation turns the *Wright Line* framework on its head. G4S was not obligated at this stage to produce evidence that Martini was mad at Sterling for reasons other than her protected concerted activity; Counsel for the General Counsel was obligated to produce evidence that Martini was mad at Sterling because of her protected concerted activity. Counsel for the General Counsel failed in that regard.

unlawfully terminate pro-union nurses for negligent care where other pro-union nurses who were not guilty of providing negligent care were retained).

Regardless of what evidence the ALJ relied on to find retaliatory animus with respect to Kercher's discipline, however, the fact remains that G4S would have issued Sterling some type of discipline for not reporting for work even had she not engaged in protected concerted activity. As the ALJ observed, other employees have been issued oral or written warnings for not reporting to work. (ALJD, p. 32, ll. 7-11). Thus, there is no evidence of disparate treatment between how Sterling was ultimately disciplined and how those employees were disciplined.

Accordingly, Counsel for the General Counsel failed to rebut G4S's position that Sterling would have been disciplined even in the absence of protected concerted activity. *See River Ranch Fresh Foods, LLC*, 351 NLRB 115, 117 fn. 16 (2007) ("Regardless of what [the worker] was talking about, the Respondent could legitimately discharge him for not getting the work done; and based on the record evidence discussed above, that is what it did."); *Gravure Packaging*, 321 NLRB 1296, 1308 (1996) ("My conclusion would be the same even if it could be said that management knew how he felt about the Union. He was a temporary employee and, while all of the temporaries who worked with him were retained, he was considered a slow employee, unsuitable for any then-available opening even by his work leader").

c. The ALJ's proposed order is moot.

For a remedy, the ALJ orders G4S to restore the status quo ante and make appropriate changes to Sterling's personnel files and/or other supervisor maintained files. (ALJD, p. 40, ll. 35-37). She further orders G4S to notify Sterling in writing this is done. (ALJD, p. 42, ll. 6-8). G4S has already restored the status quo because Kercher rescinded the Final Written Warning

and the Written Warning and advised Sterling of the same. (Tr. 246-247). Consequently, the ALJ's proposed order is moot.

G. PABLO DID NOT UNLAWFULLY TERMINATE WICKHAM.

The ALJ concludes, as a final matter, that Wickham was terminated because of his union activity in violation of Sections 8(a)(1) and 8(a)(3) of the Act. (ALJD, pp. 34-40). As identified in Exceptions 45-89, 91, 95, 101-102, and 105-107 and argued below, the ALJ's findings of fact, conclusions of law, and proposed order are erroneous and should be rejected by the Board.

1. Factual Background

On February 4, 2011, Officer Wickham was assigned to handle control room monitoring at the Price-Apache kiosk. According to Wickham, at 7:00 a.m., he was sitting in front of his monitors wearing “[b]oots, socks, pants, t-shirt, thermal, my shirt, my work shirt, a fleece, and my jacket, and a stocking cap, and gloves.” (Tr. 399). Wickham testified that the heat was not working in the kiosk, and he had had a head cold and sinus infection the previous few days. (Tr. 397). However, Wickham testified he had not taken any medication that morning. (Tr. 398).

Eggleston and Clemons were conducting routine safety checks.²⁰ (Tr. 342-343). Upon arriving at the Price-Apache kiosk, Eggleston exited the vehicle first, while Clemons stayed inside the vehicle and gathered paperwork. (Tr. 567). Eggleston approached the kiosk, looked inside the glass to the entrance door, and saw Wickham sleeping. (Tr. 355-356). Eggleston unequivocally testified to those facts: “[W]hen I first pulled up, I got out of the vehicle. I exited the vehicle. I saw him sleeping.” (Tr. 355).

At that point, according to Clemons, Eggleston called to Clemons, “Hey, come look at this, he’s sleeping.” (Tr. 567). According to Eggleston, he called to Clemons, “Look, Dave.

²⁰ Normally, only one Lieutenant conducts a safety check; however, Clemons was working overtime that day, and Major Armstrong instructed him to ride along with Eggleston. (Tr. 340, 357, 555-556).

Come here. He is sleeping.” (Tr. 359). Clemons then exited the vehicle, walked up, and saw Wickham sleeping. Clemons unequivocally testified to those facts: “I exited the vehicle on my way to walk up to the kiosk. . . . I walked up, I looked into the door, observed Mr. Wickham sleeping.” (Tr. 567-568).

Eggleston testified that he (Eggleston) beat on the door to wake Wickham up. (Tr. 354). Eggleston explained, “[N]ormally, most of the people open the door for me. I never have to use the key because they always hear me pull up, especially at that time of the morning, because I don’t think – the ASU kids weren’t in school yet, at that time, so it is very quiet, and most people, they hear me pull up. They even hear me slam the door, and even hear the radio, but for some reason or another, he just didn’t hear me or hear Dave when we pulled up.” (Tr. 361).

Wickham testified that he did not notice the Lieutenants until they knocked on the door, at which point he got up from his chair and let them in. (Tr. 401-402). While Wickham denies that he was asleep at the time, he acknowledged that when he opened the door, the Lieutenants said to him, “Wake up.” (Tr. 403). Wickham testified that Eggleston said, “There is no sleeping on duty,” Clemons asked if he wanted an energy drink, and Eggleston asked if he wanted coffee. (Tr. 404). According to Wickham, he told the Lieutenants he did not drink coffee and that he just did not feel well because he had a sinus infection and it was freezing cold in the kiosk.²¹ (Tr. 404). Wickham testified that Eggleston sat down, wrote something in his report, and then he and Clemons left to attend a meeting. (Tr. 403-404). The following day, Eggleston called Wickham and told him to report to the Phoenix office. (Tr. 407).

Both Eggleston and Clemons wrote statements describing the events surrounding their discovery of Wickham sleeping. (R. Exhs. 10 & 11). Human Resources Manager Kercher

²¹ According to Clemons, Wickham said he had not slept well the night before, and he was tired. (Tr. 568). Clemons also testified that Wickham said he was not sleeping, he was just “resting his eyes.” (Tr. 568).

reviewed both statements. (Tr. 145). Kercher then consulted with Pablo about the incident. (Tr. 146-147). On February 10, Kercher issued Wickham a three-day suspension pending further investigation. (GC Exh. 17). Kercher's further investigation consisted of viewing the videotape of the Price-Apache kiosk, along with Major Armstrong and Lieutenant Jiminez. (Tr. 145-146).

The lights in the kiosk are activated by body movement. (Tr. 400). The videotape revealed that the lights in kiosk were off on the morning of February 4, 2011, from 6:57 a.m. to 7:14 a.m. (GC Exh. 18). That the lights were off during that timeframe confirmed Eggleston's and Clemons' reports that Wickham was asleep, or at least not attending to his duties. (Tr. 241-243). Kercher testified that the videotape played very little role in the final decision. (Tr. 242). Kercher presented all the evidence to Pablo, and on February 11, 2011, Pablo terminated Wickham. (Tr. 84, 148-149; GC Exh. 18).

On February 14, 2011, Kercher and Armstrong met with Wickham to inform him of his termination. (Tr. 150-151, 409). According to Wickham, Kercher explained that they had reviewed the video evidence, the lights were out in the kiosk, and there was no motion to turn them on, which indicated he was either sleeping or remiss in his duties. (Tr. 409). Wickham did not deny that he was sleeping; instead, he asked why he was being terminated when others had not even been suspended for being caught sleeping on the job. (Tr. 410). According to Kercher, Wickham was insubordinate during the termination meeting. (Tr. 152, 271-272; GC Exh. 18). Wickham did not state or suggest that he believed he was being terminated for union activity. (Tr. 272).

When Armstrong was first promoted to Operations Manager in October 2010, he followed up on an ongoing investigation of a complaint by a customer that Wickham had been sleeping on the job. (Tr. 321-324). The customer never returned Armstrong's phone calls, but

based on the complaint and recommendation of the customer, Armstrong moved Wickham to another post. (Tr. 323-324).

2. Legal Framework

As discussed above with respect to Sterling's discipline, to establish that an employee was unlawfully disciplined because of union activity, the General Counsel must first make a *prima facie* showing sufficient to support an inference that the employee's union activity motivated the decision. *See Wright Line*, 251 NLRB 1083, 1088 (1980). The elements the General Counsel must establish are: (1) the existence of union activity; (2) employer knowledge of that activity; (3) adverse employment action suffered by the employee; and (4) a link, or nexus, between the employee's union activity and the adverse employment action. *See Wal-Mart Stores, Inc.*, 352 NLRB 815, 815 n.5 (2008). Once the General Counsel has established a *prima facie* case, the burden shifts to the employer to show that it would have disciplined the employee in the absence of union activity.

a. Pablo had no knowledge of Wickham's union activity.

Pablo testified that he had no prior knowledge of Wickham's union activity and had no involvement with Wickham at all prior to this incident. (Tr. 114-118). Counsel for the General Counsel solicited no testimony from Wickham to refute this. Nevertheless, the ALJ blindly imputes knowledge of Wickham's union activity to Pablo. This is reversible error.²²

The ALJ finds that three Lieutenants knew about Wickham's specific union involvement: Taylor, Clemons, and Rice. (ALJD, p. 35, ll. 14-22). The record makes clear that Rice was aware of Wickham's union activity. (Tr. 382, 390, 464, 468-469). Contrary to the ALJ's finding,

²² The ALJ devotes a significant amount of time in her Decision analyzing whether Pablo was aware of union activity in general; however, general knowledge of union activity is irrelevant here, because G4S acknowledges that the petition was filed – and Pablo was aware of it – prior to the date Wickham was terminated. (Tr. 46-47, 104). The relevant inquiry, then, is whether Pablo had specific knowledge of Wickham's union activity. The ALJ's focus on Pablo's general knowledge of union activity is of no consequence.

however, there is absolutely no evidence that Taylor and Clemons were aware of Wickham's specific union activity. And thus, they could not have conveyed that knowledge to Pablo.

The ALJ finds that “[t]he testimony that Taylor knew about Wickham's Union activity, and asked Wickham if he had heard from the Mickey Mouse Club, is . . . unrefuted.” (ALJD, p. 35, ll. 17-19). The ALJ offers no citation to the record to support this finding, however, because there is no record support for it. Counsel for the General Counsel did not call Taylor to testify. And Wickham's testimony refutes, rather than supports, the ALJ's finding that Taylor knew of Wickham's union involvement.

According to Wickham, when Taylor asked about the Mickey Mouse Club, “I told him I didn't know anything about it.” (Tr. 393). In other words, whatever Taylor may have previously heard or assumed regarding Wickham's involvement in union activity was directly refuted by Wickham himself. A careful review of the transcript confirms there is no other testimony establishing that Taylor knew of Wickham's union involvement. According to Rice, Rice told Taylor and Clemons about the union organizing soon after it began. (Tr. 467). However, Rice did not identify the employees who were involved. (Tr. 467). Thus, the ALJ baselessly assumes Taylor had knowledge of Wickham's union involvement.

The ALJ likewise baseless assumes Clemons had knowledge of Wickham's union involvement. Clemons did not testify to having knowledge of Wickham's union activity, and Wickham did not testify to Clemons having knowledge of his union activity. As discussed above, according to Taresh, Rice asked Clemons and Shipp if they would be interested in joining the union because the union was a few employees short of having enough cards signed to file a petition. (Tr. 551-552). Taresh testified that in addition to her, Clemons, and Shipp, Sterling was

present during the conversation. (Tr. 551-552). Taresh did not testify that Wickham was present during that conversation.

Even assuming, contrary to the record, that Taylor and Clemons had knowledge of Wickham's union activity, the ALJ fails to articulate how she imputes Taylor's and Clemons' purported knowledge of Wickham's activities to Pablo. In fact, in her Decision, the ALJ only ever explains why she imputes Taylor's and Clemons' *general* knowledge of union activity to Pablo: "If they were doing their jobs, they would have informed higher management of the Union organizing campaign." (ALJD, p. 35, ll. 30-31). Not once does the ALJ explain how Taylor's and Clemons' alleged specific knowledge of Wickham's union activity should be imputed to Pablo, and she further fails to explain on what basis she has the authority to add job responsibilities to the Lieutenants without evidentiary support.

That Pablo did not know of Wickham's specific union activities is further confirmed by the overwhelming evidence in the record establishing that Wickham and the other organizers were very secretive in their campaign.²³ Wickham testified that he devised a code – The Mickey Mouse Club – to avoid using the word "union." (Tr. 391-392, 417). He devised this code word so "that management wouldn't know that there was union organizing going on." (Tr. 416). That code word was known to and used by other employees. (Tr. 482).

Rice testified that Wickham was very careful about who he spoke to about the union. (Tr. 482). Taresh indicated that was her reason as well for speaking hypothetically. She initially resisted admitting the reason for Wickham's use of hypothetical speech until she was confronted with the sworn affidavit she had provided during the Region's investigation:

²³ The ALJ expressly found as much: "They tried to keep the organizing campaign confidential, and spoke of the Union in the hypothetical." (ALJD, p. 11, ll. 11-12).

Q: But did you believe that he [Wickham] was speaking hypothetically to keep out of trouble in case the Employer found out?

A: I don't know why he was, I know I was.

Q: I'm reading a sentence from the affidavit you provided to the Board on March 21 of 2011. I quote, "I heard Donald Wickham talking about the union a little. He would always speak hypothetically about the union. I believe he would do this to keep out of trouble in case the Employer found out." Is that an accurate statement?

A: Yes.

(Tr. 559-560).

Former Officer Sean Nagler also denied being instructed about keeping discussions of the union quiet until confronted with his Board statement in which he admitted that he had been told by Rice "not to say anything to anyone else about the union." (Tr. 546).

Witness Gilberto Robles testified he was instructed by Rice and Wickham that "he shouldn't be talking about the union to other people." (Tr. 377). They cautioned him to be quiet about the union, which is part of the reason that Robles lied to Armstrong when Armstrong asked him if Rice had contacted him regarding the union. (Tr. 377).

This evidence demonstrates that those attempting to organize the union, and most particularly Donald Wickham, were extremely cautious in their organizing strategy, speaking in hypothetical terms and using code words to ensure that management did not learn of their union organizing activities. And they were successful in this endeavor because management never did learn of Wickham's involvement in union organizing activity until this hearing. (Tr. 114-115).

There is simply no record evidence that Pablo had any inkling of Wickham's role in organizing the union at the time he disciplined him for sleeping on the job.²⁴

b. Pablo had no union animus against Wickham.

Even accepting the ALJ's entirely unsupported assumption that Pablo had knowledge of Wickham's union activity, the ALJ erroneously finds that Pablo had union animus against Wickham.

The ALJ first finds the timing of Wickham's discharge in relation to Pablo's "official" knowledge of the union petition to be indicative of unlawful motivation: "[T]he 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." (ALJD, p. 37, ll. 6-9). As discussed above, however, the record plainly reflects that Wickham was terminated on February 11, not February 4, the latter being the day he was discovered sleeping on the job. (Tr. 84, 148-149; GC Exh. 18).

Even assuming that an additional 7-day time lapse between Pablo's knowledge of the union petition and Wickham's termination would not have made a difference to the ALJ in reaching her conclusion, however, Board law is clear that "[t]iming alone is insufficient to establish a causal connection." *Royal Coach Sprinklers*, 268 NLRB 1019, 1026 (1984). And the ALJ's reliance on the other factors discussed below is clearly unconvincing.

The ALJ finds there are "problems" with Eggleston and Clemons' accounting of events. (ALJD, p. 36, ll. 9-10). According to the ALJ, "Most significantly, Eggleston testified that Clemons walked around to the front window where he had a direct view of Wickham sleeping.

²⁴ The ALJ's footnote 60 suggests that Pablo should have known about Wickham's union activity because the union conversations and distribution of union information took place at the kiosks, which have security cameras. First, there is no evidence the security cameras have sound. Second, there is no evidence Pablo (or any other member of management for that matter) viewed the security cameras in an effort to spy on union activity.

Clemons testified he only stood behind Clemons²⁵ and looked in the window on the door, which was not a head-on view.” (ALJD, p. 36, ll. 10-13). The ALJ further finds, “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?” (ALJD, p. 36, ll. 13-14). The primary problem with the ALJ’s findings is they are largely unsupported, and, in some ways, *directly contrary to the record*.

First, Clemons did not testify that he stood *behind* Eggleston, let alone that he *only* stood behind him. On the contrary, when asked by Counsel for the General Counsel, “Were you looking over Lieutenant Eggleston or were you standing next to him?”, Clemons plainly answered, “I was standing next to him, at an angle.” (Tr. 577).²⁶

Additionally, contrary to the ALJ’s finding, Clemons did not testify that he (Clemons) “only” looked through the window of the door – rather he *only* testified that he looked through the window of the door. Clemons was not asked if he also looked through the front window, and his failure to testify to that fact on his own accord certainly cannot be construed to mean that his version of events is different from Eggleston’s version.

The ALJ also mistakenly finds that Clemons and Eggleston differed on their accounts of how Wickham came to the door. When asked whether Wickham stood up and came over to the door or whether he slid his chair over, Clemons answered, “I believe he slid over in his chair.” (Tr. 578). Eggleston was not asked that question, and he never denied on his own accord that Wickham slid over in his chair. In fact, directly contrary to the ALJ’s finding, Eggleston never

²⁵ This is apparently a scrivener’s error on the ALJ’s part. Clemons obviously could not have stood behind himself. The ALJ presumably meant that “Clemons testified he only stood behind *Eggleston*,” which is consistent with her earlier factual finding on this issue: “Clemons testified that he was standing behind Eggleston the entire time, and that he only looked into the kiosk from the door.” (ALJD, p. 15, ll. 19-20 (citing Tr. 577)).

²⁶ Curiously, the ALJ actually cites page 577 of the transcript – in which Clemons clearly explains that he stood beside Eggleston not behind him – to support her finding that Clemons stood behind Eggleston. (ALJD, p. 15, ll. 19-20).

testified that Wickham “got out of his chair” to let Eggleston in.²⁷ Eggleston only ever testified that Wickham let him in.

The ALJ’s hyper-technical evaluation of Clemons’ and Eggleston’s version of events, notwithstanding its lack of evidentiary support, should be rejected for a more fundamental reason: it focuses on alleged “problems” with Clemons’ and Eggleston’s testimony at the hearing nine months after the incident. The ALJ’s focus should have been on whether there were “problems” with the version of events Clemons and Eggleston reported to upper management – of which there were none.

According to both Clemons’ and Eggleston’s reports (R. Exhs. 9 & 10), upon which Kercher – and, ultimately, Pablo – relied, they both witnessed Wickham sleeping. There was no discussion about which windows they looked through or whether Wickham slid over in his chair to let them in or stood up to let them in. The ALJ does nothing more than “nit pick” (and unsuccessfully at that) Clemons’ and Eggleston’s testimony at the hearing, which demonstrates that she has disregarded her role in these proceedings.

It is well-established that “the Board may not substitute its own business judgment for that of the Respondent or act as a ‘super-personnel’ department.” *Pro-Tec Fire Services*, 351 NLRB 52, 58 (2007). Moreover, “[e]ven shortsighted or bad business judgments are permissible so long as they are not discriminatory.” *Id.* The ALJ ignores this precedent and bases her conclusion of unlawful motivation on flat incorrect facts. *See Goldtex, Inc.*, 309 NLRB 158, fn. 3 (1991) (an employer does not act unlawfully if it shows that it discharged an employee based on a reasonable belief that the employee had engaged in conduct warranting discharge).

²⁷ The ALJ cites page 361 of the transcript to support her finding that Eggleston testified that after he beat on the door, “Wickham woke up, got out of his chair, and let him in the kiosk.” (ALJD, p. 15, ll. 21-22). No where on that entire page does Eggleston testify that Wickham “got out of his chair.”

Additionally, even if these supposed “inconsistencies” that the ALJ digs up were supported by the evidence, they are so minor and trivial that to rely on them for purposes of finding pretext is to ignore the realities of human recollection. Judges frequently recognize that minor inconsistent witness statements can easily be disregarded. *See, e.g., Inland Container Corporation*, 240 NLRB 1298, 1300 (1979) (“Upon consideration of points made, I find any inconsistency [in witness details] to be so minor as to be insignificant.”); *Royal Sound Co.*, 287 NLRB 989, 990 fn. 1 (1988) (“I was impressed with [the witness’s] credibility. . . . I make this credibility resolution notwithstanding various minor inconsistencies and a certain inability to recall certain less important details like when he started work and when his employment terminated.”).

The ALJ spends the remainder of her Decision dissecting G4S’s evidence that Wickham was treated the same as all other employees for whom Pablo authorized termination. Pablo testified that during the time he has been the Phoenix General Manager he has never authorized a lesser penalty than termination when it was verified that a Security Officer was sleeping on duty. (Tr. 115). G4S introduced a listing of all terminations that have occurred in the Phoenix district from September 1, 2008 through October 13, 2011. (R. Exh. 21). The list reflects that there have been a total of 32 terminations for sleeping during the designated period, 24 of which occurred prior to Wickham’s termination for sleeping.

Once again, the ALJ embarks on a hyper-technical review of the evidence to support her already foregone conclusion that Wickham’s termination was a result of union animus and not the uncontroverted observations of two supervisors who witnessed him first-hand asleep at a job where his only responsibility is monitoring the security of the area. First, the ALJ reasons that because not all supervisors terminated employees the first time they were caught sleeping, “if

Pablo's policy existed, it was either not effectively communicated, inconsistently enforced, or both." (ALJD, p. 36, ll. 25-26). The ALJ misses the forest for the trees.

It is undisputed that Pablo was the only one authorized to terminate employees (Tr. 60), and that he alone made the decision to terminate Wickham (Tr. 149). Thus, whether Pablo "effectively communicated" his policy or whether supervisors "inconsistently enforced" it is entirely irrelevant to Pablo's alleged animosity in making the decision to terminate Wickham. The General Counsel is not alleging that Pablo failed to do a good job managing his supervisors (e.g., by effectively communicating his policy to them or ensuring they consistently enforced it), she is alleging that Pablo terminated Wickham in retaliation for his union activities. And there is no evidence to support that allegation.

Next, the ALJ finds pretext because Kercher testified at the hearing that the video evidence played very little role in the decision to terminate Wickham (Tr. 242), yet Kercher cited the video evidence as the reason for disciplinary action on Wickham's termination form (GC Exh. 18). Contrary to the ALJ's inference, this is not a "shifting" rationale. Wickham was terminated for sleeping on the job, and that "rationale" has never shifted. Moreover, Kercher did not testify that the video played *no* role in the decision; she simply testified that it played very little role. (Tr. 242).

Next, the ALJ finds G4S's investigation "was not adequate." (ALJD, p. 39, ll. 1-2). According to the ALJ, "Kercher issued Wickham's suspension before giving him an opportunity to give his side of the story" (ALJD, p. 38, ll. 35-36), and "He was not interviewed about what happened that day" (ALJD, p. 38, l. 37). The ALJ does not cite to the record to support these findings because they lack record support. To be sure, Wickham's testimony on this issue was as follows:

Q. [D]id [Kercher] tell you why you were suspended?

A. She said I was sleeping or inattentive to my duties.

Q. Okay, and did you say anything?

A. No, I didn't.

Q. Okay, did she ask your side of the story?

A. *She may have; I don't recall.*

(Tr. 408 (emphasis added)).²⁸ For the ALJ to conclude that Kercher did not give Wickham an opportunity to “give his side of the story” in the face of the above-testimony on the issue is yet another example of the ALJ’s gross misreading of the record.

The ALJ further attacks G4S’s investigation by pointing out that “Pablo, the decision-maker, did not speak with Clemons, Eggleston, or Wickham, nor did he review the videotape.” (ALJD, p. 38, ll. 39-40). The ALJ, however, fails to explain how this demonstrates pretext, given that Human Resources Manager Kercher – whose role it is to investigate workplace incidents and report findings to the General Manager – talked to those individuals, reviewed the videotape, and then presented her evidence to Pablo. (Tr. 149). Moreover, Pablo testified that he personally reviewed the written statements of Clemons and Eggleston. (Tr. 116-117). That Pablo did not re-conduct or otherwise “second guess” Kercher’s investigation or findings is entirely consistent with G4S’s organizational structure and in no way demonstrates that G4S’s investigation was not “adequate.”

The ALJ also mistakenly finds that Clemons’ statement was solicited five days after the fact. (ALJD, p. 38, l. 40, p. 39, l. 1). This is not true, and even if it were, it is irrelevant.

²⁸ That Wickham *was* allowed to tell “his side of the story” is also confirmed by his own testimony: “[S]he handed me the suspension paper and it had a couple of sentences on it, in terms of what Eggleston had written, that he had caught me sleeping, and that I had said I didn’t get much rest the night before, *which I denied*, because I did not say that, and I wrote it on my suspension paper that I denied that, and stated that I said that I wasn’t feeling well, that I was sick.” (Tr. 408 (emphasis added)).

Clemons *typed* his statement on February 9, five days after the February 4 incident. (R. Exh. 10). As Clemons testified, however, February 4 was a Friday, and he went home after the supervisors' meeting about the union with Pablo. (Tr. 567). According to Clemons, "Monday rolled around, I was asked to write this" (Tr. 567). That Kercher did not solicit Clemons' statement until Monday following the incident the previous Friday, and that Clemons did not type his statement until two days after that, in no way suggests that the investigation was inadequate. And the ALJ's conclusion to the contrary is yet another example of her acting as a "super-personnel" department.

Finally, the ALJ finds pretext through Pablo's failure to explain why he purportedly "singled out" sleeping on duty as "the infraction that would, as a matter of his own policy, result in automatic dismissal." (ALJD, p. 39, ll. 4-5). The ALJ apparently believes that of the twenty-one grounds that *may* result in immediate termination listed in the Security Officer Handbook (GC Exh. 15, pp. 33-34), sleeping on the job is the only one enforced by Pablo. Such a conclusion is not only unsupported by the record, it defies common logic.

The evidence relied on by the ALJ does not demonstrate that Pablo only terminated employees for sleeping on the job and not for the other listed reasons. Rather, the evidence reflects that, in some situations, employees have not been discharged for engaging in the listed offenses. This is not striking, however, given that the policy plainly provides that discharge *may* be a consequence of an infraction – the policy is not couched in mandatory terms.

Moreover, it is unreasonable for the ALJ to assume that Pablo singled-out sleeping on the job to the exclusion of the remaining listed offenses. Can it reasonably be assumed that Pablo would not terminate an employee who willfully destroys client property, uses firearms without

authorization, or fraudulently alters client records? Of course not. More importantly, though, Counsel for the General Counsel produced no such evidence.

c. Wickham would have been terminated even in the absence of his union activity.

The ALJ's final unsupported conclusion is that G4S did not meet its burden under *Wright Line* to establish that Wickham's discharge would have taken place even absent his union activity. (ALJD, p. 39). According to the ALJ, G4S fails in this regard because of the 24 examples of terminations for sleeping on the job that occurred on Pablo's watch prior to Wickham's termination, "[t]here is no information . . . regarding whether or not these employees had prior infractions and/or whether their sleeping was objectively verified." (ALJD, p. 39, ll. 46-48). The ALJ concludes, "Without this information, it is not possible to compare these employees to Wickham in any meaningful way." (ALJD, p. 39, ll. 48-49).

If, as the ALJ opines, "it is not possible to compare these employees to Wickham in any meaningful way," then it certainly would not be reasonable for the ALJ to compare them for purposes of finding pretext. Yet this is precisely what the ALJ did. *See* ALJD, p. 36, ll. 24-25: "First, the General Counsel pointed to evidence that other Officers were not terminated for the first time they were caught sleeping on duty."; ALJD, p. 37, ll. 21-22: "Some of the explanations about why certain employees were not terminated for sleeping on duty also indicate pretext.

True, there is not a record of perfect uniformity with regard to termination for sleeping on duty. There is some evidence that not everyone who has slept on duty has been terminated. The Phoenix district consists of approximately 600 employees. (Tr. 86). It is not surprising or outside the realm of possibility that every subordinate manager and every supervisor does not always

follow company policy.²⁹ That there is not absolute uniformity in terminations for sleeping is not due to selective enforcement of the rule, but rather due to the foibles of human nature.

Most significant to this case, however, is the lack of evidence that Pablo – the undisputed decision-maker in regard to Wickham’s termination – has ever issued any discipline for confirmed instances of sleeping on duty other than termination. This is confirmed by evidence that when Pablo learned of situations involving confirmed sleeping on duty by security officers, his actions were absolutely consistent, and he overrode any lesser discipline issued by individuals subordinate to him. (Tr. 253-254, 591-592; GC Exhs. 22 & 23).

It is also instructive to note that there were a total of five security officer terminations for sleeping in February 2011. (R. Exh. 21). One of those was Wickham, and the other four are not alleged to be in retaliation for union activity. Quite clearly, then, G4S has satisfied its burden of showing that Pablo would have terminated Wickham whether or not he knew of Wickham’s protected activity, and the ALJ’s conclusion to the contrary should be rejected.

IV. CONCLUSION

For the foregoing reasons, the Board should reject the ALJ’s findings of fact, conclusions of law, and proposed order as identified in G4S’s exceptions and dismiss the complaint in its entirety.

Respectfully submitted,

By: /s/ Reyburn W. Lominack, III
Jonathan P. Pearson
jpearson@laborlawyers.com
Reyburn W. Lominack, III
rlominack@laborlawyers.com
Fisher & Phillips LLP
Post Office Box 11612
Columbia, South Carolina 29211

²⁹ Notably, failure to follow policy played a role in the demotion of Dean Hemstreet, a former operations manager for the Phoenix office. (Tr. 581-582).

(803) 255-0000 (telephone)
(803) 255-0202 (facsimile)

Attorneys for Respondent

April 26, 2012

CERTIFICATE OF SERVICE

On this date the foregoing **RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ALJ'S DECISION** was filed electronically and served by first-class mail on the following:

Cornele A. Overstreet
Regional Director
National Labor Relations Board – Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099

Sandra Lyons, Esq.
Field Attorney
National Labor Relations Board – Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 26, 2012, at Columbia, South Carolina.

By: /s/ Reyburn W. Lominack, III
Reyburn W. Lominack, III