

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

G4S SECURE SOLUTIONS (USA), INC.

and

Case 28-CA-023380

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

**ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF CROSS-EXCEPTIONS**

Sandra L. Lyons
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
Telephone: (602) 640-2133
Facsimile: (602) 640-2178
E-mail: Sandra.Lyons@nlrb.gov

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

G4S SECURE SOLUTIONS (USA), INC.

and

Case 28-CA-023380

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

**ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF CROSS-EXCEPTIONS**

Counsel for the Acting General Counsel (General Counsel), pursuant to Section 102.46(e) of the Board's Rules and Regulations, files the following Brief in Support of Cross-Exceptions to the Decision of Administrative Law Judge [JD(SF)-14-12] (ALJD), in this case, issued on March 29, 2012.¹ It is respectfully submitted that in all respects, other than what is excepted to below, the findings of the Administrative Law Judge (ALJ) are appropriate, proper, and fully supported by the credible record evidence.

The ALJ found that Respondent committed numerous and serious unfair labor practices, including violations of Section 8(a)(1) and (3) of the Act by issuing written warnings to employees, and discharging employee Donald Wickham (Wickham) (ALJD at 32, 39) and independent violations of Section 8(a)(1) by maintaining unlawful rules regarding professional image, "no unnecessary conversations," confidentiality and social networking; threatening employees with unspecified reprisals; creating the impression among its

¹G4S Secure Solutions (USA) Inc. is referred to as Respondent. International Union, Security, Police and Fire Professionals of America, (SPFPA), is referred to as Union. References to the ALJD show the applicable page number. "Tr. ____" refers to pages of the transcript from the hearing held October 18 through October 20, 2011. "GCX ____" refers to exhibits introduced by General Counsel at the hearing. "RX____" refers to exhibits introduced by Respondent at the hearing. "UX____" refers to exhibits introduced by the Union at the hearing. All dates are in 2011, unless otherwise noted.

employees that their protected conduct was under surveillance; threatening its employees with discipline; and threatening employees with discharge. (ALJD at 25-30)

The General Counsel excepts to the ALJ's failure to find that Respondent violated Section 8(a)(1) by:

1. maintaining an overly-broad and discriminatory social networking work rule prohibiting the placement of photographs, images and videos of Respondent's employees in uniform or a Respondent place of work on social networking sites without express permission from Respondent; and,
2. reaffirming and enforcing an overly-broad and discriminatory confidentiality rule when its Human Resources Manager instructed an employee that he could not discuss other employees' discipline to show disparate enforcement of Respondent's rules.

I. BACKGROUND

A. Respondent's Operations

Respondent is a nationwide security contractor. (Tr. 23) In Arizona, Respondent has over 65 locations, including the East Valley Metro Light Rail (the light rail) (Tr. 24), and a mass transit system that operates from Mesa to Phoenix, Arizona. (Tr. 44) Respondent provides security officers on the light rail who are responsible for watching the park and ride parking lots, the train platforms, the rail line, and the train cars.² (Tr. 292)

Across the county, the jobs performed by Respondent's security officers are numerous and varied, each unique to the job location. (GCX 2) For example, Respondent's security officers' duties can consist of sitting in the lobby of a building; sitting at a security officer gate and checking cars that enter a property such as a meat packing plant; walking the perimeter of a water treatment facility; transporting detainees from the Arizona - Mexico

² The light rail is overseen by General Manager Larry Pablo (Pablo). (Tr. 21) A different general manager is responsible for southern Arizona locations. (Tr. 24) The light rail's Project Manager is Major Jason Armstrong (Armstrong). (Tr. 23, 40) Under Armstrong are shift supervisors called Lieutenants (Tr. 41), who act as the direct supervisors of the security officers. (Tr. 42) There are currently four lieutenants at the light rail. (Tr. 41) Janelle Kercher (Kercher) is the Human Resources Director for all locations in the Phoenix area. (Tr. 24)

border for the Immigration and Customs Enforcement Agency; sitting in a control room monitoring cameras with no interaction with the public; radio response control; performing concierge services at hotels and other locations; reception duties; and ambassador-type positions. (Tr. 25-35)

B. Respondent's Handbook and Work Rules

Since at least March 2008, Respondent has maintained a Security Officer Handbook (Handbook). (GCX 15) The Handbook was revised in 2011, and applies to all of Respondent's employees across the country. (GCX 16) Respondent's Handbook is provided to each employee when that employee is initially hired. (Tr. 134)

HR Director Kercher testified that when the Handbook was revised in January 2011, current employees received a copy of the new Handbook directly from their supervisors. (Tr. 136) Contained within the March 2008 version of the Handbook is the following confidentiality rule, a rule that was found by the ALJ to violate the Act (ALJD at 22):

Page 31: Confidential Information

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

Such Confidential information includes, but is not limited to:

- wage and salary information
- computer programs and/or codes
- financial information
- marketing strategies
- technological data
- work processes and systems
- customer lists
- labor relations strategies
- communication systems
- personal data on employees and others

Employees who compromise, destroy, improperly use, copy or disclose confidential company or customer information will be subject to disciplinary action, up to and including termination of employment and legal action, even if they do not actually benefit from [sic] the disclosed information.

Do not give interviews or make public statements about the activities or policies of the company or our client without written permission from the Wackenhut Corporation.

(GCX 16) This language was in effect until the Handbook was revised on or about January 1, 2011. The only change to this provision, in January 2011, was the deletion of the paragraph that begins with “Such confidential information includes...” and the bulleted list that follows. (In addition, the name “Wackenhut Corporation” was changed to “G4S Secure Solutions USA.”³ All other language of this provision remains in the new Handbook.

(GCX 15).

Respondent also maintains work rules. One of those work rules addresses social networking. (GCX 13) Though the ALJD found and concluded that the rule was unlawful insofar as it prohibited employees from discussing “legal matters” on social networking sites, the ALJ failed to find that Respondent’s rule prohibiting the use of photos, images or videos of employees in uniform or at their work sites also violates the Act. (ALJD at 21)

II. ANALYSIS

A. The ALJ Erred in Failing to Find that Respondent’s Social Networking Policy Regarding Photographs, Images and Videos Violated Section 8(a)(1) of the Act.

1. Allegation

The Complaint, as amended at hearing, alleges that Respondent maintained a social networking policy regarding the posting of certain photographs, images and videos on social

³ Wackenhut Corporation was the previous name of Respondent.

networking sites. The rule at issue reads as follows:

Social Networking Policy, November 22, 2010:

Photographs, images and videos of G4S employees in uniform, (whether yourself or a colleague) or at a G4S place of work, must not be placed on any social networking site, unless express permission has been given by G4S Secure Solutions (USA) Inc.

The ALJ found that this rule did not expressly restrict Section 7 activity, was not promulgated in response to Section 7 activity, and was not applied to restrict the exercise of Section 7 rights. The ALJ also concluded that the rule would not reasonably be construed as prohibiting protected activity, noting that the rule itself does not ban the taking of photographs, and cited *Flagstaff Medical Center, Inc.*, 357 NLRB No. 65, slip op at 6 (August 26, 2011) (ALJD 24). In dismissing this allegation, the ALJ found that the rule only prohibited the posting of photographs on social networking sites and that Respondent maintained the rule to protect its client's privacy interests, not restrict Section 7 activity. (ALJD at 24-25)

2. Legal Analysis

In *Lafayette Park Hotel*, 326 NLRB 824 (1998), the Board explained that an employer may violate Section 8(a)(1) through the mere maintenance of certain work rules even absent enforcement. The appropriate inquiry for such a case is whether the rule in question "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Id.* at 825. The Board refined this standard in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), by creating a two-step inquiry for determining whether the maintenance of a rule violates

Section 8(a)(1). First, the rule is clearly unlawful if it expressly restricts Section 7 protected activities. If the rule does not, it will only violate Section 8(a)(1) upon a showing that:

(1) employees would reasonable construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Id. at 647. Moreover, a rule that prohibits, among other things, unprotected behavior may be unlawful if it also contains prohibitions so broad that they can reasonably be understood as encompassing protected conduct. See, e.g., *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 n. 4, 294 (1999) (rule prohibiting “false, vicious, profane, or malicious statements unlawful because it prohibits statements that are “merely false” and might include union propaganda).

Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful.⁴ In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.⁵ Applying these standards, Respondent’s social media rule is unlawful because employees would reasonably construe it to restrict Section 7 activity.

First, absent some clarification, the rule is so broad that employees would reasonably construe it to include subjects that involve their working conditions. See, for example, cases where the Board has recognized that the term “confidential information” without limiting language would reasonably be interpreted to include information concerning terms and

⁴ See *University Medical Center*, 335 NLRB 1318, 1320-22 (2001) (work rule that prohibited “disrespectful conduct towards [others]” unlawful because it included “no limiting language [that] removes [the rule’s] ambiguity and limits its broad scope”), enforcement denied in pertinent part 335 F.3d 1079 (D.C. Cir. 2003).

⁵ See *Tradesmen International*, 338 NLRB 460, 460-62 (2002) (prohibition against “disloyal, disruptive, competitive, or damaging conduct” would not be reasonably construed to cover protected activity, given the rule’s focus on other clearly illegal or egregious activity and the absence of any application against protected activity).

conditions of employment. See, e.g., *University Medical Center*, 335 NLRB 1318, 1320, 1322 (2001) (employees “might reasonably perceive terms and conditions of employment, including wages, to be within the scope of the broadly-stated category of ‘confidential information’ about employees”). Thus, employees would reasonably construe Respondent’s rule as restricting Section 7 activity.

Second, though Respondent’s clients may have their own, respective obligations regarding privacy concerns, there has been no showing that employees’ posting a picture of their co-workers would harm such interests, or Respondent’s relationships. The onus should be on Respondent to craft a rule that is sufficiently tailored to its legitimate interests and those of its clients, as the case may be, without unnecessarily treading on its employees’ Section 7 rights. The record fails to show that Respondent’s customers’ presumed privacy interests or concerns are even remotely implicated by employees’ non-commercial, concerted use of photographs of their co-workers.

Moreover, Respondent’s rule amounts to an explicit prohibition of employees’ use social media to communicate and share information regarding their Section 7 activities through pictures or videos, such as of employees engaged in picketing or other concerted activities. Respondent’s rule bars images of employees’ uniforms or the workplace, so it follows that such a rule restricts employees from posting a photograph about unsafe working conditions, concerns about uniform appearance and safety, and other protected subjects which may give rise to the use of a picture of an employee in uniform. See, e.g., *Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991) (employee tape recording at jobsite to provide evidence in a Department of Labor investigation considered protected) *enfd.* 976 F.2d 743 (11th Cir. 1992). All of these activities are protected and concerted, and a reasonable

employee would believe that they could not engage in those activities on their social networking sites, despite the ubiquitous presence of social media in the modern world.

The ALJ relies on *Flagstaff Medical Center*, 257 NLRB No. 65, slip op at 6 (August 26, 2011), in finding no violation. The ALJ concluded that because the rule in *Flagstaff* was more restrictive than the one at issue, and was found to be lawful, this suggests that Respondent's rule is lawful. (ALJD at 24). The ALJ also found that the employer in *Flagstaff Medical* had a legal duty to protect patient privacy, and that although that situation is not present in this case, the ALJ concluded that Respondent has legitimate justification for a rule preventing employees from posting pictures of uniformed employees, or employees at work, on social networking sites. The ALJ noted that Respondent employs emergency medical technicians and so patient concerns for privacy may exist. The ALJ also concluded that because Respondent serves a variety of clients on a national basis at various business and government agencies, it is presumed that such clients may have their own rules centered on privacy and legal concerns. Based on this assumption, the ALJ concluded that Respondent's rule protects Respondent's clients, a legitimate business endeavor.

It is respectfully submitted that the ALJ's determination and analysis is incorrect. At the outset, Respondent's interpretation of its rule is immaterial -- the question is how a reasonable employee would interpret the rule. Second, Respondent has failed to set forth limitations to the application of its rule, or provide employees with explanation that the rule applies only to client's privacy interests. The plain reading of the rule shows that it applies to all photographs, images, or videotapes of any employee, anywhere throughout the United States, regardless of whether the employee works in a medical facility, bank, light rail station, or government building.

Respondent, through this rule, has sought to bar images of employees' uniforms or the workplace. This would essentially bar an employee from posting on a social networking site a photograph about unsafe working conditions, or concerns about uniform appearance and safety. It would also prohibit employees from posting pictures of concerted activities, such as handbilling or picketing in front of Respondent's facilities, or of uniformed employees engaged in picketing or handbilling. All of these activities are protected, concerted activities, and a reasonable employee would believe that they could not engage in those activities on their social networking sites despite the modern world environment where a large majority of conversations between people occur on those very sites. Cf. *Guardsmark, LLC.*, 344 NLRB 809, 811 (2005) enfd. in pertinent part 475 F.3d 369, 377 (DC. Cir. 2007) (employer's "no-solicitation-in-uniform" rule a violation). Respondent's social networking rule is overly-broad and discriminatory and the ALJ's dismissal of this allegation should be overturned.

B. The ALJ Erred in Failing to Find that Human Resources Manager Janelle Kercher's Statements Violated Section 8(a)(1) of the Act.

1. Allegations

The Complaint also alleges that during an unemployment compensation hearing for discriminatee Wickham, HR Director Kercher reaffirmed and enforced the overly-broad and discriminatory confidentiality rule in the Employee Handbook prohibiting employees from speaking to each other about their discipline. Despite her findings that the confidentiality rule itself was unlawful, the ALJ found that Kercher's was merely stating her requirement as HR Director to protect employee personnel files and did not prohibit employees from discussing employee discipline with others.

2. The Record Evidence Concerning the Charge for Reimbursement

Respondent's termination of Wickham, a security guard, on February 11, 2011, was found by the ALJ to have been in retaliation for Wickham's union activities. (ALJD at 39) Wickham applied for unemployment compensation after his termination and during the course of the processing of the application, the State of Arizona Department of Economic Security held a hearing. (Tr. 161) Wickham and Kercher were present telephonically at the hearing. (Tr. 161) During the hearing, Wickham attempted to present information that other employees had engaged in conduct similar to that upon which Respondent was relying as a basis for his termination and that those employees had not been terminated. (Tr. 161). Kercher interrupted Wickham and told Wickham that he could not bring up other employees' discipline because that was confidential information. (Tr. 162-163).

3. Legal Analysis

The ALJ erred when she failed to find that Kercher's directive to Wickham was not a reaffirmation of the overly-broad confidentiality rule. (ALJD at 30) The ALJ bases this finding solely on the grounds that Kercher is the Respondent's HR Director and thus responsible for maintaining the confidentiality of personnel records. It is respectfully submitted that the ALJ's findings and conclusions are erroneous. Kercher's statements were made to an employee when he was attempting to discuss other employees' discipline and show that other employees not engaged in union activity were treated more favorably by Respondent. Kercher did not merely suggest to Wickham that he be careful not to disclose unrelated or genuinely confidential facts as part of his presentation; rather, she directed Wickham to not discuss other employees' discipline. An employees' reference to other employees' discipline and an employer's treatment of such employees, including to show

disparate treatment, is protected. Kercher's position is immaterial to the illegality of the rule. It is a long, well-established principle that an employer violates Section 8(a)(1) of the Act when it prohibits employees from speaking to coworkers about discipline and other terms and conditions of employment. See *SNE Enterprises, Inc.*, 347 NLRB 472 (2006) (Board affirmed the administrative law judge's finding that the employer violated Section 8(a)(1) of the Act by prohibiting an employee from speaking with coworkers about a disciplinary incident and then discharging the employee for violating that prohibition); see also *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990); *Guardsmark*, 344 NLRB 809 (2005); and *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465-466 (1987) (unlawful rule characterizing "Hospital affairs, patient information, and employee problems" as "absolutely confidential," and prohibiting employees from discussing them).

Employees have the right to discuss terms and conditions of employment and that includes employee discipline. Wickham was fighting for his unemployment benefits and whether other employees received a lesser punishment for allegedly sleeping on duty is completely within his rights to know about and mention during his hearing. Kercher's statements show a complete misunderstanding and disregard for employees' Section 7 rights to discuss employee discipline. *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004) *enfd.* 414 F. 3d 1249 (10th Cir. 2005); *Intermet Stevensville*, 350 NLRB 1359 (2007); *University Medical Center*, 355 NLRB at 1322 (2001) (rule prohibiting disclosure of information about employees "is unlawfully broad because it could reasonably be construed by employees to prohibit them from discussing information concerning terms and conditions of employment, including wages").

The ALJ has already determined that the rule regarding confidentiality of employee discipline was unlawful. (ALJD at 22) On April 7, 2011, Kercher reaffirmed that unlawful rule and applied that rule to an employee attempting to discuss employee discipline. Kercher's twisted explanation that she was concerned that documents from personnel files had been released and that is what prompted her statements to Wickham is disingenuous. Kercher sought to stop Wickham from discussing other employees' discipline because she knew Respondent had treated Wickham in a disparate manner from how other employees had been treated and she sought to bar him from presenting that information during the hearing. In fact, the ALJ found that Wickham was discharged for union activity in part, based on the disparate treatment he received as opposed to other employees. (ALJD at 39-40) Regardless of Kercher's motive, her statements were a reaffirmation of an illegal rule, and the ALJ's dismissal of these allegations should be overturned.

III. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests that the Board find that Respondent violated Section 8(a)(1) of the Act as discussed above, affirm and adopt the ALJ's other findings and conclusions, and issue an order providing a full and appropriate remedy in this matter.

Dated at Phoenix, Arizona, this 10th day of May 2012.

Respectfully submitted,

s/ Sandra L. Lyons

Sandra L. Lyons
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
Telephone: (602) 640-2133
Facsimile: (602) 640-2178
E-mail: Sandra.Lyons@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S CROSS-EXCEPTIONS and ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS in G4S SECURE SOLUTIONS (USA), INC., Case 28-CA-023380 were served by E-Gov, E-Filing and by E-mail, on this 10th day of May 2012, on the following:

Via E-Gov, E-Filing

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, NW, Room 11602
Washington, DC 20570-0001

Via Electronic Mail

John D. McLachlan, Attorney at Law
Jonathan P. Pearson, Attorney at Law
Reyburn W. Lominack, III, Attorney at Law
Fisher & Phillips LLP
One Embarcadero Center, Suite 2050
San Francisco, CA 94111-3712
Email: jmclachlan@laborlawyers.com
Email: jpearson@laborlawyers.com
Email: rlominak@laborlawyers.com

James M Moore, Attorney at Law
Gregory, Moore, Jeakle & Brooks, P.C.
65 Cadillac Square, Suite 3727
Detroit, MI 48226-2822
Email: jim@unionlaw.net

Via Mail

/s/ Sandra L. Lyons
Sandra L. Lyons
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
Telephone: (602) 640-2133
Facsimile: (602) 640-2178
Sandra.Lyons@nlrb.gov