

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 REPLY TO GENERAL COUNSEL'S ANSWERING BRIEF

Pursuant to Rule 102.46(h) of the Board's Rules and Regulations, Respondent G4S Secure Solutions (USA) Inc. ("G4S" or "the Company") submits this reply to the General Counsel's May 10, 2012 answering brief.

A. PROFESSIONAL IMAGE RULE

The General Counsel contends that "Respondent is just wrong" in arguing that Security Officers assigned to the PAA have contact with the public because "PAA employees do not themselves go to a situation that requires assistance, but dispatch other employees" and "[t]here is absolutely no evidence that a 'tour group' has ever, or will ever, be given a tour of the PAA location." (GC Br. p. 14). The General Counsel's assertion that PAA Security Officer themselves do not go to a situation that requires assistance is pure speculation. Moreover, it completely overlooks the fact that PAA Security Officers may have to encounter members of the public attempting to access *their own controlled site*. Certainly the General Counsel is not suggesting that a PAA Security Officer must dispatch someone for assistance rather than confront an unauthorized individual who is seeking access to the PAA?

The General Counsel's assertion that there is no evidence that a group will ever be given a tour of the PAA location is also unconvincing, given that it is flatly contradicted by the following unrefuted testimony from General Manager Lawrence Pablo: "[A]ll of our locations are subject to being visited by tour groups on behalf of the client that are not client employees" (Tr. 35). At best, the General Counsel can only argue it is *unlikely* a tour group will visit the PAA. As the ALJ acknowledged in footnote 41 of her Decision, however, and as G4S pointed out in its exceptions brief (R. Br. pp. 7-8), *the mere possibility* of security personnel having to assist or confront members of the public justifies a strict uniform policy.¹

The General Counsel also suggests that because G4S did not present specific evidence of "special circumstances" at its other locations throughout the country, the ALJ's proposed nationwide remedy is appropriate. It is hardly a surprise that G4S did not present specific evidence of the extent to which its over 37,000 other Security Officers working at countless client locations in countless industries around the country have or may have contact with members of the public or otherwise establish that "special circumstances" exist at those locations. G4S was not on notice that the professional image rule in its Security Officer Handbook was allegedly overbroad with respect to locations other than at the East Valley Metro Rail. As a review of the complaint demonstrates, the allegations concerning the professional image rule appeared in a paragraph containing allegations surrounding the East Valley Metro Rail location and only that location. As such, G4S had no reason based on the complaint to believe that every one of its thousands of work sites throughout the nation was at issue.

If employers such as G4S have the burden of demonstrating special circumstances at locations other than the one subject to a charge and complaint, they must be afforded an opportunity to elicit testimony from witnesses from each of those locations. In this case, that

¹ The General Counsel argues that even if there is the slightest possibility that PAA Security Officers may have an encounter with someone from the public, that, in and of itself, does not constitute special circumstances. (GC Br. p. 14). The General Counsel cites no Board law to support this proposition.

would have involved thousands of witnesses, unnecessarily extending this hearing by a number of months, and, quite possibly, years.

B. NO UNNECESSARY CONVERSATIONS RULE

According to the General Counsel, “Clemons was extremely clear that the Union should not be discussed at work” and “it is not required for Clemons to have specifically cited the rule” (GC Br. pp. 16-17). The General Counsel completely ignores the critical point that Clemons’ alleged statements must be considered in the context in which they were made, and in light of evidence that Clemons was an advocate for the Union. Indeed, the General Counsel does not even attempt to distinguish *Paintsville Hospital Co.*, 278 NLRB 724 (1986), cited by G4S for the proposition that when a supervisor, acting on his own behalf and not at management’s direction, cautions employees to hide their union sentiments to avoid detection by management, he is not acting unlawfully. (R. Br. pp. 13-14).

The General Counsel also fails to address the significance of the job responsibilities of Security Officers. As explained in G4S’s exceptions brief, Security Officers have a responsibility to be attentive at all times while on duty given the heightened security concerns inherent in the industry. (R. Br. p. 14). These are not employees in a manufacturing facility or restaurant who might be fully capable of carrying on conversations while performing their regular job duties. Here, the Security Officers’ primary responsibility is to observe everything around them to ensure there are no threats to G4S’ clients’ property, customers, or employees.

In an effort to circumvent the uncontroverted fact that personnel charged with security responsibilities must be attentive while on duty, the General Counsel, like the ALJ, relies on Security Officer Carol Taresh’s testimony that other non-work topics such as sports, cars, houses, and television were regularly discussed “at work.” (Tr. 563). Taresh’s testimony, however, is entirely irrelevant to the issue of whether Clemons discriminatorily applied the no unnecessary conversations rule. To be sure, Taresh’s testimony would have only been relevant

had she testified that Clemons observed Security Officers participating in other non-work discussions *and failed to caution them not to do so*. Absent such evidence, Taresh's testimony proves only that Taresh and perhaps others do not follow the rules.

Taresh's testimony also lacks relevance because she failed to clarify what she meant by "at work." Did she mean "at work" on the premises? Or did she mean "at work" on duty? The distinction is critical, given that employers may lawfully prohibit solicitation during working time, but not during times when employees are at work but not working. *See Family Foods*, 300 NLRB 649, 663 (1990) (no violation where employer told employee to refrain from solicitation on "company time," but then clarified instruction by telling employee that she could solicit when both she and person she was soliciting were not supposed to be working).

C. CONFIDENTIALITY RULE

G4S argued in its exceptions brief that the confidentiality rule in its January 2011 Security Officer Handbook does not fail to define "confidential information" inasmuch as it does not even prohibit employees from disclosing "confidential information." (R. Br. pp. 15-16). Instead, G4S pointed out, the revised policy expressly prohibits employees from improperly using, revealing, copying, disclosing, or destroying "G4S or client information," which the revised policy defines as including "any information considered proprietary by G4S or the client organization." (R. Br. pp. 15-16). The former policy, of course, prohibited employees from compromising, destroying, improperly using, copying or disclosing "confidential company or customer information," which it defined as including, among other items, "wage and salary information." (GC Exh. 16, p. 31).

In his answering brief, the General Counsel mistakenly represents that G4S only made the three following changes to the confidentiality policy in its March 2008 handbook: (1) deleting the paragraph that begins, "Such confidential information includes . . ."; deleting the bullet list that followed that paragraph; and changing the name Wackenhut Corporation to G4S

Secure Solutions USA. (GC Br. p. 6). As explained above, G4S also changed the policy by replacing “confidential company and client information” with “G4S or client information,” which the policy defines as including “proprietary” information. As discussed in G4S’s exceptions brief (R. Br. p. 16), this significant revision is entirely consistent with Board law. *See Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 278 (2003) (adopting the ALJ’s finding that a policy prohibiting employees from disclosing “proprietary information” is “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.”).

Consequently, it is unreasonable to assume, based on the changes made by G4S to its confidentiality rule, that employees might continue to believe they are prohibited from the discussing terms and conditions of their employment with each other or a third party, assuming, *arguendo*, they believed they were so prohibited under the prior policy.²

D. SOCIAL NETWORKING POLICY

In his answering brief, the General Counsel argues that “the posting of notices regarding employee rights does not absolve Respondent from unlawful provisions in its work rules” (GC Br. p. 19). He further argues that G4S’s disclaimer is “so broad and vague that a reasonable employee would not understand that this provision does not apply to its right to discuss upcoming legal matters that deals (sic) with wages, hours and working conditions.” (GC Br. p. 19). The General Counsel’s arguments are misplaced.

The Board believes that employees are generally uninformed of their rights under the National Labor Relations Act. Indeed, this was the Board’s principal justification for

² The Board should also question why the General Counsel continues to argue that a handbook provision no longer in effect is unlawful. As discussed in G4S’s exceptions brief, the confidentiality rule in the 2008 handbook was revised following charge settlements in Region 14 (14-CA-30046, 14-CA-30108, and 14-CA-30118). (R. Br. p. 15). It can only be reasonably assumed that the General Counsel is attempting to rely on this irrelevant handbook provision to paint a picture of G4S as being an anti-union employer.

promulgating its notice-posting rule on August 30, 2011.³ The summary information section preceding the rule in the Federal Register states, “The Board believes that many employees protected by the NLRA are unaware of their rights under the statute and that the rule will increase knowledge of the NLRA among employees, in order to better enable the exercise of rights under the statute.” 29 C.F.R. Part 104. The supplementary information section preceding the rule states, “Of greatest concern to the Board . . . is the fact that, except in very limited circumstances, no one is required to inform employees of their NLRA rights.” 29 C.F.R. Part 104.

One of the “limited circumstances” in which employees are notified of their rights, the Board recognizes, is the Department of Labor’s (“DOL’s”) rule requiring federal contractors and subcontractors to post a virtually identical notice informing employees of their rights under the NLRA. *See* 29 C.F.R. Part 471. As discussed in G4S’s exceptions brief, G4S is a federal contractor, required by law to post the DOL’s notice of employee rights under the NLRA. (R. Br. p. 18). The record reflects that this notice is posted in the employee area of G4S’s Phoenix office. (Tr. 268; R. Exh. 13).

In analyzing the lawfulness of G4S’s Social Networking Policy, as well as the other rules challenged by the General Counsel in this case, it is crucial to examine the contents of the notice G4S posts consistent with its obligations as a federal contractor. In addition to stating and clarifying other employee rights, the notice provides, “Under the NLRA, you have the right to . . . [d]iscuss your terms and conditions of employment or union organizing with your co-workers or a union.” (R. Exh. 13). The notice further provides that it is illegal for an employer to “[p]rohibit you from soliciting for a union during non-work time, such as before or after work or during break times” or “[p]rohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.” (R. Exh. 13).

³ The D.C. Circuit Court of Appeals has temporarily enjoined the rule.

The General Counsel misses the point by arguing that “the posting of notices regarding employee rights does not absolve Respondent from unlawful provisions in its work rules” (GC Br. p. 19). G4S does not contend that because it posts a notice informing employees of their rights, it can issue unlawful rules with impunity. Rather, G4S argues that because it posts such a notice, Security Officers cannot reasonably interpret the narrowly tailored restriction on employees discussing “work-related legal matters” on social networking sites as a restriction on their Section 7 rights. Since the applicable analysis of whether this policy is lawful hinges on whether a reasonable employee would interpret the policy to prohibit protected activities, one cannot ignore the context in which the policy exists; in this case, a context in which employees have been advised of their rights under the Act. The same holds true for the other rules at issue in this case. By the notice, Security Officers are presumed to be aware that special circumstances may exist to restrict employees from wearing union insignia on their uniforms. They are also presumably aware that G4S may not restrict them from discussing unionization during working time. Finally, they are presumably aware that G4S may not restrict them, through a confidentiality rule, from discussing the terms and conditions of their employment with each other or a third-party.

Seriously undermining the General Counsel’s position is the wealth of record evidence that employees regularly discussed unionizing among themselves, and they reached out to a union for assistance. (Tr. 390-391, 516-518, 551-552). Moreover, the record evidence is that Security Officers Debra Sterling and Asucena Banuelos discussed their harassment issues with one another, and then initiated discrimination complaints with the Equal Employment Opportunity Commission. (Tr. 498-499, R. Exhs. 11 & 14). If these individuals had reasonably believed that they were prohibited by any of G4S’s policies from discussing these issues, or from reaching out to a third-party for assistance, they would not have done so.

With respect to the disclaimer in the Social Networking Policy, to conclude that Security Officers do not understand their rights under “federal law” is to suggest that such language, including the DOL’s notice-posting requirement, is meaningless. Obviously, this is not the case, or else the Board would not have promulgated its own notice-posting requirement for the very purpose of ensuring that employees know and understand their rights. Thus, the General Counsel’s argument that no reasonable employee can understand that the restriction at issue in the Social Networking Policy does not apply to his or her rights to discuss legal matters that deal with wages, hours, and working conditions is meritless.

E. ALLEGED UNLAWFUL TERMINATION OF WICKHAM

As an initial matter, the General Counsel’s answering brief repeatedly includes inappropriate and unsupported references to G4S’s February 4, 2011 supervisor meeting as being “anti-union.” (GC Br. pp. 42, 51, 55). Yet again, this is an obvious attempt by the General Counsel to cast G4S in a negative light before the Board based on lawful conduct. The complaint contains no allegations that the subject meeting was conducted in an unlawful or objectionable manner. Instead, the record makes clear that the meeting was held to train supervisors on how to lawfully respond to an election petition. (Tr. 95). Pablo testified that he explained to the supervisors that they may not threaten, interrogate, promise, or spy on employees with respect to their union activities. (Tr. 95). He even distributed a handout reiterating the points made at the meeting. (R. Exh. 3). To suggest that G4S’s efforts to lawfully train its supervisors on responding to union activity are “anti-union” or otherwise motivated by or conducted in bad faith is wholly disingenuous and irrelevant to these proceedings. Consequently, the Board should ignore the General Counsel’s unsupported characterizations.

The Board should also disregard the General Counsel’s attempt to rely on the fact that the two lieutenants who discovered Wickham did not terminate him immediately. (GC Br. p. 51). First, there is no evidence in the record establishing that the two lieutenants had the authority to

terminate Wickham upon finding him asleep. Second, the General Counsel is asking the Board to hold against G4S the fact that Pablo took the time to investigate the matter before making a decision on the appropriate level of discipline. Such reasoning undermines, rather than supports, the General Counsel's position.

The Board should also not be misguided by the General Counsel's focus on the video shown at the hearing. (GC Br. p. 52). As Human Resources Manager Janelle Kercher testified, when she viewed the video during her investigation, she had the assistance of an officer from the PAA. (Tr. 241). According to Kercher, "He was explaining to me exactly what I was watching, what I was seeing at the time." (Tr. 242). At the hearing, however, no such assistance was provided. Thus, the General Counsel exclaims, "The video tape clearly shows us nothing – namely, there is no way to tell when the light was on in the kiosk and when the light was off." (GC Br. p. 52). What the video revealed at the hearing, of course, is inconsequential to what it revealed to Kercher on a computer screen, with a knowledgeable assistant.

Regardless, the issue of what the video revealed is a red-herring. The record makes clear that the video was not the best evidence that Wickham was sleeping. Instead, the best evidence came from the two lieutenants who directly witnessed it. Their testimony could not be more clear. Eggleston testified, "[W]hen I first pulled up, I got out of the vehicle. I exited the vehicle. I saw him sleeping." (Tr. 355). Clemons testified, "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). Whether Wickham was actually asleep is irrelevant. There is simply no dispute that Eggleston and Clemons at least thought he was.

Finally, the General Counsel's argument that pretext exists because other employees were not terminated the first time they were discovered sleeping may have been persuasive had no other employees been terminated for a first offense, or had the evidence reflected that only known union supporters were terminated for a first offense. The record, however, demonstrates

that other employees were terminated for a first offense, including employees whose union sentiments were not known.

The cases the General Counsel relies on to support his position are also easily distinguishable. In *Joseph Chevrolet, Inc.*, 343 NLRB 7 (2004), the Board found evidence of disparate treatment where a known union supporter was terminated for the same conduct for which one anti-union and one neutral employee only received reprimands. In *Wimpey Minerals USA, Inc.*, 316 NLRB 803 (1995), the Board found the employer unlawfully discriminated against known pro-union employees by excluding them from, and not paying them for, attending a meeting that was attended by pro-company and neutral employees. Significantly, in both *Joseph Chevrolet* and *Wimpey Minerals*, no pro-company or neutral employees were treated the same as pro-union employees.

Here, of course, there is evidence that at least two employees whose union activities were unknown to management (Brian Pike and John D’Ancona) were terminated the first time that Pablo substantiated they were sleeping on the job. (Tr. 253-254, 591-592; GC Exhs. 22 & 23). The Board has found such evidence sufficient to establish that an employee would have been terminated notwithstanding his or her union activity. *See St. George Warehouse, Inc.*, 349 NLRB 870, 880 (2007) (“In light of the evidence that the Respondent issued written warnings to other employees for similar conduct . . . we find that the Respondent has carried its burden of proving that it would have disciplined Wallace even absent his union activity.”).

For the foregoing reasons, as well as those set forth in G4S’s exceptions brief, the Board should dismiss the complaint in its entirety.

Respectfully submitted,

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May 24, 2012

CERTIFICATE OF SERVICE

On this date the foregoing **RESPONDENT'S REPLY TO GENERAL COUNSEL'S ANSWERING BRIEF** was filed electronically and served by e-mail on the following:

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

Executed on May 24, 2012, at Columbia, South Carolina.

By: /s/ Reyburn W. Lominack, III
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