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 ANSWERING BRIEF TO GENERAL COUNSEL'S CROSS-EXCEPTIONS

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I. BACKGROUND

On April 26, 2012, Respondent G4S Secure Solutions (USA) Inc. ("G4S" or "the Company") filed exceptions to Administrative Law Judge Eleanor Laws' March 29, 2012 Decision. On May 10, 2012, the General Counsel filed cross-exceptions to the ALJ's Decision. Pursuant to Rule 102.46(f)(1) of the Board's Rules and Regulations, G4S submits this answering brief to the General Counsel's cross-exceptions.

II. ARGUMENT

The General Counsel excepts to two findings of the ALJ: (1) the finding that G4S's Social Networking Policy includes a rule prohibiting the placement of photographs, images, and videos of its employees in uniform or at a place of work on social networking sites; and (2) the finding that Human Resources Manager Janelle Kercher did not reaffirm and enforce an unlawful confidentiality rule when she testified at an unemployment hearing.

A. SOCIAL NETWORKING POLICY

The ALJ found that G4S's rule in its Social Networking Policy prohibiting Security Officers from posting photographs, images, and videos of themselves in uniform or at a G4S place of work is not unlawful given G4S's legitimate concerns for its clients. (ALJD, pp. 24-25). The General Counsel excepts to the ALJ's finding, arguing that the rule can reasonably be read as restricting employees in the exercise of their Section 7 activities. The General Counsel's arguments are unpersuasive.

In reaching its conclusion that the rule is lawful, the ALJ relied on the Board's decision in *Flagstaff Medical Center, Inc.*, 357 NLRB No. 65, slip op. (2011). In *Flagstaff*, the employer prohibited all use of cameras for recording images of patients and/or hospital equipment,

property, or facilities. The Board found that employees would reasonably read the rule as protecting patient privacy, rather than restricting them in the exercise of the Section 7 rights.

Here, the ALJ similarly found that employees would not reasonably read the photography rule as restricting Section 7 rights given G4S's legitimate concerns about its clients' privacy. The ALJ explained:

> Starting with the worksite, Respondent does have patient privacy concerns for the EMT services it provides. Moreover, Respondent serves a variety of clients on a national basis. The various businesses and government agencies where its employees work can be presumed to have their own rules centered on privacy and legal concerns. I find the rule at issue here is reasonably construed as protecting Respondent's clients. To read it as a prohibition on Section 7 activity strikes me [as] a stretch, particularly considering the rule does not ban photographs but merely prohibits employees from posting them on social networking sites.

(ALJD, p. 24).

The General Counsel argues that, absent some clarification, the rule is so broad that employees would reasonably construe it to include subjects that involve their working conditions. (GC Br. p. 6). Specifically, the General Counsel argues that the rule can reasonably be construed as prohibiting 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." (GC Br. p. 7). Given that G4S is a federal contractor required by law to post a notice informing employees of their rights under the Act, and in light of the disclaimer language in the Social Networking Policy, the General Counsel's argument that the policy is ambiguous is a non-starter.

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 promulgating its notice-posting rule on August 30, 2011.[1] The summary information section

[1] The D.C. Circuit Court of Appeals has temporarily enjoined the rule.

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. G4S is a federal contractor, required by law to post the DOL's notice of employee rights under the NLRA. 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, 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" and "[t]ake action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union." (R. Exh. 13). Because Security Officers are presumed to be aware of their right to engage in these Section 7 activities, then, the General Counsel's argument that they would construe the photograph rule as restricting those activities holds no water.

To the extent the notice is not enough for Security Officers to understand that the rule is not intended to restrict the exercise of their Section 7 rights, the policy includes a disclaimer reiterating as much. Thus, 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.

B. CONFIDENTIALITY RULE

The ALJ found that, contrary to the General Counsel's allegation, Kercher did not promulgate and reinforce the confidentiality rule in the Security Officer Handbook on April 7, 2011, when she testified at former Security Officer Donald Wickham's unemployment hearing. (ALJD, p. 30). The following testimony from Kercher stands as the only evidence in the record as to what she allegedly testified at the unemployment hearing:

> Q. And towards the end of the hearing, Mr. Wickham had stated that there were officers who were caught sleeping on the job, but were not terminated, correct?
>
> A. He stated that, I believe so, yes, sir.
>
> Q. And in fact, he mentioned Officer Young and Officer Hill, correct?
>
> A. Yes.
>
> Q. And the Administrative Law Judge asked you if either Mr. Young or Mr. Hill was still employed by G4S, correct?
>
> A. Yes, I believe so.
>
> Q. And you said that Mr. Hill was still employed, correct?
>
> A. Yes.

Q. And you told the Administrative Law Judge that information regarding the disciplines of Mr. Young and Mr. Hill were confidential information, correct?

A. I mentioned something to that nature when Donald Wickham stated that he had documentation that would support the fact that Gerald Hill and Nicolas Young were sleeping on duty. My first thought was, if there is documentation on it, it's in the personnel file and anything in the personnel file is confidential information. That was my first thought, my first reaction.

Q. And as you, and as you already testified, such confidential information includes employee disciplines, correct?

A. It does, yes.

(Tr. 162-163).

In his cross-exceptions brief, the General Counsel cites pages 162-163 of the transcript; however, the General Counsel grossly mischaracterizes Kercher's testimony. According to the General Counsel, "Kercher interrupted Wickham and told Wickham that he could not bring up other employees' discipline because that was confidential information." (GC Br. p. 10). Kercher's actual testimony set forth above, however, makes absolutely clear that Kercher did not "interrupt" Wickham or tell him "he could not bring up other employees' discipline."

Kercher's testimony plainly reflects that Wickham mentioned during the unemployment hearing he had documentation showing that Hill and Young were sleeping on duty, which prompted Kercher to tell the administrative law judge something to the effect that information regarding the disciplines of Hill and Young is confidential. Kercher explained during the unfair labor practice hearing why she had concerns with the documentation Wickham purportedly had at the unemployment hearing:

Q. I believe you testified that Officer Wickham had made reference to this document, this disciplinary action form during the unemployment hearing, and did you have any concerns with that?

A. My concern was when he brought up documentation that he had – that he had evidence of that he had copies of documentation, my concern was that someone had gone into my personnel files and taken documentation out, and like I said, my first – my first reaction had to have gone into my file to make copies of documents like this.

Q. Does the Company have any rule with respect to employees discussing with each other, discipline that they have received?

A. They can discuss it with each other.

(Tr. 257-258).

Clearly then, the record establishes that (1) Kercher did not tell Wickham during the unemployment hearing that he could not discuss employee discipline; (2) Kercher had legitimate concerns that Wickham had accessed confidential personnel files from the Human Resources Department; and (3) the Company does not have a rule that prohibits employees from discussing discipline with one another. The General Counsel's arguments to the contrary are entirely unsupported, as the ALJ properly concluded.

III. CONCLUSION

For the foregoing reasons, the Board should overrule the General Counsel's cross-exceptions to the ALJ's Decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this date the foregoing **RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S CROSS-EXCEPTIONS** 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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