

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

GARDA CL GREAT LAKES, INC.

Respondent

and

Cases 9-CA-087203
9-RC-085968

UNITED FEDERATION OF SPECIAL
POLICE AND SECURITY OFFICERS, INC.

Charging Party

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S REPLY BRIEF TO ACTING
GENERAL COUNSEL'S CROSS EXCEPTIONS**

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the Acting General Counsel (General Counsel) files this Answering Brief to Respondent's Reply Brief.

I. **INTRODUCTION** ^{1/}

The Administrative Law Judge (ALJ) found and Respondent argues that Lubemba did not solicit employees in violation of Section 8(a)(1) of the Act. (ALJD at p. 8, fn. 10) The General Counsel filed exceptions and respectfully submits that the ALJ erred and Respondent's arguments lack merit. The record clearly demonstrates that Lubemba did solicit employees. For the reasons previously explained in its brief in support of cross-exceptions and set forth below, the General Counsel requests that the Board reject the ALJ's finding and conclude that Respondent violated Section 8(a)(1) of the Act through Lubemba's unlawful solicitation of

^{1/} References to the Administrative Law Judge's decision are referred to herein as (ALJD at p. ____, ll. ____); references to the transcript record of these proceedings are referred to herein as (Tr. ____, ll. ____; and references to Acting General Counsel's exhibits are referred to herein as (G.C. Ex. ____).

employees. Contrary to Respondent's assertions, and as shown below, General Counsel's description of the evidence is not factually inaccurate, and does not mischaracterize or misconstrue the evidence.

II. ARGUMENT

A. The Evidence Clearly Demonstrates that Lubemba Solicited Employees' Opinions About Uniform Options.

Evidence of unlawful solicitation by Lubemba was revealed during Lubemba's cross-examination, when he admitted that he went to Columbus to explain "face-to-face" to employees why they would not get the shorts that had been promised. (Tr. 286, ll. 4-7) When asked on cross-examination if he did so because he did not want the employees to have any resentment, Lubemba replied: "I think it would be more of making them – getting their opinions on something in relation to expectation." (Tr. 286, ll. 11-13) Lubemba admitted to polling employees and reporting the results to the Director of Labor Relations. (Tr. 286, ll. 18-23; G.C. Ex. 6, p. 1) In the course of his report to Linares, Lubemba wrote that after "interacting" with 34 employees, he determined that only 2 employees were interested in shorts being a uniform item. (G.C. Ex. 6, p. 1) He continued on to report on the "general consensus" that the employees' uniforms take "long to order/get issued," that the uniforms were "un-sanitized," and that the employees would get "no pants." (Id.) Lubemba also wrote that the "aspect of preparing for next summer with the option of cotton shirts and pants was discussed." (Id.) Lubemba further wrote that "the issue of lack of ballistic vests was raised with the emphasis on the holidays coming up in a few months." (Id.)

Given the content of this report and Lubemba's admission that he polled or "interacted" with employees about their uniforms, it was clear error for the ALJ to conclude there is no evidence that Lubemba solicited employees.

B. Lubemba's "Polling" of Employees Was Unlawful.

When an employer clearly departs from past practice and solicits grievances from its employees during a union organizing campaign, it raises the inference that it is promising to remedy those grievances. *Center Service System Division*, 345 NLRB 729, 730 (2005), *enfd.* in relevant part, 482 F.3d 425 (6th Cir. 2007). The danger inherent in a well-timed promise to grant a benefit is the implication that employees must disavow their union support for the promise to be fulfilled. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). It follows that an employer need not actually grant a benefit to interfere with, restrain, or coerce employees in the exercise of their rights under the Act. The promise to do so, implicit or otherwise, is sufficient to constitute a violation of the Act.

Respondent's insistence that it never actually issued shorts to employees is irrelevant. The issue is whether Respondent's attempt to address employees' concerns regarding heat-related issues, through the unprecedented solicitation of grievances or polling during the union organizing campaign, violated the Act. The uncontradicted evidence at trial established that Respondent had never asked or polled employees for opinions or suggestions for how to mitigate the heat-related issues at the facility prior to the filing of the representation petition by the Charging Party. (Tr. 52, 76) Bouquin specifically asked employees whether they would be interested in shorts and said she would be attempting to implement them into the uniform. (Tr. 52, 73)

When Respondent ultimately decided to pull the shorts program, after implicitly promising to grant said benefit, it dispatched Lubemba to the Columbus facility to explain its decision to employees. Respondent readily admits this much. Based on the evidence described

in section A, and as discussed in the General Counsel's Brief in Support of its Cross-Exceptions, the Board should infer that Lubemba not only explained Respondent's decision to pull the shorts program, but also solicited employees for other uniform ideas. The Board should conclude that by said solicitation, Respondent implicitly promised employees to improve conditions.

III. CONCLUSION:

Based on the record as a whole, and for the reasons referred to herein, the Acting General Counsel respectfully submits that the decision of the ALJ should be reversed insofar as it held that Respondent did not violate Section 8(a)(1) of the Act when its agent Lubemba solicited employee grievances and implicitly promised to remedy those grievances.

Dated at Cincinnati, Ohio this 28th day of May 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

May 28, 2013

The undersigned hereby certifies that Counsel for the Acting General Counsel's Answering Brief to Respondent's Reply Brief to Acting General Counsel's Cross Exceptions was electronically filed and also served by electronic mail to the following persons:

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