UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TOTAL SECURITY MANAGEMENT ILLINOIS 1, LLC

Case 13-CA-108215

and

INTERNATIONAL UNION SECURITY POLICE FIRE PROFESSIONALS OF AMERICA (SPFPA)

RESPONDENT TOTAL SECURITY MANAGEMENT ILLINOIS 1, LLC'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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June 6, 2014

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I. INTRODUCTION

Respondent Total Security Management Illinois 1, LLC ("TSM" or the "Company"), pursuant to Sections 102.46(a) and (b)(l) of the Board's Rules and Regulations, submits this Brief in Support of its Exceptions to the Decision of the Administrative Law Judge ("ALJ") Arthur Amchan dated May 9, 2014. The ALJ found that TSM violated Section 8(a)(5) and (1) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 158(a)(1) and (5) by discharging three employees without providing prior notice and an opportunity to bargain over the discharges to the International Union Security Police Fire Professionals of America (SPFPA) (the "Union"). In reaching his recommended decision, the ALJ improperly relied on the Board's recent decision in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012) and rejected significant procedural defenses asserted by TSM that justify the dismissal of the Complaint in this matter.

II. STATEMENT OF FACTS

The facts of this case are not in dispute and the case was submitted to the ALJ on a joint stipulated record. ALJD, p. 1 and Order Granting Joint Motion to Submit Stipulated Record,

dated April 3, 2014. On August 21, 2012, the Union was certified as the exclusive collective bargaining representative for a unit of TSM employees. Jt. Stip., ¶8. Since that time, TSM and the Union have been engaged in negotiations over an initial collective bargaining agreement. Jt. Stip., ¶10. On March 12, 2013, TSM discharged three bargaining unit employees, Nequon Smith ("Smith"), Jason Mack ("Mack") and Winston Jennings ("Jennings"), for various acts of misconduct and violations of Company policies. Jt. Stip., ¶¶11-13. TSM did not provide the Union with prior notice or an opportunity to bargain over the proposed discipline prior to implementation. Jt. Stip., ¶¶20-22.

On June 28, 2013, the Union filed a Charge against the Company alleging that the failure to provide prior notice and an opportunity to bargain over the proposed discharges of Smith, Mack and Jennings prior to implementation violated of Sections 8(a)(1) and (5) of the Act. Jt. Stip., Ex 1.[1] On August 19, 2013, the Regional Director, purporting to act pursuant to a delegation of authority from the Acting General Counsel at the time, issued the Complaint herein. Jt. Stip., Ex. 2. On September 3, 2013, TSM filed its Answer and Affirmative Defenses to the Complaint. Jt. Stip., Ex. 5. The Complaint was amended twice, once on January 10, 2014 (Jt. Stip., Ex. 7) and once on March 18, 2014 (Jt. Stip., Ex. 10).

[1]The Charge references three additional bargaining unit employees, Jermaine Billups, Charles Cole and Juan Washington; however, as part of a bilateral informal settlement, the Union submitted a withdrawal request with respect to these three employees and the Regional Director approved the request on April 2, 2014. Jt. Stip., Ex. 12. The Union filed several other Charges against the Company around the same time (Cases 13-CA-104076, 13-CA-104077, 13-CA-104078 and 13-CA-104082) which were severed from the Complaint as part of the bilateral informal settlement approved by the Regional Director on April 2, 2014. *Id.*

III. ARGUMENT

A. The ALJ Erred in Finding that TSM Had a Duty to Engage in Pre-Imposition Bargaining With the Union Over the Discharges of Nequon Smith, Jason Mack and Winston Jennings. [Exception Nos. 2, 4 and 5]

The ALJ's recommended decision rests exclusively on the Board's holding in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012). In *Alan Ritchey*, the Board announced a new rule requiring employers engaged in first contract negotiations with the employees' chosen bargaining representative to provide such representative with prior notice and an opportunity to bargain over discretionary discipline decisions prior to implementation. *Id*. at 2. In explaining why the new rule would be applied prospectively only, the Board acknowledged that it was "not aware of any evidence that a practice of preimposition bargaining over discipline has ever been common in workplaces governed by the Act" and that, therefore, the new rule might "well catch many employers by surprise…." *Id*. at 11. The Board further noted that, based on the law as it existed at the time, it would have been reasonable for the employer in the case "to believe that it could decline to bargain with the Union [preimposition] without committing an unfair labor practice." *Id*. Indeed, in its most recent case addressing the issue prior to *Alan Ritchey*, the Board had approved the administrative law judge's determination that preimposition bargaining over discretionary discipline was not required by Section 8(a)(5) of the Act. *Fresno Bee*, 337 NLRB 1161, 1186-7 (2002). Thus, but for the Board's decision in *Alan Ritchey*, TSM's actions in the present case cannot be found to violate the Act.

1. <u>The Alan Ritchey Decision is Void and Has No Precedential Effect Because the Board that Issued the Decision Did Not Have a Lawful Quorum</u>

Both Congress and the Supreme Court have made clear that the Board may exercise its powers under the Act only when it has a lawful quorum. Section 3(b) of the Act, 29 U.S.C. § 153(b), establishes that "three members of the Board shall, at all times, constitute a quorum." Id.

That provision, the Supreme Court has held, "requires three participating members 'at all times' for the Board to act." *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2640 (2010) (quoting 29 U.S.C. § 153(b)). When the Board's membership falls below three lawfully appointed members, the Board has no authority to act. Id. at 2644-45. Any action it purports to take is "void ab initio." *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), cert. granted, 133 S. Ct. 2861 (U.S. June 24, 2013) (No. 12-1281).

A panel of three Board members, Chairman Mark Gaston Pearce, Richard F. Griffin, Jr. and Sharon Block, issued the *Alan Ritchey* decision on December 14, 2012. *Alan Ritchey*, 359 NLRB No. 40 at 1. Chairman Pearce had been confirmed by the Senate on June 22, 2010 and his appointment was undisputedly valid. Members Griffin and Block, however, were appointed by President Obama on January 4, 2012, purportedly pursuant to the Recess Appointments Clause of the Constitution, to fill vacancies that had occurred on January 3, 2012 and August 27, 2011, respectively. *Noel Canning*, 705 F.3d at 498. The Recess Appointments Clause provides that: "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const., Art. II, § 2, cl. 3. Because the Second Session of the 112th Congress had convened on January 3, 2012 and, at the time of the purported recess appointments, the Senate was merely in an "intrasession" recess, the purported appointments of Members Griffin and Block were constitutionally invalid. *Noel Canning*, 705 F.3d at 506. Additionally, because the seats purportedly filled by Members Griffin and Block became vacant during an intrasession recess, the vacancies did not "happen" during "the Recess of the Senate" and the purported appointments were invalid for this reason as well. *Id*. at 514. *See also NLRB v. New Vista Nursing and Rehab.*, 719 F.3d 203 (3rd Cir. 2013) (holding member Becker's appointment in March 2010 invalid under Recess Appointments Clause); *NLRB v. Enterprise Leasing Co.*

Southeast LLC, 722 F.3d 609, 660 (4th Cir. 2013) (Presidential appointments made on January 4, 2012, were invalid because they were not made during an "intersession" Senate recess); *National Association of Manufacturers v. NLRB*, 717 F.3d 947, 952 (D.C. Cir. 2013) (finding member Becker's appointment was unconstitutional).

In the instant case, the ALJ held that he was bound to apply *Alan Ritchey*; however, none of the cases cited by the ALJ support that proposition. In *Belgrove Post Acute Care Center,* 359 NLRB No. 77 fn. 1 (2013), the employer refused to recognize or bargain with the union in part on the grounds that the Board, due to its lack of a lawful quorum, was without authority to conduct the representation proceeding or issue the certification. The Board rejected this argument and held that, until the recess appointments issue was definitively resolved, "the Board [was] charged to fulfill its responsibilities under the Act." *Id.* Thus, while the Board announced in *Belgrove* that it would continue to operate while the recess appointments issue was being litigated, nothing in the decision imposed a requirement on ALJs to apply or follow constitutionally invalid precedent in reaching their decisions. Similarly, in *Waco, Inc.*, 273 NLRB 746 (1984), the Board reversed the ALJ because the ALJ had relied on courts of appeals decisions and a dissenting opinion, rather than relevant Board precedent. *Id.* at 749, fn. 14. Unlike the present case, *Waco* simply did not involve the question of whether an ALJ is bound to apply decisions issued by an improperly seated Board.

In sum, the *Alan Ritchey* decision was issued by a Board with only one validly appointed member. It was thus void *ab initio* and has no precedential value or effect. Accordingly, the ALJ erred in relying upon the decision.

2. TSM's Failure to Engage in Preimposition Bargaining Over the Smith, Mack and Jennings Discharges Was Lawful Under the Board's Decision in *Fresno Bee*

Prior to its invalid decision in *Alan Ritchey*, the Board addressed an employer's duty to bargain over the imposition of discretionary discipline in *Fresno Bee*, 337 NLRB 1161 (2002), a case that is factually on all fours with the present case. In *Fresno Bee*, while the employer and the union were engaged in negotiations over a first contract, the employer imposed a variety of disciplinary actions on bargaining unit employees, including several suspensions and discharges, without providing the union with prior notice or an opportunity to bargain over the proposed discipline. *Id*. at 1176. The Board affirmed the ALJ's determination that the employer had no preimposition duty to bargain over the discipline even though the employer admittedly exercised discretion in administering the discipline. Id. at 1187-88. In reaching this determination, the ALJ noted that there was no evidence that the employer had changed the process by which it administered discipline after the union was certified (even though it may have tightened the discipline somewhat) and, therefore, the employer had not made a unilateral change to terms and conditions of employment when it applied the discipline. *Id*.

Fresno Bee remains good law and controls the outcome of this case. There is not even an allegation in the Complaint, much less any evidence in the Stipulated Record, that TSM changed its disciplinary system in any way or applied the system differently after the Union was certified. Although TSM may have exercised discretion in connection with its decision to discharge Smith, Mack and Jennings, such discretion by itself does not give rise to a duty to engage in preimposition bargaining under *Fresno Bee*. Accordingly, the ALJ erred in concluding that TSM violated Sections 8(a)(5) and (1) of the Act and the Complaint should be dismissed.

B. The ALJ Erred in Failing to Find that the Complaint was Improperly Issued Against TSM. [Exception Nos. 2 and 3]

In addition to the ALJ's reliance on invalid precedent, he improperly rejected TSM's argument that the Complaint itself is legally insufficient because neither the Acting General Counsel nor the Regional Director was lawfully appointed and, therefore, neither possessed the authority to issue the Complaint.

1. The Acting General Counsel Was Not Lawfully Appointed Under the Federal Vacancies Reform Act at the Time the Complaint Issued

President Obama designated Lafe Solomon ("Solomon") as Acting General Counsel effective June 21, 2010. Subsequently, in January 2011 and again in May 2012, President Obama nominated Solomon to permanently fill the position of General Counsel; however, Solomon was never confirmed. Solomon continued to serve (improperly) as Acting General Counsel until November 2013. Solomon held the position of Acting General Counsel at the time the Complaint in the present case issued on August 19, 2013. Jt. Stip., Ex. 2.

The Federal Vacancies Reform Act, 5 U.S.C. § 3345, et. seq. ("FVRA"), sets forth the circumstances under which a person can be appointed to serve as an acting officer (in this case the Acting General Counsel) in a position requiring Senate confirmation. Section 3345(a) gives the President three options for temporarily appointing an acting officer: (1) subsection (a)(1) allows the appointment of a previously designated "first assistant"; (2) subsection (a)(2) allows the appointment of a person who already holds a position subject to Senate confirmation; and (3) subsection (a)(3) allows the appointment of an officer or employee who has served in the agency for at least 90 days and has a pay grade of GS-15 or above. 5 U.S.C. §§3345(a) (1) – (3). Section 3345(b)(1) sets forth circumstances under which a person may not serve as an acting officer. This section provides that once the President nominates a person to fill the vacancy on a permanent basis, such person may not serve as an acting officer *unless* such person has served as the first assistant for a period of more than 90 days during the 365-day period preceding the

position becoming vacant. *Id.* at §3345(b) (1).[2] Solomon never held the position of first assistant and therefore his temporary appointment as Acting General Counsel became invalid in January of 2011 when the President nominated him to fill the position on a permanent basis. *Id.* *See also Hooks v. Kitsap Tenant Support Services, Inc*., 2013 WL 4094344 (W.D. Wash., Aug. 13, 2013); *Hooks v. Remington Lodging & Hospitality, LLC*, 2014 BL 74425, 198 LRRM 2802 (Dist. Ct. Alaska, Mar. 18, 2014) .

Moreover, actions taken by Solomon, or pursuant to his delegation, cannot be salvaged by the *de facto* officer doctrine. Under that doctrine, acts performed by a person acting under the color of official title, even though the appointment of such person is later discovered to be legally deficient, are protected from *collateral attack* by a party who could have challenged the person's qualification to take the action in the first instance but failed to do so. *Hooks v. Remington Lodging*, 2014 BL 74425 at p. 2810, *citing Ryder v. United States*, 515 U.S. 177, 180 (1995). The *de facto* officer doctrine does not, however, protect the acts of improperly appointed officers from *direct* challenge where the party subject to the disputed action is attacking the qualifications of the officer taking the action, as opposed to a later attack on the action itself. *Id.*, *quoting Horwitz v. State Bd. of Med. Exam'rs*, 822 F.2d 1508, 1516 (10th Cir. 1978). Here, unlike the employer in *Hooks v. Remington Lodging* who waited two years after the ALJ's initial decision before challenging the Acting General Counsel's authority to issue the Complaint, TSM directly raised its challenge to the Acting General Counsel's qualification as an affirmative defense to the Complaint. Thus, as TSM's challenge is not a collateral attack, but a direct attack

[2] Although the FVRA's legislative history appears to reveal some confusion among the legislators as to whether § 3345(b)(1) applies only to appointments under § 3345(a)(1) or to all appointments under § 3345 (a) (*compare* Remarks of Sen. Thompson and Remarks of Sen. Byrd, 144 Cong. Rec. 27496-27498 (Oct. 21,1998)), ambiguous legislative history references do not override clear statutory language. *See Milner v. Dept. of the Navy*, 131 S. Ct. 1259, 1266 (2011).

on the Acting General Counsel's qualifications to issue the Complaint in this proceeding, it is not barred by the *de facto* officer doctrine.

Based on certain *dicta* in the Board's *Belgrove* decision, the ALJ stated that he was bound to reject TSM's argument regarding the Acting General Counsel's lack of authority to issue the Complaint. In *Belgrove,* the Board noted in *dicta* that the enforcement provisions of the FVRA, 5 U.S.C. § 3348(d), which invalidate actions taken by officers improperly appointed under the FVRA, are made inapplicable to actions taken by the office of the Board's General Counsel pursuant to § 3348(e). While this statement is undoubtedly true, as far as it goes, the Board then went on to mistakenly add that "regardless whether the Acting General Counsel was properly appointed under the Vacancies Act, the complaint is not subject to attack based on the circumstances of his appointment." 359 NLRB No. 77 at fn. 1, p. 2. This is an overstatement of the law for, as recognized in *Hooks v. Remington Lodging,* while § 3348(e) exempts the General Counsel's office from the penalty provisions of § 3348(d), the effect of the exemption is merely to allow the Board to assert the *de facto* officer defense to a challenge based on improper appointment – and not, as the Board in *Belgrove* seemed to conclude, to completely insulate General Counsel actions from all such challenges. *Hooks v. Remington Lodging*, 2014 BL 74425 at p. 2810; s*ee also Hooks v. Kitsap*, 2013 WL 4094344 at 4 (exemption from penalty provisions does not grant Acting General Counsel authority to act pursuant to improper appointment). Thus, contrary to the ALJ's holding, *Belgrove* does not compel the rejection of TSM's challenge to the sufficiency of the Complaint in this case.

For the reasons stated above, Solomon's temporary appointment as Acting General Counsel became invalid in January of 2011 when the President nominated him to fill the position on a permanent basis and the *de facto* officer doctrine does not save his delegation of authority to

the Regional Director to issue the Complaint in this case. Accordingly, the Complaint should be dismissed.

2. The Regional Director's Appointment Was Invalid Because the Board Lacked a Quorum

Finally, the Regional Director was appointed by the Board on December 13, 2011. At that time, the Board had three members: Chairman Pearce, Member Brian Hayes and Member Craig Becker. Member Becker was purportedly appointed by the President on March 27, 2010 pursuant to the Recess Appointments Clause. As with the recess appointments of Members Griffin and Block, the Senate was on a two week "intrasession" recess at the time, but was not between formal Sessions. Accordingly, for the same reasons discussed above in connection with the appointments of Members Griffin and Block, the appointment of Member Becker was invalid and the Board lacked a proper quorum. *NLRB v. New Vista Nursing and Rehab.*, 719 F.3d 203 (3rd Cir. 2013) (holding member Becker's appointment in March 2010 invalid under Recess Appointments Clause). As such, the Board had no authority to appoint the Regional Director and the Regional Director, in turn, had no authority to issue the Complaint on behalf of the Acting General Counsel (who, as discussed, also lacked authority to issue the Complaint for wholly separate reasons).

IV. CONCLUSION

For all of the reasons stated herein, the Board should sustain TSM's exceptions to the ALJ's decision. Further, the General Counsel has failed to establish that the Company has violated Sections 8(a)(1) or (5) of the Act or that the issuance of the Complaint was legally valid. The Complaint should therefore be dismissed in its entirety.

Respectfully submitted this 6th day of June, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2014, I caused the foregoing Respondent Total Security Management Illinois 1, LLC's Brief in Support of Exceptions to the Decision of the Administrative Law Judge to be electronically filed via the NLRB E-Filing System and served by e-mail upon the following parties:

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