

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

PARAGON SYSTEMS, INC.

and

Cases 12-CA-105275  
12-CA-105291

UNITED GOVERNMENT SECURITY  
OFFICERS OF AMERICA, LOCAL 236

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS  
TO DECISION OF ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel herein files the following Brief in Support of Exceptions to the Decision and Order of Administrative Law Judge Joel P. Biblowitz issued on May 15, 2014. General Counsel's exceptions concern the ALJ's failure to properly apply *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012), to two suspensions and two discharges that occurred before the union and the employer in this matter entered into an initial collective-bargaining agreement, and also concern, the ALJ's failure to include certain appropriate remedies in his recommended Order and Notice to Employees.

**I. Introduction**

Respondent, Paragon Systems, Inc., provides security services to the U.S. Government pursuant to contracts with the Department of Homeland Security, Federal Protective Service (FPS). On December 1, 2012, Respondent began providing security services to federal facilities located in Tampa, Florida, and surrounding areas. Respondent immediately recognized United Government Security Officers of America and its Local 236 (the Union) as the exclusive collective-bargaining representative of its Protective Security Officers.<sup>1</sup> Between December, 2012, and July, 2013, the parties negotiated a collective-bargaining agreement that

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<sup>1</sup> Respondent succeeded ERIS Security as the contractor with FPS. The ERIS employees had been represented by the Union as well.

is effective from June 1, 2013, to November 30, 2014. (ALJD, p. 1, line 35 – p. 2, line 6; Tr. p. 42; Tr. p. 86, lines 11-12).<sup>2</sup>

Between February 25, 2013, and May 31, 2013,<sup>3</sup> before the collective-bargaining agreement took effect, Respondent suspended seven bargaining unit employees and discharged two bargaining unit employees without giving the Union notice or an opportunity to bargain over any of the suspensions and discharges. (ALJD, p. 2, line 38 to p.3, line 9). The ALJ correctly concluded that Respondent violated Section 8(a)(5) of the Act by suspending five of the seven suspended employees without affording the Union notice or an opportunity to bargain over these suspensions. (ALJD, p.8, line 10 to p.9, line 39). In reaching these conclusions, the ALJ relied upon *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012).<sup>4</sup>

However, the ALJ incorrectly applied *Alan Ritchey, Inc.* with respect to the suspensions of Joe Favell on February 25, and Kelvin Strong on April 30, and with respect to the discharges of Thomas Cifarelli on April 9, and Jose Robles on April 15, and incorrectly found that Respondent used no discretion in these disciplinary actions. (ALJD p.9, line 39 to p.10, line 13; ALJD p. 11, lines 8-10 ).

The ALJ erred by failing to conclude that various provisions in Respondent's Security Officer Handbook (the Handbook) and the Federal Protective Services Security Guard Information Manual (the Manual) provided Respondent with wide discretion in determining

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<sup>2</sup> "ALJD" refers to the Decision issued on May 15, 2014, by Administrative Law Judge Joel P. Biblowitz, followed by the appropriate page number(s) and line number(s). "GC Ex.\_\_\_\_" refers to a General Counsel Exhibit from the hearing. "Tr. \_\_\_\_" refers to the transcript from the hearing. "Exc.\_\_\_\_" refers to General Counsel's Exceptions.

<sup>3</sup> All remaining dates are in 2013 unless otherwise stated.

<sup>4</sup> The ALJ also correctly concluded that Respondent committed several other violations of Section 8(a)(5) and (1) of the Act, including requesting that employees sign Dispute Resolution Agreements, thereby bypassing the Union, their collective bargaining representative, by refusing to meet and bargaining with the Union concerning grievances filed regarding the suspensions of employees Mendez and Daley and the discharge of employee Cifarelli, and by responding to the Union's relevant information requests in an untimely manner. (ALJD, p. 7, line 40 to p.8, line 8; ALJD p.9, lines 1-17; ALJD p.10, lines 13-36; ALJD p.10, lines 46-48; ALJD p.11, lines 1-6).

appropriate levels of discipline for the alleged misconduct of employees Favell, Strong, Cifarelli and Robles. (ALJD, p. 4, lines 10-20; ALJD, p. 5 fn 5) **(Exc. 5 through 8)**.<sup>5</sup>

The ALJ misapplied *Alan Ritchey, Inc.* in determining that Respondent did not exercise discretion in suspending employees Favell and Strong for alleged open post violations<sup>6</sup> or in discharging employees Cifarelli and Robles for allegedly falsifying time records.

Respondent relied on the uncorroborated testimony of Respondent Project Manager Larry Stacy that because of the large number of open post violations, which were punished only by counseling from December 1, 2012 to January 18, 2013, Respondent changed the punishment for such violations to a three day suspension when it suspended unit employee Favell on February 25 and suspended unit employee Strong on April 30, notwithstanding that there is no evidence that Respondent documented this alleged decision to change the punishment for any open post violation, notwithstanding that Respondent gave employee Douglas a one day suspension for an alleged open post violation on April 29, well after the alleged decision to make open post violations punishable by three day suspensions, and notwithstanding provisions of Respondent's own Handbook and the Federal Protective Service Manual, both of which provide Respondent with broad discretion with respect to the imposition of discipline for violations of its rules, including alleged open post violations . (ALJD p. 4, lines 9-39; ALJD p. 9, lines 32-51). **(Exc. 1, 3, 4, 5, 6, 7 and 9)**.

Similarly, the ALJ erred by concluding that Respondent did not violate the Act by discharging Cifarelli and Robles because "no discretion was employed in these disciplinary actions." (ALJD, p. 10, lines 40-42). **(Exc. 1, 2, 4, 5, 7, 8 and 9)**. The ALJ found that Respondent discharged Cifarelli and Robles for "falsification of government documents." (ALJD, p. 4, lines 41 to p.6, line 20; p.10, lines 1-13; p.11, lines 8-10).

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<sup>5</sup> "Exc." Refers to the General Counsel's Exceptions.

<sup>6</sup> An open post occurs when a security officer's tardiness, failure to report, or early departure results in an unattended post. (ALJD p. 4, lines 5-9); Tr. p. 86, lines 1-23.

The ALJ noted but improperly disregarded the language in the Handbook and the Manual, and other relevant evidence that establishes that Respondent exercised discretion in deciding to discharge Cifarelli and Robles. The ALJ erred in finding that “discretion is not needed when a guard is accused of falsifying official documents.” (ALJD, p. 10, lines 6-12).

In making his findings that discretion was not exercised or needed in making the decisions to suspend employees Favell and Strong and to discharge employees Cifarelli and Robles, it appears that the ALJ failed to properly consider the many clear statements in the Handbook and the Manual showing that Respondent has discretion in deciding whether to suspend or discharge employees, or to give them some other form of discipline or no discipline at all, for alleged rules violations.

Moreover, although the ALJ correctly found that Respondent failed to bargain with the Union over whether Favell and Strong were late arriving for work, allegedly creating open post violations, in violation of Section 8(a)(1) and (5) of the Act, he erred by failing to conclude that this violation of the Act required Respondent to notify the Union and bargain before implementing the suspensions of Favell and Strong. (ALJD p.9, line 50-51). **(Exc. 1, 3, 4, 5, 6, 7 and 9)**. Similarly, although the ALJ correctly found that Respondent failed to bargain with the Union over whether Cifarelli and Robles were actually guilty of falsifying official documents, in violation of Section 8(a)(1) and (5) of the Act, the ALJ erred by failing to conclude that Respondent violated Section 8(a)(5) of the Act by discharging Cifarelli and Robles without first notifying the Union and bargaining over their discharges. **(Exc. 9)**.

Finally, the ALJ erred in failing to include in the Order, and in the Notice to Employees, appropriate bargaining, reinstatement, make whole, interest, excess tax liability compensation, Social Security reporting and expungement remedies. **(Excs. 10 through 16)**.<sup>7</sup>

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<sup>7</sup> Exceptions 10 through 16, including a proposed Notice to Employees, are set forth fully in General Counsel’s exceptions. These exceptions provide for customary Board remedies for the unfair labor practices in this case and are not discussed in any detail in this brief.

I will now set forth the arguments in support of these Exceptions. I will address the Exceptions concerning Favell and Strong separately from the Exceptions concerning Cifarelli and Robles.

## II. Argument

### A. **The Decision in *Alan Ritchey, Inc.***

An employer whose employees are represented by a union violates Section 8(a)(5) by making unilateral changes to employees' terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). The suspensions of Favell and Strong, and the discharges of Cifarelli and Robles, related to wages, hours, and other terms and conditions of employment, and are mandatory subjects of collective bargaining. *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012), slip op., p. 4.

In *Alan Ritchey, Inc.*, the Board held that an employer whose employees are represented by a union has a duty to bargain before imposing certain discipline during the period after a union has become the employees' bargaining representative, but before the parties have agreed on a first contract or an interim grievance procedure. 359 NLRB No. 40, slip op. at p.1. This pre-imposition duty to bargain applies to "the discretionary aspects of certain disciplinary actions that have an inevitable and immediate impact on employees' tenure, status or earnings, such as suspension, demotion and discharge." 359 NLRB No. 40, slip op. at p.8. Where this pre-imposition duty to bargain exists, it requires the employer to give the union:

sufficient advance notice ...to provide for meaningful discussion concerning the grounds for imposing discipline in the particular case, as well as the grounds for the form of discipline chosen, to the extent that this choice involved an exercise of discretion.

*Id.*

It is undisputed that the suspensions of Favell and Strong (and the suspensions of five other employees that that the ALJ found unlawful) and the discharges of Cifarelli and Robles occurred after Respondent recognized the Union and before the parties agreed upon a

collective-bargaining agreement.<sup>8</sup> (ALJD, p. 2, line 38 – p. 3, line 6). It is also undisputed that Respondent did not provide the Union with notice or an opportunity to bargain over these suspensions and discharges. (ALJD, p. 3, lines 9-14).<sup>9</sup>

## **B. Relevant Provisions of the Handbook and the Manual (Excs. 5 through 8)**

At all relevant times, Respondent's employees, including bargaining unit employees, were required to comply with the Paragon Systems Security Officer Handbook (the Handbook) and the Federal Protective Service Security Guard Information Manual (2008 revision) (the Manual) (GC Exs. 8, 9; Tr. 23).

The Handbook contains a section entitled "Rules for Personal Conduct." (GC Ex 8, pp. 48-50). It includes a list of 30 "major rule offenses," and a separate list of 27 "minor rule offenses." The explanatory language preceding the lists states: "Listed below are examples of major rule offenses for the Rules for Personal Conduct and the associated penalties. The list [sic] not all inclusive, **these and other infractions will be evaluated on a case-by-case basis.** Discipline will be administered in accordance with the Paragon Progressive Discipline Policy, **where appropriate.**" (GC Ex 8, p. 48, emphasis added). Item 9 on the list of major rule offenses states: "Falsification or unlawful concealment, removal, mutilation, or destruction of any official documents or records...including 139s." (ALJD, p. 5, fn. 5, lines 3-5).

The list of major rule offenses contains the following heading: "Major Rule Offenses – Discharge, **if warranted**, after unpaid suspension and management investigation. **Possible probation period determined at the discretion of the Program Manager.**" (emphasis added)

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<sup>8</sup> Respondent admitted that it suspended the seven unit employees and discharged the two unit employees identified in the Consolidated Complaint, and that it took these actions during the period between December 1, 2012, when Respondent recognized the Union, and June 1, 2013, when the collective-bargaining agreement took effect. (GC Exs. 1(m) and 1(o); GC Exs. 3, 13-14, 16-21).

<sup>9</sup> Union President Mestas testified, and Respondent's Project Manager, Stacy, admitted that neither Stacy nor any other Respondent official notified Mestas or any other Union official of these suspensions and discharges prior to implementing them. (Tr. 47, line 11 – Tr. 48, line 1) (Mestas); (Tr. 20, line 11 - Tr. 22, line 11) (Stacy) Mestas further testified, without dispute, that neither Stacy nor any other Respondent official offered to bargain with the Union concerning any aspect of these suspensions and discharges. (Tr. 54, line 8 – Tr. 55, line 25).

(GC Ex 8, p. 48, emphasis added); (ALJD, p. 4, lines 16-19; ALJD p.5, fn 5). One of the major rules offenses listed is “falsification or unlawful concealment ... of any official documents or records, or concealment of material facts by willful omissions from official documents or records to include government documents including 139s.” (GC Ex 8, p. 48); (ALJD, p. 5, fn. 5).

The provision on “minor rule offenses” provides for “[c]ounseling and/or written warning by the supervisor in accordance with Paragon Progressive Discipline Policy.” (GC Ex 8, p. 49).

The Handbook also has a section entitled “Discipline and Termination.” (GC Ex. 8, p. 51). This section includes the language: “When any employee fails to meet Paragon’s and/or client expectations, Paragon **may** end the employment relationship.” (GC Ex. 8, p. 51, emphasis added).

The Handbook further includes a section entitled: “Progressive Discipline Policy.” (GC Ex. 8, p. 52-54). The first portion of the Progressive Discipline Policy is the “Introduction,” which begins: “Paragon uses a progressive discipline policy for dealing with violation [sic] of work rules, instances of unacceptable behavior or misconduct, or continued poor performance by Paragon employees. ‘Progressive discipline’ means that employees will **normally** be assessed penalties that increase each time an offense is repeated or a performance improvement is not made. Of course, **some offenses will be more serious than others; therefore, certain conduct may lead to more severe discipline on the first offense.**” (GC Ex. 8, p. 52, emphasis added).

The “Progressive Discipline Policy” includes a section entitled “Causes for Immediate Suspension.” The second paragraph under this subheading states: “Some types of misconduct **may** require immediate suspension while an investigation is conducted. These include, **but are not limited to**, physical attacks, threats of violence, allegation of theft and allegation of harassment.” (GC Ex. 8, p. 52, emphasis added).

The “Progressive Discipline Policy” section also includes a section on “Procedure.” This section states: “**Supervisors must obtain approval of disciplinary measures more severe**

**than written reprimand from their supervisor or other appropriate management official,** except in those cases where employees commit egregious acts, such as acts of violence, drug abuse and insubordination.” (GC Ex. 8, p. 52, emphasis added).

The FPS Security Guard Information Manual has a chapter entitled “The Security Guard.” (GC Ex. 9, pp. 5-18). One section is entitled “Acceptable and Unacceptable Conduct.” (GC Ex. 9, pp. 11-13), (ALJD, p. 5 fn 5, lines 8-9). This section states: “You must report for duty at the assigned time and post. It is your duty to report on time and to stay on post until you are properly relieved.” (ALJD, p. 5 fn 5, lines 9-11). Within this section is a provision stating “Grounds for **Possible** Disciplinary Action.” (GC Ex. 9, p. 12, emphasis added). The text under this subheading begins: “The following list with explanations comprises grounds for **possible disciplinary action, up to and including permanent removal** from any FPS security guard contract.” (GC Ex. 9, p. 12, emphasis added). Item 16 on the list states “Falsifying ... official documents or records.” (ALJD, p. 5 fn 5, lines 11-12).

The Handbook and the Manual thus contain a number of provisions showing that Respondent reserved wide discretion in deciding how to discipline employees both for open post violations, the alleged rule violation for which Favell and Strong were suspended, and falsification of government documents, the alleged rule violation for which Cifarelli and Robles were discharged.

Thus, the Handbook explicitly preserves discretion in identifying whether an offense is a major rule offense by stating that infractions are “evaluated on a case-by-case basis.” See *Alan Ritchey, Inc.*, 359 NLRB at 2-3 (finding employer preserved discretion through handbook provision that “[d]etermination of appropriate action will be made on a case-by-case basis based on the nature and severity of the occurrence.”). The Handbook also expressly preserves discretion in deciding whether a major rule offense merits discharge. The policy uses the word “discretion” (“Possible probation period determined at the discretion of the Program Manager”). In addition, the words “if warranted” (“Discharge, if warranted, after unpaid suspension and

management investigation”) and “where appropriate” (“Discipline will be administered in accordance with the Paragon Progressive Discipline Policy, where appropriate”) show that the decisions to discharge Cifarelli and Robles were not automatic, that Respondent carefully evaluated each employee’s conduct under the circumstances, and that Respondent could have decided to impose less severe discipline consistent with its policy. Indeed, the Handbook states that Respondent could instead have placed Cifarelli and/or Robles on probation.

Similarly, in the portion of the Handbook setting forth the progressive discipline policy, Respondent’s preservation of discretion in applying progressive discipline is illustrated by the words “normally” (“employees will normally be assessed penalties that increase each time an offense is repeated or a performance improvement is not made”), and “may” (“certain conduct may lead to more severe discipline on the first offense”), (“Some types of misconduct may require immediate suspension while an investigation is conducted”).

In the Manual, the preservation of discretion is also indicated by use of “possible” (“Grounds for Possible Disciplinary Action”), (“The following list with explanations comprises grounds for possible disciplinary action, up to and including permanent removal from any FPS security guard contract”). Words like “normally,” “may,” and “possible” plainly convey that the disciplinary process has a strong subjective component, and thus uses discretion.

The language found to establish the discretionary nature of the discipline found in the employer’s handbook in *Alan Ritchey, Inc.* is similar to the above-quoted language from the Handbook and Manual used by Respondent. The introductory section of the handbook used by the employer in *Alan Ritchey, Inc.* stated that violations of the employer’s policies and procedures “may result in disciplinary action,” but that “from time to time, situations may arise which warrant consideration and flexibility on the part of management.” *Id.*, slip op., p. 2. The employer’s handbook included a list of offenses “for which corrective counseling or other disciplinary action, including termination, may be taken.” *Id.* Elsewhere, the handbook stated

that the employer “may immediately terminate the employment of any employee who threatens or engages in any act of violence.” *Id.*

The ALJ ignored most of the above evidence, citing only a few of the Handbook and Manual provisions. (ALJD, p. 5 fn 5). The ALJ also inexplicably failed to discuss this evidence in his analysis as to whether Respondent exercised discretion in deciding to suspend Favell and Strong, and to discharge Cifarelli and Robles.

**C. Respondent Used Discretion In Deciding to Suspend Employees Joe Favell and Kelvin Strong For Three Days (Excs. 1, 3, 4, 5, 6, 7 and 9)**

The record herein clearly demonstrates that Respondent used discretion in deciding to suspend Favell and Strong three days each for open posts, and in deciding to discharge Cifarelli and Robles.

In *Alan Ritchey, Inc.*, the Board pointed out that “[t]he fact that the Respondent had disciplined employees in the past pursuant to a progressive disciplinary policy for broadly defined offenses does not establish a sufficient nondiscretionary past practice privileging what would otherwise clearly be unilateral changes...” 359 NLRB No. 40, slip op., p. 10. Respondent here did not at all establish that it had imposed the same level of discipline on all employees for open post violations, or for falsification of government documents. The record is bereft of examples of Respondent’s past practices in this regard.

Tellingly, Respondent’s project manager, Larry Stacy, testified that from December 1, 2012, when Respondent became the employer of the unit, until January 18, 2013, Respondent’s policy was to issue only written counseling for an open post violation, but then Respondent changed this policy and started imposing a three-day suspension for any open post. (Tr. 109). Stacy testified that this change of policy might have been verbal or might have been documented in an email, and any such email was within the scope of General Counsel’s subpoena duces tecum issued to Respondent, but Respondent failed to produce any such document. (Tr. 114-115). Stacy then asserted that after Respondent changed to an automatic

three-day suspension for an open post, open posts all received a three-day suspension. (Tr. 116, lines 9-12). Furthermore, Stacy testified that this asserted unwritten decision to change the policy for discipline of open post violations was brought about by the large number of open post violations in December, 2012, and January, 2013. (ALJD, p. 4, lines 23-25). However, the only counseling for an open post violation listed in the “disciplinary tracker” prepared by Stacy, showing disciplines imposed by Respondent, is dated December 17, 2013, a counseling issued to employee Anthony Durand Gonzalez **after** the alleged change in policy requiring a minimum three day suspension for such infractions. (GC Ex. 3). In addition, the disciplinary tracker contains disciplines dating back to December 2012, but contains no counseling for alleged open post violations in December 2012 or January 2013, when there were numerous such counselings according to Stacy. (See GC Ex. 3, see counseling of Kelvin Strong for attendance on December 17, 2012). Moreover, it is undisputed that although Stacy claimed a change in policy requiring a three-day suspension as of January 18, 2013, on April 29, 2013, Respondent suspended employee Duane Douglas for one day (24 hours) for an alleged open post violation, and approved a five day suspension of employee Jose Robles for an alleged open post violation on or about April 3, whereas Respondent issued three day suspensions to employees Joe Favell and Kelvin Strong for alleged open post violations on February 25 and April 30, respectively. [ALJD p. 4, lines 9-39; ALJD p.9, lines 32-48; GC Ex. 3; GC Ex. 18 (Douglas); GC Ex. 20(4)(Robles)].

Project manager Stacy testified that open post violations are set forth in two of the enumerated major rule offenses.<sup>10</sup> (Tr.109). As noted above, Respondent failed to provide any

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<sup>10</sup> Stacy testified that he relied on the following major rule offenses for open post violations: Refusal to submit to authority and/or refusal to follow instructions from supervisors who have been appointed over him/her, or from a member of the client's facility who has the authority from the client to issue instructions to the security force; not following Post Orders either written or verbal. (Major Rule Offense 12)  
Violation of agency and contractor security procedures and regulation or violation of the rules and regulations governing public buildings as set forth in CFR Subpart 101-20.3 Conduct On Federal Property. (Major Rule Offense 29)

corroboration of Stacy's assertion regarding the changed policy and there is no evidence that the change was documented, or applied to any employee before Favell received a three day suspension on February 25, over a month after the purported change. In addition, there is no evidence that Respondent notified its employees about any change in the level of discipline for an open post violation.

Although the ALJ credited Stacy's testimony regarding the change in the policy for disciplining open post violations, there is insufficient evidence to show that Respondent consistently applied any policy regarding the discipline for open post violations. Certainly, a three day suspension was not automatic after January 18, 2013, as demonstrated by the aforementioned one day suspension Respondent issued to employee Douglas and five day suspension to employee Robles for alleged open post violations. [GC Ex. 18; GC Ex. 20(4)]. Although the ALJ properly found that Respondent exercised discretion in suspending Douglas for one day for an open post violation, he incorrectly and inconsistently failed to find that Respondent exercised discretion by suspending Favell for three days for an open post violation on February 25 and by suspending Strong for three days for an open post violation on April 30. Note that Strong's three-day suspension was just a day after the one-day suspension issued to Douglas for the same alleged infraction.

The fact that Respondent claims to have changed its policy regarding the level of discipline for an open post violation does not negate the fact that in practice Respondent continued to exercise discretion with respect to discipline for open post violations. Thus, Respondent variously merely counseled employees, and suspended them for varying numbers of days, for open post violations. Its Handbook and Manual permitted Respondent to exercise great discretion in disciplining employees for open post violations and other rules infractions, and Respondent never notified its employees of a set policy regarding open post violations.

It is also significant that Respondent uses a two-page document entitled "Suspension Request Form," (GC Ex. 4). The first page of this document contains, under "Part A (Incident Information)," three boxes, of which the supervisor must check one. The text after all three boxes begins "*I am requesting...*" followed by the level of discipline that the supervisor is requesting. (emphasis added). The options are: disciplinary, unpaid suspension for (undetermined) days/hours; indefinite unpaid administrative leave while an investigation takes place; and indefinite unpaid administrative leave. Thus, the suspension request form shows that supervisors did not have authority to suspend employees without approval, and further undermines the ALJ's finding that after January 18, the penalty for an open post violation is "fixed, rather than discretionary." (ALJD p.9, lines 48-49).

**D. Respondent Used Discretion in Discharging Employees Thomas Cifarelli and Jose Robles (Excs. 1, 2, 4, 5, 6, 8 and 9)**

Respondent also used wide discretion in deciding to discharge employees Jose Robles and Thomas Cifarelli for allegedly falsifying documents. The above-quoted language from Respondent's Handbook and the Federal Protective Service Manual, set forth in Point B of this Argument, and other relevant evidence, show that Respondent exercised discretion in deciding to discharge Cifarelli and Robles. The ALJ erred by concluding that Respondent did not violate the Act by discharging Cifarelli and Robles "as no discretion was employed in these disciplinary actions." The ALJ further erred in finding that "discretion is not needed when a guard is accused of falsifying official documents." (ALJD, p. 10, lines 1-13).

Cifarelli was suspended indefinitely on or about March 18 because Respondent concluded that he falsified his time records to make it appear that he had started work at his scheduled starting time on March 11 when in fact he was six minutes late. (GC Ex. 13(1)-(7); GC Ex. 16; GC Ex 19(1); ALJD, p. 5, line 18 to p.6, , line 20). Cifarelli allegedly falsified the Form 139 by altering his reporting time from "7:06 a.m." to read "7:00 a.m.," and he allegedly later altered the Form 139 again to change it back to 7:06 a.m. (GC Ex. 16; GC Ex. 13(6) and

13(7); Tr. 79-81).<sup>11</sup> Cifarelli was never permitted to resume his job, and was discharged on or about April 9. [GC Exs. 3, 16, and 19(1)]. Respondent determined that Cifarelli violated Major Rule Offense number nine, “Falsification or unlawful concealment, removal, mutilation, or destruction of any official documents or records...including 139s.” (Tr. 83; ALJD, p. 6, lines 16-20).

Robles allegedly reported for work ten minutes late on April 3, causing an open post violation. (ALJD, p. 4, line 37). Robles allegedly signed the Form 139 inaccurately on April 3, signing in at 8 a.m. when in fact he arrived about ten minutes later. (GC Ex. 19(2); ALJD, p. 4, line 43 to p. 5, line 12). Stacy at first recommended a five-day suspension for Robles, for an open post violation on April 3. (ALJD, p. 4, lines 43-47). After he concluded that Robles had signed Form 139 as though he arrived on time, Stacy changed his recommendation to indefinite suspension pending investigation, for allegedly falsifying official documents, in violation of Respondent’s Major Rule Offense number nine. (GC Ex. 8, p. 48; GC Ex. 19(2), GC Ex. 20(4)); (ALJD, p.4, line 46 to p. 5, line 12).

Both Cifarelli and Robles were placed on indefinite suspensions pending investigation. The ALJ incorrectly found that “discretion is not needed when a guard is accused of falsifying official documents,” thus ignoring Respondent’s Handbook and Manual, which are replete with allowances for Respondent to exercise discretion in issuing discipline, as demonstrated above. The ALJ’s phraseology demonstrates that he failed to correctly apply the Board decision in *Alan Ritchey, Inc.* Thus, the ALJ erred in finding, “It appears to me that discretion is not needed when a guard is accused of falsifying official documents, as is alleged here....” (ALJD, p. 10, lines 10-11). The ALJ cited no basis for his finding, nor did he flatly find that Respondent did not exercise discretion in deciding to discharge Cifarelli and Robles. Rather, the ALJ appears to

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<sup>11</sup> Respondent maintained two separate copies of the Form 139 for March 11, GC Exs. 13(6) and 13(7). Stacy testified that he believed someone had altered the first copy of the Form 139 by overwriting what was handwritten on it in a manner that changed Cifarelli’s arrival time from 7:06 a.m. to 7 a.m. and that Cifarelli was alone in Stacy’s office at the time the alteration took place. (Tr. 79-81).

have improperly relied on his own judgment that discretion was “not needed” because of the alleged misconduct of Robles and Cifarelli. In so doing, the ALJ ignored the objective and undisputed documentary evidence in Respondent’s own Handbook and the Federal Protective Service Manual, which establishes that Respondent exercised broad discretion in deciding to discharge Cifarelli and Robles.

**E. Respondent Failed to Give the Union Notice or an Opportunity to Bargain Over Whether the Employees Committed the Alleged Offenses (Exc. 9)**

In *Alan Ritchey, Inc.*, the Board held that in the absence of a collective-bargaining agreement or interim grievance agreement, an employer with a bargaining obligation must bargain over the grounds for suspending and discharging employees, and over the grounds for the form of discipline chosen for those employees. Even if an employer that establishes that it does not use discretion in determining the form of discipline, it still has to bargain over whether the employee committed the alleged offense. The Board stated that if an employer has an “established practice of disciplining employees for absenteeism, the decision to impose discipline for such conduct will not give rise to an obligation to bargain over whether absenteeism is generally an appropriate grounds for discipline. Instead, bargaining will be limited to the specific case at hand: e.g., whether the employee actually was absent and merited discipline under the established practice.” 359 NLRB No. 40, slip op., p. 10 .

Here, the ALJ correctly found that Respondent failed to bargain with the Union over whether Favell and Strong were late arriving for work, creating the open post violations. (ALJD, p. 9, lines 50-51). Even assuming for the sake of argument that Respondent was able to establish a past practice of issuing three-day suspensions to all employees guilty of open post violations, General Counsel contends that Respondent still violated Section 8(a)(5) of the Act by failing to give the Union advance notice and an adequate opportunity to bargain over whether Favell and Strong actually committed the alleged open post violations. The ALJ thus erred in

failing to conclude that Respondent violated Section 8(a)(5) of the Act by suspending Favell and Strong without first notifying the Union and bargaining over their suspensions

In the same way, the ALJ correctly found that Respondent failed to bargain with the Union over whether Cifarelli and Robles were actually guilty of falsifying official documents (ALJD, p. 10, lines 12-13). Even assuming for the sake of argument that Respondent established a past practice of discharging all employees who falsified government documents, Respondent failed to give the Union advance notice and an adequate opportunity to bargain over the specific case at hand – whether Cifarelli and Robles actually falsified government documents. Therefore, the ALJ erred in failing to conclude that Respondent violated Section 8(a)(5) of the Act by discharging Cifarelli and Robles without first notifying the Union and bargaining over their discharges.<sup>12</sup>

### **III. Conclusion**

Counsel for the General Counsel respectfully requests that the Board grant General Counsel's exceptions in their entirety and accordingly modify the findings, conclusions of law, and recommended remedy, Order and Notice to Employees in the Decision of the Administrative Law Judge. As noted above the modifications to the remedy, recommended Order and Notice to Employees are set forth in General Counsel's exceptions.

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<sup>12</sup> Respondent has made no claim of exigent circumstances that would excuse it from bargaining, nor do the facts of this case suggest the existence of any such circumstances. *Alan Ritchey, Inc.*, 340 NLRB No. 40, at p. 8-9.

Finally, General Counsel seeks all other relief deemed appropriate to remedy Respondent's violations of the Act.

DATED at Tampa, Florida, this 12<sup>th</sup> day of June, 2014.

Respectfully submitted,

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**Certificate of Service**

I hereby certify that **Counsel for the General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge** in the matter of Paragon Systems, Inc., Cases 12-CA-105275 and 12-CA-105291, was electronically filed and served by electronic mail on the 12<sup>th</sup> day of June, 2014, as set forth below:

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