

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

In the Matter of:)	
)	
RECALL SECURE DESTRUCTION SERVICES, INC.,)	
Employer,)	
)	
And)	
)	
UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 227,)	CASE 9-RC-18280
Petitioner,)	
)	
And)	
)	
GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,)	
Intervenor.)	

**EXCEPTIONS OF RECALL SECURE DESTRUCTION SERVICES, INC.
TO THE HEARING OFFICER’S REPORT ON OBJECTIONS AND
RECOMMENDATIONS TO THE BOARD**

Pursuant to Section 102.69 of the Board’s Rules and Regulations, Recall Secure Destruction Services, Inc. (“Recall” or “Company”) respectfully submits its exceptions to the June 14, 2010 Report of Hearing Officer Elisabeth J. Macaroni (“Hearing Officer”) recommending that Recall’s exceptions to the Election be overruled in the above case. The following findings and/or conclusions of law are erroneous and/or are not supported by the evidence or the applicable law. To the extent necessary, the specific grounds for each objection and the applicable portions of the record and law upon which Recall relies are set forth in Recall’s supporting brief filed herewith. Recall excepts to the following:

1. The Hearing Officer's failure to find that Louisville Lead Man Andy Pendleton was not a supervisor as defined under Section 2(11) of the Act, when the exact same Lead Man position at Recall's Lexington facility was found to be a supervisor by the Regional Director in Case 9-RC-18285. The Board rejected Petitioner and Intervenor's request for review of the Regional Director's decision on June 17, 2010. P. 3.

2. The Hearing Officer's failure to consider, refer to and credit undisputed documentary evidence produced at the hearing by Recall. P. 1-24.

3. The Hearing Officer's selective choosing of testimony by individuals she credits throughout her decision. In particular, on numerous occasions within her report, the Hearing Officer claimed that a witness's testimony supported her findings when the very same witness actually provided testimony that also undercuts the same findings. P. 1-24.

4. The Hearing Officer's failure to consider substantial evidence adduced at the hearing and briefed by Recall demonstrating that Mr. Pendleton is a supervisor under the Act. In particular, on multiple occasions within her report, the Hearing Officer claimed that no evidence was adduced regarding certain key issues when Recall had actually produced un rebutted evidence on such issues. P. 1-24.

5. The Hearing Officer's suggestion that an employee who is a team leader is necessarily not a supervisor under the Act. P. 3.

6. The Hearing Officer's claim that no evidence was presented showing how often Regional Operations Manager Jody Schunder is away from the Louisville facility. P. 4.

7. The Hearing Officer's failure to apply factual finding that Mr. Pendleton has responsibilities for overseeing day-to-day operations of the Louisville facility. P. 5.

8. The Hearing Officer's nonsensical statement that "(t)here was no evidence presented that Pendleton determines when a SSR's day begins, however, with respect to the assignment of trucks, Schunder stated that '[W]e have certain customers that can only be serviced with certain vehicles ... customers that will not accept service from an on-site shred truck or, in some cases, down there a rental truck cannot be used from some customers due to their contracts.'" Although this run-on sentence is difficult to understand, the first clause of the sentence is clearly false, as the Hearing Officer's own decision stated that "Operations Manager Schunder testified that Pendleton 'oftentimes' determines when a driver's day begins, which trucks they drive and which routes they will run." Recall excepts to the remainder of the sentence to the extent that Hearing Officer used it in support of a finding that Mr. Pendleton does not constitute a supervisor under the Act. P. 5.

9. The Hearing Officer's conclusion that the Company's use of handhelds for displaying routes is dispositive in determining whether Mr. Pendleton assigns the Louisville drivers customer routes and the use of such conclusion in reaching her erroneous legal ruling that Mr. Pendleton does not have the authority to assign employees tasks, as nothing in the evidence suggests that the handheld device functions as more than a "portable list" of the actual routes created by Mr. Pendleton. In this regard, Recall excepts to the Hearing Officer's failure to apply factual findings that Mr. Pendleton creates and assigns driver routes. P. 5, 16-17.

10. The Hearing Officer's erroneous findings that the duties of temporary employees are predetermined and that Mr. Pendleton does not assign them tasks and the use of such erroneous findings in reaching her legal conclusion that Mr. Pendleton does not have the authority to assign employees tasks. P. 6, 16.

11. The Hearing Officer's failure to apply factual findings that Mr. Pendleton adjusts and reschedules driver routes, switches service routes, approves employees' request for time off and has the ability to close the facility when necessary and the erroneous legal conclusions that followed from her failure to apply these factual findings. P. 6-7, 18.

12. The Hearing Officer's apparent use of her finding that the Company's route optimization program performed every two to three years is relevant in determining whether Mr. Pendleton assigns and responsibly directs the Louisville employees on a daily basis. P. 7.

13. The Hearing Officer's erroneous finding that Mr. Pendleton needs to have any decision regarding employees going home approved or considered by someone "above him." P. 7.

14. The Hearing Officer's failure to find that Mr. Pendleton determines overtime worked at the Louisville facility, including his own overtime, despite his own credited testimony that he can work as much overtime as he chooses and the erroneous legal conclusion based upon this incorrect factual finding. P. 8, 18.

15. The Hearing Officer's erroneous finding that it took three months after Mr. Pendleton complained that the Louisville employees were tired of working overtime before Recall hired another employee. P. 8.

16. The Hearing Officer's erroneous finding that new customers are rarely added and are "few and far between" at the Louisville facility. P. 8.

17. The Hearing Officer's failure to apply factual finding that Mr. Pendleton considers many factors in making his own independent judgments about scheduling new customer stops on driver routes, including the frequency of customer service pickups, the geographic location of the customer, the ability of the driver route to handle additional business,

Recall equipment capabilities, the type of trucks required by certain customers, fairness in workload distribution to the drivers and driver experience with particular customers. P. 8-9.

18. The Hearing Officer's implication that Mr. Pendleton's decision to take a route for the Louisville facility from the Lexington facility should be completely discounted because specific circumstances surrounding this transfer of work were not explained "in any detail" when the unrebutted evidence demonstrates that Mr. Pendleton made this decision independently without Mr. Schunder's approval. P. 8.

19. The Hearing Officer's erroneous finding that when the Company loses a new customer, Mr. Pendleton "merely lets the stop sit there on the route." P. 8.

20. The Hearing Officer's contradictory findings that the Louisville employees knew which routes they would drive and that new stops are not assigned to individual SSRs but rather are fitted into the already-established routes. P. 5, 9.

21. The Hearing Officer's implication that because Mr. Pendleton has only issued discipline to an employee on one occasion, he does not possess the authority to issue discipline under the Act. P. 9.

22. The Hearing Officer's erroneous finding that Mr. Pendleton faxed Mr. Schunder a two-page document monitoring Mr. Gupton's conduct "a couple of times," and the resulting erroneous legal conclusion regarding Mr. Pendleton's authority to discipline employees under the Act. P. 9, 21.

23. The Hearing Officer's implication that because Mr. Pendleton has not had to suspend an employee, he does not possess this authority under the Act. P. 9.

24. The Hearing Officer's apparent ruling that Mr. Pendleton's admission that he unsuccessfully attempted to issue discipline to Louisville employee Fred Gupton supports a finding that he does not possess supervisory authority to issue discipline under the Act. P. 9.

25. The Hearing Officer's erroneous factual finding that Mr. Pendleton did not have the authority to suspend employees and the resulting erroneous legal conclusion from this finding. P. 9, 21.

26. The Hearing Officer's erroneous finding that Mr. Pendleton's input to Mr. Schunder regarding the performance of the Louisville employees did not affect Louisville employees' pay. P. 10.

27. The Hearing Officer's drawing of an artificial adverse inference against Recall that Mr. Pendleton's input regarding his employees did not affect employee pay because "(t)here was no evidence that Pendleton's ratings and comments were used in the employees' evaluations *without alteration*" (emphasis added), when there was no evidence adduced that these reviews were altered. P. 10.

28. The Hearing Officer's crediting of Mr. Pendleton's blatantly self-serving testimony that he does not have any real authority regarding employee performance evaluations, when Mr. Pendleton testified that he provided numerical ratings of employee job performance for use in the annual performance evaluation process, and the erroneous legal conclusions made as a result thereof. P. 10, 20.

29. The Hearing Officer's erroneous finding that Mr. Pendleton is not held accountable for the operations of the Louisville facility and her erroneous legal conclusion based upon this incorrect finding. In this regard, Recall particularly excepts to the Hearing Officer's failure to credit evidence adduced by Recall that Mr. Schunder formally disciplined a Team Lead

in Cleveland for operation problems at the facility and that Mr. Schunder would hold Mr. Pendleton accountable if similar issues arose at the Louisville facility. P. 10, 19.

30. The Hearing Officer's failure to apply finding that Recall's Pay for Performance Program ("Pay for Performance") affects employees' pay. P. 10-11.

31. The Hearing Officer's failure to apply Mr. Gupton's credited testimony that Pay for Performance affected his pay. P. 11.

32. The Hearing Officer's erroneous finding that Mr. Gupton's complaint that he was taken off the shred truck on days he felt were heavier pickup days occurred prior to the roll out of the Pay for Performance Program. P. 11.

33. The Hearing Officer's implication that former Louisville employee Victor Shoop's statement that employees did not fight over routes is relevant to her legal analysis on the issue of whether Mr. Pendleton's ability to assign the Louisville employees tasks demonstrates supervisory authority under the Act. P. 11.

34. The Hearing Officer's failure to apply finding that Mr. Pendleton's decisions regarding route assignments affected employees' earning potential under Pay for Performance. P. 11.

35. The Hearing Officer's finding that Mr. Pendleton has not received "any more than usual" complaints under Pay for Performance, when he specifically testified that employees "dislike the whole program." P. 11.

36. The Hearing Officer's failure to credit Mr. Schunder's unrebutted testimony that Mr. Pendleton effectively recommended hire of the Louisville facility's recent hire. Recall particularly excepts to the Hearing Officer's apparent requirement that Recall prove that *only* Mr. Pendleton was involved in the hiring decision since both the testimony of Mr. Schunder and

Mr. Pendleton demonstrate that Mr. Pendleton was involved in the interview process and effectively recommended the offering of a job to one of the candidates. P. 11-12.

37. The Hearing Officer's failure to credit Mr. Schunder's testimony demonstrating secondary indicia of Mr. Pendleton's supervisory status. P. 12-13.

38. The Hearing Officer's vague and erroneous finding that Mr. Pendleton has never had to investigate or assess a security incident until recently, especially where documented evidence shows exactly the opposite. P. 12.

39. The Hearing Officer's failure to apply finding that Mr. Pendleton admitted that when an alarm goes off at the facility, Mr. Pendleton has directed other employees to turn off the alarm in his discretion. P. 12.

40. The Hearing Officer's erroneous finding that Mr. Pendleton does not conduct employee training. P. 12.

41. The Hearing Officer's erroneous decision to fully credit Mr. Gupton's testimony regarding the Company's Pay for Performance program, his complaints about unfair routes and to the extent his testimony contradicted other evidence adduced at the hearing because his testimony was directed at achieving a finding in favor of the Union. P. 13.

42. The Hearing Officer's decision to fully credit Mr. Shoop's testimony regarding the Company's Pay for Performance program, his reasons for resignation and to the extent his testimony contradicted other evidence adduced at the hearing because his testimony was directed at achieving a finding in favor of the Union. In this regard, Recall excepts to the Hearing Officer's failure to note and consider that Union Representative Kevin Evans coached Mr. Shoop while he was testifying at the hearing. P. 13.

43. The Hearing Officer's decision to credit any of the blatantly self-serving testimony given by Mr. Pendleton, especially regarding his own job duties. Recall notes that the Hearing Officer found Mr. Pendleton to be defensive and "had a tendency to qualify his testimony in regard to his job responsibilities by continually asserting that any of the others SSRs could do his job." In this regard, Recall excepts to the Hearing Officer's failure to recognize that Mr. Pendleton contradicted himself on the witness stand on several occasions and that her finding that on certain occasions, he did not "choose his words" carefully, does not mean that his testimony should be credited in its entirety. P. 13.

44. The Hearing Officer's decision to credit Mr. Pendleton's testimony over Mr. Schunder's testimony when describing Mr. Pendleton's job duties, especially given the numerous contradictions in Mr. Pendleton's testimony and the lack of such contradictions in Mr. Schunder's testimony. P. 13.

45. The Hearing Officer's decision not to credit all of Mr. Schunder's testimony despite her finding that Mr. Schunder testified in a "forthright manner." P. 13.

46. The Hearing Officer's decision to specifically discredit Mr. Schunder's testimony where she believed documents were available to substantiate his testimony but were not produced because: a) the Hearing Officer failed to consider documentary evidence actually produced supporting Mr. Schunder's testimony; b) the Hearing Officer failed to consider the uncontroverted testimony of the witnesses; and c) the Hearing Officer incorrectly assumed that documents were available to substantiate witness testimony on several issues. P. 13.

47. The Hearing Officer's failure to follow Board precedent interpreting the "assign criteria" under the Act's definition of supervisor in finding that Mr. Pendleton does not have the

authority to assign tasks to the other Louisville employees using independent judgment and therefore does not have the supervisory authority to assign tasks under the Act. P. 15-19.

48. The Hearing Officer's erroneous statement that without information regarding the handhelds, "it is impossible to conclude that Pendleton either assigns routes or uses independent judgment when doing so." P. 16. The uncontradicted evidence from Mr. Pendleton and Mr. Schunder established that Mr. Pendleton assigns the driver routes to himself and the other Louisville employees based upon the driver routes he makes and changes on his own using factors such as the frequency of customer service pickups, the geographic location of the customer, the ability of the driver route to handle additional business, Recall equipment capabilities, the type of trucks required by certain customers, fairness in workload distribution to the drivers and driver experience with particular customers

49. The Hearing Officer's erroneous legal conclusion that even if Mr. Pendleton assigns the other Louisville employees tasks, schedules and tasks, his assignments are not undertaken using "independent judgment." P. 16-18.

50. The Hearing Officer's erroneous legal conclusion that Mr. Pendleton's switching of service stops among the Louisville employees, temporarily adjusting and rescheduling routes to accommodate manpower and equipment needs do not fit in the definition of "assign" as defined by the Board's decision in *Oakwood Healthcare, Inc.* P. 17.

51. The Hearing Officer's erroneous legal conclusion that Mr. Pendleton's responsibilities in creating and changing routes when a customer is added and for special projects are not indicative of supervisory status. P. 17.

52. The Hearing Officer's erroneous legal conclusion that Mr. Pendleton does not have the authority to responsibly direct the employees under the Act. P. 19.

53. In finding that Mr. Pendleton does not have the authority to responsibly direct the employees under the Act, the Hearing Officer's erroneous statement that "(t)here was no evidence that Mr. Pendleton was subject to any adverse actions if the employees did not perform properly, or, that the Employer delegated to Pendleton the authority to take corrective action, when needed, or that Pendleton was subject to the prospect of adverse consequences if he did not take these steps." P. 19.

54. The Hearing Officer's erroneous statement that no evidence was produced to substantiate Mr. Schunder's unrebutted testimony that he holds Mr. Pendleton accountable for the facility's performance, and the Hearing Officer's inappropriate drawing of an adverse inference against Mr. Schunder's testimony because Mr. Pendleton's yearly performance evaluations were not entered into the record. In addition, Recall excepts to the Hearing Officer's finding that Mr. Schunder's direct testimony is weaker than documentary evidence where the Union (and the Hearing Officer) fully cross-examined Mr. Schunder on the issue and his testimony unrebutted. P. 19-20.

55. In finding that Mr. Pendleton does not have the authority to responsibly direct the employees under the Act, the Hearing Officer's crediting of Mr. Pendleton's blatantly self-serving testimony that he was not held accountable for failing to take corrective action when Mr. Gupton locked his keys in his truck, purportedly a fireable offense, where no evidence other than Mr. Pendleton's self-serving testimony was adduced that locking keys into a truck is a fireable offense. P. 20.

56. The Hearing Officer's erroneous legal conclusion that Mr. Pendleton does not have the authority to responsibly direct the employees under the Act. In making this erroneous legal conclusion, Recall excepts to the Hearing Officer's finding that Mr. Pendleton's

participation in the employees' yearly evaluations was primarily "a reporting function."
P. 20-21.

57. The Hearing Officer's erroneous legal conclusion that Mr. Pendleton does not have the authority to discipline employees under the Act. P. 21.

58. The Hearing Officer's erroneous statement that "(t)here was no evidence that Pendleton has ever independently disciplined an employee or effectively recommended that an employee be disciplined, other than to orally advise an employee that he needed to start coming to work on time." P. 21.

59. The Hearing Officer's erroneous finding that Mr. Pendleton merely had a "factual accounting" role in addressing employee performance rather than the authority to discipline and the Hearing Officer's resulting erroneous application of Board caselaw standing for the proposition that the mere existence of a reporting function that does not automatically lead to further discipline or adverse action does not establish supervisory authority under the Act. P. 21.

60. The Hearing Officer's erroneous legal conclusion that Mr. Pendleton does not have the authority to suspend employees under the Act. In particular, Recall excepts to the Hearing Officer's use of her patently erroneous finding that "there was no evidence that Pendleton had the authority to suspend employees, or even to send them home for the day."
P. 21.

61. The Hearing Officer's erroneous legal conclusion that Mr. Pendleton does not have the authority to effectively recommend hire under the Act. In this regard, Recall excepts to the Hearing Officer's unfounded statement in support of her conclusion that "(t)he fact that management choose to offer the position to the candidate that Pendleton selected is not indicative of supervisory authority," when Mr. Schunder's un rebutted and credited testimony was clearly to

the contrary. Furthermore, Recall excepts to the Hearing Officer's erroneous use of caselaw cited that purportedly supported her analysis on this issue. P. 21-22.

62. The Hearing Officer's failure to consider unrebutted secondary indicia of Mr. Pendleton's supervisory authority which further buttresses Recall's position that Mr. Pendleton constitutes a supervisor under the Act. P. 22-23.

63. As a consequence of failing to find that Mr. Pendleton is a supervisor under the Act, the Hearing Officer's failure to find that Mr. Pendleton's pro-union conduct interfered with employees' freedom of choice and that it interfered with and materially affected the outcome of the election. P. 23.

64. The Hearing Officer's recommendation that Recall's objections to the election be overruled based upon the fact that Mr. Pendleton does not possess any of the indicia required to establish supervisory status under the Act. P. 23.

65. As a consequence of her recommendation that Recall's objections be overruled in its entirety, the Hearing Officer's recommendation that the Board issue an appropriate Certification of Representation. P. 23.

66. The Hearing Officer's failure to permit Recall, over its arguments and proffer, to adduce evidence at the hearing in the form of Louisville employee testimony regarding the presence and level of participation by Lexington Lead Man Carson Ritchie in soliciting the signing of authorization cards during the Louisville employees' meeting with Union representatives where authorization cards were presented, as such evidence has direct bearing on the coerciveness of Mr. Pendleton's prounion conduct during the relevant period, on the basis that Mr. Ritchie's conduct is a "separate case." Tr. 243-49.

67. The Hearing Officer's failure to permit Recall, over its arguments and proffer, to adduce evidence at the hearing in the form of Louisville employee testimony regarding whether the Louisville employees made phone calls to the Union following the signing of the authorization cards, as such evidence tends to show that Mr. Pendleton was the conduit for the organizing activities from the Union. In this regard, Recall excepts to the Hearing Officer decision to only permit Recall to only introduce such evidence through Company cell phone records when the testimony of the Louisville employees is independently probative on the issue. Tr. 287-91.

In consideration of the foregoing exceptions, the Board should sustain Recall's argument that Mr. Pendleton is a supervisor under the Act, find that Mr. Pendleton's blatant pro-union conduct affected employee free choice in the election and set aside the election.

Respectfully submitted, this 6th day of July, 2010.

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CERTIFICATE OF FILING

This is to certify that on July 6, 2010, I e-filed the foregoing document with the Executive Secretary, National Labor Relations Board, on the Agency's website at www.nlr.gov. I also certify that I served a copy of the foregoing via email as indicated, and by depositing a copy of same in the U.S. Mail, postage prepaid, addressed to the following:

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