

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PARAGON SYSTEMS, INC.

Respondent,

And

Case No. 10-CA-095371

ARTHUR BLAKE,

Charging Party.

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS

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I. INTRODUCTION

Respondent Paragon Systems, Inc. (“Paragon” or “Respondent”) submits this Brief in support of its exceptions to the Administrative Law Judge’s (“ALJ”) recommended Decision issued on February 7, 2014. Paragon did not violate Sections 8(a)(1) and (3) of the National Labor Relations Act (“NLRA” or “the Act”) when it terminated the employment of Protective Service Officers (“PSOs”) Arthur Blake, Joel Baker and John Holland, and Paragon asks the Board not to adopt the ALJ’s decision. The three PSOs had worked on a federal contract that had been awarded to Paragon by the United States Federal Protective Service (“FPS”), which is a division of the Department of Homeland Security (“DHS”). Paragon terminated the three PSOs because FPS sent Paragon an investigative report finding that the three PSOs posed a security risk and recommending that the PSOs be removed from the contract.

The ALJ found that FPS’s recommendation of removal was motivated by unlawful animus towards protected activity and that Paragon should have recognized this and should have declined to comply with the FPS recommendation. The ALJ reached this conclusion even though the National Labor Relations Act (“NLRA”) expressly provides that the U.S. Government (DHS/FPS) is not subject to the NLRA’s coverage, 29 USC Section 152(2). The ALJ failed to recognize that FPS’s motivations, whatever they might be, cannot be deemed “unlawful” under a law that lacks the authority to regulate the conduct of U.S. Government personnel. For the same reason, the conduct of the PSOs cannot be characterized as “protected” from action by the U.S. Government, such as a Government recommendation that the PSOs be removed from the federal contract. Paragon is being unfairly whipsawed between one arm of the Government (FPS) telling Paragon that the PSOs should not work on the federal contract and

another arm of the Government (NLRB) telling Paragon that it cannot remove the PSOs from the federal contract.

PSOs are the persons responsible on a daily basis for enforcing the security rules at the buildings that they guard, and FPS naturally insists that the PSOs adhere closely to those security rules. The ALJ made factual findings acknowledging that off-duty PSO Arthur Blake parked his vehicle in the loading dock of the Army Corps of Engineers (“COE”) building for more than 30 minutes even though he was not loading or unloading anything from his vehicle. Blake did so for his personal convenience and despite security signs stating that the area was only to be used for loading and unloading and that the maximum parking time was 15 minutes. While engaged in this behavior, Blake also talked to on-duty PSOs Joel Baker and John Holland for 12 minutes despite knowing that this was prohibited conduct, and Blake admitted that he had on past occasions worn his uniform and gun to other federal buildings despite security rules prohibiting him from doing so. The ALJ did not dispute that each of Blake’s actions was a violation of various federal security regulations and contrary to provisions of the Security Guard Information Manual (“SGIM”) that FPS had developed and distributed to the PSOs.

The ALJ similarly made factual findings acknowledging that Baker was the PSO who was assigned to enforce security rules in the loading dock at the time of Blake’s actions, but instead of Baker enforcing those security rules, Baker abetted Blake’s violation of the rules. The ALJ did not dispute that Joel Baker was evasive when an FPS official later asked him questions about the incident. The ALJ also did not dispute that John Holland violated federal regulations and SGIM provisions when he talked with Blake for 12 minutes while on duty and that Holland directly lied to the investigating FPS official when asked whether he was aware of an incident in

which an off-duty PSO came to the building and spoke to a COE official about a possible strike at the building.

While FPS cited these violations in its report as support for its recommendation that the three PSOs be removed from the contract, the ALJ's Decision ignored these points and instead concluded that FPS's report was flawed because the report, in the ALJ's judgment, wrongly faulted the PSOs for an additional offense – i.e., allowing an off-duty to use his credentials to bypass building security screening procedures when entering a building during off-duty hours. The ALJ found that other PSOs in the past had done what Blake did in terms of entering the building off-duty without screening, and the ALJ concluded that Blake therefore did nothing wrong. The ALJ reached that conclusion despite the absence of record evidence that FPS had seen or condoned any past instances of such behavior. The ALJ also did not explain why the undisputed policy violations (the loading dock parking and extended discussion with on-duty PSOs) and undisputed dishonesty by Baker and Holland during FPS's investigation did not justify FPS's recommendation of removal from the federal contract.

In so holding, the ALJ substituted her judgment for the judgment of FPS as to whether the violations identified in FPS's report were a sufficient basis for removing the PSOs from the contract. Under the Supreme Court's decision in Department of Navy v Egan, 484 U.S. 518, 527 (1988) – and the subsequent federal court cases applying Egan – the ALJ lacked the authority to make that determination. These cases have held that decisions about whether to employ someone on federal work are security-related decisions that are committed exclusively to the Executive Branch's personnel. As a result, administrative agencies like the NLRB cannot render decisions in cases where the agency would need to assess the motivation of the federal official who made the relevant security determination.

The ALJ also clearly erred by failing to analyze this case using the analytical framework developed by the Supreme Court in NLRB v Burnup & Sims, 379 U.S. 21 (1964). The ALJ determined that Blake's visit to the building was protected activity and that his violations of the buildings security procedures (such as parking in the loading dock and talking to on-duty PSOs) occurred while he was engaging in the protected activity. In such circumstances, the ALJ must apply the Burnup & Sims analysis even if, as the ALJ stated here (ALJD-17, n.11)¹, the General Counsel would prefer to analyze the case under Wright Line, 251 NLRB 1083 (1980).

II. STATEMENT OF RELEVANT FACTS

A. The Nature of Paragon's Operations

Paragon is a federal contractor providing guard services to the U.S. Government at federal buildings at various locations in the United States and its territories, such as Guam (Tr. 296-297). Paragon obtains contracts through a bidding process with the applicable government client. Most of Paragon's contracts are with the Federal Protective Service, which is a division of the Department of Homeland Security (Tr. 305). FPS is Paragon's single largest client, and Paragon is FPS's single largest contractor, providing guard services for roughly 40% of the federal buildings where FPS is responsible for building security (Id.).

Federal contracts are awarded on a five-year basis with the first year being the base year and remaining four years each being "option" years that FPS can exercise based on their evaluation of Paragon's performance (Tr. 306). Performance is evaluated on an interim basis after six months, and there is a final evaluation at the end of each year that is summarized in a Contractor Performance Assessment Report (Tr. 307). Paragon is evaluated on how well its

¹ This Brief's abbreviations are: ALJD for the ALJ's Decision; JX for Joint exhibits; GCX for General Counsel exhibits; RX for Respondent's exhibits; and CPX for Charging Party's exhibits.

personnel have complied with the contract and how well Paragon has covered the posts assigned to it by FPS (Tr. 306-307). FPS enforces these criteria strictly (Id.).

Of all the factors that are evaluated by FPS, however, the most important factor is Paragon's responsiveness to any concerns that FPS brings to Paragon's attention about security issues (Tr. 306-308). FPS focuses heavily on this factor, both with field personnel at particular buildings and with Paragon's corporate office. On multiple occasions, FPS has communicated to Paragon the importance of responding in a timely and effective manner to any security-related concerns raised by FPS, and FPS expects Paragon to comply with FPS's directives (Id.).

One of the federal contracts that DHS awarded to Paragon was to provide guard services for all of the FPS-covered federal buildings in the State of Georgia. This encompassed 66 federal buildings and required the employment of approximately 340 PSOs (Tr. 484). Vernon Fields was Paragon's Contract Manager, and Veronica Edmiston was the Assistant Contract Manager. For FPS, the Contracting Officer for the Georgia contract was Michael DeCrescio and the Contracting Specialist was Lawana Nunnaly, but the FPS representative that Fields and Edmiston most frequently interacted with was the Contracting Officer's Technical Representative ("COTR"), Inspector Jennie Dingman. It was her job to monitor Paragon's compliance with the contract and make sure that the PSOs who were staffing posts were adhering to the training that they had received from FPS and Paragon, that that these PSOs were properly implementing the security measures that FPS had put in place at the assigned federal buildings (Tr. 378-379). One of the buildings that she monitored in this manner was the Army COE Building located in Savannah, Georgia. The COE Building was a Level 4 security facility, which is the highest level of security other than a few buildings like the Pentagon, CIA headquarters or DHS headquarters that were Level 5 facilities (Tr. 372).

B. FPS's Extensive Control Over Guard Services at Federal Buildings

Every federal contract that is put up for bid by FPS contains a Statement of Work ("SOW") (RX-4) that gives FPS substantial control over the selection, training, working conditions, work responsibilities and continued employment of guards on federal contracts (Tr. 314-315). This includes control over hiring (RX-4, p. 9); training (RX-4, pp. 28-36); job duties (RX-4, pp. 12-20); and standards of performance (RX-4, pp. 43-46) and promotion (RX-4, p. 24).

FPS similarly has retained the contractual right to control the removal of PSOs from further work on the federal contract. Section 16(A)(2) of the SOW states that the "CO [Contracting Officer] and COTR have the authority to cause the retraining (at the Contractor's expense), suspension, or removal of any contractor employee from the BPA² who does not meet and adhere to the Standards of Conduct as required in this BPA and the SGIM." (RX-4, p. 43). This point is re-emphasized even more broadly in Section 16 (B)(3), which states that the

"Government may **request** the Contractor to immediately remove any employee from any or all locations where the Contractor has contracts with the Federal Protective Service should it be determined that the employee has been disqualified for employment, suitability, performance suitability, or security reasons or who is found to be unfit for performing security duties during his/her tour of duty. **The Contractor must comply with these requests in a timely manner.** For clarification, a determination of unfitness may be made from, but not limited to, incidents involving the most immediately identifiable delinquencies or violations of the Standards of Conduct." [Emphasis added].

Section 16(C) similarly gives the FPS's Contracting Officer and COTR each the ability to "require retraining, suspension, or dismissal of any contractor employee deemed careless, incompetent, insubordinate, unsuitable or otherwise objectionable during the performance of

² The term BPA means the applicable federal contract that is awarded to the subcontractor.

duties associated with this BPA". This includes a right by FPS to conduct investigations of contractor personnel performance and procedures (RX-4, p.12 and p. 55).

C. Inspector Jennie Dingman's Investigation at the COE Building

Paragon was awarded the Georgia contract in 2008, and it entered into a 2008-2011 collective bargaining agreement with the existing union (RX-17). This was standard practice for Paragon since roughly 90% of its operations employed union-represented workers (Tr. 297). It was undisputed that Paragon encouraged union representation among its workforce because, under the Service Contract Act, 41 U.S.C. Sections 351-358, a union contract allowed Paragon to get Government reimbursement at higher wage rates, which enabled Paragon to retain better quality guards and a more stable workforce (Tr. 297-298).

At the expiration of the 2008-2011 agreement, the PSOs selected different union representation through the United Security and Police Officers of America, Local 410 (JX-1), and Paragon and the Union commenced negotiations for a new contract. At the bargaining table, the Union's bargaining committee immediately engaged in typical sabre-rattling about the right of the employees to call a strike and their general willingness to strike (Tr. 502-503, 507, 518). However, the Union did not identify any particular date or location of any work stoppage, so Paragon was not aware of any particularized threat to building security or to Paragon's ability to staff any particular building on any particular date (Id.) Negotiations were ongoing, and Paragon did not take any steps to talk about the generalized strike threat with FPS (Tr. 508).

Circumstances changed, however, on February 17, 2012. On that date, Vernon Fields was at the Atlanta Federal Center, which is one of the buildings where Paragon provides PSO services (Tr. 489). He heard rumors from several different sources that an off-duty PSO at the

COE Building in Savannah had entered the building and informed Army COE Colonel Hall about a possible strike at the COE Building (Tr. 382, 489). Fields knew that if all of the PSOs at the COE Building went on strike together, then Paragon would not be able to staff each of the posts at the COE Building, and he knew that Paragon was obligated under the SOW to report this fact to FPS (Tr. 384, 489). Moreover, he knew that FPS would want to know that the tenant that FPS was guarding (the Army COE) had been made aware of a possible strike, and any failure by Paragon to bring that fact to FPS's attention would be viewed negatively by FPS in any evaluation of Paragon's performance (Tr. 384, 518).³

Accordingly, Fields took the appropriate step under the circumstances, and he called his FPS COTR for the contract, Inspector Jennie Dingman, and informed her of what he had heard (Tr. 382-384). Inspector Dingman tried to get more information from Fields, but he did not know anything more than the rumor he had heard (Tr. 382). She did not ask Fields for his opinion as to what she should do, and he did not volunteer any opinion (Tr.383-384). He did not suggest that she investigate the situation, and he did not suggest who she should talk to or who might be the PSO who had visited the Colonel (Id.).

Inspector Dingman decided to investigate this rumor of a strike. She did so because FPS was in charge of securing the COE Building, and if PSOs went on strike at that building, FPS would need to explore alternate coverage (Tr. 384). She was aware that FPS had just three inspectors and one area commander in that geographic area, which meant that FPS itself did not have adequate coverage for the five posts at the COE Building (Id.). She needed to find out

³ FPS's control over Paragon's activity was so complete that Vernon Fields did not even have the ability to directly contact Colonel Hall, who was a tenant employee, to ask him about whether he had been contacted by anyone or whether Colonel Hall was aware of a possible strike (Tr. 490). Fields could only contact FPS about the issue based on the chain of command established by FPS for such communications.

whether there was an actual danger of a strike, but she did not want to bring the tenant agency (COE) into the situation if she could avoid doing so (Tr. 452-453).

She first made a brief call to the COE building's security post in the main lobby of the building (Tr. 385). She spoke with PSO John Holland. She asked Holland if he knew anything about a PSO coming in on his off duty time to talk to the Colonel about a possible strike (Id. and JX-3). He said that he was not sure. In response, she clarified that she wanted to know if he knew "of any time" that a PSO had gone to the Colonel about a strike, and Holland then acknowledged vaguely that he had "heard" that a PSO might have come in on his off time to talk to the Colonel and drop off some paperwork, but he did not know who or when, and he did not have any other information surrounding the visit (Id.).

1. Inspector Dingman's Interview of PSO Joel Baker

In order to get better information, Inspector Dingman made arrangements to travel to the COE Building on February 22, 2012 (JX-3). Area Commander Hathaway went with her, and Veronica Edmiston attended as Paragon's representative (Tr. 384). When Dingman arrived, she and Commander Hathaway went to the breakroom. PSO Joel Baker happened to be in the breakroom on a break, so Inspector Dingman decided to start her interviews with him so as not to disrupt any scheduled post assignments (Tr. 387).

She advised Baker that she was looking into whether a PSO had come to the building to meet with Colonel Hall about a possible strike, and she remarked that, while PSOs could go on strike, they ran the risk that they would not be allowed to work on another government contract (Tr. 141, 407-408, 444-445, 538). Inspector Dingman then asked Baker several direct questions about whether he had any knowledge of an incident in which a PSO talked to the Colonel about a

possible PSO strike at the COE Building (Id.). Baker knew exactly what she was referring to since he had been on the post where PSO Arthur Blake had entered the facility, and it was Joel Baker who had handed Blake the packet of materials that Blake delivered to Colonel Hall. Nonetheless, Baker replied that he was not sure what she was referring to, and as she asked him more questions, he responded to her with questions of his own rather than answering her questions in a straight-forward and forthright manner (Tr. 388-389; JX-3, p. 2).

After proceeding like this for a while, Inspector Dingman was forced to confront Baker about his evasiveness, and she warned him point-blank that his responses could be construed as an effort to obstruct her investigation (Tr. 390)⁴. At that point, Baker decided to be more forthcoming, and he acknowledged that he knew Blake was the person who visited the Colonel and that Baker had been the PSO on post at the time Blake arrived (Id.). He told her that Blake had come through the loading dock entrance on or about January 31, 2012 and that he had noted Blake's arrival on the 1103 log sheet that was used to record the identity of persons entering the building (Tr. 390). Veronica Edmiston then pulled the 1103 log sheet from the records, and FPS was able to use the time entries on the log sheet to pull the video records to determine the date and determine what happened that day at the loading dock entrance.

Inspector Dingman's report (JX-3, p. 9) contains an accurate summary of what was observed on the video, with time stamps (hour, minute and second) as to when activity occurred (Tr. 418). Arthur Blake pulled his vehicle into the loading dock and parked it there at 12:31:29. He exited his vehicle carrying a black notebook, and he was given a packet of material by Joel Baker, who was manning the loading dock post (Tr. 138). Blake showed Baker his credentials, but Baker did not require Blake to walk through the magnetometer or put his belongings through

⁴ Baker acknowledged that Inspector Dingman made this comment to him (Tr. 181-182).

the x-ray machine at that building entrance. Instead, Blake entered the building at 12:33 pm without being screened and without an escort, and he did not return to the loading dock until more than 20 minutes later (12:54:18). When Blake returned, he was still carrying his black notebook (Tr. 167). Blake then started up a conversation with Baker and Holland, who came to the loading dock to relieve Baker at that post. Blake talked with Baker and Holland for more than 12 additional minutes before going to his car and leaving the loading dock (JX-3, p. 9). Holland admitted this was an “extended” conversation (Tr. 216; RX-16, line 4 of statement).

When Inspector Dingman had completed her review of the videotape, she asked Baker why he had permitted Blake to park in the loading dock, and he replied that he thought anyone who worked in the building could park there for up to 15 minutes (JX-3, p. 2). Inspector Dingman asked him whether he thought Blake could use his contractor identification card for any purpose other than coming to the building for work purposes, and Baker initially replied that he did not know, but when she asked him specifically whether he had been told at the time that he was given his identification card that the card was for the purpose of work, he acknowledged that this is what he had been told. (Id.).

She next asked him whether he had been notified during training that PSOs are not supposed to discuss matters directly with tenant agencies and that PSOs should go through their chain of command instead of going directly to the tenant agencies. When she referred to “chain of command” she meant the operational chain of command that applies in a security context, whereunder a PSO who observes something that involves the tenant agency is supposed to either: (1) report that event to Paragon supervisors who would in turn report the event to FPS who in turn would contact the appropriate tenant agency representative; or (2) report the event directly to FPS’s Mega Center in Battle Creek, Michigan (Tr. 104-105; 380-382).

Baker told her that the NLRB had issued a ruling that it was lawful for PSOs to talk directly with a tenant agency and that there was no chain of command in that context (JX-3, p. 2). He did not explain that the NLRB ruling applied only to off-duty contact with the tenant agency about terms and conditions of employment, and that the NLRB ruling was not asserting that PSOs could ignore the chain of command in all circumstances. Inspector Dingman was unaware of any prior NLRB proceeding, so this claim by Baker surprised her and she asked whether it was his understanding that he took his orders from the NLRB rather than Paragon (Id.). Baker replied that he took orders from Paragon within the parameters of the law. Baker then wrote his own statement about the events of January 31 (RX-3).

2. Inspector Dingman's Interview of PSO Arthur Blake

Since PSO Arthur Blake was the person who had visited Colonel Hall, Inspector Dingman arranged to interview him next. Blake acknowledged that he was the PSO who had visited Colonel Hall, and she asked him why he had gone to see Colonel Hall and whether he had contacted any other tenant agencies (JX-3, p. 5). He replied that he had named Colonel Hall in some earlier correspondence that Blake had sent to the President of the United States, so he thought Colonel Hall should be aware of what was happening. Blake said that the NLRB had made an earlier ruling that PSOs could take issues directly to Paragon's clients or customers, so he felt it was okay to do so here. Blake said that Colonel Hall had been thankful for the information and that Blake had left the building after the meeting (JX-3, p. 5).

Inspector Dingman asked for clarification about the NLRB ruling and whether the ruling said that it was illegal to tell PSOs that they could not talk with tenant agencies about company or personal business, and Blake said that this was correct. He told her that there had been a settlement agreement to that effect and that Veronica Edmiston had a copy because he had sent it

to her earlier. (Tr. 48-49).

Inspector Dingman then asked Blake a series of questions about why he had parked in the loading dock entrance when he was not unloading anything and why he had not gone through the screening security procedures that were applicable to visitors at the COE Building. She started by asking whether he had been trained that his government-issued identification card had been issued to him solely for the purpose of his working time when he was securing the Government building and not for personal use (JX-3, p. 5). He simply replied, “No.” She asked him whether he had ever in the past used his identification card to access any other Government facility on personal business, and he replied that he had done that when he worked in the Atlanta area (Id.). She then asked him whether he had been trained that he should not fraternize with a PSO while the PSO was on post. He acknowledged that this was something covered in the SGIM, but he did not acknowledge that he had done that in this situation on the loading dock. (Id.)

Inspector Dingman also asked Blake whether he had ever gone to other federal buildings and used his credentials to enter and talk with PSOs working at those locations. Blake admitted he had gone to buildings in his full uniform and with his weapon (JX-3, p. 6). When Inspector Dingman asked Blake why he would do such a thing, he replied, “Everybody does it”, and that it happened “all around Atlanta.” (Id.). He admitted, though, that he had been trained that PSO’s are only authorized to carry their weapon to and from work. (Id.).

Like Baker, Blake filled out a written statement about the relevant events (RX-2). At the end of the interview, as she had done with Baker, Inspector Dingman told Blake that “she cannot tell us that we cannot strike”, but that if the PSOs did strike then there was a risk that they would not be allowed to work on another government contract. (Tr. 49, 407-408, 444-445, 538).

3. Inspector Dingman's Interview of PSO John Holland

Inspector Dingman returned to the COE Building the next day, again with Commander Hathaway and Veronica Edmiston. She wanted to interview PSO John Holland since he was present in the loading dock area when Arthur Blake had exited the building, and since Holland was observed on the videotape talking to Blake for more than 12 minutes.

She began the interview by explaining that she was investigating an incident in which a PSO had come to the building to talk to the Colonel about a possible strike, and she asked him if he had any knowledge of the incident (JX-3, p. 7). PSO Holland did not directly answer the question but instead was evasive in his responses. She reminded him that she had spoken to him six days earlier on February 17, and that he had said at that time that he knew someone had dropped off a letter but that he did not know who that person had been (Id.). He said that he remembered talking to her, but he did not volunteer any additional information until she confronted him with the fact that there was videotape of Holland talking with Blake at length on the loading dock on January 31. Holland finally acknowledged that he knew that Blake was the PSO who had visited Colonel Hall. When Inspector Dingman asked him why he did not tell that to her when she talked to him by phone on February 17, he replied that "you asked me about a specific date, and it wasn't that date." (JX-3, p. 8). She pointed out to him that she had followed up her original question by asking about "any date that week" and that he had responded on February 17 that he had "heard" about "someone" dropping something off, but had not told her that he had personal knowledge it was Blake.⁵

At that point, John Holland changed demeanor. He replied, "I don't know. I didn't want

⁵ Holland admitted at the hearing that he knew Inspector Dingman was talking about Blake when she asked if Holland knew who had visited, and he decided not to tell her the answer to her question (Tr. 215).

to get in trouble.” He showed remorse, and stated that if he was allowed to stay on the contract then he would abide by the SGIM and the post orders. He also filled out a written statement (R-16) in which he acknowledged that he knew Blake “was bringing a letter” to Colonel Hall and that he had an “**extended** conversation with PSO Blake and another officer regarding the letter.” (Emphasis added). He also acknowledged that he was wrong on an earlier occasion when he wore his uniform and weapon to the Savannah federal credit union while on break from the COE Building. Finally, he acknowledged a pair of incidents when he and Blake went to the DOL and IRS Buildings while off-duty for personal business, and he acknowledged that PSO Blake had done this while in full uniform and wearing his weapon. Holland admitted during the interview that he had been taught in training not to lie to federal officers, and he admitted that he had been taught not to socialize on post with other officers. (Id.). The interview ended with some additional questions about why he allowed Blake access to the building, and at some point in the meeting Inspector Dingman advised Holland, as she had done with Blake and Baker, that if the PSOs went on strike they ran the risk of not working again on a federal contract (R. 194-195, 407-408, 444-445, 538).

Throughout the interviews of PSOs Baker, Blake and Holland, Veronica Edmiston remained quiet and did not ask any questions or make any comments (Tr. 414, 445, 537). Inspector Dingman did not solicit Edmiston’s views regarding the statements by the PSOs, and neither Edmiston nor Inspector Dingman followed up on the issue of the settlement agreement involving off-duty “chain of command” contacts by PSOs with tenant agencies. Edmiston had been troubled by what the PSOs had said in the interviews, but she did not recommend to Mr. Fields that Paragon take any action at that time since this was Inspector Dingman’s investigation and the investigation was still ongoing (Tr. 556-558). Ms. Edmiston did not want there to be any

perception that Paragon was interfering with the investigation or stepping on the toes of FPS.
(Id.)

D. Inspector Dingman's Recommendation That the PSOs be Removed From the Georgia Contract

When Inspector Dingman completed her interviews, she contacted her superior, Contract Specialist Lawana Nunnally and informed Ms. Nunnally that the investigation was complete (Tr. 426, 470). She told Ms. Nunnally that she would be putting together a report on the situation when she returned from two weeks of scheduled training at Fort Benning, Georgia, but she did not tell Ms. Nunnally what recommendations she intended to make in her report (Tr. 425-426, 472-473). She began working on her report when she returned, but she had to complete it while still performing her regular duties, which were extensive.⁶ She also had to research the relevant SOW provisions and SGIM materials to develop an accurate report regarding the violations (Tr. 425).

On May 31, 2012, she completed her report and submitted it by e-mail to Lawana Nunnally (RX-5, p. 2). In her transmittal e-mail message to Ms. Nunnally, she stated:

It is my recommendation from the information I've gathered that all three be removed from the contract for lack of candor and blatant disregard of Federal law.

This recommendation was consistent with the concluding page of her report, which stated:

⁶ As the Contracting Officer's Technical Representative for the Georgia contract, Inspector Dingman had oversight of the 66 buildings and 340-370 PSOs at those buildings (Tr. 473, 484). She had to monitor open posts on all shifts in all buildings. She had to make sure PSOs were where they were supposed to be, which meant monitoring all the sign-in and sign-out forms. She had to record that information and check it against the invoices that Paragon submitted for payment. She had to conduct and review post inspection reports and deal with post order issues brought to her from other inspectors and she had to perform her own assigned inspection duties (Tr. 473).

The actions of PSO Blake, Baker and Holland have proven to be unacceptable to the Government standards of this contract. They have their own agenda and have proven with their actions listed above the security of the Federal Facility for which they are assigned come second to handling their own personal grievances. It is my professional opinion as the COTR of this contract that all three PSO's be removed. They have less than stellar candor and have shown without a doubt their disregard for the safety of the government's facility, information or employees.

(JX-3, p. 10).

1. The Report's Findings Concerning PSO Joel Baker

Inspector Dingman's report faulted Joel Baker for a series of performance problems. She found that he had failed to treat Blake as a visitor to the COE Building and had allowed a visitor to enter the building without any inspection of the materials he was carrying and without being screened using the magnetometer. She identified the specific SGIM provisions that he had violated, as well as the federal law provisions codified in the Code of Federal Regulations and included in the SGIM (JX-2) beginning at page 73 of the Manual.

She further found that Baker allowed Blake to park his personal vehicle in the loading dock area of the COE Building even though there was clear signage in the loading dock area stating that the loading dock was for loading and unloading only and for a maximum of 15 minutes and that it was not a pedestrian entrance (RX-9 through 15; Tr. 392-404). Baker was the officer on post when these violations occurred, and he was the PSO responsible for enforcing the applicable regulations and the posted signage in the loading dock area.

She also concluded that Baker had engaged in unacceptable conduct because he was dishonest with her during his interview with her. She concluded that he was not forthcoming with the information that he knew, and he was evasive in his responses because he dodged her questions and responded to her inquiries by asking his own questions instead of answering the

questions that she was asking him. He had stated that he was unsure of which PSO had entered the building even though Baker himself was the person who handed Blake the packet of information that Blake brought to Colonel Hall. Baker only became forthcoming with his answers when Inspector Dingman warned him that his continued evasiveness could be construed as obstruction of her investigation. This was a problem from her perspective because PSOs are held to a high standard in terms of integrity and candor because they have access to sensitive information and “we have to be able to rely on them” if they need to be a witness in court (Tr. 423).

2. The Report’s Findings Regarding PSO Arthur Blake

With respect to PSO Arthur Blake, the Report determined that he had violated security procedures and applicable provisions of the SGIM and federal law by misusing his identification card to gain access to the COE Building during off-duty hours and circumventing the x-ray and magnetometer screening procedures that were in place for visitors to the building. She also found that he violated building rules when he parked in the loading dock area for more than 30 minutes and when he did not engage in any loading or unloading of boxes or other materials from his vehicle. She concluded that he should have been using the main entrance to the building and that he flouted the loading dock’s signage and security procedures for his personal convenience.⁷ Her findings in this regard were consistent with Blake’s acknowledgement that

⁷ Blake testified at the hearing that, as he was walking to his car after talking to Baker and Holland, FPS Inspector Buening appeared on the loading dock and questioned whether Blake had been conducting union business with the PSOs who were on duty (Tr. 46). That is precisely what he had been doing according to Holland, who testified that the three PSOs were discussing working conditions at the COE Building and preparing a letter to “higher” personnel about perceived harassment (Tr. 217-218). Nonetheless, Blake told Inspector Buening that he had not been discussing union business and he had dropped a packet off for the Colonel (Tr. 46). This made it sound as if he had unloaded something, and Blake testified that Inspector Buening did not raise any questions about parking in the loading dock. This makes sense since Inspector

FPS had trained all PSOs about the importance of strictly adhering to the FPS-established rules and that there were no FPS rules, procedures or orders that he or the other PSOs had the discretion to ignore or not follow, including the signs in the loading dock area (Tr. 87-89). Blake nonetheless parked in the loading dock because “I had another appointment to go to”, and he did not want to take the time to park in the proper parking lot, which was one-quarter of a mile away (Tr. 92, 94).

Inspector Dingman further found that PSO Blake’s conduct was a form of dishonesty because he knew the access rules at the building and had a responsibility to ensure compliance with those access rules. Moreover, he had done so at other federal buildings as well, wearing his uniform and gun to those buildings and using his official credentials to gain entry without going through the standard screening procedures. She concluded that he acted as though he was “above the law” (JX-3, p. 7), and she was particularly troubled by the lack of remorse that he showed for his misconduct even after Inspector Dingman clearly and unambiguously advised him that he had acted improperly by using his credentials to circumvent the screening and escort procedures that were in place at the COE building for visitors (JX-3, p. 6). Instead of showing concern for the existing security procedures, he acted “untouchable” by leaning back in his chair and being unbothered by the problems she was pointing out to him (Tr. 413).

3. The Report’s Findings Regarding PSO John Holland

Inspector Dingman’s report did not fault PSO John Holland for Blake circumventing

Buening had no way of knowing at that time that Blake had been parked in the loading dock for more than 30 minutes, or that Blake had not in fact unloaded anything from his vehicle during the time he was parked there. Under these circumstances, Inspector Buening’s lack of action against Blake is not evidence that he condoned what Blake had done or that this particular FPS inspector had no problem with Blake’s activities. It is more important to recognize that Inspector Dingman had never said or done anything suggesting that she condoned these security rule violations.

screening procedures or parking in the loading dock since those violations occurred when Baker was responsible for the loading dock post. However, Inspector Dingman did conclude that Holland engaged in unacceptable conduct when he spent an extended period of time on post socializing with Blake and Baker in the loading dock area (JX-3, p. 9). More importantly, she concluded that Holland had blatantly lied to her during their February 17 phone call, as he admitted during his interview, when he denied knowing which PSO had entered the building during off-duty hours on January 31.

Dingman also stated “in my professional opinion” that Holland had not shown a willingness to change behavior and adhere to the instructions and information that she had given him during his interview (JX-3, pp. 9-10). She described a post-interview phone call in which PSO Cochran told her that Blake and Holland had told him that they were planning to go to the DOL building off-duty in uniform. He had told them not to do so until after he talked to Inspector Dingman, and he had called her to check if he was right. This caused her to conclude that Blake and Holland had not learned anything from what she had told them unambiguously during their interviews (Id.).

E. Paragon’s Decision to Comply With Inspector Dingman’s Recommendations

Lawana Nunnally forwarded Inspector Dingman’s report to Vernon Fields and Veronica Edmiston by separate e-mails on July 6, 2012 (RX-5). Edmiston then forwarded the report to Paragon’s corporate office in Virginia since the report was recommending the removal of the PSOs from the contract. Neither Edmiston nor Fields had any further involvement in the matter, and neither was asked by anyone at corporate for their opinions on what should be done in response to the report (Tr. 494, 529). The PSOs were suspended pending the review of Inspector Dingman’s report.

Paragon's General Counsel, Laura Hagan received a copy of the report that same day. She had not been previously aware of Inspector Dingman's investigation. She read the report of Inspector Dingman and the e-mail message from Inspector Dingman to Lawana Nunnally in which Inspector Dingman recommended the removal of the PSOs from the contract. Hagan then held a series of meetings and phone conferences with Paragon's Director of Employee Relations Nicole Ferritto and Director of Labor Relations Roman Gumul (Tr. 313). She already knew the requirements of the SOW for the contract since the SOW portion of FPS contracts was the same on all FPS contracts (Tr. 314-315). She also knew the requirements of the SGIM, but she pulled a copy of the applicable collective bargaining agreement with the USPOA so that she could determine whether removing the PSOs from the contract would be grievable (Tr. 314-315, 324). Paragon typically negotiated contract language saying that a termination was not grievable if the removal from the contract was a result of a Government recommendation, and she confirmed the collective bargaining agreement (JX-1, p. 4) for the Georgia contract contained this language.

When Hagan, Ferritto and Gumul discussed the report, they focused on the level of detail in the report, the report's conclusions and findings, and the supporting statements in the report regarding the violations that had occurred (Tr. 314). There also was no doubt in their mind that Inspector Dingman had been acting within the course and scope of her employment when she conducted the investigation and developed the report, since the COTR represents the contracting officer in all aspects of overseeing Paragon's performance on the contract (Tr. 316-317).

In terms of the specific violations identified by Inspector Dingman, they could see that the actions of the PSOs had in fact been violations of the SGIM and applicable federal law. Moreover, Inspector Dingman's report was very specific and detailed about the conduct that had constituted violations (Tr. 324).

The report was also well supported when it came to the findings that the PSOs had displayed a lack of candor in their responses to Inspector Dingman's questions. This was of particular concern to Laura Hagan because she was well aware that PSOs need to be credible witnesses in court when they must testify about what they observed when standing a post (Tr. 314, 318-319, 324). When responding to questions from an FPS Inspector, PSOs were not supposed to listen very carefully for ways to avoid answering the question or narrowly answer questions in a way that prevented the FPS Inspector from discovering information (Tr. 318). The PSOs were supposed to answer questions in a forthright and cooperative manner. Here, not only had Baker and Holland been evasive, each had given Inspector Dingman false information at various points of their interviews. Hagan also concluded that Inspector Dingman was justified in characterizing Blake as showing no remorse for what he had done and showing no intent to change his view that he was entitled to decide which security procedures were important to follow and which security procedures he could ignore when it was inconvenient for him to follow the security procedure (Tr. 314).

Hagan, Ferritto and Gumul were also aware that Section 16(A)(3) of the SOW stated unambiguously that FPS could request the removal of any PSO from any or all government contract locations if the FPS judged the PSOs to be unfit to perform security duties, and the same sections also stated that the "Contractor must comply with these requests in a timely manner." (RX-4, p. 43; Tr. 323). Hagan knew that this "must comply" language did not prevent Paragon from declining to follow a recommendation if, for example, the recommendation did not state a basis for the recommendation or if the recommendation was based on the PSO being married to the Inspector's brother-in-law (Tr. 323), but that was not the case here since the report identified specific reasons for its recommendations and since many of the violations were uncontested by

Blake, Baker and Holland. As a result, Hagan, Ferritto and Gumul all agreed that the proper step was to remove the PSOs from the contract and terminate the employment of the PSOs. Based on the seriousness of Inspector Dingman's findings and conclusions, Paragon's corporate office did not explore options for shifting the PSOs to non-FPS locations, but it would have been a wasted effort to have done so even if Paragon itself had not been disturbed about the conduct of the PSOs. The nearest non-FPS contracts were in Mississippi, Maryland and North Carolina (Tr. 325-326), so there was no reasonable place to move them.

F. Off-Duty PSO Access to Federal Buildings

One of the policy violations that Inspector Dingman noted in her report was that PSO Baker allowed PSO Blake to enter the COE Building without being screened by magnetometer and x-ray security equipment (JX-3). Inspector Dingman faulted both PSOs since she believed both should have been aware that off-duty PSOs were to be treated as visitors when they came during their off-duty time to the building where they worked. The ALJ found that it had been a common practice in the past for PSOs to enter buildings off-duty and bypass security screening by showing their government-issued IDs. While relevant, this testimony was immaterial since it was not coupled with any evidence that Inspector Dingman or Paragon's decision-making group (Laura Hagan, Roman Gumul and Nicole Ferritto) were aware of this asserted PSO practice.

The rules on building access are set by FPS in conjunction with the applicable Facility Security Committee or designated tenant official (Tr. 466). As the Contracting Officer's Technical Representative for the contract, Inspector Jennie Dingman was the person responsible for knowing the rules that had been set by FPS for use of government credentials. FPS clearly believed that Dingman was a knowledgeable person in that regard since FPS promoted her to the position she currently holds as Senior Instructor for Federal Law Enforcement Training Centers

under the FPS' Protective Service Officer's Training Branch (Tr. 377).

Inspector Dingman testified that contractor employees like PSOs are issued government credentials for the limited purpose of allowing access to their assigned building for work purposes (Tr. 403-404). The credentials are issued pursuant to the authority of Homeland Security Presidential Directive Number 12, which was generated by President George Bush in 2004 for the protection of federal facilities from terrorist activity (Tr. 404). Contractor employees like Paragon's PSOs must sign an agreement when they are cleared to receive a government credential, and this agreement specifically advises them that the card is for "official use only, not for personal use" (Tr. 404, 439). This point is echoed in the SGIM, which notes that: "All keys/cards maintained under your control are to be used in the performance of official duties only." (JX-2, p. 40). The SGIM also identifies "improper use of official authority, credentials or equipment" as being "grounds for possible disciplinary action, up to and including permanent removal from any FPS security guard service contract." (JX-2, pp. 12-13).

Inspector Dingman knew that the Facility Security Committee at the COE Building had determined that they wanted their COE employees to be able to enter the building by showing their credentials without daily screening, but the Committee wanted all visitors to the building to be screened (Tr. 466). She considered any circumventing of the screening procedures to be a high security risk (Tr. 468, 470). Off-duty PSOs could enter the building where they worked to the same extent as members of the public and other visitors could enter the building, but these off-duty PSOs needed to go through security screening like all other types of visitors (Tr. 403-404). There was no testimony from any witness alleging that Inspector Dingman had ever witnessed off-duty PSOs at the COE Building or elsewhere circumvent security by showing their credentials, and the ALJ did not find that Inspector Dingman believed it was acceptable for off-

duty PSOs to by-pass security screening using their credentials. (ALJD 13-14).

The ALJ's only reference to **FPS knowledge** of the off-duty entrance practice was the ALJ's finding that FPS Inspector Buening spoke to Blake as Blake was leaving the loading dock area and that Buening "did nothing" (ALJD-14). But this is not evidence that FPS or Buening did not think off-duty PSOs should be processed as visitors and subjected to the standard screening procedures. Buening arrived in the loading dock **after** Blake had entered and left the building, so he never saw Blake circumvent the screening procedures. Moreover, since Buening also arrived as Blake was preparing to leave, Buening did not know Blake had been parked in the loading dock more than 30 minutes and that Blake had not unloaded anything while parked in the loading dock. Buening questioned why Blake was talking to two on-duty PSOs, since that was the only potential violation that Buening was observing, but he accepted Blake's assertion that he had not been discussing non-work matters with Baker and Holland (Tr. 46-47). Thus, the ALJ was wrong to characterize Buening's actions as condoning in any manner the violations that Blake committed prior to Buening's arrival at the loading dock.

Similarly, there was no testimony from any witnesses asserting that Paragon's decision-making group (Laura Hagan, Roman Gumul and Nicole Ferritto) were aware of any instances in which off-duty employees accessed buildings by using their credentials to circumvent security equipment in place at those building entrances. Laura Hagan testified that her decision was based in part on her knowledge that the SGIM specifically says that credentials are not to be used except for official business, and PSOs are not engaged in official business when they are off-duty (Tr. 320-322, 353-358). She had treated the improper use of credentials seriously in two prior circumstances. One involved a PSO who entered the Atlanta Federal Center off-duty with a guest using his access card in order to gain entry without going through the appropriate screening

procedures (Tr. 327). The second involved a PSO who allowed a contractor employee at a building to bypass security equipment at a building entrance using her contractor credential (Tr. 327-329). In both instances, the offending PSOs were discharged.

Paragon's Corporate Training Officer, Donald Holcomb, testified that Paragon trained PSOs that the SGIM prohibited "improper use of official ... credentials" and trained them that the SGIM also required that credentials be used for "official duties only" (JX-2, p. 13), meaning that off-duty PSOs needed to go through the full screening process just like visitors (Tr. 565-576). The ALJ found Mr. Holcomb's testimony confusing, so she concluded that "the rule at issue was neither interpreted nor followed by the PSO's (sic) in the manner Respondent purports" (ALJD-14). The ALJ did not find, however, that Laura Hagan or Paragon believed it was acceptable for off-duty PSOs to use their credentials to circumvent standard screening procedures for visitors. Thus, whatever the PSO actual practice may have been at these Georgia facilities, Inspector Dingman and Laura Hagan's corporate group was not aware of it. From their perspectives, the PSO's actions were violations of FPS and COE Building security procedures, and Inspector Dingman and Ms. Hagan cannot be accused of treating PSOs Blake and Baker more harshly than other PSOs when Inspector Dingman and Ms. Hagan were not aware of anyone else engaging in similar conduct.

III. LEGAL ARGUMENT

A. This Case is Non-Justiciable Under Applicable Law Because Resolution of the Case Requires the Board to Second-Guess Inspector Dingman's Security-Related Assessments.

Respondent argued to the ALJ that this case is non-justiciable under the Supreme Court's decision in Department of Navy v. Egan, 484 U.S. 518, 527 (1988). The Supreme Court held in Egan that the Constitution has granted the Executive Branch the exclusive power to determine

whether employment of a person on Government work implicates national security concerns. The Court held that decisions by Executive Branch personnel about security involves an act of “predictive judgment” that “must be made by those with the necessary expertise in protecting” the security interests at issue in any particular security-related decision. Id. at 528-529.

The ALJ concluded that Egan was inapplicable here because, in Egan, the Executive Branch’s predictive judgment occurred in the context of determining whether to deny a security clearance, whereas in the instant case, the Executive Branch’s predictive judgment occurred in the context of a negative “suitability determination” for continued employment on Government security work. The ALJ cited no legal authority for her assertion that Egan’s principles do not apply to suitability determinations, and that is presumably because every federal court that has addressed the question has rejected the ALJ’s approach.

The most recent such case is Foote v Chu, 928 F. Supp. 2d 96 (D.C.D.C. 2013) in which the plaintiff received a conditional offer of employment but was subsequently denied employment because of a negative suitability determination. While acknowledging that suitability determinations are not identical to security clearances, the court rejected the plaintiff’s argument that suitability determinations were not subject to the non-justiciability principles announced in Egan.

“Although the Plaintiff is correct that the HRP certification is not a security clearance, that distinction is not dispositive under Egan. At its core, Plaintiff’s Complaint challenges the merits of the Defendant’s predictive judgment that the Plaintiff did not meet the standards of reliability and security necessary for employment in a position involving the United States nuclear weapon program. Semantics aside, the Plaintiff’s claim is barred by Egan.”

Foote, 928 F. Supp 2d at 98.

The court reached the same result in Bennett v Chertoff, 425 F. 3d 999 (D.C. Cir. 2005) in which an employee was terminated because of a negative suitability determination. The employee argued that her situation involved a suitability determination and not a security clearance determination and that, as a result, Egan's non-justiciability principles did not apply. The court rejected this argument, explaining that suitability determinations and security clearance determinations are not "mutually exclusive" and that the same considerations that go into a security clearance determination frequently are examined in the context of suitability determinations. Id., 415 F. 3d at 1002. See also, Cruz-Packer v. Chertoff, 612 F. Supp. 67, 71 (D.C.D.C. 2009) (declining to review an agency's negative suitability determination because doing so would "require the trier of fact to evaluate the validity of the agency's security determination.").

Another example is Ryan v. Reno, 168 F. 3d 520 (D.C. Cir. 1999) in which two applicants for Government positions were rejected at the background investigation stage, prior to any effort by the Government to determine whether a security clearance should be issued. Again, the applicants sought to "circumvent Egan by characterizing the challenged employment actions as procedural, divorced from any substantive security determination". Id. 168 F.3d at 524. The court rejected this approach, holding that the operative question was whether the actions of the decisionmaker "were based on the same sort of 'predictive judgment' that Egan tells us 'must be made by those with the necessary expertise in protecting classified information' without interference from the courts." Id. See also Becerra v. Dalton, 94 F. 3d 145, 149 (4th Cir. 1996), cert. denied, 519 U.S. 1151 (1997) ("We find that the distinction between the initiation of a security investigation and the denial of a security clearance is a distinction without a difference"); Hill v. White, 321 F.3d 1334 (11th Cir. 2003) (finding that a supervisor's

disciplinary action, which later led to a review of the employee's security clearance, was unreviewable under Egan since the same Egan principles applied to any effort to review the disciplinary decision).⁸

These cases make clear that the crucial question under Egan is whether the applicable court or administrative agency must, in order to decide its case, examine the merits of a government actor's⁹ decision on security-related issues, and this is true regardless of whether the decisionmaking process had reached the stage of a full-fledged revocation of a security clearance. Here, as the Board tries to determine Inspector Dingman's motives for her determinations and recommendations, the Board faces the same problem that courts routinely face in Title VII cases where courts must assess the motives of employer representatives. As these courts have continually pointed out, the burden-shifting test for assessing employer motive requires the courts to examine whether the decisionmaker made the decision for legitimate,

⁸ The only instance in which courts have been willing to not apply Egan to security clearance decisions or suitability determinations is where the record evidence shows that the decisionmaker's determination did not turn on any actual national security concerns. E.g., Jones v. Ashcroft, 321 F.Supp. 2d 1 (D.C.D.C. 2004) (finding that Egan would apply to background investigations even though the investigations were not part of a security clearance determination, but not applying Egan since the decisionmaker's determination was based on problems with the applicant's application and not any national security interests); Delgado v. Ashcroft, 2003 U.S. Dist. LEXIS 26471 (D.C.D.C) (national security not an issue in determination). Here, of course, there is no issue about whether FPS's determination was security-related since Inspector Dingman was expressly assessing the ability of the three PSOs to provide protection to the federal building that they had been assigned to guard. Protection of federal buildings and monitoring access to those buildings is a central component of maintaining national security.

⁹ While Inspector Dingman is the one who made the decision in this case to investigate the actions at the COE Building, the Court of Appeals for the Tenth Circuit has correctly pointed out that the scope of Egan's non-justiciability doctrine is as broad as the delegation of authority by the Executive Branch, and non-justiciability even extends to the decisions of private employers working on government contracts when they are authorized to make security-related decisions. Beattie v. The Boeing Company, 43 F. 3d 559, 566 (10th Cir. 1994). Of course, in the present case, it is not necessary to reach this issue since Inspector Dingman, on behalf of FPS, made the decision to investigate the situation at the COE Building and to recommend removal of the PSOs for security reasons.

nondiscriminatory reasons or whether those reasons are a pretext for a discriminatory motive, just as the Board must assess the motive of the decisionmaker.¹⁰ This would, of necessity, require the Board to assess whether Inspector Dingman's stated concerns about breaches of security policies and lack of candor during her investigation were or were not, in the Board's opinion, well-founded. The Board would have to find that the violations of security policies and lack of candor by the guards did not actually pose a security risk and that Inspector Dingman reached the wrong conclusion about the steps necessary to ensure the protection of the COE Building. This is the unavoidable result of any effort to assess and judge Inspector Dingman's motivations, and it is precisely what the Board is prohibited from doing under Egan. Accordingly, the Complaint should be dismissed on this basis.

B. Paragon's Discharge of PSOs Blake, Baker and Holland Was Lawful Under Wright Line.

The ALJ analyzed the Section 8(a)(3) claims using the standard developed by the Board in Wright Line, a Division of Wright Line Inc., 251 N.L.R.B. 1083 (1980) enf'd 662 F. 2d 899 (1st Cir. 1981) cert. denied, 455 U.S. 989 (1982). While Respondent believes that the ALJ should have used the standard developed by the Supreme Court in NLRB v. Burnup & Sims, 379 U.S. 21 (1964), this Brief will first address the errors that Respondent contends the ALJ made under Wright Line.

1. The ALJ Erred in Finding That the General Counsel proved a Prima Facie Case of Unlawful Discrimination.

The General Counsel's *prima facie* obligation under Wright Line is to **prove** an "unlawful motivation". This is not a burden that can be satisfied with mere suspicions or

¹⁰ Brazil v. U.S. Dept. of the Navy, 66 F. 3d 193, 196-197 (9th Cir. 1995); Perez v. FBI, 71 F. 3d 513, 514-515 (5th Cir. 1995); Beattie v. The Boeing Company, *supra*, 43 F. 3d at 565-566.

generalizations. "Mere suspicion cannot substitute for proof of an unfair labor practice." Lasell Junior College, 230 NLRB 1076 (1977). See also Kings Terrace Nursing Home and Health Related Facility, 229 NLRB 1180 (1977); DSL Mfg., Inc., 202 NLRB 970 (1973). The General Counsel needs to establish employer animus towards the protected activity of an employee, as well as a causal connection between that animus and the disciplinary decision. NLRB v. Transportation Management Corp., 462 U.S. 393, 399-403 (1983). Only by doing this can the General Counsel shift the burden to Paragon to prove that the same action would have been taken despite the proven unlawful motivation. The General Counsel did not meet that burden here.

To begin with, the record in this case lacks any evidence that Paragon is an anti-union employer or that Paragon wanted to get rid of PSOs Blake, Baker or Holland because of Blake's role in visiting COE Colonel Hall or because of the positions the PSOs held with the Union. Paragon is clearly not averse to working with unions in general or with this particular union local in Georgia. Roughly 90% of Paragon's operations nationally are unionized, and having unions in place helps Paragon get better wage rates for PSOs under the Service Contract Act, which in turn allows Paragon to attract and retain better quality PSOs. This history of positive union relationships undermines the General Counsel's assertion that the same employer acted with an unlawful motivation against particular PSOs because of their union connections.

The ALJ found that the General Counsel established a *prima facie* of unlawful discrimination, but the ALJ's Decision in this regard contains a number of findings that are not supported by the record evidence. For example, the ALJD asserts on page 17 that Dingman's report was based on an unlawful animus by Dingman towards the alleged protected activity of the PSOs and that Respondent was aware of this unlawful animus. Dingman's report, however, does not contain any statements criticizing the PSOs for engaging in any protected activity. She

asked PSO Baker whether he had been taught in training that PSOs should go through their operational chain of command rather than approaching client tenants like COE directly, and she asked Blake additional questions about the earlier NLRB ruling on off-duty contact of client tenants, but Dingman did not find that the PSOs engaged in any misconduct by going to Colonel Hall. Thus, her report does not serve as evidence of any unlawful animus.

The ALJ notes that Dingman told each PSO that, if they went out on strike, the PSOs could be removed from the contract and might not work another federal contract, but this assertion by Dingman is not in her report, so there is no evidentiary basis for finding that Laura Hagan, Roman Gumul or Nicole Ferritto were aware of Dingman making this observation. If they were not aware of the statement, they could not conclude that it reflected unlawful animus.

Moreover, it is important to remember that Inspector Dingman's statement was lawful and factually correct. She was not stating that anything unlawful would happen to PSOs who went out on strike. FPS is not covered by the NLRA. As noted in Egan and its progeny of cases, FPS's determinations about suitability are based on national security interests, and FPS is free to decide that a PSO who abandons a security post to engage in strike activity is not someone that FPS wants guarding access to federal buildings. This is a lawful decision by FPS because strike activity is not "protected" from responsive action by FPS. Dingman was speaking for FPS, and she did not claim to speak for Paragon, nor did she make any statements about what Paragon might do in the event of a strike. Dingman cannot be accused of "unlawful" animus where the statements she made were all lawful.

For these same reasons, it is specious for the ALJ to assert that Veronica Edmiston had some form of obligation to bring Dingman's lawful comments to the attention of Hagan, Gumul

and Ferritto when Edmiston saw that the report did not mention Dingman's observations about striking. Dingman made lawful comments about how FPS viewed PSOs who went on strike, and FPS's views had no bearing on the undisputed security violations and lack of candor covered in the report. The record evidence conclusively shows that Hagan, Gumul and Ferritto did not know about the comments. Thus, they had no "knowledge" of any alleged unlawful animus.

There is also no evidentiary support for the ALJ's statements that Hagan, Gumul and Ferritto "deliberately conducted an inadequate investigation into the allegations against Blake, Baker and Holland in order to justify its decision to discharge them" (ALJD 17) and that Hagan, Gumul and Ferritto made their discipline decision "without conducting any investigation (ALJD 18). Hagan and group did not make their decision in a vacuum. They were looking at a 10-page investigative report by a federal official who was authorized to conduct such investigations, and that report contained a question-by-question summary of interviews (and post-interview written witness statements drafted by each of the PSOs) in which the PSOs were allowed to explain their version of events. This is completely different from the cases relied upon by the ALJ (pp. 18-19) where an employer rushed to judgment without knowing the employee's side of things.

The ALJ asserted that, if Hagan and group had independently investigated the matter, they would have found that many PSOs used their credentials to bypass security when they entered buildings off-duty. The problem with this assertion is that the misuse of official credentials was only one small part of what the PSOs did wrong here. Each PSO had committed other security-related infractions or acts of dishonesty that served as independent bases for Dingman's recommendation that they be removed from the contract. Furthermore, what Dingman was saying about the proper use of official credentials was entirely consistent with Hagan's understanding of how credentials were to be used. Thus, there was nothing about the

underlying circumstances that would trigger any reason to independently investigate Dingman's findings on this issue, and the failure to re-do Dingman's investigation certainly does not support any inference that Paragon's actions were unlawfully motivated.

The same is true for the ALJ's finding that an inference of unlawful motivation can be attributed to Hagan and group from the fact that sergeants knew that off-duty PSOs sometimes entered buildings without going through the visitor security procedures. It is undisputed that sergeants were members of the bargaining unit, and that the failure of such sergeants to report policy violations by their fellow union members was the reason Paragon bargained to remove sergeants from the bargaining unit in 2012. Under these circumstances, the failure of sergeants to stop the off-duty practice is not imputable to Laura Hagan, Roman Gumul or Nicole Ferritto and cannot be relied on as "evidence" that they acted with an unlawful motive. State Plaza, 347 N.L.R.B. 755, 760 (N.L.R.B. 2006); Dr. Phillip Megdal, 267 NLRB 82 (1983). Accord: Music Express East, 340 NLRB 1063 (2004).¹¹

The ALJ also acted without supporting evidence when she found (ALJD-18) that Vernon

¹¹ Veronica Edmiston testified that she had never seen an off-duty PSO use official credentials to circumvent security screening procedures, and no witness claimed that Edmiston ever witnessed such conduct. Nonetheless, the ALJ found that Edmiston did in fact witness such conduct **not** because of any evidence that she had done so, but solely because the ALJ thought Edmiston's denial was not credible (ALJD-17). As the Board has noted in the past, "[a] mere suspicion of unlawful motivation for the discharges is not sufficient to constitute substantial evidence that the discharges resulted from improper motives." Neptco, Inc., 346 NLRB 18, 19 (2005) (footnotes omitted). The ALJ similarly asserted that Vernon Fields knew about the PSOs' off-duty use of credentials based on a single instance in which an off-duty PSO entered a building while Fields was present. The witness did not claim that Fields said anything condoning what the PSO did, and there is no evidentiary basis for twisting this isolated instance into a finding that Fields paid any attention to whether the PSO went through the magnetometer at the building or that Fields was aware of some widespread practice by PSOs concerning use of their credentials to circumvent screening procedures. Most importantly of course, like the sergeants, there is no evidence that Fields ever conveyed this isolated incident to Hagan, Gumul or Ferritto, so even if one assumes that Fields was aware of this alleged isolated instance of improper off-duty entry, this clearly does not prove that Hagan and group knew about the asserted practice.

Fields had no legitimate reason to contact Inspector Dingman about the strike issue at the COE building and that Inspector Dingman had no legitimate reason to travel to the COE building to investigate the potential strike threat. The ALJ's findings were based purely on her speculation, and her findings are both contrary to the record evidence and contrary to common sense.

It is undisputed that Vernon Fields heard rumors at the Atlanta Federal Center that an unidentified PSO had talked to COE personnel at the COE building about a possible strike at that building. Unlike the Union's sabre-rattling at the bargaining table about the Union's right to strike (CPX-3), where no date or location of strike activity was threatened, here Paragon had information about a threatened work stoppage at a specific building, and Paragon was being told that the tenant had been alerted to the work stoppage. If Paragon had declined to tell FPS about the rumors that Fields had heard, and if posts at the COE Building ended up being unmanned because of a work stoppage, Paragon might well have lost its federal contract to provide PSOs at federal buildings in Georgia.

Fields had legitimate business reasons for telling Inspector Dingman about the COE Building strike threat, so his decision to inform her about the strike threat cannot be characterized as evidence of unlawful animus. There is no evidence that Fields asked Inspector Dingman to investigate the matter, nor did he suggest to her that any PSO had violated any rule or procedure by talking to Colonel Hall at COE. He did not follow up with her about her investigation or provide any input to her investigation. The only thing he did was comply with a contractual obligation to keep FPS apprised of information that related to the security of a federal building, and that is not a factual basis for any finding of unlawful animus.

Notwithstanding the logic of Vernon Fields actions, the ALJ concluded that Fields had no legitimate reason to bring the strike threat at the COE building to the attention of FPS. The only record evidence identified by the ALJ in support of this conclusion was that, at some unknown point in time during bargaining, FPS asked Paragon to put together a general strike contingency plan for the Georgia contract. The record evidence, however, does not support an inference that FPS's request for a contingency plan occurred **prior** to Fields hearing about the strike threat at the COE building. On the contrary, the record evidence is inconsistent with such a claim. Bargaining between the parties extended from January 2012 to March 19, 2012 (ALJD-5). Fields testified that the request for a strike contingency plan happened "once the strike (threat) was made public ... whoever told FPS about the strike." (Tr. 510), but he also testified that Paragon did not tell Dingman about the strike threat that was made at the bargaining table because the generalized threat of striking was just one of those things customarily said by a union during negotiations (Tr. 503). "I didn't discuss union negotiations with the COTR." (Tr. 508). There is no contrary evidence. So, to the extent that any inference can be drawn from this evidence, the inference is that the strike threat was "made public" when Arthur Blake told COE Colonel Hall about the strike possibility at the COE Building.

In any event, even if FPS had requested on some earlier occasion that Paragon supply a strike contingency plan in case of a work stoppage throughout Georgia, that would not mean that Vernon Fields had no legitimate reason to tell Inspector Dingman about the new **specific** threat that was being directed at the COE Building (Tr. 384).. There is certainly no evidentiary basis for speculating that Fields contacted Dingman with the hope that she would investigate the situation and that she would find that various violations of security policies occurred.

The ALJ then asserts in her decision, again without supporting record evidence, that since there is a possibility that Paragon gave FPS a general strike contingency plan for the State of Georgia prior to Fields informing Dingman about the COE building strike threat, then “there was no need for Dingman to investigate whether a strike was imminent for contingency planning purposes.” (ALJD-18). The ALJ felt that Dingman should have been unconcerned about a strike and non-reactive even though Dingman testified:

“Federal Protective Services is in charge of securing these facilities, and if we find out that there may be a possibility of a strike of the protective security officers of that facility, FPS must in turn step in to secure that facility. So if we have a heads up notice that there may be a strike, it allows me the opportunity to try to get Federal Protective Service in the area, because currently at that time there was only three inspectors and one area commander, and there’s at least a minimum five posts at the Corps of Engineers. So I would need to have time to get FPS in to secure the facility.”

(Tr. 384). Dingman needed to find out whether the rumor that Fields had heard was true, and this started with finding out whether a PSO had in fact visited Colonel Hall at the COE Building. There is simply no evidentiary basis for the ALJ to characterize Dingman’s visit to the COE Building as being something suspicious. Dingman’s visit was the logical thing for any responsible FPS officer to do. The only reason that her visit morphed into an investigation of security violations at the building was because, when she reviewed the videotape of the incident to confirm who contacted Colonel Hall and the date of the contact, she saw that Baker and Blake violated loading dock security procedures and had an extended on-duty discussion between themselves and PSO Holland. She also knew when she saw the video that Baker had been lying to her when he earlier claimed that he did not know with certainty whether a PSO had come to see Colonel Hall and that he did not know who the PSO was who met with Colonel Hall. This is why her questions started focusing on the conduct of the PSOs rather than the timing of any potential strike, and it is why she needed to conduct an investigation and develop a follow-up

report. The ALJ's finding to the contrary is wrong and should not be adopted by the Board.

The ALJ further overreached when she tried to infer a discriminatory motive from the fact that Paragon did not suspend or discipline the PSOs during the three month period between the date of FPS's investigation and the date FPS forwarded its report to Paragon with the recommendation that the PSOs be removed from the contract. FPS was Paragon's client, and FPS was the one who set the standards for performance for PSOs on the contract. FPS was the one that conducted this investigation, and FPS needed to be the one to determine what steps were appropriate to address the conduct of the PSOs. If Paragon had not waited to get FPS's report and recommendation, the ALJ surely would have claimed that Paragon's rush to impose discipline before knowing FPS's view of the evidence was proof of a discriminatory motive, so it is patently unfair and wrong for the ALJ to characterize Paragon's patience as evidence of discriminatory motive.

There is also no factual basis to support the ALJ's assertion that Paragon did not follow its progressive discipline policy when it terminated the PSOs. Paragon's progressive discipline policy distinguishes between "Major Rule Offenses" that can be cause for immediate termination and "Minor Rule Offenses" that can be dealt with through progressive discipline such as counseling and warnings (GCX-5, pp. 48-49). The findings and conclusions set forth in the FPS report established violations of several "Major Rule Offenses" listed in the Handbook, including: items 10 and 11 prohibiting willfully interfering with or failing to cooperate in an official investigation; item 18 prohibiting improper use of credentials; and item 29 prohibiting violation of agency and contractor security procedures and regulations. Thus, there is no record evidence supporting the ALJ's assertion that Paragon did not follow its progressive discipline policy. The violations found by FPS were cause for immediate termination without additional warnings, so it

was not discriminatory for Paragon to apply the policy in that manner to the conduct of the PSOs here.

Finally, the ALJ's most egregious error in terms of factual findings was her mischaracterization of Laura Hagan's testimony about why Paragon discharged the PSOs. The ALJ characterized Hagan as testifying that Paragon was "required" to discharge the PSOs because of the FPS report and that this was a "misrepresentation" by Hagan that allows an inference of unlawful motivation (ALJD 19-20).

Hagan's testimony regarding the FPS report and the procedure for removing PSOs from a contract was consistent and clear. She pointed out that the FPS contract with Paragon contained a Statement of Work (SOW) drafted solely by FPS and that FPS expressly reserved the right in that SOW to recommend removal of a PSO if FPS felt that the PSO "has been disqualified for employment suitability, performance suitability, or security reasons" and Paragon "must comply with these requests in a timely manner." (RX-4, p. 43, Section 16A.3). What Hagan said is indisputably true since this is the precise contractual language in the SOW.

Hagan also testified on direct examination, however, that this statement [that Paragon "must comply" with the request] did not mean that Paragon always had to follow an FPS recommendation (Tr. 323). As examples, she pointed out that if FPS did not identify a factual basis for a recommendation, or if the recommendation was based on something unrelated to PSO performance, such as removing the PSO from the contract because the PSO happened to be married to somebody's brother-in-law, then Paragon could decline to follow the recommendation and could instead appeal the recommendation to the Contracting Officer, but she testified that she did not do that here because Inspector Dingman's report was backed up by specific instances

of rule violations and acts of dishonesty by the PSOs (Tr. 323-324).

Hagan acknowledged that, if the Contracting Officer still wanted Paragon to act on the basis of a factually unsupported recommendation, Paragon could decline to do so, and this would force the FPS to initiate its own removal procedure, as set forth in GCX-14 (Tr. 369-370). But Hagan emphasized that, in this particular case, she did not think that Paragon had any legitimate basis to decline FPS's recommendation, so she felt Paragon had no choice but to comply with the FPS recommendation, as it was supposed to do under Section 16A.3 of the SOW. **This was particularly true since FPS evaluates Paragon on a yearly basis to determine whether FPS should keep its contract with Paragon in place, and Paragon's failure to follow a well-supported recommendation would be harmful to Paragon's chances of retaining FPS's business.** This was the context in which Hagan testified that she did not think Paragon had a choice on whether to comply with the FPS recommendation. So, there was nothing disingenuous about Hagan's testimony, and there was no record evidence to support the ALJ's characterization of Hagan's testimony as a "misrepresentation" or as evidence of a discriminatory motivation.

The simple truth here is that Paragon's motivation for complying with FPS's recommendation was because the FPS report provided Paragon with no legitimate flexibility to ignore the removal recommendation. FPS acted within its rights when it investigated the conduct that it had discovered when interviewing the guards. FPS identified well-founded reasons for removing the PSOs from the contract, and FPS had the ability to award the Georgia contract to some other guard service if Paragon declined to follow FPS's recommendation. This is a lawful and reasonable motivation for Paragon's actions, and the General Counsel has not proven any unlawful conduct by Paragon.

2. **Paragon Would Have Complied With Inspector Dingman's Recommendation Regardless of Any Other Factors.**

Even if one assumed, solely for purposes of argument, that the General Counsel's office could meet its burden of proving that an unlawful motivation played a part in the decision to remove the PSOs from the contract and terminate their employment, Paragon has met its Wright Line obligation to show that it would have taken the same action even absent the alleged unlawful motivation.

FPS was Paragon's client, and FPS was the entity with primary responsibility for security of federal buildings. Paragon needed to meet the requirements and expectations set by FPS in order to be awarded the future option years for services on the Georgia contract. The federal contract gave FPS the right to conduct investigations at buildings where Paragon supplied PSOs, and it also gave FPS the right to issue reports and make recommendations to Paragon about security issues, including whether PSOs should be removed from the contract. Section 16(A)(3) of the federal contract's Statement of Work is crystal clear on this point and states that "(t)he Contractor **must comply**" in a timely manner with an FPS request to remove an employee from the Georgia contract (RX-4, p. 43; emphasis added). So, if Paragon is going to decline to implement an FPS security-related recommendation about removing PSOs from the contract, Paragon – or any reasonable employer in Paragon's position – needed to have a relatively bulletproof rationale for thumbing its nose at FPS's recommendation.

Here, FPS had taken the time and effort to interview PSOs over the course of several days and develop a detailed 10-page report identifying specific conduct by each PSO that violated security procedures and demonstrated a lack of candor by the PSOs in connection with the investigation. The report was prepared by the FPS representative who had the authority to

prepare such reports and make recommendations to Paragon about removal of PSOs from the contract. That FPS representative concluded her report by stating that “(i)t is my professional opinion as the COTR of this contract that all three PSOs be removed” (JX-3, p. 10), and she sent the report to her superior with the following unambiguous recommendation: “It is my recommendation from the information I’ve gathered that all three be removed from the contract for lack of candor and blatant disregard of Federal law.” FPS’s Contract Specialist then forwarded both the report and the accompanying e-mail recommendation to Paragon with instructions telling Paragon to inform FPS of what action Paragon intended to take in response to this recommendation of removal.

As Laura Hagan made clear, Paragon agreed with Inspector Dingman that the acts of misconduct and evasiveness by the PSOs were indeed legitimate grounds for removal of the PSOs from the contract and termination of their employment. Ms. Hagan was particularly concerned by the findings of dishonesty since they were factually supported and since those findings could be used against the PSOs when they were called to testify in any future court proceedings since it was exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963), and it could undermine the credibility of the PSOs and prevent a conviction that might otherwise be obtained by the government at trial (Tr. 318-319). This fact was unrebutted.

But the key point here is that, even if Paragon had believed for one reason or another that the security violations and dishonesty of the PSOs were not really as serious and significant as Inspector Dingman indicated, Paragon did not have the luxury of second-guessing the judgment of an FPS representative on a matter of building security. In the underlying federal contract, FPS had retained the contractual right to make decisions about whether PSOs were fit for duty and whether PSOs posed security risks, and Paragon was contractually obligated to comply with

FPS's determinations on these security issues.

Moreover, under Wright Line, the employer's obligation is only to "show that it had a reasonable belief that the employee committed the offense, and that it acted on that belief when it discharged him." McKesson Drug Co., 337 NLRB 935, 936 fn. 7 (2002); see also Midnight Rose Hotel & Casino, Inc., 343 NRB No. 107, slip op. 3 (2004) (employer must establish, at a minimum, that it had reasonable belief of employee misconduct); Yuker Construction, 335 NLRB 1072 (2001) (discharge based on mistaken belief does not constitute unfair labor practice, since an employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity); GHR Energy, 249 NLRB 1011, 1012-1013 (1989) (employer need only demonstrate reasonable, good-faith belief that employees had engaged in misconduct).

Paragon's actual motivation for terminating the PSOs was its reasonable belief that Inspector Dingman's report established valid and legitimate grounds for removal, and Paragon did not see any reason to second-guess Inspector Dingman's security judgment about the PSOs. It would not have mattered if PSO Blake had been entering the COE Building to use the bathroom or to deliver Falcons playoff tickets to a COE friend who worked in the building. The issue was how he entered and how the PSOs responded to the FPS investigation. The issue was not why he entered or what he did while talking to Colonel Hall. As such, even if one were to assume without supporting evidence that Paragon was happy to have an opportunity to terminate the PSOs, it is quite clear here that Paragon needed to take the action it did and that Paragon would have been required to take the same action irrespective of how it felt about doing so.

Rather than addressing these obvious reasons supporting Paragon's actions, the ALJ engaged in a "straw man" approach in which she characterized Respondent's evidence in a

manner that she believed would be easy to attack. Then, when she knocked down these self-created arguments, she concluded that Respondent had not met its burden of proof.

For example, the ALJ said that “Respondent presented evidence it discharged PSO’s (sic) for similar security breaches and lack of candor.” (ALJD-20; emphasis added). Not true. Respondent introduced evidence that two other PSOs (Dozier and Williams) had improperly handled issues related to building access and that each PSO had been terminated for such action. One of the PSOs had also displayed a lack of candor during the investigation of his misconduct. Respondent introduced this evidence to prove that Paragon treated lack of candor and violation of access procedures seriously, and Paragon’s evidence does prove this point. Paragon did not argue that the actions of Dozier and Williams were similar to the actions of Baker, Blake and Holland or that Dozier and Williams situations proved that Baker, Blake and Holland would have been discharge regardless of any alleged union animus. Instead, Respondent argued that FPS’s well-supported findings regarding security violations and lack of candor left Paragon with no option other than to comply with FPS’s recommendation of removal.

Specifically, Respondent pointed out to the ALJ that Baker did in fact lie to Dingman when he denied knowing who visited Colonel Hall or when the visit took place, and Baker did in fact fail to provide forthright answers to FPS’s questions. The same was true for Holland who, when confronted with the video evidence of him being on the loading dock talking to Blake, admitted lying to Dingman about whether he knew who had come to visit Colonel Hall. Respondent also pointed out to the ALJ that the FPS report was indisputably correct in finding that Blake and Baker were equally responsible for Blake’s violations of loading dock procedures (i.e., parking in the area when not loading or unloading anything and parking for more than 30 minutes in a 15 minute parking area). Respondent also pointed out that the FPS report was

correct in finding that Blake had brought his weapon to other federal buildings despite knowing that this was a violation of security procedures, and that the FPS report was correct in finding that Blake talked extensively with Baker and Holland about non-work matters while they were on duty, which is conduct that the three PSOs knew was impermissible under the rules and procedures developed by FPS.

Yet, instead of addressing these points in her decision, the ALJ focused solely on the part of the FPS report finding that the PSOs violated FPS security rules when Blake used his official credentials to enter the building without being screened as a visitor. Having found that the PSOs in Georgia regularly did what Blake did, and despite the absence of evidence that Hagan, Gumul, Ferritto or anyone at FPS actually knew about the past practice of the PSOs, the ALJ concluded that Paragon “made the discharge decision based on the alleged rule violation” and that the discharge decision would not ordinarily have been made for violation of the access rule. But as noted above, the discharge decision was not something that happened solely because of the violation of the access rule, and the ALJ’s failure to acknowledge the other rule violations does not make those rule violations disappear.

As noted earlier, Paragon had no legitimate basis to ignore or downplay the significance of the rule violations found by FPS. FPS is the one that established the applicable security policies and the requirement of candor by PSOs during FPS investigations. Even if Paragon had believed that FPS’s interpretations of the access rules developed by FPS was wrong (which was not the case), FPS’s report contained solid proof that numerous other violations occurred, and Paragon could not treat FPS’s recommendation of removal as if the recommendation was groundless. Paragon’s ability to remain an FPS contractor was contingent on being responsive to FPS security concerns and recommendations, and under such circumstances, no reasonable

federal contractor in Paragon's position would challenge FPS's recommendation and tell FPS that if FPS wants the PSOs removed from the contract then FPS must convene a formal Review Board and then order Paragon to do what FPS has already recommended Paragon do. That type of refusal to follow well-founded security recommendations is what causes federal contractors to lose contracts.

C. **The AL Should Have Applied a Burnup & Sims Analysis When Determining Whether Paragon Lawfully Discharged PSOs Blake, Baker and Holland**

In NLRB v. Burnup & Sims, 379 U.S. 21 (1964), the Supreme Court developed an analytical framework that the Board must use in situations where an employee is discharged for misconduct that occurred while the employee was engaged in protected activity. Under the Burnup & Sims analysis, the Board would need to examine the following factual points:

1. Whether the employee was engaged in protected activity at the time in question.
2. Whether the employer knew that the conduct was protected.
3. Whether the basis for discharge was an act of misconduct that occurred during the course of the protected activity.
4. Whether the employer had an honest belief that the employee engaged in misconduct.

Akal Security, Inc., 354 N.L.R.B. 1, 13 (2009) and 355 N.L.R.B. No. 106 (2010). If the employer had an honest belief that misconduct occurred, then this would shift the burden to the General Counsel to prove by a preponderance of the evidence that the employee did not, in fact, engage in that misconduct. Id.

For example, in Akal Security, the employer contracted with the United States Marshals Service (USMS) to provide security services at certain courthouses. Two guards felt that a third guard was failing to do his job correctly. While on duty, they spent 30 minutes in the control

room berating the guard and critiquing the guard's performance. Akal found out about the meeting and investigated, unlike the present case where FPS initiated the idea of an investigation and then conducted the investigation with no input from Paragon. Akal determined that the on-duty discussion caused a complete breakdown in security for the 30-minute period of time, and Akal also expressed concern that the meeting could be deemed harassment of the guard. Having completed its investigation, Akal advised USMS about the incident and told USMS that Akal intended to suspend the guards for differing periods of time. USMS felt the breakdown in security was more serious. It found that the two guards should be removed from the contract, and it confiscated their credentials. Akal had no other contracts in the area, so the guards were discharged.

The Board found in Akal Security that the meeting between the guards was protected activity because it concerned working conditions affecting the safety of the guards. It also found, however, that Akal had a good-faith belief that the two guards engaged in misconduct and that this belief was a significant factor in the disciplinary decision. Finally, the Board determined that the General Counsel had failed to prove that the misconduct did not occur, so it dismissed the allegation on that basis. The Board noted in footnote 13 of the decision that, because it had dismissed the allegation on the merits, "we need not pass" on Akal's contention that USMS was the one responsible for the termination and that Akal merely implemented a USMS decision.

In the present case, the ALJ found that both Blake's visit to Colonel Hall and the subsequent statements that the PSOs made to Inspector Dingman during their interviews were protected activity. The record evidence is indisputable that the loading dock security violations and the dishonesty in responding to FPS's questions occurred during the course of the alleged

protected activity. Nonetheless, the ALJ declined to use the Burnup & Sims analytical framework because the “General Counsel has not asserted liability under this analytical framework” and because the case turns on motive (ALJD-17, n. 11).

Needless to say, the choice of analytical framework must be determined on the basis of facts in a case and not based on whether the General Counsel would prefer a different legal theory of liability. Counsel for the General Counsel may feel that the Wright Line approach gives the General Counsel a better chance of proving liability, but that is not an adequate reason for the ALJ to ignore an analytical framework that the Supreme Court has set up for situation in which misconduct occurs during the course of alleged protected activity. Moreover, the ALJ’s observation that “this matter ... turns on motive” is nonsensical. Motive comes into play under both Wright Line and Burnup & Sims, but Burnup & Sims is the established analytical framework where a termination is based on misconduct during the course of alleged protected activity.

If the ALJ had applied Burnup & Sims, the ALJ would have realized several things. First, the General Counsel cannot meet the first two evidentiary requirements under Burnup & Sims because the PSOs interactions with FPS were not protected by the NLRA. FPS is not subject to the NLRA, and the PSOs at the COE building were not “protected” from action by FPS when PSO Blake went to visit Colonel Hall. Where a government entity is examining employee conduct, the otherwise “protected” nature of the conduct needs to be viewed differently because **the PSOs are not protected from action that the government entity considers necessary to fulfill legitimate government objectives.**

Second, the ALJ would have been forced to find that Baker, Blake and Holland did engage in misconduct under applicable FPS rules and procedures. As noted earlier, PSO Blake parked in a loading/unloading area when he was doing no loading or unloading, and he stayed there more than the allotted time for loading and unloading. When he returned to the loading dock, Blake then engaged in an extended discussion with PSOs Baker and Holland until FPS Inspector Buening arrived and broke things up. Blake did not acknowledge that his actions were wrong when confronted by Inspector Dingman, but he did admit to violations that occurred when he entered other federal buildings wearing his full uniform and weapon when off-duty and not on official business. Baker permitted the improper activities that occurred in the loading dock area, and he was evasive and misleading when questioned by Inspector Dingman about those events. PSO Holland admitted that he lied to Inspector Dingman when she initially talked to him by phone on February 12, 2012 and he also admitted to having an extended conversation with PSOs Blake and Baker while he was supposed to be on duty.

Third, the ALJ would have been forced to acknowledge that the FPS report provided a reasonable basis for Hagan's belief that the acts of misconduct did in fact occur, and there is no record evidence that would allow the General Counsel to meet his burden under Burnup & Sims' to prove that misconduct did not in fact occur. Even if there was some dispute about whether off-duty PSOs could use their credentials to enter federal buildings without going through the standard screening processes, we know here that the remaining misconduct identified in the FPS report did occur and did serve as a legitimate basis for discharging the three PSOs. Thus, the General Counsel cannot meet his obligation to prove by a preponderance of the evidence that the

PSOs did not, in fact, engage in misconduct.¹²

IV. CONCLUSION

For each of the foregoing reasons, the Complaint should be dismissed.

Respectfully submitted,

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¹² Paragon also believes that it will be unnecessary for the Board to reach the affirmative defense that Paragon has raised based on the ability of the Board to act at various stages of this proceeding based on the D.C. Circuit Court of Appeals decision in Noel Canning v. NLRB, 703 F.3d 490 (D.C. Cir. 2013), cert. granted 133 S.Ct. 2861 (June 24, 2013). However, Paragon continues to assert this defense and contends that the Complaint should be dismissed consistent with the rationale identified in Noel Canning.

CERTIFICATE OF SERVICE

I do hereby certify that on this 7th day of March, 2014, a copy of Respondent's Brief in Support of Exceptions was electronically filed with the Administrative Law Judge and was served upon each of the individuals listed below:

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