

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

PARAGON SYSTEMS, INC.,

Respondent,

v.

ARTHUR J. BLAKE,

Charging Party.

Case No. 10-CA-095371

RESPONDENT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS

Thomas P. Dowd, Esq.
LITTLER MENDELSON, P.C.
1150 17th Street N.W., Suite 900
Washington, DC 20036
Telephone: 202.842.3400
Facsimile: 202.318.8943

Counsel for Respondent,
Paragon Systems, Inc.

Dated: April 3, 2014

Pursuant to the National Labor Relation Board's Rules and Regulations, including 29 C.F.R. § 102.46(h), Respondent Paragon Systems, Inc. hereby files the following Reply Brief in support of Respondent's Exceptions to the Administrative Law Judge's ("ALJ") Recommended Decision in this case. This Reply Brief is directed solely at certain arguments contained in Charging Party's Answering Brief since, to Respondent's knowledge, Counsel for the General Counsel did not file an Answering Brief.

1. Charging Party asserts (p. 5) that the ALJ concluded that "the Charging Parties did not violate any rule of the Respondent/employer". This is not correct. While the ALJ found that Arthur Blake acted in the same manner as other PSOs who had entered their workplace while off-duty, and that Joel Baker acted in the same manner as other PSOs who in the past had permitted off-duty employees to enter their workplace during off-duty hours without going through visitor screening procedures, the ALJ did not make similar findings concerning: (a) Blake parking in the loading dock area despite not loading or unloading anything (with Baker's assent); (b) Blake parking in the loading dock for more than double the designated parking time limit (with Baker's assent); (c) Blake talking for an extended period with Baker and Holland in the loading dock area while they were on duty; and (d) Holland and Baker providing Inspector Dingman with misleading, incomplete and false information during the course of her investigation. The ALJ's factual findings (ALJD 6-10) establish that these violations of Paragon and FPS policy occurred, and the ALJ's Decision does not assert that the PSOs did not violate existing rules when they engaged in such behavior. Nor does the ALJ's Decision identify any evidence showing that any violations of this type had occurred in the past without discipline. Thus, there is no record evidence supporting the Answering Brief's assertion that the ALJ's Decision concluded that no rule violations occurred. Indeed, Respondent's exceptions are based

in part on the fact that the ALJ made factual findings that the misconduct did in fact occur but the ALJ ignored the existence of the violations since the existence of the violations undercut the ALJ's rationale for her decision.

2. The Answering Brief's reliance on Hartman and Tyner, Inc. d/b/a Madi Gras Casino and Hollywood Concessions, Inc., 359 NLRB 100 (2013) is misplaced. In Hartman, there was record evidence that the employer had permitted non-work conversations during working hours in the past, and that the employer also had permitted loitering in the kitchen until such behavior was engaged in by union supporters. Here, there was no record evidence that Paragon or FPS had ever previously condoned violations of loading dock security rules/procedures or condoned misleading/lying to an FPS investigator or discussions with on-duty PSOs about matters unrelated to the guard work being performed by the on-duty PSOs. Again, the Answering Brief's approach follows the ALJ's approach and pretends that the only rule violation at issue in this case concerns off-duty PSOs bypassing the screening procedures. However, ignoring the other violations does not mean those violations did not occur or that those violations were not significant in nature.

3. The Answering Brief (p. 6) erroneously cites Parksite Group, 354 NLRB 801 (2009) for the proposition that Paragon should have called FPS Inspector Buening as a witness and that the failure to call Inspector Buening merits an adverse inference that Inspector Buening's testimony would have been harmful to Paragon's position. No adverse inference is appropriate here. To begin with, the adverse inference doctrine applied in Parksite because the employer failed to call its own manager as a witness, and the manager was still employed with the employer at the time of the unfair labor practice hearing. Failing to call a witness who is within your control is quite different from failing to subpoena a third party. Moreover, it is

important to remember that Inspector Buening works for FPS and that Paragon cannot force a federal government employee like Inspector Buening to testify even if it served him with an NLRB subpoena. U.S. ex rel. Touhy v. Ragen 340 U.S. 462 (1951). Finally, there would have been no reason for Paragon to believe that it needed Inspector Buening's testimony in any event. The videotape showed that Inspector Buening arrived at the loading dock **after** Blake had exited the building and while Blake was talking with on-duty officers Baker and Holland. Buening did not observe whether Blake loaded or unloaded anything from his vehicle. Buening did not know how long Blake had been parked in the loading dock. Buening did not see Blake enter the building by circumventing the screening procedures. The only thing Buening observed was that Blake was talking to on-duty PSOs, and it is uncontradicted that Buening did take steps to determine whether Blake was discussing non-work matters with the on-duty guards. He asked them whether they were discussing union business (which would be non-work business) but they falsely denied that their discussions were related to union business, and Blake then ended the discussion and immediately left in his vehicle (Tr. 46). Given this state of the evidence, there was no reason for Respondent to have considered calling Buening as a witness even if Respondent had the ability (which it did not) to subpoena him.

WHEREFORE, Respondent respectfully requests that the Board reject those portions of the ALJ's Decision to which Respondent has taken exception, and conclude, in accordance with

record evidence and relevant decisional authority, that the unfair labor practice charge against Respondent should be dismissed.

Date: April 3, 2014

/s/ Thomas P. Dowd

Thomas P. Dowd
tdowd@littler.com
LITTLER MENDELSON, P.C.
1150 17th Street N.W., Suite 900
Washington, DC 20036
Telephone: 202.842.3400
Facsimile: 202.318.8943

Counsel for Respondent Paragon Systems, Inc.

CERTIFICATE OF SERVICE

I, hereby certify that I served a copy of Respondent's Exceptions to the Administrative Law Judge's Decision was served on the individuals listed below by electronic delivery and by first class mail, postage prepaid on April 3, 2014, addressed as follows:

jaktaylor@bellsouth.net
Elaine.Robinson-Fracti@nlrb.gov

/s/ Thomas P. Dowd

Thomas P. Dowd

Firmwide:126232849.1 050542.1030