

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13**

**TOTAL SECURITY MANAGEMENT  
ILLINOIS 1, LLC**

**and**

**Case: 13-CA-108215**

**INTERNATIONAL UNION SECURITY  
POLICE FIRE PROFESSIONALS OF  
AMERICA (SPFPA)**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF  
IN RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE  
ADMINISTRATIVE LAW JUDGE**

Lisa Friedheim-Weis, Counsel for the General Counsel, pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, files this Answering Brief in response to Respondent's June 6, 2014 Exceptions and Brief In Support Thereof to the May 29, 2014 Decision of Administrative Law Judge Arthur Amchan.

**A. Respondent's Exceptions 1, 2, and 3, which Challenge the Authority of the Board, the Acting General Counsel, and the Regional Director, Have No Merit**

In its exceptions to the administrative law judge's decision, Respondent argues that the judge erred by rejecting its arguments that 1) the Board's decision in *Alan Ritchey* is invalid, 2) the complaint was improper because the Acting General Counsel was not lawfully appointed, and 3) the complaint was improper because the Regional Director was appointed by a Board without a quorum. As discussed below, Respondent's arguments fail.

**1. The Administrative Law Judge Properly Followed Established Board Precedent**

Respondent argues that the administrative law judge erred by following the Board's decision in *Alan Ritchey*, 359 NLRB No. 40 (2012) (Chairman Pearce and Members Griffin and Block), because the Board did not have a lawful quorum when it decided that case.

Respondent's argument fails.

As an initial matter, as the administrative law judge properly found, Respondent cannot escape well-settled law that, notwithstanding even contrary decisions by courts of appeals, the Board's administrative law judges are required to follow established Board precedent that neither the Board nor the Supreme Court has reversed. *Waco, Inc.*, 273 NLRB 746, 749 n.14 (1984); *Los Angeles New Hosp.*, 244 NLRB 960, 962 n.4 (1979), *enforced*, 640 F.2d 1017 (9th Cir. 1981). Neither the Board nor the Supreme Court has overturned *Alan Ritchey*.

Moreover, the Board now has five fully confirmed members.<sup>1</sup> Regardless of the administrative law judge's reliance on *Alan Ritchey*, the Board is free to determine for itself whether to approve the legal theory expressed in that case. What is ultimately at issue is the validity of the General Counsel's complaint, which is premised on the proposition that discretionary discipline is a mandatory subject of bargaining and employers may not impose certain types of discipline unilaterally.

## **2. The Acting General Counsel Was Properly Appointed**

Respondent's claim that then-Acting General Counsel Lafe Solomon did not have the authority to issue the complaint or delegate its issuance to the Regional Director is based on the ruling of a district court, *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013), *appeal docketed*, No. 13-35912 (9th Cir. Oct. 1, 2013). In *Kitsap*,

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<sup>1</sup> See 159 Cong. Rec. S6049-S6051 (daily ed. July 30, 2013). All five members were sworn in as of August 12, 2013. See <http://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-has-five-senate-confirmed-members> (last visited June 19, 2014).

the judge concluded that under the Federal Vacancies Reform Act of 1998 (“FVRA”), 5 U.S.C. § 3345, et seq., Mr. Solomon could not serve as Acting General Counsel because he had not previously served as the first assistant to that office. That holding misinterprets the requirements of the FVRA. The FVRA designates three categories of persons who can serve in an acting capacity: (1) first assistants to the vacant office, (2) any Senate-confirmed officers in the government, and (3) other qualified high-level officers or employees of the agency in which the vacancy arises. 5 U.S.C. § 3345(a)(1)-(3). Only individuals designated under the first category are required to have served as the first assistant to the vacant office. Indeed, the FVRA’s legislative history makes clear that 5 U.S.C. § 3345(b)(1), which limits the circumstances in which first assistants may serve as acting officers, is inapplicable to persons designated pursuant to § 3345(a)(2)-(3). *See* 144 Cong. Rec. 27496 (1998) (Remarks of Mr. Thompson) (“Under § 3345(b)(1), the revised reference to § 3345(a)(1) means that this subsection applies only when the acting officer is the first assistant, and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3).”).

Here, because the President directed Mr. Solomon to perform the duties of the office of General Counsel pursuant to 5 U.S.C. § 3345(a)(3), there is no requirement that he previously have served as a first assistant. The legislative history of the FVRA clearly indicates that 5 U.S.C. § 3345(a)(3) was added to give the President the option of naming, as an alternative to a first assistant or Senate-confirmed official, “other qualified high-level agency employees to serve as acting officials.” 144 Cong. Rec. 27439 (1998) (Remarks of Mr. Levin). The only requirements in the FVRA concerning this third category are that the person named must have served in the agency in which the vacancy arises for at least 90 days during the 365 days preceding the vacancy, and the person must have been paid at a rate at least equal to a GS-15. 5

U.S.C. § 3345(a)(3); *see also* 144 Cong. Rec. 27496 (1998) (Remarks of Mr. Thompson). Mr. Solomon met these requirements. Accordingly, there is no legitimate basis for challenging his authority as Acting General Counsel.<sup>2</sup>

**3. In issuing the complaint and notice of hearing, Regional Director Ohr acted as an agent of the General Counsel—not the Board**

Respondent’s argument that the Region could not issue or prosecute the complaint because the Board lacked a quorum when it appointed Regional Director Peter Ohr fails to account for the independence of the General Counsel in issuing complaints. Regional Directors issue complaints as agents of the General Counsel. *See United Elec. Contractors Ass’n v. Ordman*, 258 F.Supp. 758, 760 (D.C.N.Y. 1965), *aff’d*, 366 F.3d 776 (2d Cir. 1966). Indeed, the Regional Director is not the only person who may issue a complaint; complaints can be issued by any agent of the General Counsel. *Richardson Chem. Co.*, 222 NLRB 5, 6 (1976); *see also* 29 U.S.C. § 160(b). In these circumstances, Respondent’s argument that the Region could not issue the complaint because the Board did not have a quorum when it appointed the Regional Director fails.

**B. Respondent’s Exceptions 4 and 5, Which Challenge the ALJ’s Conclusion of Law that Respondent Violated Section 8(a)(5) and the Recommended Order, are Based on the Flawed Theory that *Alan Ritchey* is Invalid**

Respondent suggests, without any substantive argument as to why, that the Board should reverse its decision in *Alan Ritchey* and return to the rule of law under *Fresno Bee*, 337 NLRB

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<sup>2</sup> Respondent’s argument that “actions taken by Solomon, or pursuant to his delegation, cannot be salvaged by the *de facto* officer doctrine” is similarly unavailing. Respondent claims (Exc. Br. 8) that the *de facto* officer doctrine is unavailable as a defense because that doctrine insulates officers only from collateral attack, not from direct challenge. In relying on the *Kitsap* court’s interpretation of *Ryder v. United States*, 515 U.S. 177 (1995), for that broad proposition, Respondent overlooks *Ryder*’s distinction between statutory and constitutional challenges. At issue in *Ryder* was a claim that certain persons held office in violation of the Appointments Clause of the Constitution. At issue here, of course, is the validity of Mr. Solomon’s appointment under the FVRA, a statutory challenge, not a constitutional one.

1161 (2002) (holding that preimposition bargaining over discretionary discipline was not required by Section 8(a)(5) of the Act). Respondent's Exceptions 4 and 5 challenge the ALJ's legal conclusion that Respondent violated Section 8(a)(5) and objects to the ALJ's proposed Order because it maintains that it should not have had a preimposition bargaining obligation over the discretionary discipline (discharge) it issued to discriminatees Jennings, Mack, and Smith.

However, there is no reason for the Board to return to *Fresno Bee*. In *Alan Ritchey*, supra, the Board expressly reversed its ruling in *Fresno Bee* and held that prospectively, employers would be under an obligation to notify and bargain with a union which had been elected or recognized (but which did not yet have an initial contract or interim grievance mechanism) before it elected to issue discretionary discipline which would alter terms and conditions of employees' employment, such as discharge. *Id.*

As such, under the dictates of *Alan Ritchey* and pursuant to Respondent's admissions in the parties' stipulated record (that Respondent fired the three discriminatees - and had discretion in doing so - without giving notice to or bargaining with the Union, and without any exigent circumstances which would have precluded preimposition notice and bargaining), the ALJ was correct in determining that Respondent violated Section 8(a)(5) of the Act by bargaining with or giving notice to the Union before terminating the employment of the three named discriminatees. The ALJ was also correct in his proposed Order that, inter alia, these three discriminatees be made whole.

### **C. Conclusion**

Respondent's Exceptions are wholly without merit – Respondent admits it violated the law as set out in *Alan Ritchey*. The ALJ's recommended decision and order should be affirmed.

Dated in Chicago, Illinois, this 20<sup>th</sup> day of June, 2014.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 20, 2014, Counsel For The General Counsel's Answering Brief To Respondent's Exceptions To ALJD in Case 13-CA-108215 has been filed electronically with the Board's Office of the Executive Secretary via the National Labor Relations Board's electronic filing system. Additionally, all parties below are being served on the same date via e-mail.

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