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Paragon Systems, Inc. and United Government Security Officers of America, Local 236. Cases 12–CA–105275 and 12–CA–105291

October 31, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND MCFERRAN

On May 15, 2014, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The General Counsel subsequently filed a Motion to Withdraw Exceptions and Modify the Administrative Law Judge’s Findings and Conclusions of Law.

The Board has considered the decision and the record in light of the exceptions, briefs, and the General Counsel’s motion and has decided to affirm the judge’s rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge, relying on *Alan Ritchey, Inc.*, 359 NLRB 396 (2012), found that the Respondent violated Section 8(a)(5) and (1) of the Act by disciplining five employees without first giving the Union an opportunity to bargain about either the discipline or the effects of the discipline. At the time of the Decision and Order in *Alan Ritchey*, however, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. In light of the Supreme Court’s decision in *Noel Canning*, the Board recently examined de novo the rule first announced in *Alan Ritchey*. See *Total Security Management, Inc.*, 364 NLRB No. 106 (2016). The Board reaffirmed the rule, but found that, in light of circumstances including the Supreme Court’s retroactive nullification of *Alan Ritchey*, applying the rule to cases preceding the issuance of *Total Security* would constitute manifest injustice. 364 NLRB No. 106, slip op. at 11–12.

The General Counsel subsequently moved to withdraw his exceptions in this case and requested that the Board modify the judge’s conclusions of law and proposed order consistent with its holding that the rule announced in *Total Security* would only be applied prospectively.¹ We

¹ See Board’s Rules and Regulations, Sec. 102.49.

grant the General Counsel’s unopposed motion and accordingly find that the Respondent did not violate Section 8(a)(5) and (1) as alleged by disciplining employees without first giving the Union an opportunity to bargain.²

ORDER

The National Labor Relations Board orders that the Respondent, Paragon Systems, Inc., Tampa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requesting that unit employees sign Dispute Resolution Agreements (DRAs), thereby bypassing the Union, their collective-bargaining representative.

(b) Refusing to bargain collectively with the Union by failing to accept and discuss grievances.

(c) Refusing to bargain collectively with the Union by failing and refusing to furnish it in a timely manner with requested information that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of the Respondent’s unit employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the DRAs signed by employees in the bargaining unit.

(b) Notify all current and former employees in the bargaining unit who signed DRAs that the DRAs have been rescinded.

(c) On request, accept and discuss grievances filed by the Union.

(d) On request, furnish the Union in a timely manner with information the Union requests that is relevant and necessary to its performance of its functions as the collective-bargaining representative of the Respondent’s unit employees.

(e) Within 14 days after service by the Region, post at each of its facilities in Florida copies of the attached no-

² In the absence of exceptions, we adopt the judge’s findings that the Respondent violated Sec. 8(a)(5) and (1) of the Act by: (1) requesting that unit employees sign Dispute Resolution Agreements, thereby bypassing the Union, their collective-bargaining representative; (2) refusing to accept and discuss grievances filed by the Union; and (3) responding to the Union’s information requests in an untimely manner. We shall modify the judge’s recommended Order to conform to our findings and to the Board’s standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

Member Miscimarra disagrees with the decision in *Total Security* for the reasons discussed in his separate opinion in that case (*Total Security*, slip op. at 17–42 (Member Miscimarra, concurring in part and dissenting in part)), but agrees with his colleagues that the Respondent’s relevant conduct here did not violate the Act under that decision.

tice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 2015.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 31, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT request that unit employees sign Dispute Resolution Agreements (DRAs), thereby bypassing the Union, their collective-bargaining representative.

WE WILL NOT refuse to bargain collectively with the Union by failing to accept and discuss grievances.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it in a timely manner with requested information that is relevant and necessary to the Union's performance of its functions as your collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the DRAs signed by employees in the bargaining unit.

WE WILL notify all current and former employees in the bargaining unit who signed DRAs that the DRAs have been rescinded.

WE WILL, on request, accept and discuss grievances filed by the Union.

WE WILL, on request, furnish the Union in a timely manner with information it requests that is relevant and necessary to its performance of its functions as the collective-bargaining representative of our employees in the bargaining unit.

PARAGON SYSTEMS, INC.

The Board's decision can be found at www.nlr.gov/case/12-CA-105275 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Thomas Brudney, Esq., for the General Counsel.
Roman Gumul, Director, Labor Relations, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on March 5, 2014, in Tampa, Florida. The consolidated complaint, which issued on December 31, 2013,¹ and was based upon unfair labor practice charges and amended charges filed on May 15, July 30 and 31 by United Government Security Officers of America, Local 236 (the Union), alleges that Paragon Systems, Inc. (the Respondent), violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by engaging in the following conduct: suspending seven employees between February 25 and May 31 and discharging two employees on April 9 and 15, without notice to the Union and without affording the Union an opportunity to bargain with respect to this discipline or with respect to the effects of this conduct; since about March 17 and 27, refusing to meet with the Union with respect to a grievance concerning the suspension of employees for performance related issues as well as a grievance related to employee Thomas Cifarelli's employment; dealing directly with employees in the unit by requiring them to sign its Dispute Resolution Agreement as a condition of employment; and unreasonably delaying in furnishing the Union with relevant information that it requested on April 9, June 9 and 16 by not furnishing this information to the Union until about September 17.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent admits, and I find, that it has been engaged in providing security and guard service to agencies of the United States Government in Florida and surrounding areas, and that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

A. Dispute Resolution Agreement

On about December 1, 2012, the Respondent was awarded the contract by the Federal Protective Service (the FPS), to provide security officers for certain Federal buildings in Florida, which work had previously been performed by ERIS, which

had a contract with the Union. On about December 1, 2012, the Respondent recognized the Union as the exclusive collective-bargaining representative of the unit composed of armed and unarmed security officers, but refused to assume the terms and conditions of the ERIS collective-bargaining agreement and, instead, negotiated a new collective-bargaining agreement with the Union that was effective from June 1, 2013, to November 30, 2014.

The principal witness herein was Larry Stacy, who is employed by the Respondent as project manager for the contract with the FPS covering the unit employees involved herein. He testified that in about February, employees told him that their pay stubs stated that they had to sign certain documents, including Dispute Resolution Agreements,² (DRAs). After speaking to the Respondent's human resources department, he notified all supervisors that they were to distribute DRAs to all unit employees, whether current employees or preemployment employees, to be signed and returned, and, prior to the distribution of these forms, he did not inform the Union that these forms were being distributed to the bargaining unit employees. About 11 employees signed these DRAs between March 19 and June 25. Shortly thereafter, Stacy was told by human resources that employees in the bargaining unit were not to be asked to sign these forms and he immediately instructed his supervisors to stop distributing these forms to the unit employees, but he never told the employees that they did not have to complete the forms. The only employees who were subsequently asked to sign these forms were employees who were not in a bargaining unit. Sharon Ragsdale, who is employed by the Respondent, testified that in about February, Sergeant Holmes handed her a copy of the DRA and the acknowledgement and receipt of it and said, "Sign this." She read them and said, "I'm not signing this," and Holmes took them back and left. He never told her that the Respondent was not requiring employees to sign the forms. Union President Charles Mestas testified that employees told him that they were being asked to sign the DRAs although he was not notified prior to this time that the Respondent was asking the employees to sign these forms, and he was never notified that the Respondent was rescinding the requirement that the employees sign this form.

B. Refusal to Bargain about Discipline

The principal portion of this case presents the issue of whether an employer who has a recognized or certified union representing certain of its employees has an obligation to bargain with that union regarding the discipline of its union-represented employees prior to the execution of the initial contract with that union.

The discipline involved herein for the nine employees took place between February 25 and May 31; alleged and admitted, is:

Joe Favell suspended on February 25.
 Kevin Daley suspended on March 4.
 Donald Mendez suspended on March 4.

¹ Unless indicated otherwise, all dates herein relate to the year 2013.

² Briefly stated, this form requires that all disputes between the employee and the Respondent be resolved by an arbitrator, rather than by a court or jury trial.

Joshua Wielder suspended on March 16.
 Thomas Cifarelli discharged on April 9.
 Jose Robles discharged on April 15.
 Duane Douglas suspended on April 29.
 Kelvin Strong suspended on April 30.
 Anthony Durand-Gonzales suspended on May 31.

Although there were few credibility issues, I found Stacy to be a totally credible witness who was open, direct, and never evasive in his testimony and credit his testimony in total. He testified that he did not notify Mestas, or anyone else from the Union, of the Respondent's decision to suspend Mendez, Strong, Daley, Favell, Durand-Gonzales, Douglas, and Wielder prior to their suspensions, and likewise did not notify Mestas, or anyone else from the Union, of the decision to discharge Cifarelli, Robles, and Carlovitch,³ nor did the Respondent offer to bargain with the Union regarding these suspensions and discharges. Mestas testified that "multiple times" during the negotiations with the Respondent from late 2012 to July, he told the Respondent's representatives that by discharging and suspending these employees they did not treat the employees properly. Stacy testified that at no time during these negotiations, nor at any other time, did the Union bring up the suspensions or the termination of Cifarelli and Robles or ask to meet to discuss these disciplines.

Daley and Mendez—March 4

Daley and Mendez failed a "covert penetration test" conducted on March 4 when they, allegedly, failed to identify an explosive device and failed to act properly in the situation by allowing an individual into "a secure zone." Because they failed to follow the proper procedure during this test, failed to identify the device involved, allowed a suspect into a secure zone, and "do not appear to accept the seriousness of the program," Stacy recommended that Mendez be removed from the facility and be retrained and that Daley be transferred to another facility, but for whatever reason, they were each suspended for 7 days. The Respondent did not notify the Union about these suspensions either before or after the decisions were made.

Durand-Gonzales and Weider

Durand-Gonzales' alleged violation was that "he failed to follow post orders and had a visitor with him during a lunch break on May 31, which is not authorized." A suspension request form states: "Durand-Gonzales violated several policies at work on the 31st of May. Didn't raise the flag, didn't make required checks and had visitor at lunch for 24 minutes." On June 6, Stacy emailed Nicole Ferritto, the director of employee relations, requesting a 3-day suspension for him, but adding: "Please provide guidance, after you review as to whether my request is too strong/weak." Ferritto emailed that he should be suspended indefinitely pending a further investigation because he had other post order violations in the past. Stacy was uncertain what length the final suspension was, although a summary prepared for the hearing by the the Respondent states that he

³ Carlovitch's discharge is relevant only regarding the request for information allegation to be discussed infra.

received a 3-day suspension on May 31 for "failure to follow post orders." At no point during this process did Stacy or the Respondent inform the Union of Durand-Gonzales' suspension.

On March 18, Stacy sent an email to Ferritto stating: "Please find attached an indefinite suspension request on Joshua Weider. On the 15th and 17th of March he pulled his OC spray and sprayed a defenseless raccoon with no provocation other than meanness." Weider was suspended on March 18, although it is unclear whether the suspension is for 5 days, as stated in a summary prepared by the Respondent, or was "indefinite," as Stacy stated to Ferritto in an email dated March 18.

Douglas, Favell, and Strong

Douglas, Favel, and Strong were suspended for creating an "open post." When a guard is the only officer to be present (for example, opening a post) and he/she is late or absent from the assignment, that post is unattended or open. The situation is different, and not as serious when the officer is late replacing another security officer who can remain on the post until the replacement arrives. An open post could result in a fine or deduction in fees for the Respondent. Stacy relied on the Respondent's security officer handbook for this discipline. Under Rules for Personal Conduct, Major Rule Offenses, and states: "Discharge if warranted after unpaid suspension and management investigation." Numbers 12 and 29 state:

12. Refusal to submit to authority and/or refusal to follow instructions from supervisors who have been appointed over him/her, or from a member of the client's facility who has the authority from the client to issue instructions to the security force; not following Post Orders⁴ either written or verbal.

29. Violation of agency and contractor security procedures and regulations or violation of the rules and regulations governing public buildings as set forth in. . .

Stacy testified that from December 1, 2012, to January 18, the Respondent was only issuing counseling to the officers for open post violations; however, because of the large number of open post violations in December and January, the Respondent decided to change the punishment from counseling to a 3-day suspension.

Supervisor Kevin Young completed a suspension request form for Douglas stating that the rule that was violated was: "Open Post." The request form states: "PSO Douglas arrived to post on time, but without his weapon. He returned to his house to get his weapon and returned to post at 9:20, 4/29/2013. . . . Requesting 24 hour suspension." This suspension was approved on April 29. Favell was given a 3-day suspension for an open post violation on February 25 and Strong was also given a 3-day suspension on April 24 for an open post violation.

Jose Robles

Robles reported 10 minutes late for work on April 3, causing an open post violation. On April 5, Stacy sent an email to Ferritto entitled "Indefinite Suspension Jose Robles," stating: "On the 3rd of April you approved a 5 day suspension for PSO Ro-

⁴ These are orders, prepared by the Government, that the security officers receive describing the officers' daily functions.

bles for causing a 10 minute open post. Today I was informed that even though he was 10 minutes late (0810), he still signed the 139 at 0800. This is the reason for this request.” She responded: “Approved.” By letter dated April 16, Ferritto wrote Robles, *inter alia*:

I am writing to notify you that effective immediately, your employment with Paragon Systems is terminated. Your employment is being terminated for falsification of government documents.

Specifically, it was determined that on 3 April 2013, you were observed arriving on post after your scheduled arrival, approximately 10 minutes late; however, you signed in as if you arrived at your scheduled time of 0800. During the company’s investigation into these events, you admitted to arriving late and to signing in on the 139 as having arrived at 0800 hours (your scheduled in-time). Falsification of time records is a violation of company policy, specifically Major Rule #9, as well as Section 2.5 of the Security Guard Information Manual.⁵

Mestas testified that he never requested to meet with Stacy regarding the suspensions of Favell, Daley, Mendez, Wieder, Douglas, Strong, or Durand-Gonzales, or regarding the discharge of Robles.

Thomas Cifarelli

As is true of the allegations discussed above, it is alleged that the Respondent discharged Cifarelli on April 9 without prior notice to the Union and without affording the Union an opportunity to bargain about the discharge. The complaint further alleges that the Respondent refused to meet with the Union with respect to a grievance related to the termination of Cifarelli’s employment and unreasonably delayed in furnishing the Union with information that it requested pertaining to the grievance that it filed on behalf of Cifarelli.

The situation with Cifarelli commenced when his supervisor noticed that he arrived at his post on March 11 6 minutes late at 7:06 a.m., rather than 7 a.m., the time he was scheduled to begin work, and he told Cifarelli to write on the form 139 that he arrived at 7:06 a.m., which he initially did. Subsequently, somebody wrote over the 7:06 a.m. and altered it by changing the initial entry to 7 a.m. and the hours worked column was

⁵ Respondent’s security officer, Handbook, under Rules for Personal Conduct, “Major Rule Offenses—Discharge, if warranted, after unpaid suspension and management investigation. Possible probation period determined at the discretion of the Program Manager,” lists as No. 9: “Falsification or unlawful concealment, removal, mutilation, or destruction of any official documents or records...including 139s.” Further, under Progressive Discipline Policy, Causes for Immediate Suspension, the handbook states: “Some types of misconduct are so intolerable that they [sic] be punished by suspension at the first occurrence. These include . . . falsification of an employment application or other work documents or records. . . .” The Federal Protective Service security guard information manual, under “Acceptable Conduct,” states: “You must report for duty at the assigned time and post. It is your duty to report on time and to stay on post until you are properly relieved.” Under “Grounds for Possible Disciplinary Action,” No. 16 states: “Falsifying . . . official documents or records. . . .”

written in for 12 hours, rather than 11 hours, 54 minutes. When Stacy was shown this form, “. . . I could immediately see that the entry was written over, so an indefinite suspension request was initiated on PSO Cifarelli.” Cifarelli was called to Stacy’s office on March 18 and told that because he falsified the form 139 he was going to be suspended. Cifarelli requested union representation and Stacy told him that he could call Mestas, and Stacy left his office so that Cifarelli could speak privately with Mestas. When Stacy returned to his office, he told Cifarelli that he was being suspended. After Cifarelli left the office, Stacy noticed that the document (the form 139) that he had shown to Cifarelli had been altered again, this time from 7 to 7:06 a.m. while he was out of the office. Because of this alteration, he decided that pursuant to the rules referred to supra, in the handbook and the manual, he should be terminated. On March 20, Stacy wrote to Ferritto changing his recommendation from a suspension to a termination, stating:

Although PSO Cifarelli states that it was only a mistake that he wrote in 12-hours for the day, he intentionally overwrote the 0706, which was originally entered, with 0700. This was an attempt by him to alter the fact that he arrived late for duty. It is apparent that he did not believe that he would get caught and that the 139 and 1103 would not be verified for accuracy. The matter here is not that PSO Cifarelli was six minutes late for duty, but that he tried to hide it by overwriting the original entry and writing that he completed 12 hours. PSO Cifarelli also attempted to cover his tracks on the 18th of March 2013 when he intentionally traced over every entry on the original 139 when he walked into my office, when I stepped out, and marked up the form; he even tried to change the time back to 0706. These actions are gross violations of company and Government policy.

By letter dated April 9, Ferritto informed Cifarelli that effective immediately his employment was being terminated for the falsification of government documents, specifically the form 139, and was informed that it was a violation of major rule 9 of the handbook and section 2.5 of the manual.

C. Grievances and Requests for Information; Mendez, Daley, Cifarelli, and Carlevitch

After Mestas learned that Mendez and Daley had been suspended, he filed a grievance with Stacy dated March 17 objecting to the suspensions. On the following day, Stacy responded stating: “As there is no CBA between the two parties, there is no grievance process.” On March 28 Mestas filed a grievance with Stacy regarding Cifarelli’s discharge; on the same day, Stacy again replied that as there is no contract, there is no grievance procedure.

By letter to Stacy dated April 9, Mestas requested the following information regarding Cifarelli:

Any and all reports, emails or correspondence from FPS used in the investigation.

The 139 for the time, date, and location in question, to include any variants sent to FPS.

The tardiness records of all bargaining unit employees over the past five months.

The names of all employees disciplined for tardiness within the past five months, dates and descriptions of each discipline, and the amount of tardiness that led to each discipline.

Mestas testified that he needed this information to assist him in filing a grievance regarding Cifarelli's discharge. By email dated April 12, Stacy responded as follows:

With respect to request number one, please see PSPO Cifarelli's statement attached.

With respect to request number two, you will have to file a Freedom of Information Act (FOISA) from the FPS to obtain the requested information.

With respect to request number three, the Form 139 is a Federal Government document and you will have to file a FOIA request for the documentation.

With respect to request number four, PSO Cifarelli was not terminated for tardiness. Rather, he was terminated for altering a Form 139. Therefore, your request is not considered as relevant, and therefore denied.

With respect to request number five, please refer to my response to request number four.

Mestas received all the information that he requested on April 9 on September 17.

Stacy testified that he discussed Cifarelli's termination with Mestas after Cifarelli was terminated, but at that meeting Mestas did not ask him to reinstate Cifarelli, and during the negotiations for the initial contract, beginning in December 2012, the Union never brought up the subject of the suspensions and terminations.

On April 9, Mestas sent an email to Stacy requesting the following information regarding employee John Carlovitch, who apparently had been discharged shortly prior to this email:

The personnel file of John Carlevitch.

The entire file of the company's investigation into this matter.

All correspondence between FPS and the company in regards to this matter.

The 1103 and 139 for the day in question, and

The names of all employees who have been charged with committing the same infraction and the outcome of those alleged violations.

Stacy responded on the following day that he would have to discuss the request with Respondent's director of labor relations in order to determine the proper procedure to be employed. On June 16, Mestas repeated his request for this information, and on June 17, Stacy responded that he has been told what he can give to Mestas, and invited Mestas to come to his office to pick up the information. Mestas testified that when he went to Stacy's office he did not receive all the documents that he had requested, and did not receive them until September 17.

III. ANALYSIS

Stacy credibly testified that he initially notified the supervisors to distribute the DRAs to all employees, including the bargaining unit employees, but was subsequently notified by the Respondent's HR department that the bargaining unit em-

ployees were not to be asked to sign these forms. He then instructed the supervisors to stop distributing them to the unit employees. After that, only nonunit employees were asked to sign these forms. As the DRAs were a term and condition of employment for the unit employees, Respondent was obligated to negotiate with the Union, the employees' collective-bargaining representative, about them. Rather than doing that, the Respondent solicited the employees directly to sign these forms. In *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), the Board stated that under certain circumstances an employer may relieve itself of liability for unlawful conduct by repudiating that conduct. However, in order to be effective, the repudiation must be timely, unambiguous, specific in nature to the coercive conduct, free from other proscribed illegal conduct, and there must be an adequate publication of the repudiation to the employees involved. As the bargaining unit employees were never told that they were not required to sign the DRAs, the requirements of *Passavant* were not satisfied, and the request that the employees sign these forms violates Section 8(a)(5) and (1) of the Act. *Kaiser-Permanente Medical Care*, 248 NLRB 147 (1980). The Respondent's brief defends that since some of the individuals who signed the DRAs were applicants for employment, rather than employees, there is no violation herein. Although it is true that some of the individuals who were asked to sign had not yet begun working for the Respondent, the Board has long found that applicants for employment are employees within the meaning of the Act. *HVAC Mechanical Services, Inc.*, 333 NLRB 206 (2001); *Massey Energy Co.*, 354 NLRB 687 (2009).

The principal portion of this case relates to what is an employer's obligation to a union representing certain of its employees after the union has been recognized or certified, by prior to the parties entering into a collective-bargaining agreement. In the situation herein, the Respondent suspended or disciplined nine of its unit employees between about February 25 and May 31, after the Union had been recognized, but before the parties had entered into their initial collective-bargaining agreement, without prior bargaining with, or notice to, the Union. The Board was presented with this issue recently in *Alan Richey, Inc.*, 359 NLRB 396 (2012), where it held that discretionary discipline is a mandatory subject of bargaining and employers may not impose certain kinds of discipline unilaterally in those situations. More specifically, the Board stated:

We now conclude that...an employer must provide its employees' bargaining representative notice and the opportunity to bargain in good faith before exercising its discretion to impose certain discipline on individual employees, absent a binding agreement with the union providing for a process, such as a grievance-arbitration system, to resolve such disputes. [Id at 397.]

[W]here an employer's disciplinary system is fixed as to the broad standards for determining whether a violation has occurred, but discretionary as to whether or what type of discipline will be imposed in particular circumstances, we hold that an employer must maintain the fixed aspects of the discipline system and bargain with the union over the discretionary aspects (if any), e.g., whether to impose discipline in individ-

ual cases and, if so, the type of discipline to impose. The duty to bargain is triggered before a suspension, demotion, discharge, or analogous sanction is imposed, but after imposition for lesser sanctions, such as oral or written warnings. [Id. at 401.]

For example, in a workplace where the employer has an established practice of disciplining employees for absenteeism, the decision to impose discipline for such conduct will not give rise to an obligation to bargain over whether absenteeism is generally an appropriate grounds for discipline. Instead, bargaining will be limited to the specific case at hand: *e.g.*, whether the employee was actually absent and merited discipline under the established practice. Similarly, if the employer consistently suspends employees for absenteeism, but the length of the suspension is discretionary, bargaining will be limited to that issue. . . . [Id. at 405.]

Mendez and Daley were suspended on March 4, when they failed a “covert penetration test” by failing to identify an explosive device and allowed an individual to walk unescorted through a “safe zone.” As an unusual offense such as this could not have had a fixed penalty attached to it, the prescribed penalty must have involved the exercise of discretion. In addition, Stacy’s recommendations regarding their punishment was rejected, further supporting a finding that there was no “fixed” punishment for their offense. Therefore, pursuant to *Alan Ritchey*, supra, prior notification to the Union is required. As the Respondent did not notify the Union of the suspension of Mendez and Daley prior to the suspensions, it violated Section 8(a)(5) and (1) of the Act. The complaint also alleges that the Respondent refused to meet with the Union with respect to the grievance that Mestas filed regarding the suspensions of Mendez and Daley. Mestas sent the grievance to Stacy on March 17 with a note stating that Stacy should contact him if he had any questions or concerns about the grievance. Stacy’s email to Mestas dated March 18, states that the grievance would not be accepted, as there was no contract and, therefore, no grievance procedure. In *Storall Mfg. Co.*, 275 NLRB 2230, 221 (1985), the Board stated:

It is well settled that grievances relating to terms and conditions of employment, including disciplinary actions taken against employees, are proper subjects of collective bargaining . . . an employer is obligated to discuss and process such grievances with the union in a sincere effort to reach resolution. The absence of a collective bargaining agreement incorporating a grievance procedure does not relieve an employer of this obligation.

By refusing to accept or discuss Mendez and Daley’s grievance due to the lack of a contract, the Respondent violated Section 8(a)(5) and (1) of the Act.

The alleged infractions by Durand-Gonzales and Weider were also of such an unusual nature that the suspensions, of necessity, had to require the use of discretion on the part of the Respondent. Durand-Gonzales’ violations were that he didn’t raise the flag, didn’t make required checks, and had a visitor at lunch. Stacy recommended a 3-day suspension, but asked for guidance as to whether that request was too strong or too weak.

Ferritto said that he should be suspended indefinitely because of prior violations. The nature of the violations, together with the interaction between Stacy and Ferritto, establishes the uncertainty of the punishment for these infractions, and clearly shows that discretion was required. As the Union was not notified of the suspension, it violates Section 8(a)(5) and (1) of the Act. Weider was suspended because he “sprayed a defenseless raccoon with no provocation other than meanness.” Clearly, there could be no fixed penalty for spraying a defenseless raccoon. As the Union was not properly notified of this suspension, it too violates Section 8(a)(5) and (1) of the Act.

On April 30, Supervisor Young completed a suspension request form for Douglas stating that on April 29 he arrived for work on time, but without his weapon. He went home and returned to his post at 9:20 a.m. Stacy requested a 24-hour suspension for Douglas, which was approved and Douglas received a 24-hour suspension, rather than a 3-day suspension. The difference may be explained by the fact that he arrived for work on time, but without his weapon. As he was suspended without prior notice to the Union, and discretion was clearly exercised in determining the length of his suspension, I find that it violated Section 8(a)(5) and (1) of the Act. By email dated February 25, Scott Milne wrote to Stacy: “Please see attached requests” which included a suspension request for Favell. This request was approved and Favell was suspended for 3 days for an open post violation. By email dated April 24 to Ferritto regarding Strong, Stacy wrote: “Here is a suspension request for an open post today, Please see attachment.” Ferritto responded, “Approved,” and Strong was given a 3-day suspension. Stacy testified that he relied upon the employee handbook in determining that open post violations warranted a 3-day suspension. He also testified that while open post violators in December 2012 were given counseling, due to the large number of subsequent violations, a decision was made to change the penalty to a 3-day suspension and, after that, all open post violations were disciplined with a 3-day suspension. As the open post penalty were fixed, rather than discretionary, I find that the 3-day suspensions of Favell and Strong, without prior notice to the Union, did not violate the Act, but that the Respondent must bargain with the Union over whether they were late arriving for work, creating the open post violation.

The remaining disciplinary allegations relate to the terminations of Robles and Cifarelli. Robles was terminated on April 16 for arriving late for work on April 3 and creating an open post, and for falsifying the form 139 to state that he arrived for work on time. Cifarelli was also discharged for falsifying form 139, but on two occasions; allegedly, he initially falsified the time sheet to show that he arrived for work on time on March 11, at 7 a.m., rather than 7:06 a.m., and subsequently, while alone in Stacy’s office, changed it back again to 7:06 a.m.. Both the handbook and the manual refer to falsification of official documents. The handbook states that it is punishable by “discharge, if warranted, after unpaid suspension,” and the manual states that it “comprises grounds for possible disciplinary action, up to and including permanent removal from any FPS security guard service contract.” It appears to me that discretion is not needed when a guard is accused of falsifying official documents, as is alleged here, and that the Respondent did not

violate the Act by terminating Robles and Cifarelli for these actions; however, it must bargain with the Union about whether they were actually guilty of these violations. When Mestas filed a grievance regarding the discharge of Cifarelli, it was rejected by Stacy for the same reason that he rejected the grievances of Mendez and Daley, that there was no contract. For the reason stated above, the rejection of this grievance also violates Section 8(a)(5) and (1) of the Act.

The remaining allegations relate to the delay in Respondent furnishing the Union with the information that it requested regarding Cifarelli and Carlevitch. Mestas filed his information request regarding Cifarelli on April 9. The final two requests involved tardiness, and Stacy correctly responded that as Cifarelli was not discharged for tardiness, these items were not relevant to the Union. However, the other requests were relevant and should easily have been obtainable by the Respondent. Mestas did not receive all the information that he requested until September 17. Mestas also requested certain information from Stacy regarding Carlevitch on April 9. Five specific areas of information were requested, and were not fully provided until September 17. The law is clear that an employer is obligated to furnish the union with requested information in a timely manner, and this obligation "cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). In evaluating the promptness of the response, "the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information." *Samaritan Medical Center*, 319 NLRB 392, 398 (1995). Neither information request was particularly complex. The three relevant portion of the Cifarelli request could have been compiled easily within a day. While the Carlevitch request was more complex, there was no valid reason why it should have required the Respondent almost 6 months to comply. I therefore find that by delaying the turnover of this information, the Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(5) and (1) of the Act by requesting that employees sign Dispute Resolution Agreements, thereby bypassing the Union, their collective-bargaining representative.
4. The Respondent violated Section 8(a)(5) and (1) of the Act by disciplining five employees, between February 25, 2013, and May 31, 2013, without affording the Union an opportunity to bargain about this conduct or with respect to the effects of the conduct.
5. The Respondent violated Section 8(a)(5) and (1) of the Act by refusing to accept and discuss grievances filed by the Union.
6. The Respondent violated Section 8(a)(5) and (1) of the Act by responding to the Union's information requests in an untimely manner.

7. The Respondent did not violate the Act by suspending Favell and Strong for 3 days and for discharging Robles and Cifarelli, as no discretion was employed in these disciplinary actions.

THE REMEDY

Having found that the Respondent has failed and refused to notify and bargain with the Union regarding the discipline of bargaining unit employees, pursuant to the Board's Decision in *Alan Richey*, supra, I shall recommend that the Respondent notify and bargain with the Union regarding the discipline of bargaining unit employees where discretion was involved in determining the discipline. Where discretion was not employed, Respondent must bargain with the Union as to whether the employees were actually guilty of the offense. Respondent will further be ordered to bargain in good faith with the Union regarding grievances that it files, and to respond in a timely manner to the Union's requests for information. As Mendez, Daley, Durand-Gonzales, Weider, and Douglas were each suspended without notification to, or bargaining with, the Union, I recommend that the Respondent be ordered to make them whole for the loss that they suffered as a result of the suspensions.

Upon these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Paragon Systems, Inc., Tampa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Requesting that employees sign Dispute Resolution Agreements, thereby bypassing the Union, their collective-bargaining representative.
 - (b) Disciplining employees without affording the Union an opportunity to bargain about this conduct or with respect to the effects of the conduct.
 - (c) Refusing to accept and discuss grievances filed by the Union.
 - (d) Responding to the Union's information requests in an untimely manner.
 - (e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Notify its employees that they are not required to sign the Dispute Resolution Agreement.
 - (b) Notify and bargain with the Union regarding the discipline of employees where discretion was exercised in the determination of discipline, and bargain with the Union over whether the employees had actually committed the offense involved, when discretion was not employed.
 - (c) Discuss and bargain in good faith with the Union about grievances that it files.

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Upon receipt of information requests from the Union that are necessary for, and relevant to the Union as the collective-bargaining representative of certain of its employees, provide the Union with the information in a reasonable and timely manner.

(e) Make whole Donald Mendez, Kevin Daley, Joshua Weider, Duane Douglas, and Anthony Durand-Gonzales for any loss that they suffered as a result of their suspensions on about March 4, March 16, April 29, and May 31.

(f) Within 14 days after service by the Region, post at each of its facility in Tampa, Florida, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 25, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 15, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT ask our employees to sign Dispute Resolution Agreements, thereby bypassing the Union, their collective-bargaining representative.

WE WILL NOT discipline employees without affording the Union an opportunity to bargain about this conduct or with respect to the effects of the conduct.

WE WILL NOT refuse to accept and discuss grievances filed by the Union and WE WILL NOT fail to respond to the Union's information requests in a timely manner.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL notify employees that they are not required to sign the Dispute Resolution Agreement.

WE WILL notify and bargain with the Union regarding the discipline of employees where discretion was exercised in the determination of discipline, and bargain with the Union over whether the employees had actually committed the offense involved, when discretion was not exercised and WE WILL make whole Donald Mendez, Kevin Daley, Joshua Weider, Duane Douglas, and Anthony Durand-Gonzales for any loss that they suffered as a result of their suspensions on about March 4, March 16, April 29, and May 31.

WE WILL discuss and bargain in good faith with the Union about grievances that it files and WE WILL, upon receipt of information requests from the Union that are necessary for, and relevant to the Union as the collective-bargaining representative of certain of its employees, provide the Union with the information in a reasonable and timely manner.

PARAGON SYSTEMS, INC.