

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: August 10, 2016

TO: Garey E. Lindsay, Regional Director
Region 9

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Allsource Global Management
Case 09-CA-172180

Deferral Chron
Remedies Chron
506-0170-0000-0000
506-2001-5000-0000
506-2017-0800-0000
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512-5012-0133-1600
530-8095

This case was submitted for advice as to whether the Employer, a subcontractor working on a Department of Defense Special Operations Forces Support Activity contract, violated Section 8(a)(3) of the Act when it (1) suspended the Charging Party for sending a group text message to management personnel and union officers/employees that stated, in part, that [REDACTED] was “declaring war” on the Employer; and (2) reported the Charging Party’s conduct as “adverse information” to the U.S. Department of Defense, Defense Security Service (DSS), which then suspended [REDACTED] security clearance on an interim basis. The Region also requested advice on what, if any, make-whole remedy it should seek.

We conclude that the Charging Party’s group text message constituted protected concerted activity that did not lose the protection of the Act and, therefore, that the Employer violated Section 8(a)(3) when it suspended the Charging Party. However, we also conclude that the Employer did not violate Section 8(a)(3) when it reported the Charging Party’s text message statements to DSS, given its obligation to report “adverse information,” the broad definition of that phrase, and DSS’s decision to suspend the Charging Party’s security clearance on an interim basis following the report. Accordingly, the Region should seek a make-whole remedy only for the period between the Employer’s suspension of the Charging Party’s employment and DSS’s interim suspension of the Charging Party’s security clearance.

FACTS

Allsource Global Management, LLC (the Employer) is a subcontractor of Lockheed Martin, which is the primary government contractor working on a Special Operations Forces Support Activity (SOFSA) contract at Lexington Bluegrass Station and in Richmond, Kentucky. The Employer's employees' primary responsibilities involve packaging and shipping supplies for use by Army Special Operations forces deployed overseas. Under the SOFSA contract, all employees are required to have a secret-level security clearance as a condition of employment. DSS is responsible for administering and implementing all security provisions for the Employer's SOFSA work, including determining who receives a personnel security clearance.

Contractors are required by the National Industrial Security Program Operating Manual (NISPOM) to report "certain events . . . that impact on the status of an employee's personnel security clearance" to DSS, including, inter alia, "adverse information coming to their attention concerning any of their cleared employees."¹ NISPOM defines "adverse information" as "[a]ny information that adversely reflects on the integrity or character of a cleared employee, that suggests that his or her ability to safeguard classified information may be impaired, or that his or her access to classified information clearly may not be in the interest of national security."² DSS's Industrial Security Letter ISL 2011-4 (dated Sept. 23, 2011) provides contractors with examples of "adverse information," including "use of illegal drugs, excessive use of alcohol, wage garnishments or other indications of financial instability, repeated instances of failing to follow established security procedures, the unauthorized release of classified information and/or unauthorized access to classified information systems, or other violations of information systems security requirements."³ NISPOM also states that DSS will "notify the contractor when an employee's [personnel security clearance] has been denied, suspended, or revoked. The contractor shall immediately deny access to classified information to any employee when notified of a denial, revocation, or suspension."⁴

¹ NISPOM § 1-300; 1-302(a).

² NISPOM Appendix C.

³ ISL 2011-4 can be found at <http://www.dss.mil/documents/facility-clearances/ISL-2011-04.pdf>.

⁴ NISPOM § 2-200(b).

The International Association of Machinists and Aerospace Workers, Local Lodge 219 (the “Union”) represents approximately 170 bargaining unit employees of the Employer. The parties’ first collective-bargaining agreement expired on September 30, 2014. After the parties failed to reach a successor agreement, the employees went out on strike in October 2014. In February 2015,⁵ the Employer and the Union reached an agreement on a contract that ended the strike. The contract is effective from March 2, 2015 to September 30, 2017. It includes the following articles:

23.2 Security Clearance Denial - It is understood by and between the parties hereto that, as a necessary condition of continued employment, employees shall be subject to investigation for security clearance or national agency check and/or unescorted entry authorization under regulations prescribed by the Department of Defense, or other agencies of United States Government on government work, and that denial of such clearance and/or unescorted entry authorization by such governmental agency shall be cause for release from the Company due to inability to meet job requirements.

23.3 Security Clearance Reinstatement - It is understood that there shall be no liability on the part of the Company for any release growing out of the denial of clearance and/or unescorted entry authorization by the United States Government. However, the Company will consider assigning an employee in his job title to an area for which he is qualified and a clearance is not required.

The Charging Party has worked under the SOFSA contract since [REDACTED] and began working for the Employer in about [REDACTED]. [REDACTED] held several positions [REDACTED] and was one of (b) (6), (b) (7)(C) during the Union organizing campaign. From about [REDACTED] until [REDACTED] the Charging Party worked as an (b) (6), (b) (7)(C)

On the morning of November 16, the Charging Party needed to leave work early to [REDACTED]. [REDACTED] requested permission from the Employer to leave work thirty minutes early in order to do so but [REDACTED] request was denied. That night the Charging Party sent a group text message to the Employer’s project manager, its HR manager, five employees who were also Union officers and stewards, and two nonemployee Union executives. The group text message sent by the Charging Party states:

Charging Party: Today I have experience the complete evilness of AGM!!!! I was refused 30 minutes of my PTO [personal time off] time today to (b) (6), (b) (7)(C) at the last minute.

⁵ All dates hereafter are in 2015, unless otherwise noted.

AGM has the most unprofessional management team that I have ever witnessed in my working life. I gave AGM a chance when I returned to work thinking that they would respect us a bit!!!! After bring [sic] denied of taking 30 minutes of my PTO time today, I'm letting all the membership know that I'm declaring total war against AGM!!!! [HR manager], just letting you know that everything runs smoothly at BGS when your not there. Your supervisor's agree too!!!! I couldn't sleep knowing that I treat a member of my team the way AGM does!!!!

Employee #1: Same shit happened to me when I was denied my pto to (b) (6), (b) (7)(C).

Charging Party: That's so freaking pathetic that a company that says they support the military would deny an employee of (b) (6), (b) (7)(C) (b) (6), (b) (7)(C)!!!! Not any amount of money on this Earth that I would deny any human being that right!!!!

Charging Party: It's soooooo crazy how all the supervisors are so scared of [the HR manager]!!!! The supervisor's are so scared to make a decision without letting [HR manager] know first!!!! It's amazing how a HR manager can control another human being!!!! I just sit back and watch how the supervisor's hate it when [the HR manager] is in town!!!! I tell all supervisors that AGM is done with you and you are now a slave to AGM.

Charging Party: It should tell you something when the supervisors are putting in for any job to get away from AGM. :-)

Employee #1: Last I heard all the supervisor's are begging for LM jobs.

Charging Party: Yep, once AGM learns that their supervisors and managers are putting in for Lockheed jobs then they are cutting their ties to the demonic AGM!!!!

Charging Party: I thinks it's really ironic that the ones that crossed our picket line are now begging to become members of LL 219, I tell them that AGM is done with you. They tell me how great AGM treated them during the strike!!!! I don't understand why they make it a point to talk to me. I'm a nobody standing up to what I know is right in this life. My calling has made me think of everything wrong I did in my life. Thank God for leading me!

Employee #2: Understand your frustration. Issues like these will be addressed this week with meetings.

Charging Party: Amen Brother, It still amazes everyone that AGM is still at BGS and [the HR manager] is still micro managing everything. [REDACTED] is on a power trip that needs to end ASAP if AGM wants another contract. No offense to [the HR manager] but [REDACTED] doesn't have a clue on managing people. [REDACTED] the scape goat for AGM!!!!

Charging Party: It's impossible to be a manager when [you are] not respected from all under you. :-)

Charging Party: The only way to let AGM know that we are here to the end is to file every grievance we can and take it all to arbitration and have no mercy on AGM!!!! Let the games begin. : -))) I love my job!!!!

On November 19, the management team at the Employer's facility received an email from the Employer's contracts manager. The email stated that corporate managers had reviewed the Charging Party's text message and found that the content and tone was "of a nature that required reporting to DSS." It also stated that until DSS completed its investigation and advised the Employer what "effect, if any, that this may have on the status of [the Charging Party's] security clearance," it was necessary to immediately suspend [REDACTED] access until further notice. That afternoon, the HR manager explained to the Charging Party that [REDACTED] was being suspended because of the group text message. The Charging Party stated that [REDACTED] did not "mean anything" in the text message, and the HR manager stated that the Employer had an open-door policy and [REDACTED] could come to [REDACTED] at any time. The Employer representatives took the Charging Party's common access card and badge and told [REDACTED] that [REDACTED] was temporarily suspended until further notice. [REDACTED] was not told what part of the text message caused the suspension, but the HR manager told [REDACTED] that [REDACTED] could not send that kind of message "in this day and age."

On January 7, 2016, the Employer received a message from DSS informing it that the Charging Party's security clearance had been "suspended in the interest of national security" and that the Charging Party was no longer authorized to access classified information pending DSS's final determination in the matter. The message also stated that the suspension was an interim action concerning access to classified information and should not be construed as affecting the Charging Party's qualification for continued employment. That same day, the Employer contacted the Charging Party and notified [REDACTED] of DSS's decision.⁶

⁶ The Employer states that it is holding the Charging Party's position open and will reinstate [REDACTED] if DSS ultimately reinstates [REDACTED] security clearance.

The Employer contends that it suspended the Charging Party and reported (b) (6), (b) (7) to DSS based on (b) (6), (b) (7) declaration of “total war” against the Employer in the November 16 group text message. The Employer argues that the message was an individual gripe that did not fall under the protection of the Act or, in the alternative, that the Charging Party lost the Act’s protection by threatening violence. The Employer also argues that if the charge is not dismissed, it should be deferred to the contractual grievance-arbitration procedure in the parties’ collective-bargaining agreement.

ACTION

We conclude that the Charging Party’s group text messages constituted protected concerted activity that did not lose the protection of the Act and, therefore, that the Employer violated Section 8(a)(3) when it suspended the Charging Party. However, we also conclude that the Employer did not violate Section 8(a)(3) when it reported the Charging Party’s text message statements to DSS, given its obligation to report “adverse information,” the broad definition of that phrase, and DSS’s decision to suspend the Charging Party’s security clearance following the report. Accordingly, the Region should seek a make-whole remedy only for the period between the Employer’s suspension of the Charging Party’s employment and DSS’s suspension of the Charging Party’s security clearance.

The Employer Violated Section 8(a)(3) by Suspending the Charging Party for Engaging in Protected Concerted Activity.

1. The Charging Party’s group text messages were protected concerted activity.

Section 7 of the Act provides that employees have the right to engage in union activity, as well as “other concerted activities” for “mutual aid or protection.”⁷ Aside from union activity, conduct is concerted when it is “engaged in with or on the authority of other employees,” or when an individual employee seeks “to initiate or to induce or to prepare for group action” or to bring group complaints to management’s attention.⁸ Mutual aid or protection “focuses on the *goal* of concerted activity; chiefly, whether the employee or employees involved are seeking to ‘improve terms and conditions of employment or otherwise improve their lot as employees.’”⁹

⁷ 29 U.S.C. § 157. See, e.g., *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (Aug. 11, 2014).

⁸ *Id.*, slip op. at 3 (quoting *Meyers Industries (Meyers II)*, 281 NLRB 882, 885, 887 (1986), enforced *sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988)).

⁹ *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)).

Applying these principles, we conclude that the Charging Party's group text message was concerted activity for mutual aid or protection. The text message elicited responses from coworkers, resulting in a group discussion between the Charging Party and other employees concerning working conditions, i.e., personal time off. Specifically, when the Charging Party conveyed that (b) (6), (b) (7)(C) had not been allowed to leave work thirty minutes early to (b) (6), (b) (7)(C) Employee #1 responded that (b) (6), (b) (7)(C) had also been denied personal time off to (b) (6), (b) (7)(C) (b) (6), (b) (7)(C). When the Charging Party made more general references to the supervisors and their decision-making, employer #1 also responded. Finally, when Employee #2, who is the (b) (6), (b) (7)(C), responded that the issues raised would be addressed in upcoming Union meetings, (b) (6), (b) (7)(C) indicated that the conversation would indeed lead to "group action." The Charging Party ended the discussion by stating that the bargaining unit should file as many grievances as possible and take them all to arbitration. Thus, while the Charging Party started the conversation about (b) (6), (b) (7)(C) personal experience that morning regarding time off, other employees acknowledged that they shared (b) (6), (b) (7)(C) concerns and that they would be addressed. The Charging Party's conduct was also for "mutual aid or protection" because it was directed at improving the employees' conditions of employment. The Charging Party sought to make the Employer aware that the practice of denying personal time off when employees have personal matters to attend to should change.¹⁰ "[P]roof that an employee action inures to the benefit of all' is 'proof that the action comes within the 'mutual aid or protection' clause of Section 7."¹¹

The Charging Party's message was also protected union activity. All of the employees on the text messages were Union officers or stewards, the messages were

¹⁰ *St. Rose Dominican Hospitals*, 360 NLRB No. 126, Slip op. at 3 (June 12, 2014) (finding that employee's distribution of petition to employees concerning coworker's attitude was for mutual aid or protection; "[a]lthough personal vindication may have been among [employee's] goals," his conduct also had the larger purpose of benefiting all of his fellow employees); *Phillips Petroleum Co.*, 339 NLRB 916, 918 (2003) (although employee's effort to secure sick leave originated from his own family's medical emergency, his conduct was protected because his efforts "embraced the larger purpose of obtaining this benefit for all of his fellow employees").

¹¹ *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 5 (citations omitted).

sent to some nonemployee Union executives, and the messages encouraged the Union to take action, e.g., filing grievances and going to arbitration.¹²

¹² See, e.g., *B&P Motor Express*, 230 NLRB 653, 655 (1977) (grievance processed through union channels constitutes “union activity”); *Cincinnati Suburban Press*, 289 NLRB 966, 967 (1988) (“Even though an employee may be acting alone, an employee attempting to form, join, or assist a labor organization is nevertheless protected by Section 7 of the Act.”).

2. The Charging Party's conduct did not lose the protection of the Act; therefore, the Employer violated Section 8(a)(3) when it suspended (b) (6), (b) (7)(C) employment.

Whether an employee's intemperate conduct with respect to supervisors or coworkers is sufficiently egregious to cause otherwise Section 7-protected activity to lose the Act's protection is determined by balancing the following four *Atlantic Steel* factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practice.¹³

Applying the *Atlantic Steel* factors, we conclude that the Charging Party's group text messages did not lose the protection of the Act. We conclude that the first factor—the place of the discussion—weighs heavily in favor of retaining the Act's protection because the discussion took place in the form of text messages (not in public or in front of customers), without any in-person confrontation with supervisors or coworkers. Additionally, the Charging Party sent the messages at night, when (b) (6), (b) (7)(C) was not in the workplace or on work time. Therefore, the Employer's work process was not disrupted.¹⁴ The second factor—the subject matter of the discussion—also weighs in favor of retaining the Act's protection because the Charging Party's messages were directly tied to terms and conditions of employment, namely, the

¹³ *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). Because the Charging Party's group text messages were sent only to management personnel, employees, and nonemployee Union executives, the test used by the Board in *Triple Play Sports Bar & Grille* appears inapplicable. See 361 NLRB No. 31, slip op. at 3-4 (Aug. 22, 2014 (applying tests from *Jefferson Standard* and *Linn* to determine whether employees' off-duty, offsite use of social media to communicate workplace complaints with coworkers or with third parties lost the Act's protection), *enforced sub nom. Three D, LLC v. NLRB*, 629 F. App'x 33 (2d Cir. 2015). While *Triple Play* is the applicable precedent for evaluating whether an employee's public social media activity, which may be observed by third parties including customers, lost the Act's protection, the group text messages here, which were not communicated to the public, are more properly evaluated under the *Atlantic Steel* test.

¹⁴ See, e.g., *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670, 676 (2007) (finding that comments raised in an employee meeting in a non-work area did not disrupt employer's work process; therefore, the place-of-the-discussion factor weighed in favor of protection); *Plaza Auto Center, Inc.*, 360 NLRB No. 117, slip op. at 7 (May 28, 2014) (outburst occurred in closed-door meeting in a manager's office away from the workplace, which weighed "heavily in favor of protection").

Employer's treatment of employees seeking to use their accrued personal time off for personal matters.¹⁵ Moreover, the parties' collective-bargaining agreement addresses the use of accrued personal time off, and a Union officer who was included in the group messages responded that the issue would be addressed in upcoming meetings.¹⁶

The third factor—the nature of the outburst—also favors retaining the Act's protection. The Charging Party's statement that [REDACTED] was "declaring total war against [the Employer]," which the Employer relied on to justify the suspension, is similar in tone and tenor to statements that the Board has found did not lose the Act's protection.¹⁷ Indeed, the Charging Party's declaration of "total war" was made in the context of a complaint about being denied paid time off, and [REDACTED] subsequent call for as many grievances as possible to be filed against the Employer and taken to arbitration provided further context into what [REDACTED] meant by "total war." Objectively, the Charging Party's statement would not be understood as a threat of physical violence.¹⁸ Only the fourth factor—whether the outburst was provoked by an unfair labor practice—weighs in favor of a loss of protection, since the text message was not provoked by an unfair labor practice or other Employer misconduct.¹⁹ Therefore, we conclude that

¹⁵ See, e.g., *Datwyler Rubber & Plastics, Inc.*, 350 NLRB at 670 (subject matter of discussion—seven-day workweek—weighed in favor of protection).

¹⁶ See, e.g., *Postal Service*, 364 NLRB No. 62, slip op. at 3 (July 29, 2016) (subject matter - discussion about pending grievances under parties' collective bargaining agreement - weighed in favor of protection).

¹⁷ See, e.g., *Kiewit Power Constructors Co.*, 355 NLRB 708, 710-11 (2010) (finding statements by two employees that things would "get ugly" and one employee's statement that supervisor "better bring [his] boxing gloves" if employer continued to enforce its break-in-place policy remained protected because, absent any accompanying conduct, nothing in the context of the incident suggested the remarks were meant to be a physical threat), *enforced*, 652 F.3d 22 (D.C. Cir. 2011); *Vought Corp.*, 273 NLRB 1290, 1295 (1984) (employee's statement to a supervisor that "I'll have your ass" was no more than a threat to file a grievance, or a Board charge, or to report the supervisor to higher management), *enforced*, 788 F.2d 1378 (8th Cir. 1986).

¹⁸ See *Plaza Auto Center, Inc.*, 360 NLRB No. 117, slip op. at 3 (citing *Kiewit Power Constructors Co. v. NLRB*, 352 F.3d at 29 n.2) (Board uses an objective standard to determine whether employee conduct is threatening).

¹⁹ The Union has not filed a grievance over the Employer's refusal to permit the Charging Party to use paid time off to leave work early, and the Employer's action does not appear to have violated the contractual "paid time off" provision.

the *Atlantic Steel* factors favor finding that the Charging Party did not lose the Act's protection.

The Employer also argues that, even if the Charging Party's conduct was concerted and retained the Act's protection, it nonetheless was required to suspend the Charging Party based on the content of (b) (6), (b) text message. However, the Employer has not referenced anything in NISPOM requiring it to suspend an employee's employment before DSS makes a determination regarding an employee's security clearance. Indeed, NISPOM Section 2-200 states that DSS will notify a contractor when an employee's clearance has been denied, suspended, or revoked, and that the contractor shall immediately deny the employee access to classified information when notified; it does not instruct contractors to suspend employees or otherwise deny them access absent notification from DSS. The Employer's argument that it was required to immediately suspend the Charging Party is further undermined by DSS's January 7, 2016 message to the Employer. In that message, DSS indicated that even its suspension of the Charging Party's security clearance was an interim measure regarding (b) (6), (b) access to classified information pending a final determination, and that this should not be construed as affecting (b) (6), (b) qualification for continued employment. Therefore, we conclude that the Employer was not required to suspend the Charging Party on November 19.²⁰ Since the Employer suspended the Charging Party for protected, concerted activity, and was not required to do so by DSS, we conclude that the November 19 suspension violated Section 8(a)(3) of the Act.²¹

²⁰ We also reject the Employer's argument that the Charging Party's "total war" statement required (b) (6), (b) immediate suspension based on OSHA's guidance concerning workplace violence, <https://www.osha.gov/SLTC/workplaceviolence>, and the Department of Homeland Security's active shooter preparedness program, <https://www.dhs.gov/active-shooter-preparedness>. Although both Agencies' websites provide employers with general guidance regarding workplace violence, neither mandates the Employer's conduct here. Moreover, when it suspended the Charging Party, the Employer did not indicate that it was relying on those programs. To the contrary, it stated only that it takes seriously any behavior or threats perceived to lead to possible violence, that corporate managers had reviewed the Charging Party's text message and found that the content and tone of the message was of a nature that required reporting to DSS, and that it was necessary to suspend (b) (6), (b) access immediately until DSS advised the Employer concerning the Charging Party's security clearance.

²¹ Although the Union has filed a grievance regarding the Charging Party's suspension, we reject the Employer's argument that the charge should be deferred to the parties' contractual grievance-arbitration process. Contrary to the requirements of *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132, slip op. at 12-13 (Dec. 15, 2014), an arbitrator is not "explicitly authorized" to decide the unfair labor practice at

The Employer did not Violate Section 8(a)(3) By Reporting the Charging Party's Conduct to DSS.

Because NISPOM requires contractors such as the Employer to report “adverse information” to DSS, the Employer’s reporting of the Charging Party’s text message would not violate the Act if the message constituted “adverse information.”²² Under all of the circumstances, we conclude that the Employer did not violate the Act by reporting the Charging Party.

Initially, “adverse information” is defined broadly: “[a]ny information that adversely reflects on the integrity or character of a cleared employee, that suggests that his or her ability to safeguard classified information may be impaired, or that his or her access to classified information clearly may not be in the interest of national security.”²³ One court has stated that:

issue here. First, the contract’s Non-Discrimination provision precludes discrimination based on race, color, religion, and a variety of other characteristics, but it does not reference union activity or other rights protected under the Act. Although the provision also references “Federal Laws,” this is only to clarify that employer conduct in compliance with federal law cannot be deemed “discrimination” under the contract. Second, the Union has informed the Region that it will not otherwise authorize the arbitrator to resolve the statutory issue. *See generally*, Memorandum GC 15-02 “Guideline Memorandum Concerning Deferral to Arbitral Awards, The Arbitral Process and Grievances Settlements in Section 8(a)(1) and (3) cases,” dated Feb. 10, 2015, at 10-11.

²² To the extent the NISPOM reporting requirement is overbroad, we cannot reach that rule because it was imposed by an exempt entity. Although we have required statutory employers to protest directives by exempt entities to discharge or suspend employees for their Section 7 protected activities, (*See Falcon Inc.*, Case 09-CA-44749, Advice Memorandum dated September 15, 2009), we would not require a contractor to refuse to comply with an arguably overbroad reporting requirement like that at issue here. We also note that the parties’ collective-bargaining agreement includes language stating that the Employer may incur obligations with respect to security under its contract with the Government and that the Union agrees that nothing in the collective-bargaining agreement shall place the Employer in violation of its security agreement with the Government.

²³ NISPOM Appendix C.

[T]he plain language of NISPOM § 1-302(a) is mandatory, and by defining “adverse information” broadly the Department of Defense creates a duty to report broadly. There is no discretion not to report, and a contractor’s failure to report something that falls within the reach of “adverse information” is not an exercise of discretion but a breach of the mandatory reporting obligation.²⁴

Although ISL 2011-04 lists several examples of what could constitute adverse information, those examples do not narrow the definition in a way that clearly exempts the Charging Party’s “declaring war” language.

Also significant is the fact that, after receiving the Employer’s report, DSS suspended the Charging Party’s security clearance “in the interest of national security” pending DSS’s final determination in the matter. The Board will typically defer to other federal agencies’ or courts’ authoritative construction of statutes that they have responsibility for enforcing, “[a]s a matter of comity.”²⁵ DSS is the federal agency responsible for administering and implementing NISPOM for the Employer’s SOFSA work, including determining who receives a personnel security clearance, and it suspended the Charging Party’s security clearance based on the information supplied by the Employer. As such, it would violate principles of comity for us to find that the Charging Party’s text message did not contain “adverse information.” This is particularly the case considering that DSS’s stated reason for suspending the Charging Party’s security clearance—“in the interest of national security”—includes

²⁴ *Stephenson v. Nassif*, No. 1:15-cv-1409, 2015 WL 9450614, at *4 (E.D. Va. 2015) (finding that employee’s state tort suit against federal contractor alleging that contractor filed false incident report against him was properly removed to federal court because contractor was “acting under” federal officer when it submitted incident report pursuant to NISPOM).

²⁵ *Roseburg Forest Products Co.*, 331 NLRB 999, 1003 (2000) (Board, noting that the EEOC is responsible for interpreting and enforcing the ADA, held that as a matter of comity, it would defer to the EEOC’s determination that the ADA does not preclude an employer from disclosing information concerning employee’s disability and need for accommodation, and rejected employer’s defense to refusal-to-provide information allegation); *see also Electrical Workers Local 48 (Kingston Constructors)*, 332 NLRB 1492, 1500-01 (2000) (deferring to Department of Labor and courts of appeals for interpretation of the Davis-Bacon Act regarding the lawfulness of dues collection for job targeting programs), *enforced*, 345 F.3d 1049 (9th Cir. 2003); *OXY USA, Inc.*, 329 NLRB 208, 208, 212 (1999) (deferring as a matter of comity to Department of Justice opinion regarding Section 302 of the Act because it has responsibility for enforcing that section).

language from the definition of “adverse information.” Therefore, we conclude that the Employer did not violate the Act when it reported the Charging Party’s text message statements to DSS.

The Region Should Seek a Make-Whole Remedy for the Period Between the Employer’s Suspension of the Charging Party’s Employment and DSS’s Suspension of the Charging Party’s Security Clearance.

The Charging Party is entitled to backpay that (b) (6), (b) (7)(C) would have earned but for (b) (6), (b) (7)(C) unlawful suspension by the Employer. However, once the Charging Party’s security clearance was suspended by DSS on January 7, 2016, (b) (6), (b) (7)(C) was no longer qualified to perform (b) (6), (b) (7)(C) usual duties, and backpay is tolled unless the Employer has other work which the Charging Party is qualified to perform that does not require the clearance.²⁶ Thus, to work on the Employer’s SOFSA contract, all employees are required to have a secret-level security clearance as a condition of employment. Section 23.2 (Security Clearance Denial) of the parties’ collective-bargaining agreement expressly states that, as a condition of continued employment, employees will be subject to investigation for security clearances, and that denial of such clearance by a governmental agency “shall be cause for release from the Company due to inability to meet job requirements.” Notwithstanding this contractual provision, the Employer has a statutory obligation to place an unlawfully suspended employee in any available position that does not require a security clearance.²⁷ However, the

²⁶ See *Pessoa Construction Co.*, 361 NLRB No. 138, slip op. at 14-15 (Dec. 15, 2014) (finding discriminatee not eligible for backpay during time his commercial driver’s license (CDL) was suspended, because record showed that employer would not have allowed him to work as a driver or in non-driving position without a CDL), *enforced per curiam*, 632 F. App’x 760 (4th Cir. 2015); *Cliffstar Transportation Co.*, 311 NLRB 152, 157 (1993) (finding that because the discriminatee was unavailable to work as a driver because his driver’s license was suspended, and because the evidentiary record did not show that the employer was obligated to offer the discriminatee some type of alternative employment when the discriminatee could not drive, the discriminatee was not eligible for backpay for the period when his license was suspended); *NLRB v. Browne*, 890 F.2d 605, 608-09 (2d Cir. 1989) (finding that a discriminatee whose driver’s license was suspended because he did not pay traffic summonses or insure his vehicle voluntarily forfeited not only his driving privileges, but also his eligibility for backpay at a driver’s rate).

²⁷ Indeed, Section 23.3 (Security Clearance Reinstatement) of the collective-bargaining agreement states that, if an employee has been denied a security clearance, the Employer will consider assigning him to an area for which he is qualified and a clearance is not required.

Employer asserts that it has no other positions in which to place the Charging Party pending DSS's final decision regarding [REDACTED] security clearance.²⁸

Therefore, we conclude that the backpay period should be tolled from the time the Charging Party's security clearance was suspended by DSS (January 7, 2016).

Accordingly, for the above reasons, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(3) by suspending the Charging Party, but dismiss, absent withdrawal, the allegation that the Employer violated Section 8(a)(3) by reporting the text message statements to DSS. Additionally, the Region should seek a make-whole remedy only for the period between the Employer's initial suspension of the Charging Party's employment (November 19) and DSS's interim suspension of the Charging Party's security clearance (January 7, 2016).

/s/
B.J.K

H:ADV.09-CA-172180.Response.Allsource Global. [REDACTED]

²⁸ If the Region determines that the Employer had other positions in which it could have placed the Charging Party while [REDACTED] security clearance was suspended, the Region should seek to modify the backpay period to end at the time that the Employer places the Charging Party in such a position.