

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
WASHINGTON, DC

UNIVERSAL SECURITY, INC.

Respondent

and

Case Nos. 13-CA-178494  
13-CA-182708

SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 1,

Charging Party

*Nicholas A. Rowe, Esq.; Andrea Y. James, Esq.,*  
for the General Counsel.

*John P. Lynch, Jr., Esq.; William P. Bingle, Esq.,*  
for the Respondent.

*Michele Cotrupe, Esq.,*  
for the Charging Party.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Chicago, Illinois, on May 9 and 10, 2017. Service Employees International Union, Local 1 (the Charging Party) filed the charge in Case 13-CA-178494 on June 17, 2016.<sup>1</sup> The first amended charge in case 13-CA-178494 was filed by the Charging Party on November 10. The charge in case 13-CA-182708 was filed by the Charging Party on August 24, with an amended charge filed in the case on December 16. The Regional Director for Region 13 (the Region) of the National Labor Relations Board (NLRB/the Board) issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on January 12, 2017. On January 26, 2017, Universal Security, Inc. (the Respondent) filed a timely answer and affirmative defenses to the consolidated complaint denying all material allegations in the complaint. On March 2, 2017, the Region amended the consolidated complaint to add,

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<sup>1</sup> All dates are in 2016, unless otherwise indicated.

By the conduct described in paragraphs V(a), V(b) and VI(a), Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

5 (GC Exh. 1(o).)<sup>2</sup> On March 14, 2017, the Respondent filed a timely answer to the amendment to the consolidated complaint.

10 The consolidated complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) when (1) since about April 13, the Respondent has promulgated and maintained a rule prohibiting its employees from speaking with the media; and (2) since about July 29, the Respondent has issued a revised written uniform policy and has since maintained a rule requiring its employees to suspend their employment badge from a Respondent issued lanyard or Chicago Department of Aviation (CDA) issued clip. The consolidated complaint also alleges that on about April 13, the Respondent discharged its employees Marcie Barnett (Barnett) and Sadaf Subijano (Subijano) in violation of Section 15 8(a)(1) and (3) of the Act.

20 On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

25 The Respondent, a corporation with an office and place of business in Chicago, Illinois, provides security guard services at O'Hare International Airport (ORD) and Midway International Airport (MDW), both in Chicago, Illinois. During the relevant calendar year, the Respondent in conducting its business operations provided services to ORD and MDW, 30 enterprises directly engaged in interstate commerce, valued in excess of \$50,000. The Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Further, I find, and the Respondent admits, that the Charging Party, at all material times, has been a labor organization within the meaning of Section 2(5) of the Act. (Tr. 103.)

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### II. ALLEGED UNFAIR LABOR PRACTICES

#### *A. Overview of Respondent's Operation*

40 The Respondent has been in the security service business since 1992. It provides armed and unarmed security services to private and public entities. On April 19, 2007, the City of Chicago (the City) awarded a contract to the Respondent to provide security guard staffing for

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<sup>2</sup> Abbreviations used in this decision are as follows: "Tr." for transcript; "Jt. Exh." for joint exhibit; "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "GC Br." for the General Counsel's brief; "R. Br." for Respondent's brief; and "CP Exh." for Charging Party's brief. Specific citations to the transcript, exhibits, and briefs are included where appropriate to aid in review, and are not necessarily exhaustive or exclusive.

ORD and MDW. The initial contract ran from June 1, 2007 to May 31, 2012, but was subsequently extended and continues in effect. During the period at issue, the Respondent employed approximately 100–140 security guards. Mark Lundgren (Lundgren) is the owner and president of the company. Tim Mayberry (Mayberry) has been employed by the Respondent for about 10 years as the project manager, overseeing security services provided by the Respondent to ORD and MDW.<sup>3</sup> He is the liaison between the Respondent and the City to ensure that the Respondent's responsibilities under the contract are fulfilled. In addition to other duties, Mayberry also oversees training, hiring, firing, and resolution of issues involving the Respondent, the City's Chicago Aviation Police Department (CAPD) and Care Plus.<sup>4</sup> Mayberry goes to ORD five to six times a week to ensure operational efficiency. During the period at issue, Jeff Rennemeyer (Rennemeyer) was employed with the Respondent as vice president of operations and business development. He subsequently left the company. [First name unknown] Jeffries and Lydia Richardson (Richardson) were supervisors. Part of the supervisors' responsibilities was to conduct uniform checks and roll calls prior to the beginning of security shifts. (Tr. 67.) [First name unknown] Covington was the manager of security officers.

Barnett worked for the Respondent as a security officer from June 19, 2014 until her termination on April 13. She was assigned to ORD and worked 32 hours a week on the first shift from 5:45 a.m. to 2 p.m. Part of her job responsibilities included maintaining the safety of the airport and passengers and keeping unauthorized people out of secure areas of the airport. Jeffries was her immediate supervisor. After Barnett was hired, she had a training session with Mayberry. During the training session, he talked with her about post orders, gave her a tour of the airport, and trained her on security procedures for multiple locations. Subijano was employed as a security guard by the Respondent from November 2011 until her termination on April 13. She was assigned to the second shift (2 p.m. to 10 p.m.) at ORD. However, she had worked in security at ORD for other companies since 1993.<sup>5</sup> Like Barnett, Subijano was also responsible for overseeing the security and safety of the airport and passengers.

### *B. Contract between Respondent and the City*

The Respondent is required not only to adhere to the standards in its contract with the City, but must also comply with certain provisions in the Code of Federal Regulations (CFR) and the Illinois Department of Professional Regulations (IDPR). Consequently, certain provisions of the CFR and the IDPR are incorporated into the contract between the Respondent and the City. The CFR and IDPR address employee qualifications, disciplinary sanctions, the definition and safeguarding of Sensitive Security Information (SSI) and the protocols for addressing it. The scope of the services the Respondent has to provide is contained in the contract, including the duties security guards have to perform. The CFR sets out the requirements imposed by the

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<sup>3</sup> Mayberry has approximately 27 years of experience working at the airport for security guard companies. He has spent about 18 years as a project manager for companies contracted to provide security at airports. Mayberry worked for McCoy Security from 1992/1993 until he was hired by the Respondent in 2007.

<sup>4</sup> Care Plus is one of the City's subcontractors. It is responsible for servicing the Respondent's invoices and billing.

<sup>5</sup> Prior to her employment with the Respondent, Subijano worked for Global Airport Security, Combined Contract, McCoy Security, and Andy Frain Services (Andy Frain). She also worked for another company that provided airport security services but could not recall the name. (Tr. 81.) McCoy and Andy Frain are unionized companies.

Transportation Security Administration (TSA) which includes the definition of Sensitive Security Information (SSI). Documents in the Respondent's possession containing SSI must be marked as such by the Respondent. The IDPR also establishes employee qualifications, procedures for maintaining employee records, disciplinary sanctions for provision violations, and definition of confidential information. Under the terms of the contract, the City also determines the guards' salary, employee qualifications, creates the post orders,<sup>6</sup> and sets minimum training requirements. The contract also contains other steps the Respondent has to take to remain in compliance with municipal, city, State, and Federal regulations and statutes. (R. Exh. 1.)<sup>7</sup> If the Respondent fails to remain in compliance, for example by disclosing SSI, the City can terminate the contract and hold the Respondent liable for any monetary damages the City might incur as a result of the Respondent's violation of the contract. The contract is a public document.

### *C. Respondent's Revised Uniform Policy*

15 The contract at issue requires that at a minimum:

20 [The Respondent's] employees must maintain a professional appearance at all times and wear items of uniform that conform to industry standards and practices and are acceptable to the Department. Each employee of the [Respondent] must have, at a minimum: 2 long sleeve shirts/blouses, 2 short sleeve shirts/blouses, 2 ties, 1 jacket, 1 raincoat, 1 parka, 1 pair of black shoes and a flashlight.

25 (R. Exh. 1.) The employee identification badge is also a required component of the security guard uniform. The badges come in different colors; and the colors correspond to the employee's level of access to various parts of the airport. The meaning of a badge's color is considered confidential information, and, consequently, the significance of the color is known only to the person wearing that badge. Moreover, the badge's color does not alert unauthorized persons which areas of the airport that the person has access to enter. Procuring a badge is subject to a Federal Bureau of Investigation (FBI) and TSA background checks.

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<sup>6</sup> Post order is a document that details a security guard's responsibilities while guarding a particular area and controlling critical access points. A post order is located at each guard's security post.

<sup>7</sup> On May 3, 2017, the Respondent filed a Motion for Protective Order. (GC Exh. 1(bb).) The General Counsel filed a timely response opposing the Respondent's motion. (GC Exh. 1(cc).) During the hearing, the Respondent again requested that the following exhibits be covered by a protective order and placed under seal: R. Exhs. 1, 4, 11, 13 – 21, 28, 29, 50, 51. Based on a careful review of the documents and Board law, I have determined that all of those exhibits, except for nos. 28 and 29, were improperly covered by the protective order and placed under seal. There was undisputed testimony that R. Exh. 1 (contract between the Respondent and the City) is a public document. R. Exh. 4 is a heavily redacted copy of a post order. The portion of the document that is not redacted is presumably not security sensitive information otherwise the Respondent also would have redacted it. R. Exhs. 11 – 16 are newspaper articles (and in one case a media statement) which have been viewed by or are available to the general public either in hardcopy or electronic form. R. Exhs. 17 and 18 are the termination letters from the Respondent to Barnett and Subijano. The Respondent has failed to provide a compelling reason or legal basis for placing run-of-the-mill termination letters under a protective order. Likewise, there is no compelling reason or factual or legal basis for placing the warning letters issued by TSA to the charging parties and the Respondent (R. Exhs. 19 – 21) under a protective order. Last, the Respondent's exhibits 50 and 51 are the company's former and revised uniform policies. The document describes the Respondent's dress code but makes no mention of particular uniform items that would constitute a breach of any security sensitive information or confidential information. Consequently, I am removing the following exhibits from the previously granted protective order and seal: R. Exhs. 1, 4, 11, 13 – 21, 50, 51.

The Respondent developed a written uniform policy to complement the dress requirements contained in its contract with the City. (R. Exh. 50.) Its personal appearance and attire rule (dress code policy) restricts certain clothing, hairstyles, body piercing, and tattoos while at work. The City had to approve the uniform policy. Employees, including Barnett and Subijano, are provided with a written copy of the dress code policy when they are first hired.

As part of their uniform, employees are required to display their photo identification badges on their outermost garment. Although the CDA provides clips for employees to use to attach the badges to their uniforms, most employees do not use them because the clips are easily broken. The majority of the Respondent's employees purchase their own lanyards to use to display their badges. Until the revision to the company's uniform policy, the Respondent's employees had worn lanyards with an array of logos, messages, and colors. As an example, Barnett wore a red "Lakeview High School" lanyard when she was first hired but approximately 5 to 6 months later she began wearing her badge on a black lanyard with the word "Cadillac" written on it; and Subijano wore her employee identification badge on a metal lanyard. Neither had ever been criticized by their managers for wearing those lanyards.

In February, the union first distributed union branded lanyards to about 40 to 50 of the Respondent's employees. Around the same time, Mayberry began to notice what he felt was an increase in the variety of lanyards worn by employees. In about February, Mayberry and CAPD Captain Kevin Zator (Zator) met for one of their weekly meetings. In the meeting, Zator commented to Mayberry that the Respondent's employees were looking sloppy in their uniforms and questioned the appropriateness of some of the employees' lanyards. Mayberry discussed with Lundgren his belief that the employees looked unprofessional; and expressed that the issue oriented messages on some of the lanyards could cause conflicts among employees. Further, he relayed to Lundgren Zator's comments about the appearances of the security guards and their different lanyards. Mayberry argued to Lundgren that the Respondent should follow the lead of other companies that had standardized lanyards issued to their employees; and recommended to Lundgren that their employees should also be issued better fitting uniforms. Lundgren accepted Mayberry's recommendations. On about April 10 or 11, the union again distributed union labeled lanyards to the Respondent's employees. Many of the employees wore the union lanyards the same day they received them. However, Richardson told them that they could not wear the union lanyards, so everyone removed them.<sup>8</sup> In May or June, the Respondent issued company-branded lanyards to its employees.

Sometime in the latter part of 2016, Lundgren and his management team began discussing changing uniform vendors and getting the employees new uniforms. As part of this effort, on about July 29, the Respondent issued its revised written uniform policy to read in relevant part,

The complete USC uniform must be worn and the employment badge must be displayed on the outermost garment (suspended by the USC-Issued lanyard or issued clip by CDA) and above the waist at all times while working.

<sup>8</sup> The Respondent denies that Richardson told the employees that they could not wear the union-issued lanyards. I find Subijano credible on this point. The Respondent failed to produce testimony from Richardson or other substantive evidence to rebut Subijano's testimony.

(R. Exh. 51.) The prior uniform policy did not mention lanyards. (R. Exh. 50.) In February 2017, Lundgren approved the purchase of new uniforms for the security guards. The new uniforms had a new company logo and “look” and were a different color from the old uniforms.  
 5 The new uniforms and lanyards cost the company a total of more than \$50,000.

*D. Respondent’s Media Policy*

10 The post orders are an integral part of the Respondent’s contract with the City. The Respondent writes the post orders in partnership with the City. Lundgren has delegated to Mayberry the role of assisting the City with writing the post orders. The City provides Mayberry with the information that has to be included in the post order; and he then creates a format for the post order using the information received from the City. Mayberry then submits his version of  
 15 the post order to the City for its approval. Prior to implementation of the post order, the TSA has to approve the contents of the orders which cannot be unilaterally changed by the Respondent. Post orders follow the contract and not necessarily the security company. For example, McCoy inherited post orders from Andy Frain when McCoy took over the contract. The majority of the post orders in use by the Respondent were originally created in the 1990s. Throughout the years,  
 20 the Respondent has made, with approval from the City and the TSA, several changes to the post orders and added several addendums.

Whenever the Respondent is given a new post to guard, the new post orders have to be created. Post orders contain confidential information or SSI. Disclosing the post orders to  
 25 unauthorized persons can lead to discipline or termination of the Respondent’s contract with the City. TSA requires that post orders are placed at every security post while a security guard is on duty. The post orders are placed in plastic covers and inserted into two green folders then placed in a binder. On arrival at their post, the security guard has to check that they have a radio, post orders, and the post is clean. If any of these three items is not present then they have to  
 30 immediately notify a supervisor. Once the security guard has ensured that all the required items are present at the security post, the guard must review the post order. If the employee is given a roving post assignment, then the post orders are given to the employee on a clipboard to take with them to their different posts. A post is never supposed to be left unattended and the security guard has to wait at the post until the relief guard arrives.

35 Contained in the Respondent’s post order is a rule prohibiting employees from speaking with the media.<sup>9</sup> Initially, the media policy stated,

**USC personnel are NOT ALLOWED to speak to the media at any time. If the Media arrives at your post, call your supervisor immediately.**

40 (R. Exh. 4.) The media rule in the post order was revised about April 11, 2 days prior to Barnett’s and Subijano’s terminations. The revised policy reads,

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<sup>9</sup> The post orders entered into the record are heavily redacted.

8. Universal Security personnel are not allowed to speak with anyone regarding post orders, SSI material, or training at any time. If someone approaches the USC officer and begins to ask questions regarding the post orders, SSI material, or training the guidelines below must be followed:

- A. USC officers are only allowed to talk to TSA Inspectors APD or CPD after verification via their ORD badge. In order to verify USC Officer must ask for the persons ORD badge. Check the ORD badge to confirm that it is valid (check date of expiration) and match the picture to the face of the person. TSA Inspector may use their federal badge for proof of who they are.
- B. **If the person is a TSA inspector (notify your supervisor) then after verifying TSA inspector's credentials proceed to cooperate with TSA inspector's request. An incident report will be required if a TSA inspector was at your post.**
- C. If the person is APD or CPD Officer after verification of the ORD badge, then you are to answer questions pertaining only to post orders.

Universal Security personnel are NOT ALLOWED to speak to the Media at any time regarding any Sensitive Security Information (SSI) that is provided by Chicago Department of Aviation to Universal Security.

**If the Media arrives at your post, call your supervisor immediately.**

**USC personnel are NOT ALLOWED to speak to the media at any time. If the Media arrives at your post, call your supervisor immediately.**

(GC Exh. 1(r) attachment O.)

### *E. Employee Training*

The Respondent's employees are required to attend training when they are first hired; and receive remedial training throughout their tenure. Employees are also given training on the sensitive secure nature of post orders.<sup>10</sup> In order to receive an employee identification badge, employees had to view a Secured Identification Display Area (SIDA) film, entitled "Run! Hide! Fight!", that describes employees' responsibilities for the badge and how to react when people ask about safety and security at the airport.<sup>11</sup> The film emphasizes to employees that they cannot

<sup>10</sup> While employed by McCoy and Andy Frain, Subijano also received training on post orders and the SSI contained within them.

<sup>11</sup> The General Counsel argues that contrary to the Respondent's assertion, the training video is not confidential information or SSI because it is posted on YouTube for anyone to view. The Respondent insists that the Run! Hide! Fight! video posted on YouTube is not the same film it uses to train its security guards. I credit the Respondent on this point. As the party asserting the claim, it is the General Counsel's responsibility to prove it. The General Counsel failed to provide evidence showing that the film used by the Respondent and the YouTube video the General Counsel argues is in the public domain is identical.

discuss with unauthorized people the airport security programs. Employees usually view the SIDA film annually on their birthday.

5 Mayberry is primarily responsible for employee training. All employees are cross-trained in different areas because they might periodically be required to work different posts. When conducting training, Mayberry uses a sheet which lists the training areas that he reviews and explains to the employees. He also uses a Post Order Review Form to document that he has conducted a post order review with the employee. Mayberry utilizes the forms to document that their training program is in compliance with the contract in the event the City conducts a training  
10 audit of the Respondent's training program. (GC Exh. 1(r) attachment P.)

#### *F. Union Organizing Campaign*

15 In August 2015, the SEIU began an organizing campaign against the Respondent (and other vendors) at ORD. Sarah Sahed (Sahed) is the lead coordinator and organizer for the campaign which includes eight additional organizers. Part of the union's organizing campaign at ORD includes Sahed holding union meetings, engaging employees in conversations about their working conditions and benefits, and holding strikes. She is often at ORD five times a week and frequently engages with airport workers, including the Respondent's employees. The union  
20 invites employees to attend its meetings which were held about once or twice a week. Employees' attendance at union meetings is tracked via a sign-in sheet. (GC Exhs. 4-10, 13-25.)<sup>12</sup> In addition to the union's general meetings, it has also held a town hall event on November 1,<sup>13</sup> a holiday party for airport workers, and a union convention that was attended by some of the Respondent's employees. (GC Exhs. 12, 24, 26; Tr. 141-145.)

25 The union maintains a system for tracking employees' involvement with the union. Sahed and Marwan Morlerry (Morlerry) are responsible for tracking their involvement. Employees are ranked based on their level of union support. The factors that are considered includes whether the employee: openly supports the union, attends union meetings, talks with  
30 coworkers about the union, participates in union organizing strikes, and attends other union sponsored events and protests.

35 Based on the level of their involvement, Sahed felt that Barnett and Subijano were leaders in the union's organizing effort. In October 2015, Barnett attended her first union meeting. She later became directly involved in the union organizing campaign by discussing organizing strategy, speaking with coworkers about the benefits of unionization and encouraging them to participate in union strikes, and engaging in strikes. During her involvement with the union organizing campaign, Barnett participated in solidarity strikes held on November 2015<sup>14</sup> and March 31, and attended about eight to 10 union meetings. After Subijano began working for  
40 the Respondent, Sahed approached her to tout the enhanced work benefits and increased wages union membership could provide. Subsequently, in 2015 Subijano began her involvement with

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<sup>12</sup> Sahed testified that the sign-in sheets that are created in type-face reflects employees' commitment to attend a specific meeting. (GC Exh. 23.) The sheets are generated on a computer in advance of the meeting to speed up the sign-in process.

<sup>13</sup> Approximately four of the Respondent's employees attended the Union's town hall event.

<sup>14</sup> Barnett acknowledges that she was not disciplined for her participation in the November 2015 strike.

the union. Between 2015 until her termination on April 13, Subijano attended about seven to eight union meetings and participated in union organized strikes in November 2015 and March 31.

5 On March 31, the Union held a 1-day solidarity strike at ORD with employees from various airport vendors, including the Respondent, participating. The previous night at about 9:45 p.m. “Officer McShane” and “Sarah” approached Mayberry as he was preparing to start roll call to inform him that they wanted to give him “some documents.”<sup>15</sup> (Tr. 330–331.) He refused and explained to them that Lundgren instructed him not to accept anything from the union and for them to provide the documents to the corporate office. Instead, Officer McShane dropped the strike notices at Mayberry’s feet and left. Consequently, Mayberry took the documents to his office and faxed them to the corporate office. On March 31, Barnett attempted to deliver strike notices to Mayberry before the strike started but he again refused to accept them. Barnett dropped the strike notices on the floor at Mayberry’s feet, and he later faxed them to the corporate office. (GC Exhs. 2, 3, 11; Tr. 25 – 27.)

Barnett played a very public role in the union organized strike held on March 31. Striking employees began arriving at about 4:30 a.m. or 5:00 a.m. Employees from different airport vendors, including several of the Respondent’s employees, participated in the strike. After making posters, the strike began at about 8:30 a.m. or 9:00 a.m. with Barnett and other strikers marching inside and outside the terminals chanting. When there was a pause in the marching, several protesters, including Barnett, were called to the podium to speak. There were several news outlets present. Barnett read a statement that she had written with help from the union. (R. Exhs. 11, 12.) In the statement, Barnett identified that she worked as a security officer, guarded airport entranceways, secured doors on the concourse, screened employees for their identification cards, and logged in vendors. She also stated that the reason she was on an “unfair labor practice strike” is because she was struggling to “put food on the table” and afford other expenses. Id. Barnett did not seek, nor did the City, the Respondent, or the TSA review or authorize her statement to the media.

Although she was merely an observer at the November 2015 union organizing strike, Subijano willingly played a more prominent role in the March 31 strike. Consequently, when the union arranged several media interviews for her and several other protestors to speak about the employees’ campaign for better wages and working conditions, she agreed to be interviewed. Shortly before the March 31 strike, Subijano was interviewed and/or quoted by a local news station, and newspapers the New York Post, the Washington Post, the Chicago Tribune, the Chicago Sun Times, and the PR Newswire. (R. Exhs. 13–16.) In some of her interviews, Subijano identified herself as a security officer employed by the Respondent. She also told the reporter that as a security officer she communicated with a radio, sometimes worked alone on the airfield with only a radio for communication, noted the Respondent’s security guards did not have adequate training, and referenced that as part of their training they had to watch a video called “Run! Hide! Fight!” Id. During this period, Supervisor Richardson had not forbidden employees from speaking with the media; and Subijano was unaware that it was against company policy.

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<sup>15</sup> Based on the context of Mayberry’s testimony, it is clear that “Sarah” is Sarah Sahed and the documents he references are strike notices.

*G. Barnett and Subijano Terminated on April 13*

On March 31, Mayberry saw the video statement Barnett made to the media while participating in the 1-day union organized strike. He had also read an article written by Mark Brown in which Subijano was interviewed and quoted. Consequently, Mayberry notified Rennemeyer about Barnett's and Subijano's media appearances which led them to start searching for other media posts featuring Barnett and Subijano. Late on the night of March 31, Mayberry and Rennemeyer called Lundgren to tell him about Barnett's and Subijano's media appearances. Lundgren, who had been aware of the union's organizing campaign since at least 2015 and maybe as far back as 2007, knew that Barnett and Subijano had participated in the strike. He was also aware of media reports related to the strikes in November 2015 and March. Lundgren told Mayberry and Rennemeyer to gather as much information as they could from any media outlets where Barnett and Subijano had potentially discussed SSI. Based on their search, Mayberry found Barnett and/or Subijano were interviewed and/or quoted by a local news station, and newspapers the New York Post, the Washington Post, the Chicago Tribune, the Chicago Sun Times, and the PR Newswire. (R. Exhs. 13-16.)

In recommending Barnett's termination, Mayberry relied on Barnett's videotaped statement to the media on March 31. Specifically, he identified the following statements by Barnett as an unauthorized release of SSI:

"I'm a security officer with Universal Security. I guard entranceways at the airport and ensure no one get through that's not supposed to be there. We are also called to secure doors on the concourse, screen IDS for employees . . . and log in vendors."

(R. Exh. 11.) These are the only statements that Barnett made to the media that Mayberry used as the basis for his decision to recommend her termination.

Mayberry used the statements Subijano made in several articles as the basis for his decision to recommend her termination. First, Mayberry took into consideration Subijano's interview with the Chicago Tribune. (R. Exhs. 13.) He relied on several remarks she made in that interview as a basis for his recommendation to fire her. Subijano identifying herself as a security guard combined with her statement that she "feels unprepared in an emergency, particularly in light of the Brussels attack, and wants more training on how to respond" was, in Mayberry's mind, a violation of the prohibition against releasing SSI. (R. Exh. 13, p. 3.) Mayberry also considered her statements that the security guards only have "a radio to communicate with command center" and "including an undesirable placement outside in the airfield, where she has never been placed before" as unlawful releases of SSI. Id. Second, an article written by Mark Brown was also instrumental in Mayberry's decision to recommend Subijano's termination. (R. Exh. 14.) In that article, Mayberry pointed to Subijano's statement that the employees only have radios to deal with security threats as a breach of SSI; and her reference to the training video entitled "Run! Hide! Fight!" as an unauthorized release of confidential information. (R. Exh. 14.) Third, Mayberry used a statement that Subijano made in a Washington Post article to justify, in part, his decision to recommend her termination.

Mayberry felt Subijano violated the restriction on releasing SSI when she told the newspaper reporter that the security guards need critical training to protect passengers and other workers in an emergency. Fourth, Subijano's repeating to the reporter of the PR Newswire that the security guards need critical training was, again, for Mayberry an unauthorized release of SSI. (R. Exh. 5 16.) Mayberry felt that considered as a whole, Subijano's statements violated provisions of the Respondent's contract with the City.

Approximately 1 or 2 days after the strike, Lundgren received a call from [first name unknown] Edgeworth, City of Chicago Aviation Chief, inquiring why the Respondent's 10 employees were talking about their job description to the press. According to Lundgren, at some point, a representative from TSA twice called their office and left messages asking why two of the Respondent's employees were talking about their job description to the media.<sup>16</sup> Likewise, Mayberry is uncertain about when the TSA first became aware of Barnett's and Subijano's 15 statements to the media. He did note, however, during one of their weekly meetings, he told Sergeant Zator and a representative from Care Plus that they were investigating the possible release of SSI to the media by two of its security guards. Lundgren also discussed the situation with company counsel and notified representatives from the City within the first week of Barnett and Subijano talking with the media. (Tr. 201, 275.) The Respondent also contacted TSA 20 representative Kyle Bullock to inform him that they were investigating two of their employees who had possibly released SSI to the media. Again, the exact date and/or time of this conversation is unknown.

Based on their findings, Mayberry told Rennemeyer that he believed Barnett and Subijano should be fired. Rennemeyer agreed. Mayberry and Rennemeyer compiled the 25 information they had gathered on the possible security breach and put it into a report which they gave to Lundgren for his review. Lundgren reviewed the report with them and asked for their recommendations on what action he should take against Barnett and Subijano. Mayberry and Rennemeyer made a recommendation to Lundgren that Barnett and Subijano be terminated. Mayberry's recommendation was based solely on Barnett's and Subijano's statements to the 30 media and not on any conversation that he had with TSA. After consultation with Mayberry, Rennemeyer, counsel, the City, and TSA, Lundgren made the decision to terminate Barnett and Subijano about 2 weeks after the March 31 strike.

On April 13 at about 2 p.m., Barnett was at post 6 and 7 in terminal 5 waiting for her 35 relief to arrive when Mayberry, Richardson, and an unnamed man approached her. Richardson handed her an envelope and instructed her to read it. Inside the envelope was Barnett's termination letter. The letter read in part,

40 It has come to our attention that you have repeatedly spoken to a number of media outlets over the past several weeks regarding the details of your security work at

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<sup>16</sup> The record is unclear on the exact date that the messages from the TSA representatives were left for the Respondent. While there is no substantive evidence to rebut Lundgren's testimony that TSA twice left a message for him, I will give it minimal weight, as his testimony regarding the calls is vague. Moreover, I find it highly unlikely that the Respondent, a company with a \$31 million dollar contract with the City, does not have a system for logging and retaining telephone messages. Lundgren should have come to the hearing more prepared to answer the question.

O'Hare International Airport. Your comments have included sensitive security information. As you are aware, Universal's General Post Orders, which are mandated by the Chicago Department of Aviation, make clear that Universal personnel are not permitted to speak to the media regarding security operations at the airport.

Accordingly, your employment with Universal is terminated effective immediately.

(R. Exh. 17.) Barnett was told to surrender her badge; and her termination was effective immediately. Subsequently, the TSA sent a letter to Barnett at Subijano's address. Subijano took a picture of the letter and forwarded it to her. The letter, dated August 11, read in part,

The Transportation Security Administration (TSA), at Chicago O'Hare International Airport (ORD), has completed an investigation into the circumstances surrounding an alleged violation of Transportation Security Regulations (TSR), Title 49 Code of Federal Regulations (C.F.R.) §1520.9(c).

Specifically, this investigation was in regard to media reports indicating your client disclosed SSI to the media resulting in your termination from Universal Security.

(R. Exh. 20.) The letter further warned Barnett that while the warning notice was not a formal adjudication or a legal finding of the matter, a repeat incident of this type would result in a more severe sanction.

On April 13, Subijano was assigned to a post in terminal 3. Once she arrived at the post, Subijano began to complete the required daily activity report. While she was completing the report, Mayberry, Richardson, and an unnamed person approached her and handed her a termination letter. (R. Exh. 18.) The substance of the termination letter was identical to the one issued to Barnett. (R. Exh. 17.) Her termination was with immediate effect. Subsequently, Subijano received a letter dated August 11, from the TSA which was also identical to the one issued to Barnett. (R. Exhs. 20, 21.) Likewise, the TSA cautioned Subijano that a repeat of the types of communications she had with the media in March would result in severe sanctions.

On August 2, the Respondent received a letter from the TSA notifying the Respondent that it was being issued a warning for failing to notify the TSA that its employees engaged in unauthorized release of SSI to the media and possibly other individuals. The Respondent was cautioned that this incident may have represented a failure to comply with U.S. regulations on reporting the release of SSI. Nonetheless, the Respondent did not lose its contract with the City, nor is there evidence that the Respondent was subject to a civil penalty because of the violation.

#### *H. Decline in Union Participation After Barnett's and Subijano's Terminations*

After Barnett and Subijano's terminations, the union continued to work on behalf of employees who worked for various airport vendors. However, after their termination, Sahed

noticed a decrease in the number of employees attending union meetings and other union sponsored events.<sup>17</sup> Notably, only two of the Respondent's employees attended the union sponsored airport workers' holiday party in December. Although about 300 airport workers participated in the November 1-day strike, none of the Respondent's employees participated. Moreover, following the strike held in March, Sahed did not have a general meeting with workers but instead engaged them in small conversations and daily interactions.

### III. DISCUSSION AND ANALYSIS

#### A. RULE PROHIBITING EMPLOYEES FROM SPEAKING TO THE MEDIA

The General Counsel argues that the Respondent's media rule is overly broad and, therefore, the Respondent has been interfering with, restraining, and coercing employees in the exercise of their Section 7 rights. The Respondent counters that the media policy clearly "applies to Universal guards only while they are on their post, as is the case with all post orders." It denies that the rule is overbroad because while away from their post "guards are free to discuss wages or employee benefits with the media." The Respondent insists that a "reasonable person would interpret the rule as only proscribing communication with the media while at work." (R. Br. 11.) Moreover, the Respondent notes that the current media rule contained in the Post Order clarifies that security guards are prohibited from disclosing SSI, post orders, or their training at any time which any reasonable person would understand that the rule does not restrict employees from communicating about terms and conditions of their employment, labor disputes, or any other topic.

Under *Lutheran Heritage Village-Livonia*,<sup>18</sup> the Board held that if a rule specifically restrains Section 7 rights, the rule is invalid; and even if the rule does not restrict specific Section 7 rights, it may still be unlawful if employees would reasonably interpret the rule to prohibit Section 7 activity. However, in *Boeing Co.*,<sup>19</sup> the Board recently overturned *Lutheran Heritage's* "reasonably construe" standard. Under *Boeing*, the Board held that it will "no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee 'would reasonably construe' a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future."<sup>20</sup> Consequently, the Board established the following analytic framework:

[W]hen evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA

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<sup>17</sup> Sahed testified to several conversations that she had with current and former employees of the Respondent. Allegedly, the employees told her that after Barnett and Subijano were terminated they were afraid to continue to publicly show their union support. (Tr. 148-175.) I allowed the testimony with the caveat that I would give it only the weight it deserves. Consequently, I am giving no weight to Sahed's testimony about her conversations with those employees because it is hearsay testimony. Moreover, there is no evidence (or argument) that the conversations fall within any of the exceptions under the hearsay rule. Federal Rules of Evidence 803, 804, 807

<sup>18</sup> 343 NLRB 646 (2004).

<sup>19</sup> 365 NLRB No. 154 (2017).

<sup>20</sup> 365 NLRB at 2.

rights, and (ii) legitimate justifications associated with the rule. We emphasize that *the Board* will conduct this evaluation, consistent with the Board’s “duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,” . . . focusing on the perspective of employees, which is consistent with Section 8(a)(1). . . . As the result of this balancing, . . . the Board will delineate three categories of employment policies, rules and handbook provisions (hereinafter referred to as “rules”):

- *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are . . . the “harmonious interactions and 15 relationships” rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility . . . .
- *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- *Category 3* will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

*Boeing* at 3–4. The Board has also held that employer’s work rules which are ill defined and overbroad violate Section 8(a)(1) of the Act. In *Trump Marina Casino Resort*,<sup>21</sup> the Board upheld the administrative law judge’s decision that the employer’s rule prohibiting employees from releasing statements to news media without prior authorization and designating that only certain company employees were allowed to speak with the media violated the Act. *Trump Marina Casino Resort* is one of several Board cases holding that Section 7 of the Act protects employees’ communications to the public and, by extension, the media. See also *Interbake Foods, LLC*, Case No. 05–CA–033158, et al., 2013 NLRB LEXIS 583 (N.L.R.B. Div. of Judges, Aug. 30, 2013), adopted, 2013 NLRB LEXIS 674 (N.L.R.B. Oct. 29, 2013) (employer’s policy violated the act because it restricted employees’ ability to communicate with the news media about their terms and conditions of employment); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004) (the Board adopted the administrative law judge’s finding that a section of the employer’s handbook’s “Communications” rule was unlawful because it prohibited employees from “provid[ing] information about the company to the media.”)<sup>22</sup>

<sup>21</sup> 354 NLRB 1027 (2009), affd. and adopted 355 NLRB 585 (2010), enfd. 435 Fed. Appx. 1 (D.C. Cir. 2011).

<sup>22</sup> The *Boeing* majority did not specifically address or expressly overrule *Trump Marina Casino Resort*, *Interbake*, or *Double-Eagle Hotel & Casino*. See slip op. at 12 fn. 51 (“Other than the cases addressed specifically in this opinion, we do not pass on the legality of the rules at issue in past Board decisions that have applied the Lutheran Heritage ‘reasonably construe’ standard. In all future cases, the legality of such rules will turn on the principles set forth in today’s decision.”)



extended to other union clothing and items. *Chinese Daily News*, 353 NLRB 613 (2008) (employer violated the Act by creating a dress code policy prohibiting employees from wearing clothing with the name or logo other than the employer, specifically including the union); *Sam's Club, Division of Wal-Mart Stores, Inc.*, 349 NLRB 1007 (2007) (while the Board held banning badge backer bearing a statement of their rights under the Act was unlawful, it found the employer could prohibit the wearing of lanyards with the union logo only because the employer was able to establish the nonbreakaway nature of the lanyards created a safety issue); *P.S.K. Supermarkets, Inc.*, 349 NLRB 34 (2007) (the Board held the exposure of customers to union buttons, standing alone, is not a special circumstance, nor is the fact that the rule prohibited all buttons, not just union buttons). The right of employees to wear items with union insignias must be balanced against an employer's right to manage its business in an orderly fashion. However, a rule restricting or prohibiting the wearing of items with union logos must be narrowly tailored to justify the rule. *Wal-Mart Stores v. NLRB*, 400 F.3d 1093 (8th Cir. 2005), enforcing as modified, 340 NLRB 637 (2003) (employer violated the Act because there was no evidence that shirts with union logos interfered with the operation of the store); *Goodyear Tire & Rubber Co.*, 357 NLRB 337 (2011) (employer ban on employees wearing T-shirts that said "scab" in relation to contract employees was not justified by special circumstances).

I find that this rule falls under Boeing category 3 because its negative impact on employees' Section 7 rights is not outweighed by the Respondent's stated business justification. The Board and courts have consistently held that employees have a right to wear union-branded items in the workplace absent "special circumstances." The Respondent argues that justification exists for banning lanyards with union logos, among others, because opposing messages displayed on the lanyards could cause conflict among employees; wearing sloppy and unprofessional lanyards could cause the City to terminate its contract with the Respondent; and guards are more effective when they look well-groomed and professional. I find that these justifications fail on all points. Since at least November 2011, employees had been allowed to wear lanyards of their choosing without incident. The Respondent failed to present any evidence to show why, after at least 6 years of employees wearing lanyards of their choice without conflict, the situation now presented a real risk of employee strife over the opposing lanyard messages. Second, there is no evidence in the contract between the Respondent and the City or otherwise that the Respondent was even remotely in danger of losing its contract with the City because the lanyards violated the terms of the contract. Mayberry testified that Sergeant Zator with the CAPD conveyed to him that the Respondent's security guards looked sloppy in their uniforms and questioned the appropriateness of some of the lanyards. However, there is no evidence that the City informed the Respondent it would have to standardize the lanyards or prohibit security guards from wearing union-labeled lanyards to be in compliance with the contract. Last, the Respondent presented zero evidence, empirical or otherwise, that guards are more effective when they look well-groomed and professional.

Accordingly, I find that the Respondent's uniform policy revised about July 29, is unlawful and thus violates Section 8(a)(1) of the Act.

*C. Barnett's and Subijano's termination on April 13*

5 The General Counsel alleges that terminating Barnett and Subijano is unlawful “under three different legal theories: a traditional *Wright Line*<sup>24</sup> theory, a single motive theory, and because Respondent improperly relied on a blatantly overbroad rule as the basis for the terminations.” (GC Br. 15.) The General Counsel argues that under the *Wright Line* theory, the terminations are unlawful because the employees’ statements to the media were union and protected concerted activities; the Respondent was aware of the activity prior to terminating Barnett and Subijano; and circumstantial evidence “supports the inference that Respondent discharged the employees because of its animus against [the employees’] protected concerted union activities.” (GC Exh. 18.) Under the single-motive analysis, according to the General Counsel, Barnett and Subijano’s statements did not lose protection of the Act; and therefore, the basis for their terminations is flawed and unlawful. Last, the General Counsel contends that the media rule was unlawfully overbroad which makes the Respondent’s decision to terminate Barnett and Subijano on that basis likewise unlawful.

20 The Respondent counters that the General Counsel failed to establish its prima facie case under *Wright Line* because the statements were not protected activity since they revealed confidential information and SSI in violation of State and Federal laws; and there is no evidence in the record that the Respondent harbored any union animus, nor exhibited any antiunion motivation in its decision to terminate Barnett and Subijano. Moreover, the Respondent argues that even assuming the General Counsel established its initial burden of proof, Barnett and Subijano were discharged for nondiscriminatory reasons.

25 1. *Wright Line* analysis

30 I find that the *Wright Line* mixed-motive analysis is not the correct standard to apply to this case. Barnett and Subijano were engaged in protected concerted activity when they addressed the media. I address this below in more detail.<sup>25</sup> The Respondent acknowledges that it terminated Barnett and Subijano solely on the basis of their statements to the media shortly before and during the March 31 strike. Therefore, the Respondent’s motive is not at issue; and the question becomes whether their conduct was so egregious as to have lost protection of the Act.

35 2. Single motive theory

40 The General Counsel contends that the termination of Barnett and Subijano is unlawful under a single motive analysis because they engaged in concerted and/or union activity; and neither employee disclosed SSI or confidential information. Therefore, they did not lose protection of the Act. Citing *NLRB v. Washington Aluminum Co.*,<sup>26</sup> the General Counsel states,

<sup>24</sup> 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

<sup>25</sup> While Subijano was engaged in protected concerted activity, I ultimately find that her actions lost protection of the Act. Even assuming *Wright Line* is the appropriate standard for analyzing this case, Subijano’s discharge would still be *lawful* because she was not engaged in protected activity; and the Respondent had a legitimate nondiscriminatory reason for terminating her. (emphasis added)

<sup>26</sup> 370 U.S. 9, 17 (1962).

“concerted activity may be found unprotected when it involves conduct that is unlawful, violent, or otherwise “indefensible.” Significantly, whether employees have lost the protection of the Act does not depend on the employer’s “subjective perception” of their behavior. “Rather, the question is an objective one; i.e. whether the alleged misconduct is so serious that it deprives the employees of the protection the Act normally gives for engaging in concerted activity.” (R. Br. 24, citing *Kiewit Power Constructors Co.*, 355 NLRB 708, 711 (2010), *enfd.*, 652 F.3d 22 (D.C. Cir. 2011)). In cases involving confidential or privileged information, employees are not engaged in protected activity if they reveal information that the employer is justified in concealing. These types of cases are generally analyzed on a case-by-case basis. See e.g., *International Business Machines Corp.*, 265 NLRB 638 (1982) (the Board found that the employer had a legitimate business justification for its rule restricting the disclosure of wage information that it had classified as confidential. Nevertheless, the Board refused to hold that the employer could enforce a confidentiality policy by terminating any employee who violates it regardless of the circumstances).

First, the General Counsel must establish that Barnett and Subijano engaged in protected concerted and/or union activity. Despite the Respondent’s arguments, I find that the General Counsel has met his burden on this point. Barnett’s and Subijano’s involvement in the 1-day strike organized by the Union is the classic definition of union activity. On the day of the strike, Barnett read a statement to the media in which she spoke about her struggle to meet living expenses because security guards are low paid. Her statement focused on the inadequacy of the workers’ wages and their fight for fifteen dollars an hour. Moreover, the evidence is undisputed that both Barnett and Subijano had been very active in the union organizing campaign since 2015. In addition to the role they played in the March 31 solidarity strike, Barnett and Subijano attended union meetings, encouraged other employees to support the Union’s organizing campaign, attended a union convention, and participated in a 1-day union strike in November 2015. These actions are clearly protected.

Even assuming the employees engaged in protected concerted activity, the Respondent contends that, in talking with the media, Barnett and Subijano divulged confidential information and SSI which caused them to lose the protection of the Act. According to the Respondent, the information that Barnett and Subijano revealed in their public statements to the media “threatened the health and safety of others and had the potential to be abnormally destructive.” (R. Br. 15.) Additionally, the Respondent argues that Barnett’s and Subijano’s statements knowingly and admittedly disclosed the details of post orders and employee training, both of which are confidential. Consequently, the Respondent insists it had a substantial and legitimate business justification for terminating the employees.

In *KHRG Employer, LLC d/b/a Hotel Burnham & Atwood Cafe*, 366 NLRB No. 22 (2018), the Board wrote that “[w]hen, . . . , an employer defends a discharge based on employee misconduct that is a part of the *res gestae* of the employee’s protected concerted activity, the employer’s motive is not at issue. Instead, such discharges are considered unlawful unless the misconduct at issue was so egregious as to lose the protection of the Act. See, e.g., *Consumers Power Co.*, 282 NLRB 130, 132 (1986) (“[W]hen an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act . . .”) (footnote omitted). To

answer this question, the Board balances employees' right to engage in concerted activity, allowing some leeway for impulsive behavior, against employers' right to maintain order and respect. *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994); *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), enfg. 148 NLRB 1379 (1964). *KHRG* at 2.

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The Respondent admits that it discharged Barnett solely because of the written statement she read to the media on March 31. Specifically, Mayberry testified that the first 3 sentences of Barnett's statement caused him to recommend her termination and Lundgren concurred with this decision. However, I fail to find anything in those three sentences that reveals SSI and/or, confidential information. She discloses that she is a security guard who guards entrances, screen employees for identification, and logs in vendors. Barnett's uniform and badge clearly identify her as security. Her uniform has the company name prominently displayed on it; and part of the company's name is "Security". Consequently, any person with a modicum of intelligence would identify her as a security guard. Moreover, the contract, which is a public document, sets forth the general duties of the security guard. Barnett's statement, in describing her duties, was no more specific than the contract's description which is available to any member of the public. (R. Exhs. 1, 11.) A reading of the contract reveals that its description of the security guard's duties is far more comprehensive than Barnett's March 31 statement to the media. The Respondent's witnesses attempted to argue that it was the combination of Barnett's statements which posed a danger to its business operation, employees, and airport personnel and customers. However, I find that even when read as a whole, the sentences reveal nothing more than that Barnett is a security guard who works at ORD ensuring airport access points are safe. This is hardly a stunning revelation of SSI and confidential information. Consequently, I find that Barnett did not lose protection of the Act; and thus, the Respondent had not established its burden.

Subijano's statements to the media, however, are more problematic. According to the Respondent, it was not Subijano's union involvement that caused her termination, but rather key statements that she made to the media which were outside the bounds of the Act's protection. In its posthearing brief, the Respondent writes that Subijano made herself a target for "potential terrorists and criminals and disclosed the training and communications equipment used by Universal guards. That information could be used to bring harm upon the traveling public, O'Hare Airport, and the guards themselves if they remained security guards." (R. Br. 15.) I agree. Mayberry and Lundgren testified in detail about the statements Subijano made to the media that they relied on in deciding she should be terminated. Unlike Barnett, Subijano talked about areas she felt were critically lacking to perform her job function. She noted that she was unarmed on the airfield with only a radio for communication; disclosed that the security guards had inadequate training; identified the training video guards were required to watch; and disclosed "security directives." Maybe viewed in isolation, each sentence might not have appeared to violate confidential information or SSI. However, viewed as a whole, Subijano's statements clearly revealed that when guarding the airfield, she is alone with nothing other than a radio to protect the airfield and communicate with other security personnel. Combined with her statements that she needed more training, a terrorist or other individual with nefarious intentions could logically surmise that the airfield is an easy target because those assigned to secure it are poorly trained and armed with nothing more than a radio to guard against an attack. Moreover, revealing the communication equipment (radio) used to comply with aviation requirements,

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unescorted access to the airfield, and portions of the training materials (training video) are identified as SSI pursuant to 49 CFR 1520.5, which is also incorporated into the contract that the Respondent has with the City. (R. Exhs. 1, 3(c).) Subijano’s violations of the TSA-mandated requirements could subject the Respondent to civil fines and/or the termination of its contract with the City. Consequently, I find that as a result of her statements to the media Subijano lost protection of the Act; and the Respondent had a lawful basis for terminating her.

### 3. Barnett and Subijano terminated based on unlawful rule

The General Counsel argues that the Respondent’s reliance on its media rule as the basis for terminating Barnett and Subijano violates the Act because the rule is unlawfully overbroad. According to the General Counsel, the Respondent failed to establish that Barnett’s and Subijano’s “statements to the media interfered with Respondent’s ability to provide security at the airport or that Respondent cited to or relied on any purported interference as the reason for termination.” (GC Br. 31.) The Respondent counters that its media rule does not explicitly restrict Section 7 activities; and denies that it is overbroad. Further, the Respondent insists that it has established its affirmative defense because Barnett’s and Subijano’s statements “threatened the health and safety of others and had the potential to be abnormally destructive.” (R. Br. 15.)

The Board and the courts have consistently held that the promulgation and maintenance of an overly broad rule violates the Act because it can have a chilling effect on employees in the exercise of their Section 7 rights. See, e.g. *IBM Corp.*, 265 NLRB 638, 638 (1982) (“to the extent that an employer’s policy of classifying its wage information “muzzles” employees who seek to engage in concerted activity for mutual aid or protection by denying the very information needed to discuss wages, it adversely affects employee rights”). Consequently, the Board has long held that discipline based on an unlawfully overbroad rule is itself unlawful “regardless of whether the conduct could have been prohibited by a lawful rule.”<sup>27</sup> In *Continental Group*, 357 NLRB 409, 412 (2011), the Board clarified the rule it established under *Double-Eagle*, that discipline imposed pursuant to an overbroad rule is unlawful, by holding,

...an employer will avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee’s conduct actually interfered with the employee’s own work or that of other employees or otherwise actually interfered with the employer’s operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. (citations omitted) It is the employer’s burden, not only to assert this affirmative defense, but also to establish that the employee’s interference with production or operations was the actual reason for the discipline. In this regard, an employer’s mere citation of the overbroad rule as the basis for discipline will not suffice to meet its burden. Rather, assuming that the employer provides the employee with a reason (either written or oral) for its imposition of discipline, the employer must demonstrate that it cited the employee’s interference with production and not simply the violation of the overbroad rule.

Following the Board’s analytic framework for a case with similar facts as the one at issue, I find that the Respondent did not violate the Act when it terminated Subijano because I previously

<sup>27</sup> *Double-Eagle Hotel & Casino*, 341 NLRB at 112 fn. 3.

found that she lost the protection of the Act as a result of her statements to the media. However, I find that the Respondent's discharge of Barnett violated the Act because it was based on an unlawfully broad rule; and the Respondent has not established a valid reason apart for the unlawful rule to justify her discharge. Previously, I found that the Respondent's media rule is overbroad; and Barnett was engaged in protected concerted activity. The Respondent argues that Barnett's statement to the media interfered with its ability to provide security at the airport. There is nothing in the record to support such a finding, other than the Respondent's speculation that Barnett's statement to the media might have caused it to be subjected to civil penalties by the TSA or the termination of its contract with the City. However, neither of these scenarios occurred. Moreover, there is nothing in the record to indicate that Barnett's actions prevented her or other workers from performing their duties. On the contrary, Barnett's statement to the media was a call to improve the working conditions for her and other airport workers so that they could better perform their jobs. Moreover, although Barnett's termination letter provided a reason for her termination, it failed to cite that her actions caused a specific (or any) disruption in the Respondent's operations. *Continental Group*, supra.

Based on the record, I find that the Respondent violated section 8(a)(1) and (3) of the Act when it terminated Barnett. However, I recommend that the complaint as it pertains to Subijnao's termination be dismissed.

#### CONCLUSIONS OF LAW

1. The Respondent, Universal Security, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated the Act by the following conduct:

- a. Terminating Barnett on April 13, 2016
- b. Since April 13, 2016, promulgating and maintaining a rule prohibiting its employees from speaking with the media
- c. On July 29, 2016, revising its written uniform policy requiring its employees to suspend their employment badge from a Respondent-issued lanyard or CDA-issued clip

3. The above violations are unfair labor practices that affects commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not violated the Act except as set forth above.

5. I recommend dismissing that portion of the consolidated complaints which allege that the Respondent violated Section 8(a)(1) and (3) of the Act when:

- (a) On about April 13, the Respondent discharged its employee Sandaf Subijano.

## REMEDY

5 Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

10 The Respondent having discriminatorily discharged its employee, Marcie Barnett, must offer Marcie Barnett reinstatement and make her whole for any loss of earnings and other benefits she suffered as a result of the discrimination against her from the date of the discrimination to the date of her reinstatement. Further, the Respondent must remove from its files (both official and unofficial) all references to the discharge of Marcie Barnett.

15 Backpay because of the discriminatory discharge shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate Marcie Barnett for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

25 As I concluded that the Respondent's media policy and revised written uniform policy are unlawful, the recommended order requires that the Respondent revise or rescind the unlawful rules, and advise its employees in writing that the said rules have been so revised and rescinded.

30 Further, the Respondent will be required to post and communicate by electronic post to employees the attached Appendix and notice that assures its employees that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>28</sup>

35 ORDER

The Respondent, Universal Security, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

40 1. Cease and desist from

(a) Discharging or otherwise discriminating against its employees in retaliation for their protected concerted activities.

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<sup>28</sup> 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.

(b) Promulgating and maintaining a media policy that requires its employees to refer all media inquiries to the Respondent without comment, and without informing its employees that they may choose to speak to the media on issues concerning their wages, hours, and working conditions, or a union organizing campaign.

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

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

(a) Within 14 days from the date of the Board's Order, offer Marcie Barnett full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of the Board's Order, make Marcie Barnett whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Marcie Barnett, and within 3 days thereafter notify Marcie Barnett in writing that this has been completed and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."<sup>29</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, 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 and members are customarily posted. In addition to physical posting of paper notices, the 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in

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<sup>29</sup> 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."

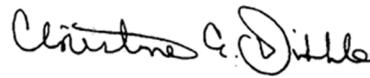
these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 13, 2016.

- 5 (f) 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.

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Dated: April 2, 2018

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Christine E. Dibble (CED)  
Administrative Law Judge

## 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** do anything to prevent you from exercising the above rights.

**WE WILL NOT** ask you about your discussions with employees.

**YOU HAVE THE RIGHT** to discuss wages, hours, and other terms and conditions of employment with other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

**WE WILL NOT** instruct you not to speak to each other about terms and conditions of employment.

**WE WILL NOT** threaten you with prosecution or legal action for talking to other employees, customers or the general public regarding your wages, hours, and working conditions.

**WE WILL NOT** fire employees because they exercise their right to discuss wages, hours, and working conditions with other employees.

**WE WILL NOT** in any like or related manner interfere with your rights under Section 7 of the Act.

**WE WILL** offer Marcie Barnett her job back along with her seniority and all other rights or privileges.

**WE WILL** pay Marcie Barnett for the wages and other benefits she lost because we fired her.

**WE WILL** compensate Marcie Barnett for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

**WE WILL** file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

**WE WILL** remove from our files all references to the discharge of Marcie Barnett and **WE WILL** notify her in writing that this has been done and that the discharge will not be used against her in any way.

**UNIVERSAL SECURITY, INC.**  
**(Employer)**

**DATED:** \_\_\_\_\_ **BY** \_\_\_\_\_  
**(Representative)** **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

**National Labor Relations Board**  
**Dirksen Federal Building**  
**219 South Dearborn Street – Suite 808**  
**Chicago, IL 60604-2027**  
**Telephone: 312-353-7570**  
**Hours: 8:30 a.m. to 5:00 p.m.**

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/13-CA-178494> 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.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.**  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF  
POSTING AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER  
MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS  
PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE  
OFFICER.