

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON DC BRANCH OFFICE**

HBC MANAGEMENT SERVICES, INC.

Respondent

and

Case: 05-CA-219166

UNITED SECURITY & POLICE OFFICERS
OF AMERICA (USPOA)

Charging Party

BRIEF OF THE COUNSEL FOR THE GENERAL COUNSEL

To the Honorable Michael Rosas, Administrative Law Judge

Brendan Keough, Counsel for the General Counsel
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 South Charles Street
Suite 600
Baltimore, MD 21201
(410) 962-2741
(410) 962-2198 (FAX)
Brendan.Keough@nlrb.gov

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A. INTRODUCTION

The General Counsel alleges HBC Management Services, Inc. (“Respondent”), a service contractor for the United States Government and military, violated Section 8(a)(5) of the National Labor Relations Act (“the Act”) by failing and refusing to negotiate with the National Union, United Security & Police Officers of America (“the Union”) concerning wages. Nearly all the critical facts are uncontested. For example, Respondent and the Union (collectively referred to as “the parties”) agree that the current collective-bargaining agreement (“the Agreement”) contains a wage reopener clause, the Union properly invoked the reopener clause, Respondent received the Union’s bargaining request and subsequent wage proposal, Respondent told the Union it would respond to the proposal, and despite Respondent’s receipt of the Union’s wage proposal and promise to respond, Respondent never responded to the Union, in violation of its bargaining obligation under the Act. So why the need for administrative hearing and briefing? Because Respondent, whether it knows it or not, is attempting to resurrect the long-dead defense that the uncertainty of its dealings with the Federal Government negates its bargaining obligations. See *Dynalectron Corp.*, 286 NLRB 302 (1987).

More specifically, Respondent’s defense for ignoring its bargaining obligation in December 2017 and January 2018, and thereafter, is essentially that its bargaining obligation ceased because it could not guarantee reimbursement from the Federal Government for wage increases. To further this defense, Respondent turns its bargaining obligation on its head by blaming the Union for missing Respondent’s self-imposed deadline.

Brief of the counsel for the General Counsel

Though counsel for the General Counsel addresses Respondent's specific defense, it is important for the Administrative Law Judge ("ALJ") to remember that Respondent admits it was not limited in bargaining wages with the Union either before or after its self-imposed deadline. Respondent could have agreed to wages after its deadline and still received reimbursement from the Federal Government, and if it did not receive reimbursement from the Federal Government, it could have paid for wage increases from other sources.

Additionally, it's important to remember Respondent simply never answered the Union's wage proposal - not even to tell the Union it believed it missed a Federal Government deadline for guaranteed reimbursement. Respondent ignored the Union's proposal, and its bargaining obligation, and continues to do so to this day. Had Respondent told the Union it believed the Union missed a deadline, the Union could have convinced Respondent otherwise, or proposed other ways of compensation, or requested information verifying Respondent's inability to pay. Instead, Respondent willfully disregarded its bargaining obligation.

Counsel for the General Counsel argues that the ALJ should find the violation alleged in the complaint and order Respondent to remedy its unlawful conduct. To assist the ALJ in making his determination, this brief is structured by breaking the facts section into two distinct sections: section I primarily recites the plain facts and communications between the parties, and section II presents and deconstructs Respondent's meritless defense. Following the facts section is counsel for the General Counsel's legal argument supporting a finding of violation.

B. ISSUE PRESENTED

1. In December 2017 the Union invoked the Agreement's wage reopener clause and later proposed wage increases for Respondent's security guards. Was Respondent entitled to ignore the Union's wage proposal based on its concerns about reimbursement from the Department of Navy ("DON")?

C. FACTS

I. RESPONDENT IGNORES THE UNION'S WAGE PROPOSAL

a. Respondent and Its DON Contract

Respondent, a subsidiary of Hui O Ka Koa, a native Hawaiian-owned organization, provides security, custodial, and grounds keeping services to the Federal Government.¹ (89, Cooper)² Respondent has approximately six service contracts with the Federal Government. *Id.* at 111. At issue in the present case is part of Respondent's contract with the DON in which it provides approximately 40 armed and unarmed security guards at the Washington D.C. Navy Yard ("the Navy Yard").³ (17-18, Richards)(91, Cooper)(Jx1)

Respondent won the security contract with the DON at the Navy Yard by competitive bid in 2015. (91, Cooper) The service contract is a one-year base contract with four option years that begin on February 1 of each year which are exercised at the discretion of the DON. *Id.* As a contractor providing services to the Federal Government in an amount exceeding \$2,500, Respondent is subject to the Service Contract Act. (*Id.* at 92)(Jx7)

¹ Hui O Ka Koa also owns controlling interests in subsidiaries: Hana Group, Hana Industries, Hana Technologies and Systems, and Hana Enterprises. (90, Cooper)

² Testimonial citations take the form of transcript page number, then witness name.

³ The Navy Yard is just one of several locations included in Respondent's contract with the DON. (91, Cooper)

Regarding wages, the Service Contract Act mandates that all contractors with Federal Government service contracts pay its employees, at a minimum, a wage rate established by the Department of Labor (“DOL”).⁴ *Id.* However, the Service Contract Act does not establish a maximum wage rate a contractor can pay its employees, nor does the Service Contract Act state that an agreed to wage rate between a contractor and collective-bargaining agent must be reimbursed by the Federal Government. (*Id.* at 110)(Jx7) In circumstances in which a collective-bargaining representative negotiates an employee wage rate greater than the minimum set by the DOL, the agreed to wage rate replaces the DOL minimum wage rate so long as the wage rate is reasonable.⁵ *Id.* at 92-93.

Bradley Cooper is Respondent’s Chief Operating Officer. *Id.* at 90. He is responsible for all of Respondent’s service contracts with the Federal Government, including the service contract with the DON at the Navy Yard.⁶ *Id.* As COO, Cooper has ultimate decision-making authority for terms and conditions of employment, including wages agreed to between Respondent and any collective-bargaining agent representing Respondent’s employees. *Id.*

b. The Union and the Agreement

Respondent’s security guards at the Navy Yard have been represented by the Union for the purposes of collective-bargaining since approximately 2015. (18, Richards) The parties have negotiated multiple collective-bargaining agreements since

⁴ The minimum wage rate determined by the DOL takes into consideration, among other things, the service provided, job classifications, and geographic locale and cost of living. (Jx7)

⁵ The record contains no evidence of what the Federal Government considers reasonable. However, the Federal Government does require arms-length dealing between contractors and unions when those parties negotiate wage rates. (93, Cooper)

⁶ Cooper testified that he is the COO of all of Hui O Ka Koa’s subsidiaries, including Hana Group and Hana Industries. (90, Cooper)

2015. *Id.* at 19, 59. The Agreement has effective dates from January 9, 2017 to January 31, 2020. (Jx1)

Ishun Richards, the Union's National Vice President, negotiated the Agreement on behalf of the Union between December 2016 and January 9, 2017.⁷ (18, Richards) The parties concluded negotiations for the Agreement on January 9, 2017 because, on that day, James Waite, DON Contracting Officer, imposed a sudden deadline on the parties to finalize the agreement by the end of the day.⁸ (*Id.* at 55, 56)(GCx5)(GCx6) Due to Waite's deadline, the parties negotiated the current wage rate identified in Appendix A of the Agreement in approximately six hours on January 9, 2017. *Id.* at 60.

Also due to the contracting officer's abrupt deadline, the Union agreed to a wage rate less than it was originally seeking for the upcoming February 1, 2018 option year. *Id.* at 59. However, the Union insisted that wage reopener language from prior collective-bargaining agreements be kept to negotiate wages for subsequent option years. *Id.*

Appendix A of the Agreement contains the wage reopener clause stating:

Pursuant to a prior Adoption and Extension of Collective Bargaining Agreement between these parties, ***the parties have earlier agreed to meet to bargain over potential increased rates for Wages that would go into effect on February 1, 2018 and February 1, 2019***; or alternatively, to bargain over wage reopener provisions relating to those respective dates. (Jx1, pg. 17) (emphasis added)

The Agreement does not contain limits on the amount of time the parties had, or have, to meet and bargain over potential wage increases to go into effect of February 1,

⁷ Richards was the Union's sole negotiator that bargained for the Agreement. Clifton Metaxas, Respondent's former Director of Operations, was Respondent's sole negotiator for the Agreement. (21, Richards)

⁸ GCx6 is a January 9, 2017 e-mail from contracting officer Waite to Metaxa explicitly stating that the latest he will accept contract terms for the Agreement was end of business day on January 9, 2017.

2018 or 2019. (22, 29, Richards)(Jx1) Nor is there any language in the Agreement that prevents retroactive application of agreed-to wage rates made after the start of the option years. (Jx1) Additionally, Richards provided uncontradicted testimony that the parties have no separate agreements that wage negotiations had to be completed before the beginning of an option year.⁹ (22, 29, Richards)

c. Respondent Fails and Refuses to Respond to the Union's Wage Proposal For the Upcoming Option Year

Though Richards never received notice from the contracting officer that the DON intended to exercise the option year beginning February 1, 2018, he anticipated the possibility, and requested bargaining with Respondent regarding wages for the upcoming option year.¹⁰ (51, 64, 65, Richards)(GCx4)

On December 8, 2017, Richards sent an e-mail to Cooper and Clifton Metaxa, Respondent's then Director of Operations,¹¹ invoking the wage reopener provision, stating:

Good Morning All,

The Union would like to request to bargain for the members of the Washington Navy Yard.

This is in reference to the economic re-openers agreed to in the last CBA. There are also language issues that the Union would like to address also. These language proposals will be submitted soon.

⁹ Cooper testified that it was his "intent" that the wage reopener language not allow for wage negotiations beyond the beginning of the 2018 and 2019 option years. (101, Cooper) However, the plain language of the Agreement does not contain Cooper's alleged intent. (Jx1) Moreover, Cooper admitted that he did not negotiate the language of the wage reopener clause. (125, Cooper) Therefore, there is no ambiguity in the language contained in Appendix A, and no need for parole evidence.

¹⁰ Respondent received notification from the DON's contracting officer regarding DON's intent to exercise the option on December 11, 2017. (Jx5) Though it received notification, Respondent never informed the Union of the DON's intent to exercise the option. (130, Cooper)

¹¹ In its Answer to the Complaint and Notice of Hearing, Respondent admits Metaxa was Respondent's supervisor and agent. (GCx1-E)

The Union is aware of the need to complete negotiations by December 31, 2017 per the contracting officer.¹² (Jx2, pg. 4)

Richards' reference to December 31, 2017 in the above email was based on the parties' previous negotiations for the Agreement in which Metaxa told Richards, by e-mail, that the contracting office wanted negotiations for the Agreement concluded by the end of the calendar year.¹³ (27, 40, Richards)(GCx2)

On December 13, 2017, Metaxa acknowledged receiving Richards' request to bargain by e-mail stating:

...Thank you for the email concerning the Navy Yard CBA. Yes, please send me your economic and language proposal ASAP. We need to stay focused on getting this done before the upcoming option year. Incidentally, I am not aware of a December 31st deadline you refer to in your e-mail. Please elaborate. (Jx2, pg. 3)

Metaxa's response to Richards' mistaken deadline of December 31, 2017 informed Richards that he had more time to prepare his wage proposal. (79, Richards)

At the time of his December 2017 request to bargain with Respondent, Richards was already engaged in protracted wage negotiations with Cooper and Metaxa concerning the security guards for Hana Industries located at the Federal Trade Commission Building. (19-20, 33, 80 Richards) During the Hana Industries negotiations, Richards learned that Cooper required supporting documentation, including wage comparables, from other security contractors to justify the Union's wage proposals.¹⁴ *Id.* at 33, 61-62.

¹² Cooper received Richard's bargaining request on December 8. (112, Cooper)

¹³ On December 19, 2016, Metaxa sent Richards an e-mail stating, "...KO wants new CBA's by December 31, 2016. We know what the FAR says, but if we can comply with the KO it makes everyone's life easier." (GCx2)

¹⁴ Cooper admitted it is his practice to require unions to provide supporting documents with wage proposals. (94, Cooper) Respondent's requirement that unions' proposals include supporting documentation is odd considering it has multiple contracts with the Federal Government that could serve

Between December 2017 and January 19, 2018, Richards attempted to secure wage and language information from other unions representing security guards at the Navy Yard. *Id.* at 34-35. Unfortunately, none of the other unions responded to Richards' inquires. *Id.* Not wanting to delay longer, Richards based his wage proposal on general information such as overall increases to the armed services and risk factors such as officer safety. *Id.* at 35-36.

Richards explained that obtaining comparable and other information to support his proposals from contractors of the United States Government, meaning non-military branches, is easy because the Federal Protective Service maintains a database of all Federal contracts. *Id.* at 33-34. However, the same is not true for contracts between contractors and branches of the United States military due to national security interest. *Id.* at 17, 33. Therefore, in the present case, the Union was forced to acquire supporting information from less centralized sources, such as other unions.

Nothing prevented Respondent from making its own wage proposal while the Union sought supporting documentation; however, Respondent made no attempt to contact the Union regarding wage negotiations with its own proposal.¹⁵ *Id.* at 38.

On January 19, 2018, Richards sent Cooper and Metaxa his wage and language proposals by e-mail stating:¹⁶

...Attached is the Union's proposal for the WNY [Washington Navy Yard] Contract.

as comparables. Additionally, Respondent has at its disposal the ability to conduct wage surveys, which it did not do in the present case. (94, Cooper)(Jx3)

¹⁵ Richards testified that he was in negotiations with Cooper and Metaxa concerning Hana Industries, and they never mentioned HBC Management or his request to bargain. (80, 86, Richards)

¹⁶ Richards' January 19, 2018 e-mail also clarified his basis for assuming a preferred December 31, 2017, deadline related to Metaxa's December 2016 e-mail in which Metaxa claimed the contracting officer wanted concluded negotiation by the end of the calendar year. (Jx2)

Brief of the counsel for the General Counsel

The 3% wage increase is based upon the raise the Uniformed Service members received for 2018, 2.4% and the fact that the proposed improvements to security since the deadly shooting in 2013 have yet to be completed and leave the employees still exposed to the act of repeating itself... (Jx2, pg. 2-3)

Richards sought a 77-cent/hour wage increase, from \$25.82 to \$26.59.¹⁷

(Jx2, pg. 5)

Cooper received Richards' wage proposal on January 19, 2018, but never responded to the proposal in any substantive way. (129, Cooper)(Jx2, pg. 2) Four days later, on January 23, 2018, Metaxa acknowledged receipt of Richards' proposal by e-mail, stating:

Mr. Richards,

We are in receipt of this email and will respond shortly.

Thank you. (Jx2, pg. 2)

After several weeks passed without a response from Respondent, Richards sent a follow-up e-mail to Cooper and Metaxa on February 6, 2018, stating:

...The Union is still awaiting a counter to the last proposal. (Jx2, pg. 2)

For the first and only time, Cooper responded to Richards' wage proposal by e-mail stating:

Ishun, Cliff no longer works for Hana. Mr. Charles Carroll is the new PM for this project. We will be responding to your proposal. Brad.¹⁸ (Jx2, pg. 1)

¹⁷ The ALJ should reject any suggestion that Respondent was confused by the Union's inclusion of an erroneous date and address contained in Richards' January 19 proposal for the following reasons: 1) the Union only represents Respondent's security guards at the Navy Yard location; 2) Respondent never expressed confusion to the Union, or internally, and 3) Respondent has not defended itself from the present charge on the basis of confusion caused by the Union's wage proposal. (91, 92, Cooper)(Jx3)(Jx4)(GCx7)

¹⁸ Metaxa left Respondent at an unknown time in late January. (GCX1-E)

Despite Cooper's assurance to respond, Respondent has never responded to the Union's wage proposal, not even to tell the Union that it was not planning on making a counter proposal. (40, Richards)(112-113, 125-126, Cooper)

II. RESPONDENT'S ALLEGED BASIS FOR IGNORING THE UNION'S WAGE PROPOSAL

a. Summary of Respondent's Position

Respondent's defense for not responding to the Union's January 2018 wage proposal is that it could not guarantee reimbursement from the Federal Government, so it did not bargain. (109, 124, Cooper) As stated in its position statement, Respondent's "strong motivation" is to be reimbursed by the Federal Government for any wage increase. (GCx7, pg. 2)¹⁹

More specifically, as a contractor with the Federal Government, Respondent is subject to the Federal Acquisition Regulations ("FAR") which provides guidelines *for contractors* seeking modifications to current contracts, including wage modifications. (44, Richards)(93, Cooper)(Jx8) According to Respondent, for it to have the highest chance of reimbursement for wage increases, FAR Section 22.1012-2 required the parties to have agreed to, and submitted, a new wage rate to the DON contracting officer by the end of day, January 22, 2018. Respondent contends that because the parties did not agree to a modified wage rate by end-of-day, January 22, 2018, it was not required to bargain. (93, 99, Cooper)(GCx7)

While Respondent's interpretation of the FAR is discussed below, it is important for the ALJ to remember that Respondent admitted at hearing that there were no actual

¹⁹ Respondent's counsel admitted in his opening statement that there is nothing that prevents Respondent from agreeing to wage increases with the Union, but that reimbursement from the Federal Government weighs heavily on Respondent. (10-11, Miller)

limitations on its ability to bargain with the Union regarding wages either before or after January 22, 2018. (97, 100, 109, 110, 122, 123, 124, 126, Cooper)

b. Respondent Admissions

Before addressing Respondent's specific FAR argument, the ALJ should recall several key admissions by Cooper. First, Cooper admitted that he made no attempt to proactively bargain with the Union, as required in the wage reopener clause, after he received the Union's December 8 bargaining request. *Id.* at 112-113. Second, Cooper admitted he had sufficient time to negotiate wages with the Union between January 19, 2018 (the date of the Union's wage proposal) and January 22, 2018 (the date of Respondent's alleged deadline).²⁰ *Id.* at 122-123. Next, Cooper admitted he could have negotiated wages beyond January 22, 2018 and sought an equitable wage adjustment from the Federal Government to be applied retroactively.²¹ *Id.* at 96-97, 124. Also, Cooper admitted he could have agreed to a wage increase and paid for the increase from sources other than the Federal Government, such as company profits. *Id.* at 100, 109, 110, 124. Last, Cooper admitted the notice section of the FAR was not complied with, and thus, its self-imposed deadline was inapplicable.²² *Id.* at 114-115, 130. In short,

²⁰ Cooper's admission that there was sufficient time to negotiate wages between January 19 and 22, 2018, is not shocking considering that Respondent and the Union completed wage negotiations in six hours during the 2017 negotiations for the Agreement. (60, Richards)

²¹ Equitable adjustments are discussed in more detail below in section d.

²² Cooper testified that he was unaware of the FAR's notice requirement and that the Union had not received notice from the DON contracting officer. (114-115, Cooper) The ALJ should give little weight to Cooper's ignorance about the FAR's notice requirement. As the COO of multiple companies engaged in Federal service contracts, Cooper knew or should have known about the notice requirement, particularly since Respondent seems willing to use the FAR as its defense for not bargaining. Second, a review of the notices provided by the contracting officer reveal that the notices provided to Respondent identify the Union when the Union had been provided notice. A review of the December 11, 2017 notification letter sent to Respondent about the upcoming option year does not identify the Union, suggesting the Union had not been provided notice. (GCx3)(GCx4)

Respondent admitted it had a bargaining obligation under the wage reopener and that it had no constraints on its ability to bargain with the Union regarding wages.

c. FAR

The FAR are federal guidelines for contractors, not unions. (44, 74, Richards)
The FAR generally regulates contractors' attempts to secure a service contract with the Federal Government or modify an existing contract. *Id.* There is no evidence that the FAR limits a contractor's legal obligation under the Act to engage in good-faith bargaining over mandatory subjects of bargaining. However, Richards testified that despite the Agreement's silence regarding the FAR, or any other deadline for submitting wage proposals, he considers the FAR when making bargaining proposals as a courtesy to contractors. *Id.* at 74, 79.

According to Cooper's interpretation of the FAR, the "*general*" deadline for concluding wage negotiations was January 22, 2018. (93, 99, Cooper) Respondent's defense is premised on Section 22.1012-2, 2.(b) which states:

For contractual actions other than sealed bidding, a new or changed collective bargaining agreement shall not be effective under 41 U.S.C. 6707(g). if notice of the terms of the new or changed collective bargaining agreement is received by the contracting agency after award of a successor contract or a modification as specified in 22.1007(b), provided that the contract start of performance is within 30 days of the award of the contract or of the specified modification. If the contract does not specify a start of performance date which is within 30 days of the award of the contract or of the specified modification, or if contract performance does not commence within 30 days of the award of the contract or of the specified modification, any notice of the terms of a new or changed collective bargaining agreement received by the agency not less than 10 days before commencement of the work shall be effective for purposes of the successor contract under 41 U.S.C. 6707(c).²³ (Jx8)

²³ It appears from FAR section 22.1012-2, 2(b) that because Respondent's contract with DON already contained a start date of February 1, 2018 any modification agreed to between Respondent and the Union

Cooper admitted that any deadline imposed by the FAR for submitting wage adjustments are only applicable if Section 22.1010, Notification to interested parties under collective-bargaining agreements, is complied with. (114-115, Cooper) Section 22.1010 states:

1. (a) The contracting officer should determine whether the incumbent prime contractor's or its subcontractors' service employees performing on the current contract are represented by a collective bargaining agent. If there is a collective bargaining agent, the contracting officer shall give both the incumbent contractor and its employees' collective bargaining agent written notification of -
 - (1) The forthcoming successor contract and the applicable acquisition dates (issuance of solicitation, opening of bids, commencement of negotiations, award of contract, or start of performance, as the case may be); or
 - (2) The forthcoming contract modification and applicable acquisition dates (exercise of option, extension of contract, change in scope, or start of performance, as the case may be); or
 - (3) The forthcoming multiple year contract anniversary date (annual anniversary date or biennial date, as the case may be).
2. (b) This written notification must be given at least 30 days in advance of the earliest applicable acquisition date or the applicable annual or biennial anniversary date in order for the time-of receipt limitations in paragraphs 22.1012-2(a) and (b) to apply. The contracting officer shall retain a copy of the notification in the contract file. (Jx8)

It is undisputed that the DON contracting officer failed to provide the required notice to the Union that the DON intended to exercise the February 1, 2018 option year.²⁴ (49, Richards)(GCx4) Thus, according to Section 22.1012-2, any potential

agreed to prior to February 1, 2018, would have been automatically approved by the Federal Government (conditioned on wages being reasonable and made at arms-length dealings). (Jx8)

²⁴ GCx4 is an e-mail from DON contracting officer Waite to Richards clearly stating that the DON failed to provide notice of the DON's intent to exercise the option year February 1, 2018.

deadline for guaranteeing reimbursement for wage adjustments was inapplicable to the parties and their negotiations. (Jx8)

d. Equitable Adjustments

As identified above, despite the FAR's guidance regarding deadlines for wage reimbursement, the FAR allows for contractors to seek retroactive wage adjustments after deadlines identified in the FAR. (74-75, Richards)(96-97, Cooper) Both Cooper and Richards admitted methods exist that allow for contractors and unions to negotiate beyond FAR deadlines and propose retroactive wage adjustments to the Federal Government. *Id.* According to Cooper, the risk of an equitable adjustment request is the Federal Government may not approve and reimburse an agreed to wage increase. (97, 109, 124, Cooper)

e. Respondent's DON Contract Modification

Undermining Respondent's claim that the Union had until January 22, 2018 to complete wage negotiations with Respondent, Cooper had already finalized terms with the DON for the February 1, 2018 option year on January 17, 2018. (Jx6, pg. 1)

Five days before Respondent's so-called January 22, 2018 deadline, Cooper had already signed the DON contracting officer's contract offer which kept the unit employees' wages the same as the 2017 option year. *Id.* Cooper signed the DON's offer knowing the Union had previously requested wage negotiations. (112, Cooper)

f. Respondent's Internal Communications

In response to the Union's January 19, 2018 wage proposal, Metaxa sent Cooper an e-mail on January 22, 2018 at 7:51 a.m., stating:

Checking with you before I respond that they missed the deadline for a wage adjustment for this option year. How do you want to handle? (Jx3, pg. 3)

Cooper replied to Metaxa's question that same day at 9:40 a.m., stating:

...We are past the deadline to incorporate any increases for the next option period, even if we wanted to. We should continue discussions, but economic change will not take effect until 2019. Has HR done an updated wage survey? Depending on where we are in what we are willing to do, that will dictate our response.²⁵ (Jx3, pg. 2)

Despite both Cooper and Metaxa stating that a deadline was missed, neither of them bothered to inform the Union of their belief. (37, 40, Richards)(125-126, Cooper) Cooper later instructed Metaxa to contact Richards to relay the message that Respondent was in receipt of Richards' January 19, 2018 proposal and would respond shortly. (Jx3, pg.1)

In response to Richard's February 6, 2018 follow-up e-mail about his wage proposal, Cooper and Carrol exchanged e-mails with each other later that day. In one of those e-mails, Cooper states:

I need to get organized first, Chuck. What is important to note is that the window for us to submit to the Navy an adjustment based on increased CBA wages is gone. We, therefore; can't agree to an increase in the current option year. As soon as I get organized; I'll walk you through how we handle these. I may have our outside counsel serve as lead negotiator. Ishun has proven to be difficult to deal with, and he is likely to file an NLRB complaint. (Jx4)

Again, despite the Respondent's internal decision that it would not seek a wage increase for reimbursement, it never communicated this belief to Respondent. (125-126,

²⁵ Cooper's e-mail exemplifies Respondent's disregard of its bargaining obligation. Despite knowing that the Union requested wage bargaining in December 2017, neither Cooper nor anyone else from Respondent bothered to facilitate a wage survey until after, it had already agreed to the DON's January 17, 2018, offer, and its alleged January 22, 2018 deadline.

Cooper) Rather, it decided to prepare for a potential unfair labor practice charge.²⁶
(Jx4)

At the time of Respondent's decision to not communicate with the Union, Respondent knew that it had finalized its modification for the upcoming option year with the DON on January 17, 2018 - five days before its self-imposed deadline of January 22, 2018. (119, Cooper)(Jx6, pg. 1)

D. LEGAL ANALYSIS AND CONCLUSION

I. Legal Framework

Section 8(a)(5) and 8(d) establish an employer's obligation to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment." Parties to a collective-bargaining agreement can, by mutual consent, include a reopener provision in their contract, by which they agree to open specified subjects for bargaining before the expiration date of the contract. See *Speedrack, Inc.*, 293 NLRB 1054 (1989); *Ridge View Industries, Inc.*, 316 NLRB No. 144 (1995).

In *Speedrack, Inc.*, concerning reopener provisions, the Board stated:

When parties agree to a reopener provision, they essentially choose flexibility over stability as to those provisions of their contract governed by the reopener, because each party has thereby waived the protection that the proviso to Section 8(d) of the Act would otherwise provide against being called on to bargain over matters governed by the contract prior to the period that commences 60 days before the contract's expiration. See *Allied Chemical & Alkali Workers Local 10 v. Pittsburgh Plate Glass*, supra at 186. **They also must intend, in the absence of a clear indication to the contrary, that the bargaining will consist of more than one party asking the other if it would agree to a change**, for even in the absence of a reopener provision, changes

²⁶ While Respondent attempted to portray the Union's unfair labor practice charge in the present case as being quickly filed, clearly Respondent already decided to defend against an unfair labor practice charge rather than negotiate, as evidenced by Cooper's e-mail. Additionally, it's important to remember that at the time the Union filed the charge in the present case, it had a pending charge for failure to bargain against Hana Industries.

may be made by mutual consent. In determining what freedom of action the parties may have under our Act during such reopener periods, we must avoid imposing conditions that would turn reopener bargaining into little more than a charade that would barely differentiate it from the kinds of discussion that may lawfully occur even in the absence of a reopener. [emphasis added]

293 NLRB at 1055. In considering other Federal laws, the Board has stated that its duty is to construe the labor laws so as to accommodate the purposes of other Federal laws.

Meyers Industries, 281 NLRB 882, 888 (1986). Many Board cases reflect this philosophy where an employer argues that it violated the labor laws only because it was merely acting in compliance with another Federal law. See, e.g., *Swanson Group*, 312 NLRB 184 (1993) (employer refused to bargain with union on grounds that Service Contract Act provided defense); *National Fuel Gas Distribution Corp.*, 308 NLRB 841, 844 (1992) (employer relied on sec. 415 of the Internal Revenue Code as a justification for its unilateral repudiation of contractual thrift plan obligations). These defenses have been rejected by the Board. See *Bozeman Deaconess Foundation*, 322 NLRB 1107, 1119 (1997).

The Board has explicitly rejected defenses based on an alleged conflict between respondents' bargaining obligations and its relationships with the Federal Government, including uncertainty regarding wage reimbursements. In *Dynaelectron Corp.*, the Board rejected respondent's jurisdictional defense based on respondent's uncertainty regarding a lack of control over economic matters, stating:

The Employer argues that jurisdiction should not be asserted because of the possibility that the contract price may be insufficient to compensate it for collectively bargained wages and benefits. The Employer's contention fails because in essence it is a claim that the DOL limits the Employer's total budget. *Long Stretch*, rejected the argument that an employer lacks control over economic matters in such a circumstance. The contract here may set minimum wage

and benefit requirements, but the Employer is able to bargain with the employees over the terms and conditions of employment and is free to compensate its employees at more than the minimum levels set by the DOL...

The Employer next contends that its ability to bargain is limited because if it enters into negotiations with a labor organization during the term of the contract, and a collective-bargaining agreement results in a contract price higher than that for which the Employer bid, the Employer would not be able to recoup the difference until the next fiscal year. At that time, those collectively bargained wage and benefit rates would become the new wage determination. Although it is true that the Employer is unable to pass on to the Navy the cost of increased wages and benefits, at least until the next fiscal year, this also is true for any private employer that is a party to a fixed-price contract and that agrees in collective-bargaining negotiations to provide its employees increased wages and/or benefits during the term of that contract. In addition, the Service Contract Act does not require the employer to agree to provide higher wage rates or benefit levels than those prevailing in the locality.

...In any event, as the Employer acknowledged at the hearing, an employer may bargain for language in the collective-bargaining agreement to protect it should the bargained-for rates not be incorporated into a revised wage determination.

286 NLRB at 304. Additionally, the Board has found it significant when there is no evidence that collectively-bargained wage and benefit increases would not have been incorporated in the wage determinations by the Federal Government. See *Old Dominion Security*, 289 NLRB 81, 82 (1988).

II. Respondent violated Section 8(a)(5) of the Act by Failing and Refusing to Bargain with the Union regarding the Union's January 2018 Wage Proposal

By ignoring the Union's January 2018 wage proposal, properly submitted according to the Agreement's wage reopener, Respondent violated Section 8(a)(5) of the Act.

The following facts are not in dispute:

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- The Agreement contains a wage reopener clause;
- On December 8, 2017, the Union properly invoked the wage reopener clause;
- Respondent immediately received the Union's bargaining request;
- On January 19, 2018, the Union proposed a 77-cent increase to unit employee wages;
- Respondent immediately received the Union's wage proposal;
- Respondent communicated to the Union that it would respond to the Union's wage proposal;
- Respondent never responded to the Union's wage proposal.

These undisputed facts alone are sufficient to sustain the General Counsel's allegation.

Respondent's defense that its bargaining obligation is somehow contingent on the Federal Government's reimbursement has been previously tried and rejected by the Board in *Dynalectron Corp*, albeit in a different context.

There is no language in either the Agreement, Federal statute, or the FAR, that explicitly limits or curtails Respondent's bargaining obligation regarding wages. Rather, Respondent misappropriates FAR Section 22.1012-2 to manufacture a defense for its willful disregard of its bargaining obligation.

Respondent concedes it had sufficient time to negotiate with the Union prior to January 22, 2018, and that it could have negotiated with the Union after January 22, 2018 and sought a retroactive wage adjustment from the Federal Government. There is no evidence that the DON would not have approved a wage increase either before or after January 22, 2018. Moreover, Respondent admitted it is not limited to Federal Government reimbursement in compensating employees for wage adjustments. Additionally, Respondent's reliance on the FAR falls apart because its self-imposed deadline was inapplicable because the FAR's notice requirements to the Union were not complied with. Finally, Respondent's reliance on a January 22, 2018 deadline is of little

use since it had already entered into an agreement with the DON for the February 2018 option year on January 17, 2018 – five days before the so-called deadline.

Here were all the bargaining options available to Respondent:

- Respondent could have offered its own wage increase, or decrease, instead of waiting until the Union's January 19, 2018, proposal;
- Respondent could have immediately responded to the Union's January 19, 2018 proposal instead of waiting until after January 22, 2018;
- Respondent could have responded to the Union's proposal after January 22, 2018 and sought an equitable adjustment from the Federal Government;
- Respondent could have negotiated wages at any time, and paid an increase from sources other than Federal Government reimbursement, such as profits; or
- Respondent could have merely informed the Union that it could not pay a wage increase without a Federal Government reimbursement, and let the bargaining process play out.

Instead, Respondent acted in the exact way the Board cautioned against in *Speedrack, Inc.* - as though wage reopener negotiations are a one-way street driven by the Union. Significantly, Respondent maintained complete silence opposite the Union's request to bargain and its bargaining proposal. The ALJ should easily reject Respondent's defense and find a violation of Section 8(a)(5).

E. CONCLUSION

The sum of the record evidence reveals Respondent has violated the Act by failing and refusing to bargain with the Union regarding wages as alleged in the Complaint and Notice of Hearing. Respondent admits it was not limited in its ability to bargain over wage increases, but simply decided to ignore its legal obligation because of internal economic reasons.

Counsel for the General Counsel respectfully urges the ALJ find that Respondent has violated the Act as alleged in the Complaint, and order Respondent to cease its unlawful conduct.

APPENDIX I – PROPOSED ORDER

That Respondent, HBC Management, Inc., its officers, agents, successors, and assigns be ordered to:

1. Cease and desist from:
 - (a) Failing and refusing to bargain collectively about wages for unit employees, pursuant to the reopener clause of the Agreement;
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
 - (a) Meet and bargain with the Union with respect to wages for the unit employees pursuant to the reopener provision, and if an understanding is reached, embody that understanding in a signed agreement.
 - (b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX II – (Proposed) NOTICE TO EMPLOYEES

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative 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.

United Security & Police Officers of America (USPOA) is the employees' representative in dealing with us regarding wages, hours and other working conditions of the employees in the following unit:

All full and regular part-time security officers employed by the Employer at the Washington Navy Yard Naval Sea Systems Command (NAVSEA) and the Military Sealift Command (MSC)

WE WILL NOT, upon request, refuse to bargain in good faith with **United Security & Police Officers of America (USPOA)** as the exclusive collective-bargaining representative of our employees in the appropriate unit described above.

WE WILL, upon request, bargain in good faith with **United Security & Police Officers of America (USPOA)** as the exclusive collective-bargain representative of our unit employees, with respect to employee wages as set forth in Article XXVI and Appendix A of the collective bargaining agreement effective January 9, 2017 to January 31, 2020

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

CERTIFICATE OF SERVICE

This is to certify that on January 22, 2019, a copy of the Brief of the counsel for the General Counsel was served by e-mail on:

BRAD S. MILLER, ESQ.
COOPER & MILLER, LLC
SUITE 1200
1515 MARKET STREET,
PHILADELPHIA, PA 19102
Bmiller@Coopermillerlaw.com

/s/ Brendan Keough
Counsel for the General Counsel
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 South Charles Street
Suite 600
Baltimore, MD 21201
(410) 962-2741
(410) 962-2198 (FAX)
Brendan.Keough@nlrb.gov