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American Security Programs, Inc. and Union of Patriots Plaza. Case 05–CA–211315

December 16, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND KAPLAN

On November 14, 2018, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.¹

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions, to

¹ Member Emanuel is recused and took no part in the consideration of this case.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge inadvertently stated that the Respondent unilaterally implemented its final offer on November 27, 2017, rather than November 28, as the parties had stipulated. The judge also inadvertently attributed a quotation from *Centinela Hospital Medical Center*, 363 NLRB No. 44, slip op. at 3 (2015), to *Atlantic Queens Bus Corp.*, 362 NLRB 604 (2015). We correct these inadvertent errors, which do not affect the disposition of this case. We also do not rely on the judge's citation to *Area Trade Bindery Co.*, 352 NLRB 172 (2008), a case decided by a two-member Board. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

For the reasons stated in his decision, we adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unilaterally implementing its final offer in the absence of a valid impasse. We do not, however, adopt the judge's additional finding that the Respondent violated Sec. 8(a)(5) and (1) by failing and refusing to meet and bargain with the Union after it unilaterally implemented its final offer. The complaint does not allege the latter violation, and the judge's decision contains no analysis addressing either the merits of this additional finding or whether the finding of this unalleged violation is appropriate under the standard set forth in *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

Chairman Ring agrees that the Respondent failed to meet its burden of showing that the parties reached a valid impasse. In so finding, he relies on evidence showing that the Respondent imposed shifting deadlines for the parties to reach agreement (including falsely claiming that another entity, the Federal Protective Service, had imposed one of those deadlines), and presented and shortly thereafter implemented a final offer that changed the Respondent's position on multiple significant

amend the remedy,³ and to adopt the recommended Order as modified and set forth in full below.⁴

We shall modify the judge's recommended Order to conform to our findings herein and to the Board's standard remedial language. Specifically, to remedy the finding that the Respondent unlawfully unilaterally changed its terms and conditions of employment by implementing its final contract offer absent impasse, we shall order the Respondent to cease and desist, to rescind its unilateral changes, and, before implementing any further changes, to notify and, on request, bargain with the Union.

Based on his additional finding that the Respondent refused to meet and bargain with the Union, the judge included in his recommended order an affirmative bargaining order. Because we are not adopting the judge's refusal-to-bargain finding, and because the unlawful unilateral changes implemented by the Respondent in the absence of a valid impasse do not warrant an affirmative bargaining order, we will substitute a limited bargaining order instead.⁵

Our colleague would adopt the judge's recommended affirmative bargaining order. She relies on several cases

noneconomic issues on which the parties had previously reached agreement. Chairman Ring further notes that although he would not require the Respondent to agree to mediation in order to reach a valid impasse, the Respondent did not even respond to any of the Union's multiple requests for mediation. The Chairman does not rely, however, on the judge's findings that the decision to bargain economic terms by email and the inexperience of the Union's negotiators weigh against a finding of impasse.

³ We amend the judge's remedy to provide that the Respondent make all delinquent contributions to the applicable benefit funds, including any additional amounts due to the funds on behalf of unit employees in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, we amend the judge's remedy to provide that the Respondent make unit employees whole for any expenses they may have incurred as a result of the Respondent's failure to make such payments in accordance with *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Further, to the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes to the funds.

⁴ We shall substitute a new notice to conform to the Order as modified.

⁵ Our colleague states that the Respondent did not except to the judge's recommended affirmative bargaining order, but "[i]t is . . . firmly established that remedial matters are traditionally within the Board's province and may be addressed by the Board in the absence of exceptions." *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996).

in which the Board issued such an order for violations of the kind at issue here, the unlawful implementation of the terms of a final offer in the absence of a valid impasse in collective bargaining. Preliminarily, we observe that in none of these decisions did the Board explain its choice of that remedy. However, as the orders in some of the cases our colleague cites attest, the violation to be remedied is that the employer unilaterally changed unit employees' terms and conditions of employment without a legal right to do so. See, e.g., *Microdot, Inc.*, 288 NLRB 1015, 1023 (1988) (ordering employer to cease and desist from "[u]nilaterally implementing changes in the terms and conditions of employees in the bargaining unit . . . without first engaging in bargaining with [the union]"); *SGS Control Services*, 275 NLRB 984, 989 (1985) (ordering employer to cease and desist from "[m]aking unilateral changes in . . . terms and conditions of employment"). In 2002, the Board began issuing so-called limited bargaining orders, rather than affirmative or general bargaining orders, to remedy unilateral-change violations. See *Mimbres Memorial Hospital*, 337 NLRB 998, 998 fn. 2, 999 (2002), review denied sub nom. *NLRB v. CHS Community Health Systems, Inc.*, 108 Fed. Appx. 577 (10th Cir. 2004).⁶ All but two of the cases our

⁶ Our colleague contends that *Mimbres* is distinguishable because that case did not involve unilateral changes during negotiations for a collective-bargaining agreement. This contention misses the point. The *Mimbres* Board held that a limited bargaining order, rather than an affirmative bargaining order, is the appropriate remedy for unlawful unilateral changes. The Board's rationale in that decision did not rely on when or under what circumstances the unilateral changes were made. Rather, the Board held that an affirmative bargaining order was unnecessary because the employer "did not withdraw recognition of the [u]nion." 337 NLRB at 998 fn. 2. And the Board has long recognized that *Mimbres* so held. See *Long Island Head Start Child Development Services*, 345 NLRB 973, 973 fn. 1 (2005), enf. denied on other grounds 460 F.3d 254 (2d Cir. 2006).

Although the Board has not been perfectly consistent, limited bargaining orders have long been regarded as the standard remedy for unilateral-change violations. See, e.g., *Ferguson Enterprises, Inc.*, 349 NLRB 617, 617 fn. 1 (2007) ("[W]e will substitute a limited bargaining order for the judge's recommended affirmative bargaining order, which is not necessary to remedy the [r]espondent's unlawful unilateral changes in terms and conditions of employment.") (citing *Mimbres*); *Alta Vista Regional Hospital*, 355 NLRB 265, 265 fn. 2 (2010) ("[W]e shall substitute a limited bargaining order for the affirmative bargaining order recommended by the judge, which is not necessary to remedy the [r]espondent's refusal to provide information and unilateral changes in terms and conditions of employment."), incorporated by reference in 357 NLRB 326 (2011), enf. sub nom. *San Miguel Hospital Corp. v. NLRB*, 697 F.3d 1181 (D.C. Cir. 2012); *Tampa Electric Company, a wholly owned subsidiary of TECO Energy, Inc. d/b/a TECO Peoples Gas*, 364 NLRB No. 124, slip op. at 1 fn. 2 (2016) ("We shall also substitute a limited bargaining order for the judge's recommended affirmative bargaining order in accordance with *Mimbres Memorial Hospital*['.']; *Walden Security, Inc.*, 366 NLRB No. 44, slip op. at 1 fn. 5 (2018) (same). Indeed, the Board has held that it was "error" to issue an affirmative bargaining order for unilateral-change violations. See

colleague cites in footnote 4 of her partial dissent predate *Mimbres Memorial Hospital* and thus are of questionable authority on the remedial issue presented here. Post-*Mimbres*, the Board has been inconsistent. Our colleague cites two cases in which it issued an affirmative bargaining order to remedy unilateral changes effected through implementation of a final offer absent a valid impasse, but in at least two other cases, the Board did not do so. See *Mike-Sell's Potato Chip Co.*, 360 NLRB 131, 141 (2014); *Southcoast Hospitals Group, Inc.*, 365 NLRB No. 100, slip op. at 1 fn. 2, 2 (2017) (limited bargaining order).⁷

The Board's remedial discretion is broad, see, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898–899 (1984), and for 8(a)(5) violations of the type at issue here, we believe *Mike-Sell's* and *Southcoast* reflect the better choice. They are consistent with the cases cited in footnote 6, above, which demonstrate that the limited bargaining order is the standard remedy for unilateral-change violations. Moreover, an affirmative bargaining order remedy would add nothing to the Respondent's legal obligations. Under our order, the Respondent must cease and desist from implementing a final offer absent a valid impasse, it must rescind its unilateral changes, and it must not depart from the status quo ante without giving the Union notice and opportunity to bargain. By operation of law—specifically, Section 8(d) and 8(a)(5)—the Respondent must, on request, bargain in good faith with the Union, and during such negotiations for a collective-bargaining agreement, it must refrain from making further unilateral changes unless and until negotiations reach a valid impasse. See *Bottom Line Enterprises*, 302 NLRB 373 (1991), enf. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). The only material difference an affirmative bargaining

Print Fulfillment Services LLC, 361 NLRB 1243, 1247 fn. 22 (2014) (finding unilateral-change violations, and stating that "[a]lthough the complaint did not allege that the [r]espondent generally failed and refused to recognize and bargain with the [u]nion, the judge's recommended Order included language reserved for such an allegation [i.e., an affirmative bargaining order]. We shall correct this error by substituting a limited bargaining order appropriate to the violations of Sec. 8(a)(5) we have found.") (emphasis added).

Our colleague says an affirmative bargaining order is warranted because of "the absence of evidence establishing that the Respondent actually continued to bargain with the Union." In other words, she would base the remedy on the Respondent's failure to prove that it acted lawfully, even though the complaint did not allege, and the General Counsel did not prove, that it acted unlawfully by failing and refusing to bargain. This proposition refutes itself.

⁷ Our colleague contends that both of these cases include distinguishing facts that explain the absence of an affirmative bargaining order. However, the Board did not state that it relied on these or any other facts in fashioning its remedy for the unlawful implementation of the final offer.

order would make would be to preclude the unit employees, for as long as a year, from exercising their Section 7 rights to choose to be represented by a different union or by no union at all. See, e.g., *Caterair International*, 322 NLRB 64 (1996). Based on the foregoing considerations, we believe that for violations of the type at issue here—absent any finding of an unlawful refusal to bargain or withdrawal of recognition—an affirmative bargaining order with its corresponding decertification bar is not necessary to effectuate the purposes of the Act.⁸

ORDER

The National Labor Relations Board orders that the Respondent, American Security Programs, Inc., Reston, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making unilateral changes in unit employees' terms and conditions of employment by unilaterally implementing its last, best, and final offer at a time when it had not reached a valid impasse in bargaining with the Union of Patriots Plaza (the Union) for a collective-bargaining 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) Rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on November 28, 2017.

(b) Before implementing any further changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All full-time and regular part-time security officers employed by the [Respondent] at the Patriots Plaza I and II Buildings currently located at 395 and 375 E Street, S.W., Washington, D.C.; but excluding all office clerical employees, managerial employees, and supervisors as defined in the Act.

(c) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral implementation of its final offer in the

manner set forth in the remedy section of the judge's decision.

(d) Compensate unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

(e) Make all delinquent contributions to the applicable benefit funds on behalf of unit employees that have not been paid since November 28, 2017, including any additional amounts due the funds, in the manner set forth in this decision.

(f) Make unit employees whole for any expenses ensuing from the failure to make the required contributions to the applicable benefit funds, with interest, in the manner set forth in this decision.

(g) 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.

(h) Within 14 days after service by the Region, post at its Washington, D.C. facilities copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees

⁸ This case has brought to the surface an inconsistency in Board precedent, which we have addressed. It does not involve a doubt or uncertainty created by the Respondent's wrongdoing. Accordingly, the general rule, cited by our colleague, that doubts should be resolved against the wrongdoer does not apply here.

⁹ 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."

and former employees employed by the Respondent at any time since November 28, 2017.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 16, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting in part.

A newly certified union, whose president and bargaining representative had no prior labor experience, began negotiating with the employer for a first collective-bargaining agreement. The negotiations did not go smoothly—the employer refused to negotiate wages other than by email, misrepresented communications about its service contract with the government that materially affected employees' terms and conditions of employment, fabricated deadlines to pressure the union to accept its proposals, and, finally, unilaterally implemented its regressive final proposal before the parties had reached an impasse. The majority correctly finds that this conduct was unlawful,¹ but mistakenly fails to order a full remedy. As I will explain, the Board should issue an affirmative bargaining order, in addition to the other remedies ordered here. In the circumstances of this case, an affirmative bargaining order—which specifically requires the employer to bargain in good faith with the union—is standard and appropriate. The judge recommended an affirmative bargaining order, and the employer did not except.

I.

A very brief review of the Respondent's unlawful conduct helps to demonstrate the need for an affirmative

¹ I agree with my colleagues that no lawful impasse was reached here. That conclusion is supported not only by the factors relied upon by the majority, but also by (as considered by the judge) the Union's inexperience and the Respondent's insistence on conducting email negotiations over the most important subject of concern to the Union. See generally *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd. sub nom American Federation of Television and Radio Artists, AFL-CIO v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

bargaining order here. The Respondent, which provides contract security services for federal agencies, had such a contract with the Federal Protective Services (FPS), an agency within the Department of Homeland Security.² The Respondent's security officers who worked under the FPS contract were previously represented by another labor organization before the Union was certified on September 2, 2016, to represent them.

The Union's certification issued shortly before the predecessor union's collective-bargaining agreement with the Respondent, and the Respondent's service contract with FPS, were set to expire at the end of September 2016. At the Respondent's request, FPS extended the existing service contract another year (until September 30, 2017) and subsequently to March 31, 2018, maintaining existing wages above the prevailing wage rate. Meanwhile, the Respondent received a new FPS contract, to take effect December 1, 2017,³ and both the Respondent and the Union expressed their desire to reach a new agreement in time to submit it to FPS before that date.

The parties thus commenced bargaining. After reaching agreement on noneconomic terms over the course of six in-person meetings between May 19 and September 1, the Respondent stated that going forward, it would negotiate economic terms only by email. Throughout the remaining exchange of proposals, which diverged on the subject of wages, the Respondent ignored the Union's repeated requests for mediation and refused to consider historical wage rates. As the judge explained more fully, the Respondent accompanied its economic proposals with "short, ever-changing deadlines," including a false ultimatum that the Union sign its "best and final offer" by September 19 to be recognized by FPS, followed by several threats that it would revert to the lower prevailing wage on December 1 if no agreement were reached by October 31. The Respondent tied its series of bargaining deadlines to the renewal of the FPS contract, while misrepresenting its communications with FPS -- and failing to divulge to the Union that FPS had extended the contract term through March 31, 2018. The Respondent revised its final offer, modifying noneconomic proposals that had been agreed to before September 1. After its fabricated deadlines had come and gone without an agreement, the Respondent informed the Union on No-

² The contract was governed by the McNamara-O'Hara Service Contract Act (SCA), which requires contractors to pay their employees the area's prevailing wage rates. The U.S. Department of Labor enforces the SCA and issues "wage determination" orders setting the minimum wage that must be paid. If a collective-bargaining agreement provides for higher than prevailing wages, and is submitted with a bid, the employer may be reimbursed at that higher rate.

³ All subsequent dates are in 2017, unless otherwise indicated.

ember 28 that it would implement its final offer, effective December 1.

II.

I join the majority in finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its final offer without bargaining to a good-faith impasse. Contrary to the majority, however, I would adopt the judge's recommended affirmative bargaining order (which the Respondent did not except to). The Board's remedial obligation is to effect "restoration of the situation, as nearly as possible, to that which would have obtained but for" the unfair labor practices. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Here, the judge's recommended affirmative bargaining order is necessary to restore the status quo ante to the point in time when the Respondent effectively terminated the parties' negotiations by announcing that it would implement its final offer. Indeed, an affirmative bargaining order is the Board's standard remedy in these circumstances, because an employer's unlawful implementation of its final offer interrupts the bargaining process. This necessitates an order requiring the parties to resume good-faith bargaining.⁴

The majority refuses to issue such a remedy here in part because the Board is *not* adopting the judge's finding that the Respondent failed and refused to resume bargaining *after* the Respondent's unlawful implementation. But the judge also relied upon the Respondent's multiple unilateral changes to mandatory subjects of bargaining, made both prior to and upon the unlawful implementation of its final offer. These unilateral changes were, by their very nature, "tantamount to an outright refusal to negotiate" on the relevant subjects. *NLRB v. Katz*, 369 U.S. 736, 746 (1962). Indeed, such unilateral action "is a circumvention of the duty to negotiate which frustrates the objectives of Sec. 8(a)(5) much as does a flat refusal." *Id.* at 743.⁵ An affirmative bargaining order is necessary to ensure that the Respondent resumes

bargaining in accordance with its statutory duties (which, of course, it has already violated).⁶

The majority also maintains that an affirmative bargaining order would add nothing to the Board-issued cease-and-desist and limited bargaining order remedies addressing the Respondent's unilateral changes, except for a decertification bar precluding a challenge to the Union's status as bargaining representative. To the contrary, neither cited remedy for the unilateral changes actually puts the parties back at the bargaining table. And neither remedy fully recognizes that it was the Respondent that disrupted the collective-bargaining process. Thus, instead of requiring the Respondent (the wrongdoer here) to initiate further bargaining, so as to resume where the parties left off, those remedies place the burden on the Union (the wronged party) to request such bargaining, with little anticipation of success.

Finally, in addition to an affirmative bargaining order being the standard remedy in this situation, there is no evidence suggesting that such an order is unnecessary, as in *Mike-Sells*, noted above, where there was evidence that the parties actually had resumed bargaining. Thus, an affirmative bargaining order remains entirely appropriate here, given the absence of evidence establishing that the Respondent actually continued to bargain with

⁴ See e.g., *Atlantic Queens Bus Corp.*, 362 NLRB 604, 607, 616 (2015); *Coastal Cargo Co.*, 348 NLRB 664, 664-665, 668 (2006); *Bottom Line Enterprises*, 302 NLRB 373, 375 (1991), *enfd.* sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994); *Microdot, Inc.*, 288 NLRB 1015, 1016 (1988); *Milwaukee Terminal Services*, 282 NLRB 637, 637, 646 (1987); *SGS Control Services*, 275 NLRB 984, 987-989 (1985).

⁵ I join the majority in not adopting the judge's violation relating to the Respondent's post-implementation actions, as they were not alleged in the complaint. The Respondent's unilateral implementation of its final contract proposal, and its concomitant failure and refusal to bargain were, however, fully alleged in the complaint and litigated as the main issue in this case.

⁶ The cases cited by the majority do not undercut the appropriateness of that remedy. *Mimbres Memorial Hospital*, 337 NLRB 998 (2002), review denied sub nom. *NLRB v. CHS Community Health Systems, Inc.*, 108 Fed.Appx. 577 (10th Cir. 2004), bears no resemblance to the situation in this case: an employer's unlawful implementation of its final offer and the remedy required to restore the parties to where they were before the unlawful implementation. The employer in *Mimbres* unilaterally changed its absence and sick leave policies independently of contract negotiations, without implementing any kind of final offer that terminated negotiations. *Id.* at 998 fn. 2, 999. *Mimbres* is not only distinguishable, but like the other cases cited by the majority, remedies an entirely different violation—a unilateral change to an established term and condition of employment, see, e.g., *Tampa Electric Company*, supra, 364 NLRB No. 124, slip op. at 9, not the shutting down of months of bargaining toward an overall collective-bargaining agreement as we have here. The majority also mistakenly contends that two cases—*Mike-Sell's Potato Chip Co.*, 360 NLRB 131 (2014), and *Southcoast Hospitals Group, Inc.*, 365 NLRB No. 100 (2017)—show that the Board has been inconsistent in issuing affirmative bargaining orders in similar circumstances. In *Mike-Sell's*, there was affirmative evidence that the parties had continued to bargain after the employer unilaterally implemented its final offer, and that they continued to meet until shortly before the hearing. This removed the need for a bargaining order to restore the status quo. In *Southcoast Hospitals Group*, the Board found that the employer unlawfully withheld relevant information requested by the union, in addition to implementing its final offer. The status quo ante was restored in part by the Board's order to produce the withheld information, which put the parties back on equal footing to resume bargaining. Although the Board did not explain why it chose not to also issue an affirmative bargaining order, the case certainly does not stand for the proposition that such an order is unnecessary or inappropriate in these circumstances.

the Union.⁷ Issuing such an order in these circumstances, moreover, comports with the Board's well-established position that in a remedial context uncertainty resulting from unlawful conduct must be resolved against the wrongdoer.⁸

For all of these reasons, the Board should issue an affirmative bargaining order here to fully remedy the Respondent's unlawful conduct. Because the majority's failure to do so is unwarranted, I dissent on this point.

Dated, Washington, D.C. December 16, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT make unilateral changes in our unit employees' terms and conditions of employment by unilat-

⁷ The majority misconstrues the significance of the absence of proof of continued bargaining. Contrary to the majority, I am not suggesting that the Respondent needs to prove it continued bargaining in order to avoid the finding of another violation. It's simply a factual matter that goes to whether the standard affirmative bargaining order is necessary to remedy the violation we all agree upon.

⁸ See generally *Total Security Management Illinois, LLC*, 364 NLRB No. 106, slip op. at 18 & fn. 41 (2016) (placing burden on the employer to establish that discharged employee would have been fired for cause even absent employer's refusal to bargain); *Basin Frozen Foods*, 320 NLRB 1072, 1074 (1996) (backpay proceeding). The Board's view, moreover, accords with that of the Supreme Court: "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946).

erally implementing our last, best, and final offer at a time when we have not reached a valid impasse in bargaining with the Union of Patriots Plaza (the Union) for a collective-bargaining agreement.

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

WE WILL rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented on November 28, 2017.

WE WILL, before implementing any further changes in wages, hours, or other terms and conditions of employment of our unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

All full-time and regular part-time security officers employed by the [Respondent] at the Patriots Plaza I and II Buildings currently located at 395 and 375 E Street, S.W., Washington, D.C.; but excluding all office clerical employees, managerial employees, and supervisors as defined in the Act.

WE WILL make our unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral implementation of our final offer, plus interest.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

WE WILL make all delinquent contributions to the applicable benefit funds on behalf of our unit employees that have not been made since November 28, 2017, including any additional amounts due the funds.

WE WILL make our unit employees whole for any expenses ensuing from our failure to make the required contributions to the applicable benefit funds, with interest.

AMERICAN SECURITY PROGRAMS, INC.

The Board's decision can be found at <https://www.nlr.gov/case/05-CA-211315> 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.



Clark C. Brinker, Esq., for the General Counsel.
Jason M. Branciforte and Tony W. Torain, II, Esqs. (Littler Mendelson, P.C.), of Washington, D.C., for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Washington, District of Columbia on September 12, 2018. The complaint alleges that American Security Programs, Inc. (the Company or Respondent) unilaterally implemented its last contract proposal and changed employees' terms and conditions of employment, including wage rates and health, welfare and pension contributions, without first bargaining with the Charging Party, the Union Patriots of Plaza (the Union), to an overall good-faith impasse for a collective-bargaining agreement (CBA) in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).¹ The Company admits that it unilaterally implemented its last contract proposal, but did so only after it reached a lawful, good faith impasse with the Union.

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

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation with an office and place of business in Reston, Virginia, has been engaged in the business of providing security services to various industries and government agencies outside the State of Virginia, including the Federal Protective Service at various locations in Washington, D.C., valued in excess of \$50,000. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Company's Operations*

The Company provides contract security services to the federal government at various locations throughout the Washington, DC metropolitan area. The contracts at issue are with the Federal Protective Services (FPS), an agency within the Department of Homeland Security, and involve security officers

assigned to 395 and 375 E Street, S.W., Washington, D.C. (395 or 375 employees). These locations are also referred to as Patriots Plaza I and II, respectively.

To obtain a contract with FPS, companies submit proposals, including wages and benefits, responding to FPS's request for a quotation. As a federal agency, FPS contracts over \$2,500 fall under the McNamara–O'Hara Service Contract Act (SCA), 41 U.S.C. § 6701 *et seq.*, The SCA requires general contractors and subcontractors performing services on covered federal or District of Columbia contracts in excess of \$2,500 to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality as determined by the United States Department of Labor, or the rates contained in a predecessor contractor's collective bargaining agreement. This is also known as the prevailing wage.

SCA regulations are enforced by the United States Department of Labor (DOL), which issues wage determination orders setting the minimum wages that contractors must pay to their employees on federal contracts. Contractors can, however, pay higher wages than those set by the DOL. If an employer has a CBA with a union that contains wages and benefits for its security officers, it has to submit the CBA to FPS as part of the bid. In such instances, the FPS generally considers the CBA to be the wage determination and reimburses the company at the higher rates in the CBA for the security officers' wages and benefits. The FPS-approved higher rate is then paid to the unit employees. As a result, the contractor maintains the same profits regardless of the wage rate, so long as FPS reimburses the contractor at that rate. The Company, a federal contractor for at least the past ten years, has never paid its employees a higher wage rate than what FPS has paid the Company.

On October 1, 2011, the Company was awarded a one-year contract by FPS to provide security services at Patriots Plaza (the 2011 contract). The 2011 contract term also included four option years, all exercised by FPS and the last of which expired on September 30, 2016. The Company's CBA with the National Association of Special Police and Security Officers (NASPSO), the predecessor union, also expired on that date. At the Company's request, FPS extended the 2011 contract until September 30, 2017.² During the additional year, FPS paid the Company the same amount for wages and benefits that were paid pursuant to the expired CBA with NASPSO.³

On June 21, the Company bid on a new FPS security services contract at 375 and 395 E Street commencing December 1. On August 31, FPS awarded the new contract to the Company. On September 26, with the 2011 contract expiring five days later, FPS extended that contract until March 31, 2018.⁴ Wages and benefits remained the same during this period.⁵

B. *The Collective-Bargaining Agreement*

Prior to September 2016, NASPSO represented the security officers employed by the Company at Patriots Plaza I and II.⁶ The CBA with NASPSO at Patriots Plaza I and II expired on

² All dates hereinafter refer to 2017 unless otherwise indicated.

³ R. Exh. 5.

⁴ R. Exh. 3.

⁵ R. Exh. 6-8.

⁶ R. Exh. 1-2.

¹ 29 U.S.C. §§ 151-169.

September 30, 2016.⁷ Sometime before that contract expired, the security officers decided to withdraw from NASPSO and form a Union to represent themselves. Rondell Cropper, a security officer at Patriots Plaza II with no prior labor experience, became the Union's president and was instrumental in petitioning the Board for certification of the Union as the exclusive collective bargaining representative of security officers at Patriots Plaza I and II.⁸ The Union won the subsequent election and, on September 2, 2016, was certified as the exclusive collective-bargaining representative of the following unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time security officers employed by the [Company] at the Patriots Plaza I and II Buildings currently located at 395 and 375 E Street, S.W., Washington, D.C.; but excluding all office clerical employees, managerial employees, and supervisors as defined in the Act.⁹

C. The Bargaining Sessions

1. May 19

Negotiations with the Union did not commence until May, over eight months after certification. All bargaining sessions were conducted at the Company's corporate office.¹⁰ Mark Phinney, vice president of government operations, was the Company's lead negotiator, assisted by human resources manager Sylvia Martinez and administrative assistant Siobhan Bloomer. Cropper and shop steward David Harris negotiated on behalf of the Union, assisted by vice president Dorian Brown and recording secretary Jacqueline Anderson.

At the first meeting, the parties exchanged initial CBA model proposals. After the Union refused to review the Company's proposed model, the Company left the room to review the Union's version. Sometime later, the Company representatives returned to the conference room. Phinney informed Cropper that the Company agreed to proceed with bargaining based on the Union's CBA template.¹¹ He also reminded Cropper that unit employees were facing wage determination.¹² Although the Union's CBA included economic proposals (wages, health and welfare benefits), the parties did not discuss any of those provisions, which sought to treat Patriots Plaza I and II equally and pay the officers a wage that escalated each year on October 1.

⁷ R. Exh. 1-2.

⁸ Cropper had no prior membership in a labor organization or experience in collective bargaining. (Tr. 19, 24.)

⁹ Company employees assigned to another building, Patriots Plaza III, are represented in labor matters by another labor organization, Union Rights for Security Officers (URSO).

¹⁰ The parties did not share bargaining notes as to what they agreed to, although Cropper notated agreements as to the noneconomic portions on his draft. He incorporated the agreed upon provisions into an updated version of the Union's model CBA after each meeting. His last update was made after the September 1 meeting. (Jt. Exh. 23; GC Exh. 2; Tr. 45-48.)

¹¹ GC Exh. 1.

¹² It is undisputed that Phinney told Cropper prior to their first bargaining session that unit employees were facing "wage determination" and he wanted to have a CBA in place by September 19.

2. May 26

At the second meeting, Phinney read the Union's proposal and agreed to the \$6 proposal for health and welfare. No other economics were discussed at the second meeting. Also at the second meeting, the parties discussed the issue of temporary employees. The Union expressed its opposition to having temporary employees work at the facility and the Company agreed to drop this point.

3. June 30

The parties met again on June 30 and bargained over the noneconomic provisions. After the June 30 meeting, Bloomer emailed Cropper the Company's proposed language for several provisions: Article 11 (No Strike No Lockout), Article 15 (Jury Duty) and Article 20 (Training and Requalification).¹³

4. August 3 and 18

The parties met on August 3 and 18. During these meetings and the rest of the month, they discussed and agreed to several topics, including gear-up and gear-down time, compensation for peak time, jury duty, firearm licensing and qualification, and holiday pay. The parties also exchanged proposals on duty and leave pay, but did not reach agreement at that time.

On August 21, Harris emailed Phinney a copy of the CBA for a nearby "sister building" staffed by Union members:

As we discussed in CBA negotiations on Friday, August 18, 2017, you will see the current base rate, health & welfare, and pension for our sister building 500 C. st. as of September 1, 2016. Base rate \$29.00 H&W \$6.00 Pension \$1.19.

According to sources a new CBA agreement is about to be signed any day now with the new wages to go into effect as follows: Base rate \$33.00 H&W \$7.00 Pension \$1.59.

Now when you cross reference, the current rates and pending rates of our sister contract, compared to what we are asking for, you shall see it's the market rate. Please keep in account that on Friday August 18, 2017, Mr. Phinney you read the old CBA agreements of PP1 and PP2, and seen that we didn't receive any type wage increase in 3-4 years. Thank you in advance for your time and we will be looking forward to meeting with you soon.¹⁴

On August 31, in preparation for the bargaining session the next day, Phinney emailed Cropper a FPS listing of applicable wage determination rates in the absence of CBA rates:

The attachment is the notice from FPS indicating which sites have a CBA in effect. Please note that DC0208 and DC0175 are at WD or Wage Determination. This is highlighted in green.

I wanted to make sure we have an understanding about tomorrow's negotiation. Following up from previous meetings, we

¹³ Jt. Exh. 2-4.

¹⁴ Jt. Exh. 5.

have discussed that we will need two separate CBA'S or use one CBA but with a separate economics for each site. We will not be able to use one CBA for these two sites using the same economics, this will not be feasible and we will not be able to continue our negotiations.

However, from the above attachment we are running out of time. Please let me know where you stand on separate economics.¹⁵

5. September 1

By the end of the September 1 meeting, the parties had agreed upon all of the noneconomic terms, including hours required for full-time work. At that point, Phinney said the parties no longer needed to meet and could communicate regarding the economic terms by email.¹⁶

D. Bargaining Over the Economic Terms

On September 8, the Company submitted its first economic proposal, an offer to pay 395 employees \$25.85 on October 1, \$26.40 on October 1, 2018, and \$26.95 on October 1, 2019. For the officers at 375, the Company offered to pay \$22.75 on October 1, \$23.90 on October 1, 2018, and \$25.10 on October 1, 2019.¹⁷

On September 11, the Union counteroffered with a wage reduction of \$.0.10 less per hour for each proposed year:

Attached to this email is a copy of our counter offer to your recent email received on Friday September 8, 2017. Please Mr. Phinney if we need to get a mediator involved to resolve these wage issues please let us know asap. Thank you in advance for your time and have a nice day.¹⁸

Phinney responded the same day with a counteroffer raising the hourly rates for 375 employees by \$0.25 in 2017, \$0.50 in 2018 and \$1.25 in 2019. He did not, however, propose any change to his previous wage offer for 395 employees and the benefits of employees of both buildings. Nor did he address the Union's request for mediation.¹⁹

On September 12, the Union counteroffered by proposing wages of \$28.89 on October 1, \$31.89 on October 1, 2018 and \$34.15 on October 1, 2019 for 395 employees. For 375 employees, the Union proposed \$25.85 on October 1, \$29.85 on October 1, 2018, and \$34.15 on October 1, 2019. The email also included an explanation that the proposal was based on a comparison of wage rates paid at nearby locations staffed by private security officers and, once again, proposed mediation:

¹⁵ Jt. Exh. 6.

¹⁶ This finding is based on Cropper's undisputed and credible testimony. (GC Exh. 2; Tr. 44-48.)

¹⁷ Jt. Exh. 7.

¹⁸ While I credit Cropper's testimony that he consulted with a mediator, I did not give weight to the uncorroborated hearsay statements allegedly made to him by the mediator. (Tr. 55-57; Jt. Exh. 8.) See *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980) ("hearsay evidence is admissible before administrative agencies, if rationally probative in force and if corroborated by something more than the slightest amount of other evidence).

¹⁹ Jt. Exh. 9.

Attached to this email you will find two (2) attachments, 1 the counter offer from the [Union], and 2 a site comparison of PSO sites within a 10 minute radius of 395 and 375. Now the last time we had a meeting at the corporate office in Virginia, you mentioned that you willing to give up a 3.5% wage increase each year for PP1 395 didn't receive a pay increase. Well as it stands 395 and 375 didn't receive a wage increase in 2014, 2015, 2016, and 2017. Now, if you multiply **4 (years) x 3.5% = 14% + \$25.34 (base rate) = \$28.89 new base rate.** (emphasis in original)

Also if you look at the site comparison chart of your competition that I attached, you will find that the average salary according to 2016 standards, we also separated the buildings 395 & 375 at your request Mr. Phinney. What more can you ask for, many of those other sites pay uniform allowance, shift differential, boot allowance, sick/personal leave up to 88 hours and etc. All that we are asking for is not to be paid the highest wages but a fair wage. Mr. Phinney we have come to an agreement on the entire CBA so far, lets resolve this final issue and continue moving forward in the right direction. If need be I can provide to you the CBA agreements of your competition so you can see and read the wages for yourself, the same way I provided to you the CBA of our sister building FEMA 500 C. ST that we used to be attached to. Once again Mr. Phinney, if we can't resolve these minor wage issues and come to some type of agreement on our own. The [Union] isn't obliged to the idea of seeking the help of a federal mediator from the Department of Labor to resolve all wage disagreements.

Read over the information that I've provided to you and let's sign a deal, we will be looking forward to hearing from you soon. Thank you in advance for your time and have a nice day.²⁰

Phinney replied later that day with an explanation as to the factors that the Company was considering with respect to the appropriate wage rate going forward, but did not respond to Harris' request for mediation:

I want to be clear I stated I would communicate you for this year and the CPI was 1.5%. I am looking to compensate you for the years going forward and trying to bring 375 up as fast as I can, but I am not going to look back at the last four years. We go forward. I do appreciate all of your information, and I will look at it.²¹

Harris replied on September 13, stating that the parties were at a "stalemate" with respect to wages and, searching for a way to create movement on the issue, once again suggested the par-

²⁰ Taken in context with the rest of this and other statements, Harris' remark that the Union "isn't obliged to the idea" reasonably appears to mean that the Union did not object to the idea of seeking the help of a federal mediator. (Jt. Exh. 10.)

²¹ Jt. Exh. 11.

ties submit the remaining economic issues to mediation:

Good morning Mr. Phinney, it seems as you do not understand where the [Union] is coming from pertaining to fair wages. I have provided vital information to [the Company] more than once, proving as to what the fair wages should be for buildings 375 & 395 and you disregarded it. We have agreed 100% on the CBA except the wages portion, and we agreed to every change that you disputed within the new CBA. Since we have come to a stalemate as far as wages are concerned, and you do not want to meet us halfway. I ask you once again; Mr. Phinney do you need [the Union] to contact a federal mediator provided through The Department of Labor to step in and help us resolve this minor issue we are having with you concerning wages? We will be looking forward to receiving your response very soon. Thank you in advance for your time and have a nice day.²²

On September 14, Phinney counteroffered with the Company's "best and final offer" of an hourly wage rate for 395 employees of \$25.95 for 2017, \$26.60 for 2018 and \$27.25 for 2019; and for 375 employees, an hourly wage rate of \$23.20 for 2017, \$25.05 for 2018, and \$27.05 for 2019. Once again, he made no mention of the Union's request for mediation.²³ He followed-up on September 16 in an email to Harris and Cropper, reminding them that "we have to have a CBA by September 19 in order to get the CBA to FPS for them to recognize it."²⁴

On 12:29 p.m. on September 19, Harris replied, disputing Phinney's assertion that the Company had submitted its best and final offer:

You say you have submitted your best and final offer even though it's just a \$0.51 raise to base and \$0.00 for H&W and \$0.00 for pension for 395 after 4 years of no raises. We tried to negotiate with you fairly but only to be disregarded and disrespected. You didn't even try to meet us halfway with wages, H&W and pensions. I submitted our best offer with supporting information as far as PSO building comparisons, the sister contract we were attached before ASP was awarded the Patriot Plaza contract. Not to mention the majority of buildings that were on the list will soon be ASP contracts. So with that being said, you are fully aware of the current wages being paid to PSO's in the NCR, and you chose to disregard it for what reason no one understands. So I guess at this moment we are at a impasse. Thank you for your time and have a nice day.²⁵

²² Phinney's alleged understanding of "stalemate" – that the Union was not going to propose "any other offers or proceed with negotiations as far as wages," is contradicted by the continued exchange of counteroffers by the parties. (Jt. Exh. 12; Tr. 115.)

²³ Jt. Exh. 13.

²⁴ It is undisputed that applicable federal regulations required the Company to submit a CBA to FPS ten days before the expiration of the contract. (Jt. Exh. 14; Tr. 116.)

²⁵ Phinney and Cropper testified as to their impressions of what the latter meant by his reference to "impasse," neither of which is controlling here. (Jt. Exh. 15; Tr. 68-69, 117-118.)

Phinney responded to Harris at 4:00 p.m. that day with yet another final wage offer and warning that unit employees faced pay cuts if a CBA was not signed by that day:

Knowing that if we don't sign a CBA by COB today everyone at 375 and especially 395 will have their pay rate reduced to wage determination as indicated on the RFQ which I showed you during our negotiations. Therefore in an effort to see that the officers receive an increase, the company is willing to consider a \$.15 increase for 395 E only, to bring the wages to 26.10; everything else staying the same for one year, then renegotiate the Wages, H&W and Pension. This is so the officers do not receive a pay cut.

I need an answer by COB today or I will not be able to present an REA to FPS for any new wages and 375 E and 395 E Street will go to wage determination of \$20.57, H&W of 4.13 with sick [leave] of 56 hours and no pension.²⁶

The Union did not respond to that proposal. Unbeknownst to the Union, however, around that time the Company and FPS had been discussing a six-month extension of the expiring contract until March 31, 2018. In connection with that extension, on September 20, John DeSimone, FPS's contracting officer, sought clarification from the Company as to the applicable wages and fringe benefits for the extension.²⁷ Rachna Koulgi, the Company's vice president for government services, replied on September 26:

Thanks for giving us the additional time to submit the CBA related documentation for the extended option period. Please see attached – the letter for DC0208 (375 E Street) and DC0175 (395 E Street). The CBA DC0331 (500 E Street) is also attached. I'm waiting for the 355 E Street MOU. Do you have the leeway to wait another couple of hours? Please let me know.

DeSimone acquiesced and later that day Koulgi sent the following letters explaining that the Company was unable, after several bargaining sessions, to reach an agreement with the Union with respect to 375 E Street and 395 E Street:

In order to safeguard the interests of all parties concerned to include the government stakeholder and to not cause significant hardship to our security officers at the above mentioned sites, *[the Company] will honor the economic terms (wages and fringe benefits to include H&W, pension, vacation, holiday, sick leave, relief breaks, etc.) of the latest CBA addendum which effective beginning October 1, 2014 for both the above stated locations (enclosed with this correspondence) for the entire duration of the referenced option period (emphasis added).*²⁸

²⁶ Jt. Exh. 16.

²⁷ R. Exh. 7.

²⁸ There is no indication in the record that the Company ever made the Union aware of the 6-month contract extension by FPS. (R. Exh. 6-7.)

Koulgi also sent a similar notification to another FPS contracting officer, Debby Abraham.²⁹ As a result, FPS issued an Amendment of Solicitation/Modification of Contract, dated September 26, and unit employees' wages at 375 and 395 were to remain unchanged during the six-month extension of the FPS contract, which stated in pertinent part:

- A. Pursuant to FAR 52.217-8, this modification exercises the six month extension effective October 1, 2017.
- B. The following Department of Labor Wage Determinations are incorporated into the contract effective October 1, 2017:

...
The remaining sites (DC0175 and DC0208) on this contract will remain covered under the following Wage Determinations previously incorporated into the contract via P00012 and P00017:

CBA-2013-6080, Revision 1: Collective Bargaining Agreement between American Security Programs, Inc. and National Association of Special Police and Security Officers (NASPO) (covers DC0175)

CBA-2013-6084, Revision 1: Collective Bargaining Agreement between American Security Programs, Inc. and National Association of Special Police and Security Officers (NASPO) (covers DC0208).³⁰ ...

On October 21, Phinney, without making any reference to the six-month extension, notified the Union "that the sites at 375 and 395 E Street will go to SCA wage determination as of 12.1.2017 if we don't have a CBA in place as of 10.31.2017. Please contact me if you want to proceed."³¹ He provided no explanation as to why the alleged deadline had moved from September 19 to October 31.

On October 23, Cropper responded to Phinney with an alternative approach by the Union with respect to wages and benefits, and seeking a prompt resolution:

Good morning, Mr. Phinney. I am the President of [the Union] we love to have the CBA ratified by 10/31/2017. As we negotiated earlier about the buildings not separated because they are under the same collective bargaining unit, we are at 32.00 base and 6.00 H&W; so if we can get the CBA ratified ASAP our base will not escalate to 33.00 base. You have seen the comparison of the NCR, and our base rate is market rate. Thanks again Mr. Phinney for addressing this issue; We hope to come to a prompt resolution.³²

On November 1, the government's contracting officer

²⁹ R. Exh. 5.

³⁰ Phinney's testimony that he "thought it mainly was for a bridge between October 1st and December 1st, when the new contract was supposed to start," is contradicted by the Company's documentary evidence of the FPS contract extension through March 31, 2018. (Tr. 119-120; R. Exh. 3.)

³¹ Jt. Exh. 17.

³² Jt. Exh. 18.

emailed Koulgi inquiring whether the Company "anticipate[d] any further CBA amendments for the remaining [E street sites] for this contract." Koulgi replied a short while later:

The two locations that are operating under CBAs are DC0175 and DC0208 (the officers are currently being paid CBA wages and benefits). Unfortunately, despite our efforts, negotiations are at a standstill since the union representatives are not budging from their demands of a single CBA covering both locations and \$32.00 in wages, \$6.00 in H&W plus other benefits for both sites.

Although we have until November 20th technically to submit new CBAs or amendments for incorporation into the contract (subject, I believe to receipt of the task order for the base period), based on the current status of discussions, we do not anticipate executing a CBA/CBAs for these sites.³³

On November 15, Phinney, without mentioning the six-month extension, notified the Union that the Company was moving the deadline again with an offer to avoid wage determination by entering into a Memorandum of Understanding maintaining the status quo as to wages and benefits for an additional year:

We have heard from FPS, and they have stated that if we do not reach an agreement by 11.17.2107 and a provide a CBA with agreed upon wages then the two sites 375 E Street and 395 E Street, SW will revert to wage determination of \$20.57 with \$4.13 H&W with the company providing sick leave. At this time [the Company] and the [Union] are too far apart from an agreement on wages to establish a CBA. Therefore, we would offer that the [Union] and [the Company] establish a Memorandum of Understanding and send this forward to FPS which will hold the wages where they are at this time as we continue to work on resolving the wage issue. The resolved wages once agreed to would then be effective 10.1.2018.

Therefore, we need to establish this Memorandum of Understanding by 11.17.2017 allowing FPS to look at the situation and make a determination on the Memorandum of Understanding.

If approved by FPS, the Memorandum of Understanding's pay rates will go into effect on 12.1.2017, if FPS does not approve the Memorandum of Understanding, we will pay the wage determination pay rates mentioned above.

I have provided a Memorandum of Understanding see attached.³⁴

On November 17, Phinney sent the Union a revised final of-

³³ R. Exh. 9.

³⁴ Once again, the Company's assertion regarding the alleged deadline are contradicted by the fact that FPS afforded the Company an extension until March 31, 2018 of the wage rates set forth in the 2014 NASPSO contract. (Jt. Exh. 19.)

fer with a rate lower than its November 15 offer. It consisted of a proposed CBA with current rates reduced to the aforementioned wage determination levels and also threw in new non-economic proposals even though the parties had previously agreed to such provisions by September 1:

FPS has reiterated unless they receive a signed agreement by 1700 on 11.20.2017, FPS states that as of December 1, 2017, the officers' pay rate at 375 E Street and 395 E Street (contract # HSHQEC-17-D-00005) would be at wage determination of \$20.57 for wages and \$4.27 for H&W.

Therefore, [the Company] is sending this revised Last, Best and Final offer for 375 E Street and 395 E Street sites on the FPS contract # HSHQEC-17-D-00005. After 11.20.2017 at 1700, this offer shall be rescinded. If there are any questions, please contact me.³⁵

In a conversation with Phinney later that day, Cropper rejected Phinney's latest proposal and, once again, urged the Company to agree to submit the remaining economic issues to mediation or arbitration. Phinney replied that he just wanted to know if Cropper received his November 17 email but, once again, ignored the Union's request to engage in mediation.³⁶

On November 20, Phinney re-sent the Union the Company's "signed Last, Best and Final offer as we have not heard back from you as of Friday 11.17.2017." The proposal reiterated that wages would be set at wage determination, effective as of December 1, and "to be determined" in each of the following years.³⁷

On November 28, Phinney emailed Cropper and Harris, referencing the Company's offer of November 17 and request that the Union reply by November 20. Omitting any reference to his conversation with Cropper on November 17 and the latter's request that the parties submit the economic issues to mediation or arbitration, Phinney said that the Company would implement immediately its "Best, Last and Final offer unilaterally and will be informing the officers of this change to wage determination of \$20.57 and H&W of \$4.27 as of 12.1.2017."³⁸ On December 1, the terms of the Company's final offer of November 28 went into effect.

Phinney's final email produced a sharp rebuke from Cropper on December 3 and yet another request that the Company agree to engage in mediation or arbitration:

Per conversation November 17, 2017, Mr. Phinney I spoke with you about the memorandum of understanding and said to you as well as Ms Glenita that I will not agree to the reduction

³⁵ Jt. Exh. 20.

³⁶ This finding is based on the assertions in Cropper's subsequent email of December 3, none of which were responded to or otherwise disputed by Phinney. (Jt. Exh. 22.)

³⁷ As previously found, Cropper did in fact respond to Phinney's November 17 email in a conversation later that day. Phinney, however, was simply interested in confirming Cropper's receipt of the email and ignored Cropper's request for continued bargaining through mediation. (Jt. Exh. 21(a)-(b).)

³⁸ R. Exh. 4.

of wages; and your reply was thank you, and I just wanted to know if you received my email. Now if you are determined to undermine scrupulous business practices I suggest that we sincerely need a federal mediator or arbitration to resolve this issue of wages, the union has asked you several of times for a federal mediator and you have not responded. And no! detrimental action was taken against [the Company]. And for you to reduce your employees pay is total retaliation against the union! We will not stand for being taken advantage of you have hard working dedicated employees and you destroyed the morale of [Company] employees. Mr. Phinney if you ever want to talk face to face about 395 and 375 I'm happy to listen, but now you give me no other option except to speak to our representatives in Washington DC.³⁹

Phinney did not respond to Cropper's request to bargain and, as was the case with the Union's previous requests for mediation, ignored that request as well.⁴⁰

Legal Analysis

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of [its] employees." Section 8(d) further defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party."

An employer violates its duty to bargain collectively by unilaterally implementing terms and conditions of employment without first bargaining to impasse or agreement. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); accord *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enforced sub nom. Am. Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968); *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991). The party asserting impasse bears the burden of proving it. *Wayview Care Ctr.*, 664 F.3d 341, 347 (D.C. Cir. 2011).

Impasse exists only if "there [i]s no realistic possibility that continuation of discussion . . . would [be] fruitful" and "the prospects of reaching an agreement ha[ve] been exhausted." *Am. Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d at 628-29. A finding of impasse requires futility, not just frustration. *Powell Electrical Mfg.*, 287 NLRB 969, 973 (1987). In determining whether impasse has been reached, the Board considers the totality of the circumstances, including "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues

³⁹ Jt. Exh. 22.

⁴⁰ The vague testimony of Phinney, an experienced bargaining representative, that he "didn't think mediation would help at all," was not credible. That he repeatedly ignored requests for mediation without even the briefest of explanations clearly indicated that he was not interested in achieving a deal on the economic issues prior to any of the shifting deadlines. (Tr. 126.)

as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations.” *Taft Broadcasting Co.*, 163 NLRB at 478. In addition, “continuous negotiating progress is strong evidence against an impasse.” *Teamsters Local 175 v. NLRB*, 788 F.2d 27, 31 (D.C. Cir. 1986). One or two factors alone, however, may be sufficient to demonstrate the absence of impasse. See *Monmouth Care Center v. NLRB*, 672 F.3d 1085 (D.C. Cir. 2012).

I. BARGAINING HISTORY

The Company had a previous bargaining history with the NASPSO, the predecessor union, but there is no evidence as to the nature of that relationship. In 2016, unit employees replaced NASPSO with the Union. The Union, newly created, had no previous bargaining relationship with the Company or any other employer. Eight months after the Union’s formation, the parties began bargaining over an initial contract. The relationship encountered complications even before bargaining began, however, when the Company advised the Union that bargaining needed to be completed by a government issued deadline. Encountering a newly created labor organization operated entirely by unit employees, the Company had no reason to believe that negotiations would be accomplished quickly or by a certain date unless it accelerated negotiations.

Under the circumstances, the lack of a bargaining history between the parties mitigates against a finding of impasse. See *Grinnell Fire Systems, Inc.*, 328 NLRB 585, 596 (1999), *enfd.* 236 F.3d 187 (4th Cir. 2000), *cert. denied* 122 S.Ct. 49 (2001) (no impasse where there the lack of a significant bargaining history warranted more time to arrive at an initial agreement).

II. GOOD FAITH OF THE PARTIES DURING BARGAINING

In determining whether impasse existed, it is inconsequential that the complaint did not allege a lack of good faith bargaining by the Company. As the Supreme Court has explained, “[c]learly, the duty [to meet and confer] thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact— ‘to meet * * * and confer’—about any of the mandatory subjects.” *NLRB v. Katz*, *supra* at 742-743. See also *Grinnell Fire Systems, Inc.*, 328 NLRB at 596-597 (no impasse, notwithstanding the absence of bad faith, where employer expressed unwillingness to move from its position and the union had not offered specific concession, but had declared its intention to be flexible and sought further bargaining).

In any event, the Company’s assertion – that “it consistently demonstrated its desire to reach agreement during its negotiations with the Unions” – is partially correct. While it is true that the parties reached agreement on every provision except wages and benefits by September 1, it is also evident that the Company decelerated negotiations after that date, deciding to forgo in person meetings and, instead, bargain with the inexperienced Union representatives by email. The Company chose this approach even though the most important issues – the economic provisions – remained and it professed the need to submit executed CBAs to FPS, by ever-changing deadlines. Moreover, the Company repeatedly ignored the Union’s re-

quests that the parties submit to mediation or arbitration on the economic issues.

III. LENGTH OF THE NEGOTIATIONS

The parties met on six occasions between May 19 and September 1, with the first meeting essentially a meet and greet where CBA drafts were exchanged. By September 1, the parties had negotiated and agreed to the non-economic provisions of an initial CBA. Even though the Company advised the Union that it was in a hurry to wrap up bargaining because of the FPS contract and the Union’s initial proposal on May 19 included economic proposals, the Company provided no counteroffers to those aspects during the initial three and a half months of bargaining. At the conclusion of the September 1 meeting, the Company’s lead negotiator told the Union representatives that further in person bargaining was unnecessary and the parties could negotiate over the remaining issues – the economic terms – by email. He did so even though he told the Union representatives the previous day that “we are running out of time” to complete economic bargaining because of wage determination, a comment that he reiterated on September 8 when the Company submitted its first wage and benefits proposal. Under the circumstances in this case, such an unorthodox approach was a recipe for failure. See *Dish Network Corporation*, 366 NLRB No. 119, slip op. at 3 (2018) (Board “precedent is clear that only in-person, face-to-face meetings satisfy the Act’s obligation to meet and confer”).

Although the parties are not expected to participate in a set number of sessions, the Board has found six sessions insufficient to support an impasse. See *Hendrickson Trucking Co.*, 365 NLRB No. 139, slip op. at 22 (2017) (parties met six times, including once before a federal mediator); *U.S. Testing Co.*, 324 NLRB 854, 860–61 (1997), *enfd.* 160 F.3d 14 (D.C. Cir. 1988) (parties were “not at the end of their rope” where economic proposals were exchanged at the fourth of six bargaining sessions); see also *Taft Broadcasting Co.*, *supra* (no impasse after 23 sessions). Also significant is the length of bargaining on the topic or topics upon which alleged impasse is premised. See *Old Man’s Home of Philadelphia*, 265 NLRB 1632, 1634 (1982) (limited discussion on issue of wages during a 6 month period in which parties met 17 times was insufficient to establish impasse); *Beverly Farm Foundation, Inc.*, 323 NLRB 787, 793 (1997) (no impasse where parties bargained on economic issues during only 3 of 19 sessions).

In this case, the length of negotiations was remarkably short and the parties did not even meet in person to bargain over economic terms at any time before the Company declared impasse on November 28 and unilaterally reduced unit employees’ wages and benefits to the minimum level permitted under federal regulations. The Company exchanged its initial economic proposal on September 8 and revised it several times until its final proposal on November 20. During that time, each party shared in the delays—first, the Union in not responding to the Company’s September 19 proposal until October 23, and the Company by delaying three weeks before counteroffering on November 17. Accompanying the Company’s proposals were short, ever-changing deadlines precipitated by its FPS contract renewal – first September 19, then October 1, then

November 17 and, finally, November 20 (identical to November 17). At the time of the November 17 final offer, which introduced a new economic proposal, albeit a regressive one decreasing wages, and several new non-economic proposals, the Company alluded to a December 1 deadline. Unbeknownst to the Union, that was not true, since FPS had extended the Company's contract until March 31, 2018.⁴¹

On November 27, when the Company unilaterally implemented its last final offer of November 20 in order to meet the wage determination deadline, the parties were not at deadlock since the Union had expressed flexibility in its economic counteroffers and a desire to submit the economic issues to mediation. The SCA only established the minimum amount of wages and benefits for unit employees and the Company was free to pay them a higher amount if it chose. The Company, however, coupled each proposed minimal wage increase with a looming deadline due to its reluctance to compensate unit employees at levels much higher than wage determination levels.

Under the circumstances, the Company's unilateral implementation was thus based on an artificial deadline and did not support a finding of impasse. That the Company repeatedly ignored the Union's repeated requests for mediation clearly suggests that it was predetermined to run out the clock and impose the SCA's prevailing wage in lieu of a CBA wage rate. An employer, however, cannot curtail bargaining and declare impasse based on an artificial deadline rather than exhausting all avenues of bargaining. See *Grinnell Fire Systems, Inc.*, 328 NLRB at 598 (no impasse where employer invoked an arbitrary deadline instead of bargaining to deadlock); *Newcor Bay City Division*, 345 NLRB 1229, at 1228-1239 (2005) (no impasse where employer's unilateral action motivated by a rush to implement its own final proposal). As the Board stated in *Management Training Corp.*, 317 NLRB 1355, 1358 (1995):

Thus, the Act ensures that the wages and benefits of employees working for service contractors under a collective-bargaining agreement would not be reduced with a new service contract but would, at a minimum, be in accordance with rates provided in the contract. In these circumstances, to question whether such contractors are able to engage in meaningful bargaining seems anomalous.

IV. IMPORTANCE OF THE ISSUE OVER WHICH THERE IS DISAGREEMENT

It is undisputed that the issues over which there remains disagreement—wages and benefits—were of paramount importance to the parties. *Royal Motor Sales*, 329 NLRB 760, 763 (1999), *enfd.* 2 F. App'x 1, (D.C. Cir. 2001). (“[n]egotiating the details on such important subjects as wages is at the heart of collective bargaining”); *Brotherhood of Locomotive Fireman and Enginemen*, 447 F.2d 1127, 1136 (5th Cir. 1971) (“to each union and to its every member there are no minor disputes, and that all controversies entail economic is-

⁴¹ As previously noted, Phinney's vague and unsubstantiated impression regarding a December 1 deadline is belied by the record. (R. Exh. 3.)

issues of transcendent importance”). See also dissent of Chairman Miscimarra in *Stein Industries, Inc.*, 365 NLRB No. 31, slip. op at 9 (2017) (“there was no need for the parties to discuss noneconomic matters before the Respondent declared impasse because economic issues were of overriding importance.”). Each party, however, took different approaches in attaining its economic objectives.

The Union incorporated economic proposals in the initial CBA template utilized by the parties. Cognizant of the Company's expressed desire to wrap up negotiations by September 19, the Union accompanied its subsequent offers of September 11, 12 and 13 with suggestions that the parties seek the assistance of a mediator. The Company, on the other hand, engaged in productive bargaining over the noneconomic issues during the first three and a half months without presenting any economic proposals. Its inaction was not likely attributable to a belief that the economics were unimportant, but rather, recognition that they entailed the most difficult bargaining. See *Grinnell Fire Systems, Inc.*, 328 NLRB at 597 (one could expect that bargaining over wages and benefits, “in order to be fruitful, the negotiations would be long and arduous.”).

Given the reality that negotiations over two locations would likely be long and arduous, the Company's approach was to leverage its position by repeatedly tying its economic proposals to looming FPS contract deadlines. Of great importance to the Company was the need to keep wages and benefits separate for each facility, while it was equally as important for the Union to achieve equalization in wage and benefit rates for unit employees at both facilities. Either way, the parties needed to bargain over 18 rates for the 3 year term of an initial CBA.

Finally, with the latest of the Company's alleged wage determination deadlines fast approaching, it obliterated any chance of a quick resolution by suddenly reintroducing noneconomic proposals that had already been agreed upon. The significance of that development was that the Company had placed back on the table topics of importance to it over which the parties' brief history suggested there was every reason to expect eventual agreement. At the very least, the new proposals required further bargaining. See *Atlantic Queens Bus Corp.*, 362 NLRB No. 65 (2015) (“eleventh-hour changes in the Respondent's bargaining proposals, particularly on the centrally important issue of healthcare, persuade us that the Respondent was not warranted in assuming that further bargaining would be futile.”).

V. CONTEMPORANEOUS UNDERSTANDING OF THE PARTIES

The parties did not have a contemporaneous understanding that further bargaining would be futile when the Company implemented its last, best and final offer on November 27. That it was the last in a series of similar pronouncements by the Company conveying certain wage levels to the Union as last, best and final offers was not unusual. In collective bargaining, as Judge Posner has observed, “[a]fter final offers come more offers,” *Chicago Typographical Union Local 16 v. Chicago Sun Times*, 935 F.2d 1501, 1508 (7th Cir. 1991).

Not surprisingly, the parties continued to exchange proposals even after the Union refused to capitulate to the Company's “last, best and final” offers by several shifting deadlines – September 19, October 31, November 17 and, finally, November

20. Aside from rejecting the Company's final proposal to reduce wages and benefits to the wage determination level, the Union consistently conveyed flexibility on the economic issues and suggested bargaining through mediation on September 11, 12 and 13, all prior to the Company's first artificial deadline of September 19. See *Grinnell Fire Protection Sys. Co.*, 328 NLRB at 585-586 (demonstrations of flexibility and willingness to compromise reflect an understanding that further negotiations could be fruitful and thus cut against a finding of impasse).

Even aside from the parties' understanding as to where they stood on the economic issues, the Company resurrected several noneconomic issues relating to full-time hours, gear up and gear down time, paid breaks, holiday pay, temporary employees, firearms training and qualifications. As previously explained, the emerging history between the parties indicates that they were unlikely to end up at impasse on any of these topics. If anything, the piling on of a host of noneconomic issues onto outstanding economic issues at the eleventh hour presented a new platter of options for the parties, negating the notion that further bargaining would have been futile.

While the Company reached for the end of its self-imposed rope when it unilaterally reduced wages and benefits on November 27, it is equally as clear that the Union still sought to bargain as evidenced by its December 3 protest, which included another request to mediate the dispute. That response to the Company's final offer of November 27 was not untimely since, unbeknownst to the Union, FPS agreed to reimburse the Company at the expired CBA wage and benefit rates through March 31, 2018.

On several occasions, an inexperienced unit employee serving as a Union negotiator, cited "impasse" or "stalemate" on the economic issues, but did so in the context of a request that the parties continue bargaining with the assistance of a mediator. In addition, such remarks were followed by subsequent counteroffers and indications of flexibility, especially the change in approach by the Union on October 23. In such situations, the Board evaluates the utterance of legally significant words in context. See *PRC Recording Co.*, 280 NLRB 615, 635 (1986) (citing *Builders Institute of Westchester County*, 142 NLRB 126, 127 fn. 2 (1963) ([t]he use of words like 'impasse' or 'deadlock' by the parties, even relating to overall issues, does not necessarily imply that future bargaining would be futile."). That is especially the case where, as here, the statement is made by an inexperienced negotiator. See *Colfor, Inc.*, 282 NLRB 1173, 1180 (1987), enf. 838 F.2d 164 (6th Cir. 1988) (statement by an "untutored negotiator who uses this term of art without legal precision" did not establish the existence of impasse).

In any event, even if the parties were at impasse in September when Harris referenced "impasse" and "stalemate," they broke that impasse by continuing to bargain after that time. "The Board and courts have made clear that anything that creates a new possibility of fruitful discussion (even if it does not create the likelihood of agreement) breaks an impasse as do further negotiations and bargaining concessions, implied or explicit." *PRC Recording Co.*, 280 NLRB at 640 (citing cases); see also *Royal Motor Sales*, 329 NLRB at 762 (no valid impasse where

union made deadlock breaking proposal 2 days earlier).

Finally, it is irrelevant whether the Company's disregard for the Union's repeated requests for mediation was a deliberate attempt to leverage its economic position by pinning inexperienced union negotiators against artificial deadlines or mere oversight. The Union's mediation requests, all ignored by the Company, coupled with the Union's continued flexibility on economic issues, establishes that neither had a reasonable belief that they were at impasse. See *Powell Electrical Manufacturing Company*, 287 NLRB at 971 (union's efforts to involve mediator indicated its belief that there was room for movement); *Grinnell Fire Systems, Inc.*, 328 NLRB at 595 (same); *Area Trade Bindery Co.*, 352 NLRB 172, 176 (2008) (same).

IV. TOTALITY OF THE CIRCUMSTANCES

There is no allegation that the Company's actions or inaction amounted to bad faith. The Company failed, however, to show that any of remaining *Taft Broadcasting Company* factors supported a finding of impasse, as the evidence established that the parties bargained an insufficient length of time over the vitally important economic issues and there was no contemporaneous understanding in their new relationship that they were at impasse. Because "[b]oth parties must believe that they are at the end of their rope" for impasse to exist, the Union's conduct reflecting its belief that further negotiations could be fruitful was enough to forestall a finding of impasse. See *PRC Recording Co.*, 280 NLRB at 635 ("anything that creates a new possibility of fruitful discussion . . . breaks an impasse"); cf. *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1116-17 (D.C. Cir. 2001) (finding impasse when the union requested additional meetings, but made no further proposals after the employer announced its final offer). Moreover, to countenance the Company's total disregard for requests by inexperienced Union representatives to resume in person bargaining, before and after the declared impasse, with the assistance of a mediator is antithetical to the purposes of the Act. See e.g., *Hooker Chemicals & Plastics Corporation*, 224 NLRB 1535, 1538 (1976) ("conciliation is so important to the promotion of stable labor relations").

Accordingly, I find that the Company violated Section 8(a)(5) and (1) of the Act by declaring an impasse on November 27, 2017 and refusing to meet and bargain before and after it implemented a unilateral change in wages and benefits.

CONCLUSIONS OF LAW

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

2. The Union, Union Patriots of Plaza, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and, at all material times, was the exclusive collective bargaining representative of the following appropriate units at Respondent's Washington, D.C. facilities:

All full-time and regular part-time security officers employed by the [Company] at the Patriots Plaza I and II Buildings currently located at 395 and 375 E Street, S.W., Washington, D.C.; but excluding all office clerical employees, managerial

employees, and supervisors as defined in the Act.

4. By unilaterally implementing the terms of its last, best, and final collective-bargaining agreement offer on November 27, 2017 without bargaining with the Union to a good-faith impasse, the Respondent violated Section 8(a) (5) and (1) of the Act.

5. By failing and refusing to resume bargaining collectively towards a new collective-bargaining agreement on or after November 27, 2017, the Respondent violated Section 8(a)(5) and (1) of the Act.

REMEDY

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.

Specifically, I shall order Respondent to rescind the unlawful unilateral changes contained in its last, best and final offer and unlawfully implemented/made on about November 27, 2017, regarding the unit employees' terms and conditions of employment, if the Union requests, and to restore the status quo ante, if the Union requests, that existed prior to the changes until such time as Respondent begins to bargain with the Union in good faith to a collective-bargaining agreement or good-faith impasse. This obligation also includes that Respondent immediately begin to bargain in good faith with the Union to a new collective-bargaining agreement or bona fide impasse.

The Respondent shall be ordered to make whole any unit employees affected by the unlawful unilateral changes. This includes reimbursing the employees for any loss of earnings or benefits resulting from the changes. The make-whole remedy shall be computed in accordance with *Ogle Protective Service*, 183 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). It also includes making any benefit contributions on behalf of eligible unit employees that have not been made since the date of the unlawful changes, plus reimbursement of unit employees for any expenses incurred as a result of Respondent's failure to make the required contributions to their health and welfare fund accounts, such amounts to be computed in the same manner as backpay described above. Finally, the Respondent shall be ordered to pay any other amounts due the health and welfare funds, less any amounts that the fund would have paid out for covered claims but did not pay out as a result of the Respondent's unlawful implementation of its final offer in the absence of a valid impasse.

In accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, file with the Regional Director for Region 5 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

Finally, the Respondent shall post an appropriate informa-

tional notice, as described in the attached appendix. This notice shall be posted in the employer's facilities or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 27, 2017. When the notice is issued to the employer, it shall sign it or otherwise notify Region 5 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴²

ORDER

The Respondent, American Security Programs, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying Union Patriots of Plaza (the Union) and giving it an opportunity to bargain.

(b) Failing and refusing to bargain on request with the Union as the exclusive collective-bargaining representative of the unit employees.

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

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

(a) Rescind the changes in the unit employees' terms and conditions of employment contained in the Respondent's last, best, and final offer that were unilaterally implemented on about November 27, 2017.

(b) Make the unit employees whole for any loss of earnings and other benefits, including reimbursement for an expenses incurred as a result of the Respondent's failure to make the required payments since about November 27, 2017, in the manner set forth in the remedy section of this decision.

(c) Compensate the affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director of Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Make all contractually required contributions to the Union's health and welfare and other funds on behalf of all eligible unit employees that it has failed to make since about November 27, 2017, if any, with interest, plus any other amounts

⁴² 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.

due the health and welfare funds, less any amounts that the fund would have paid out for covered claims but did not pay out as a result of the Respondent's unlawful implementation of its final offer in the absence of a valid impasse.

(e) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time security officers employed by the [Company] at the Patriots Plaza I and II Buildings currently located at 395 and 375 E Street, S.W., Washington, D.C.; but excluding all office clerical employees, managerial employees, and supervisors as defined in the Act.

(f) Within 14 days after service by the Region, post at its facilities in Washington, D.C., a copy of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 27, 2017.

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

Dated, Washington, D.C. November 14, 2018

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 change your terms and conditions of employment without first notifying the Union Patriots of Plaza (the Union) and giving it an opportunity to bargain.

WE WILL NOT fail and refuse to bargain on request with the Union as the exclusive collective-bargaining representative of our unit employees.

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

WE WILL rescind the changes in your terms and conditions of employment that were unilaterally implemented on about November 27, 2017.

WE WILL make whole all bargaining unit employees for any loss of earnings and other benefits resulting from our unlawful unilateral implementation of terms and conditions of employment on about November 27, 2017, plus interest.

WE WILL make all contractually required contributions to the Union's health and welfare funds on behalf of all eligible unit employees that we have failed to make since about November 27, 2017, if any, with interest, plus any other amounts due the health and welfare funds, less any amounts that the fund would have paid out for covered claims but did not pay out as a result of the Respondent's unlawful implementation of its final offer in the absence of a valid impasse.

WE WILL file with the Regional Director of Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time security officers employed by American Security Programs, Inc. at the Patriots Plaza I and II Buildings currently located at 395 and 375 E Street, S.W., Washington, D.C.; but excluding all office clerical employees, managerial employees, and supervisors as defined in the Act.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/05-CA-211315 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.

