

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF ADMINISTRATIVE LAW JUDGES**

XCEL PROTECTIVE SERVICES, INC.

and

**INTERNATIONAL UNION, SECURITY,
POLICE, AND FIRE PROFESSIONALS
OF AMERICA, LOCAL 5**

**Cases 19-CA-232786
19-CA-233141
19-CA-234438
19-CA-237861
19-CA-241689**

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This matter was heard by Administrative Law Judge John Giannopoulos (“ALJ” or “Judge Giannopoulos”) in Seattle, Washington, on September 24–27 and November 18–19, 2019, based upon charges filed by International Union, Security, Police, and Fire Professionals of America, Local 5 (“Union”), that led to an Amended Consolidated Complaint and Notice of Hearing (“Complaint”) alleging that Xcel Protective Services, Inc. (“Respondent”) violated the National Labor Relations Act (the “Act”) by: retaliating against its employees Mark Salopek (“Salopek”) and Stephen Mullen (“Mullen”) for their protective concerted activity by discharging Salopek and constructively discharging Mullen; telling employees to bring pay issues to Respondent rather than the Union; retaliating against its employee Daniel Lein (“Lein”) for his complaints about pay by refusing to allow employees to go home early; and failing to provide the Union with information requested in support of a grievance of Salopek’s termination. Counsel for the General Counsel (“CGC”) seeks to have the ALJ find that Respondent violated the Act as alleged in the Complaint, as amended at hearing,¹ and order Respondent to cease and desist and provide the affirmative remedies as laid out in the attached proposed notice and order.

I. OVERVIEW

Employees Salopek, Mullen, and Lein became concerned that Respondent’s practices in testing its guard employees for weapons proficiency violated the Navy’s rules and were unsafe. After repeatedly raising these concerns with management without result, they decided to take their concerns to the Navy. What followed was a whistleblower’s nightmare.

¹ At hearing, CGC moved to amend the complaint to include the dates of filing and service of the first amended charge in Case 19-CA-241689.

Within hours of blowing the whistle, Mullen was promptly subjected to harassment from coworkers for his complaints. That harassment took the form of threats and loaded guns being waved at him. Although he immediately and repeatedly reported the harassment to Respondent and demanded that it be stopped, no supervisor even responded. Tr. 481–82, 489–90.² Mullen felt he had no choice but to quit for his own physical safety — as Respondent had every reason to anticipate, because Mullen had shared with supervisors his history of career-ending workplace injury at the hands of coworkers. Tr. 231–32.

Salopek, on the other hand, stayed on the job long enough to find the Navy focusing its investigation not on Respondent’s shoddy weapons practices, but on the whistleblowers. The Navy’s investigators wrote a report that was intensely hostile to the whistleblowers (although it quietly admitted that Respondent had indeed committed weapons violations). The Navy held off for a time on going after Salopek, because he and Mullen had also filed complaints with the Occupational Safety and Health Administration (“OSHA”) and the Navy’s Inspector General (“IG”). Tr. 546–48, R. Ex. 2. Nevertheless, the minute Respondent’s new management got wind of the Navy’s displeasure, it fired Salopek. Tr. 202, 1003; Jt. 13 Bates 1679; Jt. 18 p.2.

In the months after Salopek’s firing and at hearing, Respondent concocted at least five different stories about why it fired him. Tr. 33, 202 II.17–19, 355, 1003, 1005; Jt. 5, Bates 1285; Jt. Ex 13, Bates 1679; Jt. 18; Answer to Consolidated Complaints dated April 11, 2019 (“April 11 Answer”); Answer to Consolidated Complaints dated April 25, 2019

² References to the transcript will be designated as “Tr.” References to Joint Exhibits will be referred to as “Jt.,” followed by the exhibit number, while Counsel for the General Counsel Exhibits will be referred to as “GC.” Respondent Exhibits will be referred. to as “R,” and Union Exhibits as “U.” Wherever Bates numbers exist, page citations are to those numbers, rather than any original page numbers.

("April 25 Answer"). Its flurry of shifting reasons includes several that are tantamount to admissions that it fired Salopek for his protective concerted activity: being "a malcontent in the workplace," "the one causing all the turmoil," who "has undermined management" and incited "discontentment among the guards." Jt. 18 pp.1–2. When the Union requested information in pursuit of grieving Salopek's firing, Respondent failed and refused to provide the information. Tr. 821–25; Jt. 1; Jt. 3.

Although the third whistleblower, Daniel Lein, hung onto his job, he was not unscathed. Management told him he had made "a big mistake" by blowing the whistle, and he was later subjected to threatening comments and retaliation when he raised pay concerns. Tr. 698, 711–724, 725. Therefore, the CGC requests that the Administrative Law Judge find merit to the allegations in the Amended Consolidated Complaint and order the full remedy requested.

II. FACTS

Since at least 2015, the Union has represented a unit of about 68 guards employed by Respondent at Naval Magazine Indian Island ("Indian Island"), a military weapons depot in northern Puget Sound, where it contracted with the U.S. Navy to provide security services. Tr. 41–42; Amended Answer to Consolidated Complaint dated Sept. 23, 2019 ("Sept. 23 Answer"). The contract required the guards to carry Navy-owned weapons—an M-9 pistol, an M-5 shotgun, and an M-4 rifle—on duty and to be tested regularly on their ability to safely and accurately use the weapons. Tr. 49, 53, 103, 444–46, 655–656, 891–93. The Navy requires these tests to be done following Navy rules at Navy-designated firing ranges. Tr. 53–54, 104, 667. The Navy also requires the Indian Island guards to pass physical fitness tests consisting of sit-ups, push-ups, curl-ups, and a timed

run. Tr. 56, 218, 876. Under the contract between Respondent and the Navy, the Navy can request that a guard be removed from working on the contract, although it has no power to discipline or discharge any employee or require Respondent to do so. Tr. 549, 558, 571; R 43 p.11. Such a request for removal would originate with Navy contracting officer representatives, who would recommend the removal to the Navy contracting officer, who would then make the request to Respondent in writing. Tr. 549, 1003.

The most senior Respondent supervisor at the Indian Island facility is the site manager, who was Michael Terry (“Terry”) during the relevant time. Tr. 70. The site manager reports to corporate leadership offsite; until September 2018, Terry reported to then-CEO John Morgan, and since that time he has reported to Senior Vice President Michael Filibeck (“Filibeck”). Tr. 39, 70. Reporting to the site manager are lieutenants, who perform scheduling, training, and daily weapons check-out and track guard hours. Tr. 74–75. One lieutenant, Gerald Powless (“Powless”), has the title of range master and is in charge of qualifying guards on weapons. Tr. 456. Respondent maintains an employee handbook that encourages, but does not require, guards to raise concerns first with immediate supervisors before taking them to the next level of supervision or farther up the chain of command. GC 2 p.16; R 7 p.16.

Shifts are normally eight hours long, with day shift running from 5:45 AM to 2:15 PM, swing 1:45 to 10:45 PM, and graveyard 9:45 PM to 6:15 AM, although on occasion guards work 12-hour shifts, 5:45 AM to 6:15 PM or 1:45 PM to 2:00 AM, or fill in for only 4 hours. Tr. 444. For each shift, each guard at Indian Island is assigned to work a given post, either fixed or roving. The fixed posts are the main gate, the commercial vehicle inspection (“CVIS”) gate, and a pier gate. Tr. 79–80. At least two guards work each fixed

post, one checking identification, the other serving as fully armed “cover,” carrying a shotgun, and at CVIS a third guard performs “overwatch” carrying a rifle. TR. 103, 999.

The roving posts are north and south patrol, each covering half the island (guards perform patrol using vehicles). Tr. 80. Patrol duties include scheduled checks, such as verifying that building doors and windows are locked and making sure no one unauthorized is present. Tr. 48, 464, 748. Guards carry shotguns in their vehicles on patrol. Tr. 471. The base is a relatively quiet one, and while on patrol guards can take bathroom breaks or step in to cover the fixed posts while other guards take breaks, leaving their roving patrol for up to 30 minutes at a time without having another guard take over the patrol. Tr. 653, 747–55.

Among the Indian Island guards was Salopek, who worked for Respondent at Indian Island from 2013 until he was fired on October 27, 2018. He was active as a workplace leader throughout his tenure, serving as a Union steward in 2014 and on the Union’s contract bargaining committee through two contract cycles, and repeatedly sending memos about workplace concerns to management. Tr. 81, 82, 86, 88–89, 91–97; Jt. 15; Jt. 16. He doggedly pursued concerns on behalf of the women who made up a small minority of Respondent’s guards, pushing management to get them properly sized ballistic vests and belts that would allow them to carry weapons comfortably while pregnant. Tr. 94–96.

His skill was valued by Respondent, as CEO Morgan sent him to other sites to conduct training and retained him even after he made a serious error in 2015, leaving Respondent’s weapons vault unlocked for several hours. Tr. 61–62, 939, 969–70; Jt. 5 Bates 1280–81. Although the Navy requested his removal for this mistake, Respondent

successfully lobbied to keep him, instead suspending him and demoting him from part-time lieutenant rank. Tr. 62, 939–41; Jt. 5 Bates 1280. That is the only discipline Salopek ever received from Respondent until his termination in October 2018. Tr. 64, 205–06.

Mullen worked as a guard at Indian Island from 2011 to July 17, 2018 (with a break from December 2016 to May 2017), and for some of that time filled in part-time as a lieutenant. Tr. 215–16. He had had an earlier career as a prison guard for the California Department of Corrections, but that career ended when a fellow guard closed a heavy steel door on him, crushing his shoulder. Tr. 223. Immediately before that incident, Mullen had complained about that guard to a sergeant. Tr. 224, 227–229. When the guard learned about his complaint, “She told me that I did not know what I stepped in.” Tr. 228 l.6. A few days later, while she was working the door, which moves shut only when someone pushes a spring-loaded rocker switch, Mullen was crushed by the door. Tr. 228–29. As his shoulder was being crushed, he yelled up to her to open the door, but she yelled back, “Don’t tell me what to do.” Tr. 228. Mullen recounted this story to Respondent’s then-site manager, fellow guards, and Terry. Tr. 231–32.

Mullen received no discipline during his tenure with Respondent. Tr. 69; Jt. 4; Jt. 7. Mullen did, however, struggle to pass the physical fitness tests, in part because a rare form of blood cancer caused him to be unable to run until he was diagnosed and treated. Tr. 215, 218–19. Respondent’s policy is that employees who cannot pass a physical fitness test get 6 months to retake it, at which point, if they cannot pass it they are laid off, but are eligible for rehire when they are able to pass the fitness test. Tr. 87. This is exactly what happened with Mullen; in December 2016 he was laid off, but designated eligible for rehire and rehired in May 2017 when he could pass the fitness test. Tr. 218,

220; Jt. 4, Bates 1216; Jt. 7 Bates 1378, 1386. During his break in service, he received unemployment benefits. Tr. 220.

Daniel Lein began working as a guard at Indian Island in April 2018 and continues to work there.

A. Weapons Qualifications Issues Emerge

As noted above, Respondent's guards are required to demonstrate weapons proficiency. The Navy requires annual tests, termed "qualifications," on the pistol, shotgun, and rifle, during which the guard has to hit a certain number of shots within targets. Some of the tests require shooting at the target in low light. Tr. 775, 892. Six months after each qualification, the guard must take a "sustainment" test on the pistol and rifle. Tr. 103–04, 445–47, 497–98, 892–95. The Navy requires these tests to be done using only Navy-issued ammunition and weapons and only at a Naval range (typically the range at Bangor Naval Base) or another range approved by the Navy. Witnesses were aware of only one such approved alternative range, the Port Townsend Rifleman's Association.³ Tr. 53–54, 105, 447, 459, 612–13.

In 2016 and 2017, Salopek and Mullen began hearing from other guards about weapons qualifications occurring at gravel pits, guards' houses, and other unofficial sites, using employees' personal weapons. Tr. 106, 447–48. At trial, Terry confirmed that this, in fact, occurred. Tr. 968. Both Salopek and Mullen were concerned that this was unsafe

³ According to Terry, the Navy had allowed weapons tests to be done at employees' houses and other unofficial sites until January 2018. Tr. 893–99. However, this testimony was not corroborated by any other witness, including the Navy representative. It is also not consistent with the Navy's investigation report, which indicates that, while "remedial" practice may be done at any location, formal qualification has always been required to be done at an approved range. R 2.

and against Navy rules, and both expressed their concern to supervisors, including range master Powless and site manager Terry. Tr. 106–10, 448–50.

In February 2018, Salopek witnessed a supervisor using a Sharpie to make large black crosses on the centers of targets so that officers Tom Cunningham (“Cunningham”), Butch Lauritzen (“Lauritzen”), and Kevin David (“David”), who were struggling to pass their tests, could see the targets better. Tr. 110–111. Salopek discussed this incident and his concerns about weapons qualifications practices with Mullen and other guards, including Lein and Jake Schryver (“Schryver”).⁴ Tr. 114, 121. He also called CEO Morgan to express his concern about the qualifications at gravel pits and the alteration of targets. Tr. 115–17, 120. In May 2018, Salopek witnessed newly hired guards Lein and Emily Coler (“Coler”) try and fail to qualify on weapons. From watching Coler and speaking with her, Salopek believed that Coler had not received sufficient weapons training and was not handling the rifle safely. Tr. 124–26.

Shortly after this, Powless told Lein that he would be given a second chance to qualify, this time at a gravel pit on May 27 or 28, 2018. Tr. 661–62. Powless directed Lein to meet him and Coler at a U-Haul to go to the gravel pit for qualification. Tr. 670. Lein was troubled by this plan and discussed it with Salopek and Mullen. Tr. 127, 455, 662–67, 671. Lein decided not to go to the gravel pit, but he overheard a conversation between Powless and guard Robert Armstrong in which they made plans to use private

⁴ There are two guards with similar names who were mentioned at hearing, Jake Schryver and Evan Schroeder. Witnesses appeared to confuse the two at times, *see, e.g.*, Tr. 1080, as did the court reporter (in Transcript volume 1 all references to “Schroeder” seem to intend “Schryver,” as do the references at Tr. 987, 989, 990). Schryver is the line safety coach who often helped train other guards on weapons. Tr. 106, 123, 280. Schroeder is the guard who allegedly has a shooting range at his private property. Tr. 898, 962, 968.

weapons at the gravel pit for qualification. Tr. 667–68. Salopek had a conversation with Powless in which Powless described these plans. Tr. 128.

Later, Salopek heard from another guard, Joab Eades (“Eades”), that Eades and Coler had gone out to a gravel pit to qualify on weapons. Tr. 131, 666. Afterward, Powless told Lein that Coler had qualified at the gravel pit, and Salopek, Mullen, and Lein saw that Coler was scheduled for posts that required the shotgun and witnessed Coler carrying the rifle and shotgun as if she were fully qualified on the weapons. Tr. 139–40, 456, 673–75. Mullen, acting as a lieutenant, signed out the rifle and shotgun to Coler and took handoff from her when she worked CVIS overwatch post, which requires carrying the rifle. Tr. 103, 456.

On about June 25, 2018, Salopek and Mullen told a supervisor, Lt. Doug Lux (“Lux”), that guards were being qualified at gravel pits. Tr. 137–39, 460–61. Initially, Lux responded by confirming that it was improper for weapons qualifications to occur at gravel pits and asking Salopek to help with re-training employees on correct procedure, but a few days later, Lux told Salopek plans had changed and the problem was only that Powless had made a mistake. Tr. 139–42.

On June 28, 2018, Salopek emailed CEO Morgan a five-page memo detailing his concerns about weapons qualifications. GC 3–5. Salopek mentioned the difficulty Lauritzen, Cunningham, and David had had qualifying and described alteration of targets with the Sharpie, but got the date of the incident wrong, placing it in May 2018, instead of February 2018. GC 3. Morgan responded that Salopek and Terry needed to fix their relationship. GC 5. To Salopek, this indicated that CEO Morgan would do nothing to stop the use of gravel pits and other weapons qualifications irregularities. Tr. 152–53.

Soon after that, Salopek heard from Eades that Coler had not in fact accurately shot the weapons even at the gravel pit. Tr. 154–55. He was deeply disturbed by this news, which he believed meant she was carrying weapons she did not know how to safely handle. He concluded, first, that she needed further weapons training, which he arranged for her to get, from a fellow guard who was also a firearms instructor. Tr. 155. Second, he concluded that Respondent’s weapons qualifications problems were more serious than he had realized. He discussed the issue with Mullen and Lein. Having followed Respondent’s chain of command policy, they decided that it was time to take the issue directly to the Navy. Tr. 158; GC 2.

B. Salopek and Mullen Raise their Concerns with the Navy; Mullen is Forced to Resign

On the afternoon of Sunday, July 8, 2018, Salopek, Mullen, and Lein walked together to the office of the Naval base commander. Tr. 160–61, 462. Salopek was not working that day, Lein had just finished a shift, and Mullen was working south patrol, which includes the base commander’s office. Tr. 165, 462–63, 688. The three were initially reluctant to tell their story, with Salopek saying only that they wanted to make a complaint to the IG and Lein noting that he was nervous to come forward because he was still on probation. Eventually, however, the base commander lost patience, barking at them to just tell him the story. Tr. 162, 463, 686.

At that point, the three told him that weapons qualifications had been done at unapproved sites, targets had been altered, and documents had been falsified to show that qualifications occurred at the Navy range, when in fact they had occurred at unapproved sites. Tr. 161–62, 463–64, 684–88. After hearing their story, the commander ordered them to email their account to the Navy’s installation security officer (“ISO”),

Michael Jones (“Jones”). Tr. 162–63, 463. The conversation with the base commander lasted 15 to 30 minutes. Tr. 464, 736.

During that time, Mullen did not miss any of his post checks. Tr. 464. The Navy’s contract representative, civilian Richard Rake (“Rake”), testified that Mullen left his post and Rake would have recommended his removal from the contract for that, and Senior VP Filibeck testified that Mullen had “abandoned his post” to go “on a junket” (attributing this choice of words to Rake). Tr. 589–90, 996–97. However, Salopek, Mullen, and Lein all testified that Mullen’s post included the commander’s office and there was nothing improper about spending a few minutes in the commander’s office while on south patrol. Tr. 48, 464, 748.

The next day, July 9, 2018, Mullen, who was off duty, drafted the requested email to ISO Jones, copying and pasting from Salopek’s earlier memo to CEO Morgan. Tr. 163, 465. Salopek called Terry to warn him that a complaint was being made, and then he told Mullen to hit send on the email to Jones, which Mullen did at 10 AM. Tr. 166, 465; R 1. In the email to Jones, Mullen repeated the allegation about Lauritzen, Cunningham, and David and the altered targets, as well as Salopek’s mistake on the date, again erroneously placing the incident in May 2018. He also described weapons qualifications occurring at gravel pits and stated that Coler had been issued weapons she had not been properly qualified on. R 1. Jones immediately forwarded the email to Rake, who forwarded it to Terry. Tr. 535, 537.

Mullen arrived at work at about 1 PM that day to start a shift at 1:45. Tr. 444, 466; R 32. When he entered the training room, where guards begin and end their shifts, and sat down to await his shift, he could hear through open doors site manager Terry in his

adjacent office speaking to CEO Morgan on speaker phone about the complaint to the Navy from Mullen, Salopek, and Lein. Tr. 466. Mullen heard Morgan say, “the one officer is on probation, he's easy to get rid of” and “the other two officers are a cancer.” Tr. 467 I.16–19.

At that moment, at about 1:30 or 1:40 PM, guard Cunningham (who had been one of the ones who had trouble qualifying) came into the training room carrying a shotgun and yelling. R 5, R 6. He stood over Mullen, demanded an apology, and called Mullen a “fucking rat” and a “fucking skell” while waving the barrel of the shotgun across Mullen’s legs. Tr. 467–68, 474. He demanded that Mullen apologize to him, but Mullen refused, and Cunningham left the room. Tr. 468.

That day, Cunningham worked day shift on north patrol ending at 2:15, more than half an hour after his confrontation of Mullen. Tr. 467, 929, 1079; R 6, 32. Cunningham testified that he came into the room to sign the timesheet at the end of his shift, but he walked right back out of the building after confronting Mullen. Tr. 468–69, 1061. Although guards sometimes wait in the training room for their turn to disarm at the end of their shift, a fully armed guard does not ordinarily have any reason to be in the training room during his shift, and they normally leave the shotguns in their vehicles during patrol. Tr. 51, 432, 470–73, 674. Other than Cunningham’s testimony, there is no evidence in the record showing any reason he had to come into the training room with his shotgun at that time other than to confront Mullen.

Cunningham claimed that he gets along with everybody in the workplace, but also admitted that he does not get along with guard Ben Gentry (“Gentry”) and had a confrontation with him in which he yelled at Gentry and “got in his face.” Tr. 1081–84 I.20.

He testified that no one in management had told him it was Mullen who filed the complaint and that he first heard about Mullen's complaint from rumors, but he couldn't recall from whom he heard the rumors. Tr. 1058–59, 1060.

After Cunningham left, Terry called Mullen in to his office to speak with CEO Morgan on speaker phone. Tr. 475. Morgan asked Mullen if he was one of the three officers who had gone to the commanding officer's office. Tr. 475. When Mullen said he was, Morgan told Mullen he could be facing discipline. Tr. 475. Mullen then left the room to start his shift. He was not scheduled to work again until July 13, 2018. Tr. 477; R 32.

On July 10, 2018, at about 6:20 PM, Mullen received a series of text messages from David, who was not working that day. Tr. 477; GC 6, R. 32. David testified that he had learned from "several different people" that Salopek, Mullen, and Lein had filed a complaint alleging that he and several others had not properly qualified on weapons.⁵ Tr. 1036 l.25, 1045 ll.11–12. David texted, "So I'm on your little fucking list, your [sic] a fucking idiot & don't know what you have stepped in. Better call your butt buddy Mark," then "Slander with no proof dumb ass," and then "Stupid leading stupider." GC 6. Because David used the same phrase the guard in California had used before crushing Mullen's shoulder, "[You] don't know what you have stepped in," Mullen believed that he was again in danger of violent reprisal. Tr. 480.

Mullen immediately called Salopek and Navy liaison Steve Manson ("Manson"), and, a short time later, Respondent's on-duty lieutenant, Lux. Tr. 480–82; GC 14. When

⁵ David denied at hearing that management had told him who filed the complaint and, despite increasingly direct questions about who he heard it from, denied being able to remember who, other than "several people" or "several different people," "just other guards," or "rumors" passed from shift to shift among a dozen people. Tr. 1036 ll.22 and 25, 1049 l.7. Although David also testified that he first learned he was on the list of those who hadn't properly qualified on weapons about a week after hearing of the complaint, he sent the text messages one day after Mullen submitted the complaint to the Navy. Tr. 477, 1048; GC 6.

Mullen told Lux about the text messages from David, Lux said he was already aware of them and that “administration” had told him to tell Mullen to call law enforcement (Lux had, in fact, spoken with Terry, who gave the directive to call law enforcement). Tr. 482, 909. Mullen immediately did so and got a report number. Tr. 485; GC 14.

Unbeknownst to Mullen, two of Respondent’s lieutenants called David. They told him not to send any more texts to Mullen, although they apparently did not tell him to cease harassing Mullen. Tr. 1040. Three days later, having heard nothing from Respondent, Mullen called Powless to tell him that he would not be coming to work until the threats and harassment were addressed. Tr. 489. In response, Powless said, “Okay.” Tr. 489. The next day, still having heard nothing from Respondent, Mullen emailed Terry to report the harassment from Cunningham and the threatening texts from David. Tr. 489; Jt. 7 Bates 1454. Mullen wrote, “This has caused me a great deal of stress, to the point that I have not [been] able to return to work,” and he asked Terry to look into the matter. Jt. 7 Bates 1454.

That same day, July 14, 2018, Terry forwarded Mullen’s email to CEO Morgan and spoke with Morgan about it. Tr. 910. Terry and Morgan agreed that the allegations were “very serious,” requiring a thorough investigation immediately, including taking a statement from Mullen. Tr. 910. However, neither of them responded to Mullen or acknowledged his email in any way. Tr. 490, 910. Further, Terry did not make any attempt to take a statement from Mullen. Tr. 921–22.

On July 11, 2019, Mullen contacted OSHA to file a whistleblower complaint. Tr. 492; R 12. Respondent would later claim in a position statement to OSHA that Mullen had not informed Respondent of the harassment until July 14, 2018. Jt. 17.

Unbeknownst to Mullen, on Monday, July 16, 2018, Terry took statements from Cunningham and Norm Simons, a guard who had been in the room when Cunningham confronted Mullen. R 5, R 6. Terry also posted in the break room copies of Respondent's policy on hostile work environment and required all the guards to sign an acknowledgement of the policy. Tr. 919–20; R 7. Management did not say anything to the guards beyond telling them to read the policy and sign the acknowledgement. Tr. 1050. It did not take a statement from David, nor did it tell him he had broken any policy or done anything wrong by sending the texts.⁶ Tr. 1051. That was the extent of Respondent's response to the allegations of harassment and threats. Neither Cunningham nor David received any discipline. Tr. 935, 1063. Respondent did not introduce any evidence demonstrating how this compared to its handling of other allegations of harassment.

Also unbeknownst to Mullen, his email to Jones triggered a formal investigation by the Navy's contract liaisons, Rake and Manson. Rake and Manson interviewed Salopek, Lein, and most of the guards mentioned in Mullen's email to Jones and took signed written statements from them. R 2 pp.13–24. They took a statement from Cunningham on July 11, 2018. R 2 p.21. Cunningham testified that he first heard that his name had been mentioned in the complaint when the Navy called him in to give a statement, but that occurred two days after he had already confronted Mullen. R 2 p.21.

⁶ Mullen testified on cross examination that if Respondent had told him Respondent was doing something about the harassment, he would not have quit. Tr. 790–91. He gave the same answer in response to questions from the OSHA investigator. R 49. But Respondent did not in fact tell him it was doing anything. What Mullen would have done if things had happened differently is speculative. As Mullen wrote to OSHA, in the actual world, "Since [Terry] had not contacted me...I was left with no other choice but resign for my own safety." R 49.

Salopek found the tone of Rake and Manson's interview "odd" and "confrontational," their questions pointed and narrow rather than open-ended. Tr. 177–78. After writing a first draft of a statement, Salopek decided that he wanted to start over, so he wrote a second draft, crumpled up the first, and told Rake at the end of his interview that he would take it to shred. Rake told Salopek he would keep the draft and shred it. However, he did not do so, instead including the draft among all the other written statements, with no indication that it had been rescinded by the witness. Tr. 1099–1100; R 2 pp.13–15.

Manson and Rake never reached out to Mullen to attempt to interview him. Tr. 477, 541. On July 17, 2019, having heard nothing to indicate Respondent was taking any action regarding the harassment and threats, Mullen emailed Terry to say he was resigning because of "work place harassment and threats." Jt. 4 Bates 1225. Whereas when Mullen was laid off in 2016, he was marked eligible for rehire, this time Respondent marked him ineligible for rehire. Jt. 7 Bates 1388.

On July 25, 2018, Rake completed a report on the investigation. Jt. 10. He devoted two of the report's 12 pages to detailing prior bad conduct by Salopek, writing that "While I could not prove the following I had the feeling Officer Salopek was trying to get back at the company for [those] incidents." Jt. 10 Bates 1673. Rake recommended that Salopek be removed from the contract because of comments made during his interview, his failure to provide documents to support the complaints he, Mullen, and Lein had made, and causing the government to waste its time on conducting the investigation. Jt. 10 Bates 1674.

Although the report stated that Lein in his interview denied that he had been told to go to a gravel pit for weapons qualification, Lein's written signed statement asserted that he had been told exactly that, and at hearing he testified to the same. Tr. 661, R 2 p.16. Although the report stated that Schryver denied that a gravel pit shoot had been treated as a qualification, his written statement was in fact much more careful. Schryver wrote, "In reference to the statement that I qualified Mr. Cunningham at a gravel pit, I never said the words, 'He's qualified.'" Schryver also wrote, "If Mr. Cunningham was qualified I have no personal knowledge of it. Any and all complaints referring to the range from myself were brought to Lt. Gerald Powless as he is the primary RSO for the company." R 2 p.24. Rake's report concluded that documents showed Coler had repeatedly been issued weapons she was not qualified to carry. Jt. 10 Bates 1668-69. However, in her written signed statement she denied that she had ever had possession of weapons she was not qualified on. R 2 p.22.

The report concluded that there was no evidence that weapons qualifications had occurred at gravel pits or other unapproved locations or that any documents had been falsified to hide qualifications occurring elsewhere than the Bangor or Port Townsend ranges or using non-Navy weapons. Jt. 10 Bates 1664-65. Filibeck described it as finding that the Salopek, Mullen, and Lein complaint had "no basis in reality" and that they had filed a "false report." Tr. 999. However, at hearing Terry testified that Respondent had conducted qualifications at non-Navy sites with private weapons and that at least one document showed a qualification taking place at the Bangor range, when in fact it had occurred at an employee's private property. Tr. 893-99, 962. Rake's report noted that the problem of issuing weapons to unqualified guards had been discussed with

Respondent, and Terry testified that Respondent got its “hand slapped for that,” although a performance report from Manson in December 2018 did not mention the issue and rated Respondent’s record keeping, quality control, and its self-identification and resolution of problems as excellent. Tr. 978, 963; Jt. 10 Bates 1068–69; R 22.

Although Rake’s normal procedure is to immediately release such an investigatory report to the involved contractor, Rake was ordered not to do so in this case because of the OSHA complaint. Tr. 547–48.

In August 2018, Salopek filed a complaint with the Navy IG, asserting that weapons qualification records had been falsified and the Rake-Manson investigation botched. Tr. 185–87; GC 9. Although the IG quickly closed its analysis of Salopek’s allegations with a finding that they were not appropriate for an IG investigation, it did investigate Salopek, locating his LinkedIn page, on which he had years before posted photos of Naval boats at Indian Island, which he had taken at Respondent’s request, for its marketing use, and posted with Respondent’s knowledge. Tr. 433–35, 595–96, 1094–97; GC 9 p.13; R 13. Salopek had discussed the photos with the base commander before posting them online; the commander told him that nothing on the boats was classified. Tr. 353–54, 433–36. Rake testified that he was concerned that the photos showed the instruments used on Navy boats and displayed an individual boat’s unique number-letter identifier.⁷ Tr. 638; R 13.

On September 7, 2018, Rake sent an email to Respondent’s site manager Terry asking him to ask Salopek to remove the photos. R 13. Although Filibeck testified that the photos were “classified,” their posting a “serious threat to our national security” that

⁷ Salopek, however, testified that the instruments on the boats can be purchased on the internet. Tr. 435–36.

would prevent Salopek from working on any military contract, Rake's email concluded by saying "do not push him" to remove the photos from social media. Tr. 1002, 1005–06, R 13. Although Filibeck testified that the Navy is pursuing an "active" investigation of the photos, there is no other evidence in the record of any investigation after Rake's September 7 request. Tr. 1005. At the time of the hearing, Respondent's own website displayed a similar photograph of a Navy boat, with unique number-letter identifier visible, against a panorama identifiable as the surroundings of the Indian Island base. Tr. 641–42; GC 13.

In the fall of 2018, CEO Morgan resigned and Filibeck was hired to take his place running the company. Tr. 980, 982. Because Morgan left suddenly, Filibeck did not get much information from him about Respondent's operations. Tr. 983, 986. As part of getting acquainted with the Indian Island contract, on October 26, 2018, Filibeck met with the Navy's contract representative Rake and his superior, contract officer Michelle Burris ("Burris"). Tr. 555. During that meeting, Rake read from his report, including its conclusions regarding Salopek. Tr. 998. Rake told Filibeck that he recommended removal of Salopek from the contract, although Burris told Filibeck that the Navy could not tell Respondent who to fire. Tr. 571, 1003. Filibeck testified that Rake also said Respondent "was having a lot of performance issues." Tr. 997 ll.24–25. This meeting was the first time Filibeck learned of Mullen and Salopek's complaints to the Navy. Tr. 988–90.

C. Respondent Fires Salopek

Normal procedure is for the Navy to put a removal request in writing; no such written request was made to Respondent to remove Salopek. Tr. 1003. Nevertheless,

after the meeting, Filibeck decided to fire Salopek. Tr. 1003; Jt. 13 Bates 1679; Jt. 18 p.2. On October 27, 2018, Filibeck told Salopek he was fired for “dishonesty, violation of chain of command, and lack of candor.” Tr. 202. According to Filibeck’s testimony, he told Salopek that he was firing him at the request of the Navy, but Salopek testified that Filibeck did not mention the Navy. Tr. 1016, 1101.

Respondent did not provide anything in writing to Salopek stating why he was fired. Tr. 203. However, on October 29, 2018, it put in his personnel file a “change of status” form stating that he was fired for “Chain of Command Violation and Dishonesty.” Tr. 203; Jt. 5 Bates 1285. Filibeck testified that any time a contractor fires an employee for cause, the contractor must submit a form to the government detailing why the employee was fired, but there is no evidence in the record that Respondent created or submitted any such document regarding Salopek’s firing. Tr. 1005.

Within a couple of days, Terry informed Rake that Salopek no longer worked for Respondent. Tr. 571. Whenever an employee ceases working at a Navy facility, whether because the employee quits, transfers to another location, or is fired, this change of status causes the Navy to cancel the employee’s base common access card (“CAC”). Tr. 571–576. As soon as Rake learned from Terry that Salopek was fired, he followed this protocol, cancelling Salopek’s access card. Tr. 573–74, 579; Jt. 13 Bates 1678; GC 10–11. Rake did not revoke Salopek’s security clearance, as he has no power to do so, nor is there any evidence in the record that Salopek’s security clearance was ever revoked. Tr. 573. As far as Salopek is aware, his clearance remains intact. Tr. 256.

After Salopek’s firing, with investigations by both OSHA and the NLRB ongoing, Respondent generated documents setting forth other rationales for his termination. On

January 3, 2019, Terry sent Filibeck a “timeline” leading up to Salopek’s termination. He listed numerous incidents involving Salopek, including the complaint to the Navy and conversations he had had with coworkers about their entitlement to boots under the CBA (in which he allegedly gave incorrect information). He stated that for years Salopek had been “undermining management” and “been a malcontent in the workplace,” and that Filibeck made the decision to fire him because “all the indicators pointed at Salopek as the one causing all the turmoil at Indian Island.” Terry wrote that Salopek was fired for “dishonesty and chain of command violation.” Jt. 13 Bates 1679.

On January 11, 2019, Respondent’s then-attorney submitted a position statement to OSHA copying the material from Terry’s email, but adding that Salopek was also fired for “inciting discontentment among the guards, poor attitude, writing 10 reports all against female persons, non-conforming to company regulations and policies and lying to the government on official documents.” Jt. 18 p.2. Respondent claimed that Salopek was fired “because the Navy instructed Xcel to discharge him for falsifying complaint documents,” and “Salopak [sic] falsified numerous reports about other staff ... only to find out that it was all a fabrication.” April 11 Answer. A few weeks later, Respondent claimed that “Employee Salopek had his security clearance revoked by the Navy, and hence was not, and is not qualified to work at XCEL or for rehire.” April 25 Answer.

When Respondent later received a copy of Rake’s report, Filibeck found no surprises in it, given Rake’s earlier reading from it. Tr. 1029. Even after receiving a copy of the report and the attached witness statements in December 2018, Respondent disciplined no one other than Salopek in connection with it. Tr. 1029–30. Despite the discrepancy between Coler’s written statement and the Navy report’s conclusion that she

carried weapons she had not properly qualified on, Coler was not disciplined for dishonesty. Tr. 960; R 2.

D. Lein Faces Retaliation for His Protected, Concerted Complaints

After having joined Mullen and Salopek in complaining to the Navy about weapons qualification, Lein was confronted by management and coworkers. On July 9, 2018, Cunningham came out to Lein's post and yelled, "You're all a bunch of F'n rats." Tr. 691–92. Cunningham was again fully armed during this confrontation. Tr. 691.

The next day, July 10, 2018, while on post, Lein received an angry phone call from Terry. Terry asked if he had talked to the commander and if so who with. When Lein said he had gone to the commander with Salopek and Mullen, Terry said, "I'm pulling you off the post and I'm pulling you off the contract, and you made a big mistake." Tr. 725 ll.23–25. Terry told Lein that CEO Morgan wanted to ask him questions, so at the end of his shift, Lein went to Terry's office, where he spoke with Morgan on speaker phone. Tr. 726. Morgan was angry, accusing Lein of breaking the chain of command. Tr. 727. Although the conversation was contentious, Lein ended it on a conciliatory note, thanking Morgan for the work opportunity, and Morgan in turn thanked him for his prior military service. Tr. 727–28.

In late September 2018, in chatting with coworkers, Lein became aware that he had been paid less than state minimum wage during his initial 80-hour "in-hire" period. Tr. 695. He also noticed that, although he was not being paid the contract rate during that period, full Union dues had been deducted. Tr. 695–96. He then called Union representative Scott Harger, who followed up with an email to Terry on September 26, 2018. Tr. 696, 825–26; GC 17. A few days later, Terry called Lein in to meet in his office.

Tr. 697–98. Terry was angry and asked Lein why he hadn't talked to Terry if he had pay issues. Terry said, "If [you] have pay issues, [you] need to speak to [me] and not the Union."⁸ Tr. 698 ll.19–20. Lein responded that he had every right to speak to his Union and that he believed that he and everybody who had been hired after January 1, 2018, had been incorrectly paid. Tr. 699.

On October 27, 2018, when he learned that Salopek had been fired, Lein assumed that he was next. Tr. 705. At the end of his shift, Lein was told that Lt. Powless wanted to speak to him. Tr. 706. Powless told Lein that management was going to fire him, but they had decided to give him a second chance because it was his first time jumping chain of command. Tr. 706.

In late December 2018, Lein agreed to work a 4-hour shift on short notice. Tr. 709–10. Under Article 12 of the Collective Bargaining Agreement ("CBA"), guards are required to be fully armed up and ready for duty before the start of shift, and they receive an extra 30 minutes "guard mount pay" per shift to allow for 15 minutes' arm-up at the beginning of shift and 15 minutes' arm-down at the end of shift, although if a guard is back from post and armed down, he is free to leave before the 15 minutes are completed. Tr. 710, 718, 950, 952–53; Jt. 15 pp.13-14. However, after working the 4-hour shift and filling out 4.5 hours on his time sheet, Lein returned to discover that someone had whited it out and written in 4.25 hours. Tr. 710–11. Lein raised the issue with the shift lieutenant, who

⁸ Although Terry denied that he had told Lein not to go to the Union, he did admit that he told him to bring issues with terms of employment to him (Terry): "[I told him that] if he -- you know if he has an issue with his pay, uniforms, whatever it is, please let me know to see if I can't solve the issue on my level first before -- not before -- even -- I just said, let me see if I can't solve your problem. Just let me know what's -- what's going on." Tr. 956.

told him to take it up with Terry. Tr. 713. When Lein did so, Terry, without discussion, indicated that he could go ahead and claim 4.5 hours. Tr. 713, 955.

However, a few days later, Lein arrived at work for another 4-hour shift and, along with another guard, attempted to arm up 15 minutes before start of shift as usual. Lt. Lux told them that they could not do so until the actual start of shift. Tr. 715. Lein said this was wrong, that he had discussed arm-up pay with Terry, and that it was in the CBA, but Lux refused to allow them to arm up for 15 minutes. This caused Lein to be late relieving the guard going off shift, who was annoyed. Tr. 715–16.

The next day, when Lein and another guard arrived in the guard mount room as usual for arm-up and briefing, Lt. Powless directed them to the lieutenant's office, which Lein found odd. When they arrived in the office, night-shift guards coming off shift were there, which was also unusual. Tr. 717. Lein felt that everyone was staring at him. Instead of giving the usual briefing on base operations, Powless announced that because somebody had complained to Terry, nobody was allowed to go home early anymore. Tr. 718.

After the briefing, Lein followed Powless out of the room and said that everyone knew Powless had been talking about him. Powless responded angrily, "Oh, are you going to write me up?" Tr. 719. Lein understood him to be referring to the July 9 email complaint to the Navy. Tr. 720.

That day at work, multiple guards spent hours berating Lein for having complained about guard mount time. Tr. 721–22. Later that day, Lein complained to both Terry and Powless about the harassment. Tr. 723. Powless responded, "If you have any issues or concerns, ... maybe next time you should bring them up to your peers." At the end of

Lein's shift, Powless told him that Terry said nobody had to stay late anymore. Tr. 724. Terry testified that he gave the directive to require employees to stay until the end of their paid time because Lein had raised the issue and he reversed course because "I didn't want to feel like ... I'm punishing everybody for some of the questions that were made about ... who was getting paid" Tr. 953 ll.15–18.

E. Union Requests Information About Salopek Firing

On October 30, 2018, a few days after Salopek was fired, the Union filed a grievance contesting his firing, along with a set of requests for related information, including his personnel file, the rules he was accused of violating, any document given to him or signed by him regarding his discharge, and Respondent's investigation record and its witnesses. Jt. 1; Jt. 2; Sept. 23 Answer. In the weeks afterward, Union representative Harger made numerous calls and emails to Terry and Filibeck, who repeatedly promised to provide responsive information but never did. Tr. 821–25; Jt. 1; Jt. 3.

After his efforts to obtain the information proved fruitless, Harger turned the grievance and information requests over to the Union's attorney, Rich Olszewski ("Olszewski"), who began communicating with Respondent attorney Jason Bowles ("Bowles") about the grievance. Tr. 833. On January 21, 2019, Bowles provided Olszewski with "the documents we have pertaining to Salopek's personnel file." Jt. 1; Jt. 5; Sept. 23 Answer. Included in the attachment, without explanation, were two pages from the parties' CBA, including Article 10, which defines "serious misconduct" to include dishonesty. Jt. 5 Bates 1283–84; Jt. 16. Respondent also provided three witness statements, two from 2015, years before Salopek's termination, and one about boots from June 2018, also without explanation (the boots statement apparently referenced the

incident cited in Terry's January 3 summary and apparently involved Salopek's giving a guard incorrect information about the CBA). Jt. 5 Bates 1275, 1281–82.

That same day, Olszewski requested additional information in connection with the Salopek grievance, including witness statements supporting the claim that Salopek was terminated for chain of command violation and dishonesty, documents defining chain of command violations, discipline of employees other than Salopek for chain of command violations, and documents showing a request by the government to remove Salopek or a revocation of his clearance or site access (this last item Olszewski requested by separate email later in the day). Jt. 1; Jt. 6; Jt. 9 Bates 1207; Sept. 23 Answer. On January 23, 2019, Bowles sent Olszewski another batch of documents, without stating which information requests they were responsive to. They included some of the same documents sent two days before, but also additional documents on a Salopek work injury, the Navy's request to remove the LinkedIn photos, and the harassment of Mullen. Jt. 8 Bates 1459–69, 1472–77, 1482–1500.

Between January 21 and January 31, 2019, by email, Olszewski answered questions from Bowles and repeatedly reminded him of the information requests. Jt. 9. On January 24, 2019, Bowles sent Olszewski a copy of the Navy report (without witness statements), which had been provided to Respondent around December 3, 2018, by the OSHA investigator; again, Bowles did not specify what request it was in response to. Tr. 1023; Jt. 1; Jt. 10. Olszewski and Bowles also spoke once on the telephone about the information requests in January 2019, when Bowles called Olszewski to ask what he meant by a request by the government to remove Salopek. Olszewski explained that it

was common in the government security industry for contracts to allow the military to request that an employee no longer work on a given contract. Tr. 839–40.

On February 28, 2019, Olszewski repeated the previous requests and added a request that Respondent state whether the government had requested Salopek's removal. Jt. 1; Jt. 11. On May 8, 2019, Olszewski made another information request, including for documents supporting Respondent's claim that Salopek had his clearance revoked, documents related to weapons qualification procedures, and documents relating to complaints by other guards about supervisor misconduct. Jt. 1; Jt. 12. On May 14, 2019, Bowles again sent Olszewski documents, most of which were Salopek personnel documents previously provided, but also the January 3 email from Terry to Filibeck summarizing the events leading to Salopek's firing. Jt. 1; Jt. 13 Bates 1679.

On May 16, 2019, Bowles emailed Olszewski to state that he had sent all documents responsive to Olszewski's "discovery requests," apparently referring to Olszewski's information requests. Jt. 1; Jt. 14. After that date, Respondent provided no more documents in response to the Union's information requests. Jt. 1.

During the time the Union made its requests, October 2018 through May 2019, its grievance of Salopek's termination was pending and, by May 2019, the grievance had been moved to arbitration.⁹ Tr. 840; Jt. 14. Respondent has admitted receiving the requests. Sept. 23 Answer, ¶¶ 9, 10. See *also* Jt. 1.

⁹ Eventually, pursuant to its deferral policy under *Dubo Mfg Co.*, 142 NLRB 431 (1963), the Region directed the Union to choose its forum; that is, withdraw the grievance or the Region would defer these proceedings to the grievance procedure. The Union then elected to withdraw the grievance. Tr. 346.

III. RESPONDENT VIOLATED THE ACT BY DISCHARGING SALOPEK, CONSTRUCTIVELY DISCHARGING MULLEN, RETALIATING AGAINST AND COERCING LEIN, AND FAILING TO PROVIDE INFORMATION

Activity is protected under the Act when it addresses terms and conditions of employment and concerted when employees raise a grievance together. See, e.g., *Alstate Maint., LLC*, 367 NLRB No. 68 (Jan. 11, 2019). The “mutual aid or protection” clause of Section 7 protects not only employees who engage in protected concerted activity directly with their employer, but also those who concertedly “seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

The Board has developed several different standards to assess whether an employee was unlawfully fired as a consequence of protected activity. When an employer fires an employee who engaged in protected activity, but the employer asserts a reason other than the employee’s union or protected concerted activity, the Board applies a standard designed to ferret out the causally relevant motive. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981). See also *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (Nov. 22, 2019). To establish unlawful retaliation for protected concerted activity under *Wright Line*, the General Counsel must make a *prima facie* showing that the employee engaged in protected concerted activity, the employer was aware of the activity, the employee suffered an adverse employment action, and the employer demonstrated animus toward the activity, that is, there is a nexus between the protected activity and the adverse action. See, e.g., *Tschiggfrie*, 368 NLRB No. 120, slip op. at 10.

If such a showing is made, the burden shifts to the employer to show that it would have taken the same action in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089.

On the other hand, where an employee is fired for supposed misconduct arising out of protected activity, but the General Counsel demonstrates that the employee was not, in fact, guilty of the misconduct, a violation will be found, without regard to the employer's motive or good faith. *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964). See also *Taylor Motors, Inc.*, 365 NLRB No. 21 (Mar. 13, 2017); *Marshall Engineered Products Co., LLC*, 351 NLRB 767 (2007). Under *Burnup & Sims*, the General Counsel must prove that the employer knew the employee was engaged in protected activity and that an alleged act of misconduct in the course of that activity was the basis of the discharge, but the alleged misconduct did not in fact occur. *Burnup & Sims*, 379 U.S. at 23. In adopting this standard, the Court explained that setting aside proof of employer motive was necessary to protect the rights guaranteed by the Act; “[o]therwise the protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent effect on other employees.” *Id.*

A. Respondent Unlawfully Discharged Salopek

Under either standard, Respondent violated the Act by firing Salopek.

1. Respondent Unlawfully Fired Salopek Under *Wright Line*

Under *Wright Line*, evidence that the proffered reason is pretextual supports an inference of unlawful motivation, both to support the General Counsel's *prima facie* case and to rebut an employer's defense. See, e.g., *L.B. & B. Assoc., Inc.*, 346 NLRB 1025, 1027 (2006), *enfd.* 232 Fed. App'x 270 (4th Cir. 2007); *Fluor Daniel*, 304 NLRB 970, 971

(1991) *enfd. mem.* 976 F.2d 744 (11th Cir. 1992). Timing of the adverse employment action in relation to the employee's protected conduct may support an inference of unlawful motivation. See, e.g., *Kag-W., LLC*, 362 NLRB 981, 982 (2015); *Masland Indus.*, 311 NLRB 184, 197 (1993).

"It is well settled that an employer violates the Act when it follows the direction of another employer with whom it has business dealings to discharge its employees because of their protected activities." *Paragon Sys., Inc.*, 362 NLRB 1561, 1565 n.14 (2015) (citing *Black Magic Res., Inc.*, 312 NLRB 667, 668 (1993), *decision supplemented*, 317 NLRB 721 (1995)). See also *Dews Constr. Corp.*, 231 NLRB 182, 182 (1977); *Georgia Pacific Corp.*, 221 NLRB 982 (1975). "The fact that the direction comes from a Government actor does not alter our analysis."¹⁰ *Paragon*, 362 NLRB at 1565 n.14.

Here, a term of employment for Respondent's employees at Indian Island is carrying weapons and taking tests to demonstrate the capacity to safely and accurately use them. A group of three employees, including Salopek, complained to the Navy about this term of employment. They first did so to supervisors, but when this was unavailing, they complained to the Navy, which found their complaints to be accurate in part. These complaints were decidedly protected and concerted. *Eastex*, 437 U.S. 556; *Delta Health Center, Inc.*, 310 NLRB 26, 43 (1993) (employees' communications to a government agency (the Public Health Service) were protected); *Afro-Urban Transp.*, 220 NLRB 1371

¹⁰ In *Paragon*, the employer contracted with the Federal Protective Service ("FPS") to provide security services at an Army facility. *Paragon Sys., Inc.*, 362 NLRB at 1561. During contentious collective bargaining, employees delivered union materials, including a notice of impending strike, to the highest ranking military officer at the facility. *Id.* FPS investigated and issued a report recommending removal of the employees from work on the contract; the employer then terminated the employees for "dishonesty," among other infractions. *Id.* at 1562. The Board found that the government directive in no way absolved the employer of liability. *Id.* at 1565. Furthermore, the Board found the employer's claim that it had no choice but to fire the employees to be pretextual, warranting an inference of unlawful motive. *Id.* at 1565. It therefore found the terminations unlawful. *Id.* at 1566.

(1975) (employee effort to seek the aid of governmental organizations and agencies in order to protect working conditions is protected activity provided it is undertaken without malice or bad faith). Mullen and Salopek also filed complaints with OSHA and Salopek filed a complaint with the Navy's IG. This activity was also indisputably protected and concerted. *Owens Illinois, Inc.*, 290 NLRB 1193 (1988) (complaint about workplace air safety to OSHA protected and concerted).

It is undisputed that Respondent was aware of these protected, concerted activities, as the complaints first came directly to them and then the Navy immediately passed the complaints back to Respondent. Respondent has never denied that Filibeck fired Salopek as soon as he learned from the Navy of Salopek's complaints, timing highly suggestive of causality. Furthermore, there is direct evidence of animus: CEO Morgan's statement made clear that those who had complained to the Navy were "a cancer;" and Terry told Lein that complaining to the Navy was "a big mistake." Thus, a *prima facie* case of unlawful retaliation is made out, and the burden shifts to Respondent to demonstrate that it would have fired Salopek in the absence of his protected activity. An employer cannot carry this burden "by merely showing that it had a legitimate reason for imposing discipline against an employee." *Monroe Mfg., Inc.*, 323 NLRB 24, 27 (1997) (quoting *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989)). "Rather, the Respondent must show by a preponderance of the evidence that the 'same action' (i.e., discharge) would have occurred even in the absence of the protected conduct." *Id.* (citing *Wright Line*, 251 NLRB at 1089).

Respondent's reasons for firing Salopek have repeatedly shifted: Filibeck told Salopek in October 2018 when it fired him that he was fired for dishonesty, violation of chain of command, and lack of candor. Shortly afterward, Respondent placed a record in his file saying he was fired for dishonesty and violation of chain of command. However, two months after firing him, its internal emails stated he was fired because he was "constantly undermining management," "the one causing all the turmoil at Indian Island" and a "malcontent in the workplace."

Then, in its position statement to OSHA, Respondent repeated these later-developed reasons, but added others: "inciting discontentment among the guards, poor attitude, writing 10 reports all against female persons, non-conforming to company and regulations and lying to the government on official documents." Changing its rationale yet again, Respondent claimed in its April 11 Answer that it fired Salopek "because the Navy instructed Xcel to discharge him for falsifying complaint documents." This reason was clearly manufactured, as even the Navy, in Richard Rake's testimony and his report, never contended that it required Respondent to fire Salopek, and Contract Officer Burris explicitly said the Navy could not tell Respondent who to fire.

Finally, in its April 25 Answer, Respondent claimed that it fired Salopek because the Navy had revoked his clearance. It then added one last footnote to its list of shifting reasons, suggesting at hearing that an "active" investigation into a serious threat to national security by Salopek (due to the photos Respondent had requested he take) precluded reinstatement.

The very fact that Respondent has repeatedly shifted its stories suggests pretext. See, e.g., *Shamrock Foods*, 366 NLRB No. 117, slip op. at 27–28 (June 22, 2018) (employer's shifting reasons for an adverse action are evidence of unlawful motive), and cases cited therein; *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007) (“an employer's shifting explanation for a discharge, or . . . its post hoc attempt to rationalize such a decision, are suggestive of a pretext”); *Avondale Indus., Inc.*, 329 NLRB 1064, 1238 (1999) (“Respondent's shifting from defense, to defense, to defense shows that all of the defenses are pretextual”). Furthermore, some of Respondent's shifting reasons are also completely baseless.

As noted previously, the Navy could not fire Salopek. As Navy representatives told Respondent, the Navy has no authority to command a contractor employee's firing. Although it can request removal, that appears not to have happened here: there was no formal, written request for Salopek's removal as per normal procedure, and Respondent did not follow protocol by stating in writing to the Navy the reasons it fired Salopek. Further, even had there been a removal request, Salopek's own history shows that, when Respondent chooses, it can decide not to honor a Navy removal request, as it did by keeping him in 2015.

In any case, a government request under a contract is no defense as a matter of law, as found by the Board in *Paragon*. The military here, as in *Paragon*, openly expressed its hostility to the protected activity and requested that Respondent remove its employee for it. Also as in *Paragon*, Respondent's employees took their concerns directly to the military, and the military did not like it. As the Board found in *Paragon*, the military's wish is not Respondent's command.

Further, Respondent produced no evidence that Salopek's security clearance was revoked (despite promising such evidence in its opening statement), and Salopek has never received any information that it is not intact. In addition, the claim that Salopek was under active investigation for seriously endangering national security by posting photos online of Navy boats is inconsistent both with the Navy's low-key email to Terry about the photos and with the fact that Respondent had itself posted similar photos on its own website (not to mention that Respondent had known about Salopek's posting for years and commissioned the taking of the photos itself).¹¹ Similarly, there is no evidence in the record of Salopek's "lying to the government on official documents,"¹² although there is evidence from Respondent's own witness that *Respondent* lied to the government on official documents, just as Salopek had asserted. This evidence of pretext both supports the GC's prima facie case and fatally undermines Respondent's defense.

In addition, several of the reasons Respondent asserted amount to admissions that it fired him for his protected concerted activity. "Malcontent," "undermining management," and "causing all the turmoil" are classic euphemisms for union or protected concerted activity. *Phillips Petroleum Co.*, 339 NLRB 916, 924–25 (2003) (listing code words often found by the Board to suggest animus to protected activity, including "malcontent," "troublemaker," and "attitude"). The turmoil at issue was that stirred up by

¹¹ These points also go to remedy, as Respondent has claimed it cannot reinstate Salopek because of the revocation of his clearance and the investigation of the photos. Respondent's own actions caused the cancellation of Salopek's Navy access and clearance lists; if it reinstated him it could freely place his name back on required Navy clearance forms, and there is no evidence of any active Navy investigation of Salopek other than Filibeck's implausible testimony. Such fictionalizing also undercuts Filibeck's credibility as a witness overall.

¹² Despite Respondent's harping on the erroneous May 2018 date in Mullen and Salopek's complaints to the Navy, it failed to place in the record any evidence that this was anything but an honest mistake.

the trio's concerted complaints about weapons and safety and Salopek's years of advocating on behalf of the guards in his various roles.¹³

Finally, direct comparator evidence here establishes Respondent's animus. The Navy's own report demonstrates that Coler was dishonest in her signed statement to the Navy, yet Coler received no discipline. Coler was dishonest, but was not disciplined, while Salopek was allegedly dishonest and was fired, the difference being that Salopek engaged in protected concerted activity. This warrants the inference that Respondent fired him because of his protected activity. Therefore, under *Wright Line*, Respondent violated the Act by firing Salopek.

2. Respondent Unlawfully Fired Salopek Under *Burnup & Sims*

In *Burnup & Sims*, the employer asserted that it fired two employees for saying, while soliciting another employee to join the union, that the union would use dynamite if it did not win representation through the normal channels. 379 U.S. at 21. However, the evidence showed that the employer was aware that the supposed comments were made in the course of union and protected activity and that the discriminatees never actually made the comments. The Board found that the employer's good-faith belief that they had made the comments was no defense, and the Supreme Court agreed. 379 U.S. at 23.

Setting aside the fact that Respondent's defenses keep shifting, Respondent's position is clear that it fired Salopek for alleged misconduct arising in the course of his protected activity. The problem for Respondent is that the misconduct didn't happen. The Navy and Respondent accused Salopek of filing false charges, but the Navy in its report acknowledged that some of the charges were true and Respondent's own witness

¹³ Even the incident in which Salopek allegedly gave out incorrect information about CBA rights to boots, cited in Terry's January 3 summary, was protected union activity.

admitted on the stand that even more of them were true.¹⁴ In fact, Terry admitted that, just as Salopek had charged, Respondent had been qualifying guards at non-Navy ranges with non-Navy weapons and that Respondent had filed documents falsely showing that they took place at a Navy range.

Another accusation, that Salopek violated chain of command rules in making the complaints to the Navy, is also false. He repeatedly raised concerns about weapons qualifications to Respondent's supervisors, all the way up to its CEO, and took these serious safety concerns to the Navy only when his complaints to Respondent proved fruitless — just as Respondent's own chain of command policy "encourages." Because Salopek's supposed misconduct did not occur, any reliance by Respondent, good-faith or otherwise, on such misconduct, is no defense and Respondent violated the Act under *Burnup & Sims* by firing Salopek.

B. Respondent Constructively Discharged Mullen

A constructive discharge is a quit that the Board treats as a discharge because of the circumstances surrounding it. Among those circumstances is when an employer imposes on the employee intolerable job conditions and the employee quits as a result. *Dish Network Corp.*, 366 NLRB No. 119 (June 28, 2018) (citing *Remodelling by Oltmanns, Inc.*, 263 NLRB 1152, 1161–62 (1982)). For a quit to qualify as a constructive discharge, the employer must have imposed the intolerable working conditions on the employee in retaliation for his protected activity and "reasonably should have foreseen that the changed working conditions would induce that employee to quit." *M.P.C. Plating, Inc.*, 295 NLRB 583, 592 (1989) (citing *Keller Mfg. Co.*, 272 NLRB 763, 784–85 (1984)).

¹⁴ Had it even turned out that all of Salopek's charges were inaccurate, this would not demonstrate that he lied, only that he was mistaken. As whistleblower law recognizes, even mistaken charges are protected.

The Board has specifically ruled that it is immaterial that the working conditions caused the employee to quit for reasons personal to that employee; all that matters is that the employer know that these working conditions would cause this employee to quit. *Am. Licorice Co.*, 299 NLRB 145, 148–49 (1990) (when employee informed employer that she needed to transfer to another shift because she could not afford child care, the employer reasonably should have foreseen that refusing to grant the employee's transfer request would force her to resign). Once the quit is recharacterized as a discharge, the usual *Wright Line* analysis is applied; if the General Counsel demonstrates a prima facie case that the intolerable conditions were imposed because of protected activity, the burden shifts to the employer to demonstrate that it would have taken the steps that caused the quit in the absence of the protected activity. *M.P.C. Plating*, 295 NLRB at 593.

Here, Mullen engaged in the protected activity of complaining both to Respondent and to the Navy about weapons qualifications and Respondent indisputably knew about that activity because the Navy immediately forwarded Mullen's email to Terry. As described above, CEO Morgan displayed animus toward that activity by calling the whistleblowers a "cancer" and their whistleblowing "a big mistake."

Respondent was well aware that a guard had crushed Mullen's shoulder after he complained about her, because Mullen told the story to people at work, including Terry. With this history, Respondent reasonably should have foreseen that the threats from David, combined with the armed confrontation by Cunningham, would be terrifying to Mullen. Even if Respondent could somehow argue it couldn't have reasonably foreseen this given his known history, Mullen explicitly told Lt. Powless on July 13 that he would not come to work until the threats and harassment were addressed. And he told Terry on

July 14 that the incidents with Cunningham and David had made it impossible for him to come to work. Thus, there is direct knowledge.

Indeed, Terry himself testified that he and Morgan agreed that the allegations were very serious, requiring an immediate, thorough investigation, including interviewing Mullen. They took the threat seriously enough to tell Mullen to call the police. Despite this, no one interviewed him or bothered to tell him that they took his complaint seriously or were going to do anything to stop the harassment. Respondent reasonably could foresee that, if he did not receive any assurance that the threatening behavior would be addressed and shut down, Mullen would quit. This was especially so given that Mullen reasonably assumed that Cunningham and David were targeting him because Respondent had informed them that Mullen had complained about them. Therefore, a *prima facie* case that Respondent constructively discharged Mullen is established, and the burden shifts to Respondent to demonstrate that its failure to offer any assurances to Mullen that it was taking meaningful steps to end the harassment was motivated by something other than an intent to cause him to quit.

Respondent's witnesses denied that any supervisor or manager told Cunningham and David that Mullen had complained about them, but the evidence does not support finding them credible. For example, despite Mullen's having submitted his complaint on July 9 and David's texting him the very next day, David evasively pleaded lack of memory of who told him about Mullen's complaint, claiming "several different people" told him and offering a vague account of being triggered to send the texts on a day he was not at work. Cunningham also vaguely pointed to "rumors" despite the speed of his confrontation of Mullen after the complaint was lodged and the documents in the record establishing the

timeline. Further, Cunningham's self-contradictions in testimony regarding getting along with everyone at work also undermine his credibility overall. See *NLRB v. Quest-Shon Mark Brassiere Co.*, 185 F.2d 285, 289 (2d Cir. 1950) (inconsistent statements tend to show the witness is not credible). The evidence strongly suggests that Respondent did tell David and Cunningham, an armed employee with a history of getting in other employee's faces, that Mullen had made a complaint about their qualification for their jobs.

Further, Respondent untruthfully claimed to OSHA that Mullen didn't tell management about the harassment until July 14. Also, Terry's testimony that he and Morgan took Mullen's allegations seriously and intended to do a thorough investigation is inconsistent with the steps Terry actually took. Instead of doing a thorough investigation, he only had guards sign acknowledgement of the anti-harassment policy.

All told, these disparities between Respondent's assertions and the evidence suggest pretext and that Respondent intended Mullen to quit; that is, that it foresaw the quitting was likely to happen and took no steps to prevent it (it appears likely it in fact actively promoted it by telling Cunningham and David who had complained). The burden is Respondent's to prove that it would have made the same lackadaisical response to the complaint of harassment in the absence of Mullen's protected activity, yet it introduced no comparator evidence.

Respondent seemed to be advancing at trial the defense that, had Mullen not quit first, it would have fired Mullen for abandoning his post, eliciting testimony from Rake and Filibeck to this effect (with the added flourish of characterizing his protected concerted whistleblowing as a "junket"). This is pure speculation. But even if it were not, the defense

would still fail under *Burnup & Sims* because his alleged abandonment of post in the course of protected concerted activity did not occur. Similarly, if Respondent intends the claim of abandonment to go to remedy, foreclosing reinstatement, such foreclosure fails for the same reason.

Respondent also seemed to suggest that Mullen quit not because of the harassment but because he foresaw being unable to pass an upcoming physical fitness test. Mullen testified that he expected to pass the test. In any case, Respondent's story is implausible given that Mullen previously qualified for unemployment compensation when laid off for failing the fitness test, whereas when he quit he received no such compensation. Thus, it was against his self-interest to quit. For all these reasons, Respondent violated the Act by constructively discharging Mullen.

C. Respondent Retaliated Against and Made Coercive Statements to Lein

It is well settled that Section 7 rights include the rights to speak about wages and to speak to union representatives. *Jerry Ryce Builders, Inc.*, 352 NLRB 1262, 1268–69 (2008); *Triana Industries*, 245 NLRB 1258 (1979) (cited in *Scientific-Atlanta, Inc.*, 278 NLRB 622, 624 (1986)). Therefore, telling an employee that he may not discuss wages or may not speak to his union is unlawful. *Main St. Terrace Care Ctr.*, 327 NLRB 522 (1999), *enfd*, 218 F.3d 531 (6th Cir. 2000); *Heck's, Inc.*, 293 NLRB 1111, 1119 (1989). Retaliating against employees for discussing wages or speaking to their union is equally a violation of the Act. See, e.g., *Labinal, Inc.*, 340 NLRB 203 (2003); *Main St. Terrace.*, 327 NLRB at 526.

In September 2018, Lein discussed some questions about wages with coworkers and then with the Union's Harger, who emailed Terry. Soon afterward, according to Lein, Terry called Lein into the office and said, angrily, "If [you] have pay issues, [you] need to speak to [me] and not the Union." By this statement, Terry attempted to bar Lein from exercising his Section 7 rights to talk to his union. Even according to Terry's version of this conversation, he told Lein to bring his pay issues to Terry. That amounts to a directive to share whatever he wanted to say to the Union with Respondent first. Lein's testimony should be credited, as he testified clearly and forthrightly. However, either version of the conversation violates the law.

Lein further testified without contradiction that, in December and January 2018, he complained to lieutenants and to Terry about being shorted quarter hours for arm-up and arm-down time. Terry confirmed that he then gave an order, disseminated by Powless, barring employees from going home before the end of their paid time because Lein had complained. Later that day, he reversed course, and he admitted at hearing that he did so because it sure looked like retaliation against Lein for complaining.

Undisputedly, Respondent imposed a penalty on the bargaining unit for a day because Lein had asserted contractual rights. The violation may have been brief, but the harm was done, and there is no right to break the law briefly. In addition, due to the amount of harassment directed at Lein because of the brief punitive action, there can be no good faith claim that it was *de minimus*. Respondent, by its own admission, retaliated against an employee for his Section 7 activity, in violation of §§ 8(a)(1) and (3).

D. Respondent Failed to Respond Adequately to the Union's Information Requests

Upon a good-faith request by a union, an employer has a duty to provide information that is potentially relevant to the union in discharging its statutory responsibilities. See, e.g., *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). Information concerning terms and conditions of employment of bargaining unit members is presumptively relevant and necessary. *Bryan & Stratton Bus. Inst.*, 323 NLRB 410 (1997). This duty includes information requested for handling grievances. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 438 (1967); *U.S. Postal Service*, 337 NLRB 820 (2002); *U.S. Postal Service*, 337 NLRB 635 (2000).

Information as to the reasons an employer has disciplined employees is relevant information. *Tritac Corp.*, 286 NLRB 522, 527 (1987) (citing *General Dynamics Corp.*, 270 NLRB 829 (1984)). The Board has long held that the names of witnesses to incidents leading to discipline of a bargaining unit member are relevant and must be provided. See, e.g., *Am. Baptist Homes of the West, d/b/a Piedmont Gardens*, 362 NLRB 1135, 1138 (2015). The duty to provide information includes a responsibility to state that requested information does not exist. *U.S. Postal Service*, 332 NLRB 635 (2000).

The Act requires an employer to make a diligent effort to respond to a request for relevant information "reasonably" promptly. *NLRB v. John S. Swift Co.*, 277 F.2d 641, 645 (7th Cir. 1960). What is "reasonable" depends on the entire context, including how burdensome collection of the information is and where it is located. See *U.S. Postal Service*, 354 NLRB 412 (2009) (30-day delay unreasonable given the location and nature of the records sought and their necessity for a pending grievance); *Capitol Steel & Iron Co.*, 317 NLRB 809, 813 (1995) (2-week delay unreasonable given that requested

information was simple and in the employer's possession); *Union Carbide Corp., Nuclear Div.*, 275 NLRB 197 (1985) (10½ month delay reasonable given that there was no evidence employer could have gotten the information faster and union was not prejudiced by the delay).

Here, the Union requested the information in support of its grievance of Salopek's discharge and the information all pertains to bargaining unit employee terms and conditions. It is therefore presumptively relevant. Respondent has admitted receiving the requests.

Respondent has admitted failing to provide the information listed in Complaint ¶¶ 9(a)(i), 9(a)(vi), and 9(a)(viii). It admits failing to provide the information listed in ¶¶ 9(a)(iv), 9(a)(vii), and 9(a)(ix), although it states that this information does not exist. As noted above, the duty to provide information includes the duty to say it does not exist, which Respondent did only as of the date of its September 23 Answer, nearly a year after the requests were made, hardly "reasonably promptly." Therefore, it failed in its duty to provide the information as pled in Complaint ¶¶ 9(f), 9(g) and 9(h).

It denies failing to provide the items in Complaint ¶¶ 9(a)(ii), 9(a)(iii), and 9(a)(v), policies Salopek was accused of violating, documents signed by Salopek during the course of the investigation leading to his discharge, and witness statements related to his discharge. There are some policies, some documents signed by Salopek, and some witness statements included among documents provided by Respondent. However, Respondent never explained that these documents were responsive to the items in ¶¶ 9(a)(ii), 9(a)(iii), or 9(a)(v) — if they were — and it is not obvious on their face that they

are. None of the documents signed by Salopek (such as routine personnel forms from years prior and the grievance form he signed) were signed by him during the investigation leading to his discharge.

Similarly, Respondent provided three witness statements, two from 2015, years before his termination and one about boots from June 2018. If Respondent intended to indicate that these witness statements “related to his discharge,” it failed to say so or to indicate in any way how. Respondent did provide, among Salopek’s personnel file, a copy of a portion of the CBA listing dishonesty as among serious offenses, but again it never stated that this was fully responsive to the Union’s request for policies Salopek was accused of violating. Therefore, Respondent did not satisfy its duty to provide items set forth in ¶¶ 9(a)(ii), 9(a)(iii), and 9(a)(v), as pled in Complaint ¶ 9(h).

Respondent admits failing to provide the information in Complaint ¶¶ 9(b)(ii) and 9(b)(iii). It denies failing to provide the information set forth in ¶ 9(b)(i), witness statements and investigatory reports supporting the claim Respondent terminated Salopek for chain of command violation and dishonesty. As described above, there are some witness statements included in documents Respondent provided to the Union, but Respondent never explained if they were responsive and to what. Arguably, Bowles’ May 16, 2019, statement that he had provided all responsive documents established that there was nothing further. If that is found to be the case, then Respondent still failed in its duty to provide item 9(b)(i) until May 16, as pled in Complaint ¶ 9(i).

Respondent denies failing to provide the items in ¶ 9(b)(iv), documents relating to any request by the government to remove Salopek from the contract or revocation of his clearance. It did not provide any such documents or say they do not exist. Therefore, Respondent did not satisfy its duty to provide the items in ¶ 9(b)(iv), as pled in Complaint ¶ 9(j).

Respondent admits failing to provide a response to the item in ¶ 9(c), but states no such documents exist. This is a non-responsive answer, as ¶ 9(c) is a yes or no question. Board law establishes that information requests need not be limited to documents and can include interrogatories, which employers are obligated to answer. See, e.g., *Mining Specialists, Inc.*, 314 NLRB 268 (1994) (employer unlawfully failed to respond to union's interrogatories); *Consolidation Coal Co.*, 310 NLRB 6 (1993) (employer unlawfully failed to respond to information request that included requests for documents and interrogatories). Therefore, Respondent did not satisfy its duty to provide an adequate response to the item in ¶ 9(c), as pled in Complaint ¶ 9(k).

Respondent admits failing to provide the items in ¶¶ 9(d)(iv)–9(d)(x). It denies failing to provide the items in ¶ 9(d)(i)–(iii), documents related to the claim Salopek had his security clearance revoked, the reasons for the alleged revocation, and the names of Navy personnel who revoked the clearance. However, Respondent provided no responsive documents and never said the documents do not exist. Therefore, Respondent did not satisfy its duty to provide items in ¶¶ 9(d)(i)–9(d)(iii), as pled in Complaint ¶ 9(l).

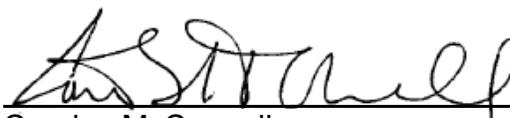
The Union requested all of the above information in connection with its grievance of Salopek's termination, it was all presumptively relevant, and Respondent failed to provide it as required by law. Therefore, as pled in the Complaint, Respondent violated § 8(a)(5).

IV. CONCLUSION

Based on the foregoing, Counsel for the General Counsel prays that the Administrative Law Judge find that Respondent violated §§ 8(a)(1), (3), and (5) of the Act as alleged in the Complaint, as amended, and order that Respondent offer Salopek and Mullen immediate reinstatement, make them whole by paying any back pay, provide the requested information, post an appropriate Notice to Employees, and order such other relief as is necessary and appropriate under the circumstances.¹⁵

DATED at Seattle, Washington, this 14th day of January, 2020.

Respectfully submitted,



Carolyn McConnell
Counsel for the General Counsel
National Labor Relations Board Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, WA 98174

¹⁵ A proposed Order and a proposed Notice to Employees are attached.

PROPOSED ORDER

Respondent, Xcel Protective Services, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - a. Refusing to bargain collectively with International Union, Security Police and Fire Professional of America, Local 5 (the Union), as the exclusive representative for purposes of collective bargaining for employees in the following unit ("Unit"):

Federal contract security officers employed by Respondent at the Indian Island Magazine in the State of Washington. Excluding all other employees, employed in any capacity such as Area Managers, Captains, Lieutenants, office or clerical employees, and professional employees as defined in the National Labor Relations Act.
 - b. Discharging employees or causing employees to quit because they concertedly complained to Respondent or the U.S. Navy about working conditions;
 - c. Telling employees to bring wage issues and complaints only to Respondent, rather than to the Union;
 - d. Refusing to let employees go home early because they brought wage issues to Respondent on behalf of themselves and other employees;
 - e. Refusing to timely provide the Union with information that is relevant and necessary to its role as Respondent's exclusive collective-bargaining representative; and
 - f. In any like or related manner interfering with, coercing, or restraining employees in the exercise of their Section 7 rights.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
 - a. Within 14 days of the Board's Order, offer immediate and full reinstatement to Mark Salopek (Salopek) and Stephen Mullen (Mullen) to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed;
 - b. Pay Salopek and Mullen for the wages and other benefits they lost, including search for work expenses and any consequential damages, because Respondent fired or constructively discharged them;
 - c. Remove from Respondent's files all references to the firing or constructive discharge of Mark Salopek and Stephen Mullen and revise its files to reflect that they are eligible for rehire by Respondent;

- d. Reimburse Salopek and Mullen for an amount equal to the difference in taxes owed upon receipt of his lump-sum backpay payment and the amount of taxes that would have been owed had they not been discharged or constructively discharged by Respondent;
- e. Submit appropriate documentation to the Social Security Administration for Salopek and Mullen so that when backpay is paid, it will be allocated to the appropriate periods;¹⁶
- f. Provide the Regional Director with a backpay report allocating the payment(s) to the appropriate calendar year and a copy of the IRS form W-2 for wages earned in the current calendar year no sooner than December 31st of the current year and no later than January 30th of the following year;
- g. Allow employees to go home early as Respondent allowed in the past;
- h. Provide the Union with the information it requested on October 30, 2018, January 21, February 28, and May 8, 2019, about Salopek's termination;
- i. Within 14 days after service by the Region, request of the current employer of the guards at Indian Island that it post at its facility at Indian Island, Washington, copies of the attached notice marked Attachment A, on forms provided by the Regional Director for Region 19 after being signed by the Respondent's authorized representative, for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.¹⁷ In addition to physical posting of notices, Respondent shall mail copies of the notices to all employees employed by the Employer at Indian Island and distribute the notices electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicated with its employees by such means; and
- j. 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 Respondent has taken to comply.

¹⁶ *Don Chavas, LLC*, 361 NLRB No. 10 (2014).

¹⁷ 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."

Attachment A

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 a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

International Union, Security, Police, and Fire Professionals, Local 5 (“Union”), is the exclusive collective bargaining representative of our employees in the following unit (“Unit”):

All of our federal contract security officers employed at the Indian Island Magazine in the State of Washington. Excluding all other employees, employed in any capacity such as Area Managers, Captains, Lieutenants, office or clerical employees, and professional employees as defined in the National Labor Relations Act.

YOU HAVE THE RIGHT to freely bring weapons safety issues and complaints to us or to the U.S. Navy on behalf of yourself and other employees.

YOU HAVE THE RIGHT to freely bring wage issues and complaints to us or to your Union on behalf of yourself and other employees.

WE WILL NOT fire you or cause you to quit because you exercise your right to bring issues and complaints to us or to the U.S. Navy on behalf of yourself and other employees.

WE WILL NOT tell you to bring wage issues and complaints only to us, rather than your Union.

WE WILL NOT refuse to let you go home early because you bring wage issues to us on behalf of yourself and other employees.

WE WILL NOT refuse to provide the Union with information that is relevant and necessary to its role as your exclusive collective-bargaining representative.

WE WILL remove from our files all references to the firing or constructive discharge of Mark Salopek and Stephen Mullen and revise our files to reflect that they are eligible for rehire by us and **WE WILL** notify them in writing that this has been done and that the firing or constructive discharge will not be used against them in any way.

WE WILL offer Mark Salopek and Stephen Mullen immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and/or privileges previously enjoyed.

WE WILL pay Mark Salopek and Stephen Mullen for the wages and other benefits they lost, including search for work expenses and consequential damages, because we fired them or caused them to quit.

WE WILL allow employees to go home early as we did in the past.

WE WILL provide the Union with the information it requested on October 30, 2018, January 21, February 28, and May 8, 2019, about Mark Salopek's termination.

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

Xcel Protective Services, Inc.

(Employer)

Dated: _____

By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at <https://www.federalrelay.us/tty> (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

915 2nd Ave Ste 2948
Seattle, WA 98174-1006

Telephone: (206)220-6300

Hours of Operation: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Counsel for the General Counsel's Brief to the Administrative Law Judge was served on the 14th day of January, 2020, on the following parties:

E-File:

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