

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
REGION 19**

In the matter of:	:	
	:	
XCEL PROTECTIVE SERVICES, INC.	:	CASE NOS. 19-CA-232786
	:	19-CA-233141
Respondent	:	19-CA-234438
	:	19-CA-234438
and	:	19-CA-237861
	:	19-CA-241689
INTERNATIONAL UNION, SECURITY, POLICE, and FIRE PROFESSIONALS OF AMERICA, LOCAL 5	:	January 14, 2020

Charging Party

**RESPONDENT'S POST HEARING BRIEF TO THE  
ADMINISTRATIVE LAW JUDGE**

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## I. INTRODUCTION

There are five discrete claims pending against Respondent Xcel Protective Services, Inc. (“Xcel”) as outlined in the Complaint issued on July 31, 2019. All of the claims are addressed below, but Xcel will briefly summarize the two discharge claims against the company: the alleged constructive discharge of Stephen Mullen on July 17, 2018, and the later termination of Mark Salopek on October 27, 2018. The record demonstrates clearly that Xcel did not violate the National Labor Relations Act (“the Act”) in any way whatsoever with respect to these two employees.

The General Counsel alleges that Mullen was constructively discharged after he, along with colleagues Mark Salopek, Daniel Lein and Jacob Schryver, made a complaint to the U.S. Navy regarding weapons qualifications of their fellow security guards. To support the claim of constructive discharge, Mullen described only *two* incidents of interactions with colleagues that allegedly led him to feel compelled to resign: a text message from security guard Kevin David and an exchange with security guard Thomas Cunningham wherein Cunningham asked for an apology. David and Cunningham were merely upset by the fact that Mullen had falsely claimed that they had failed their qualification for the shotgun on May 9, 2018—a fact to which Mullen admitted.

Nevertheless, Xcel timely and effectively addressed both incidents after Mullen informed management about them. For instance, several lieutenants called David within minutes of him sending the text messages to Mullen to instruct him to stop texting Mullen, and management took statements from Cunningham and a witness, Norman Simons, regarding the incident between Cunningham and Mullen the next business day after receiving Mullen’s complaint about Cunningham. Indeed, Mullen, at Xcel’s direction, called local law enforcement after receiving the text messages, and local law enforcement said it could do nothing about the text messages, as they posed no legitimate threat. In addition, Simons confirmed multiple times in writing that

Cunningham did not in any way—either verbally or physically—threaten Mullen.

Mullen, however, resigned a mere *three days*—which included only *one* business day—after he complained to Xcel about the two incidents. Notably, Mullen stated at trial and previously in writing to OSHA that he would not have resigned if he had known that Xcel was trying to address his complaints. The two minor incidents described by Mullen certainly do not rise to the level of creating conditions so unbearable that Mullen was compelled to resign. Moreover, Xcel took timely and proper steps to address his concerns, and even Mullen felt those steps were sufficient to have enabled him to continue his employment.

The General Counsel claims also that Xcel improperly terminated Salopek in response to his involvement with two complaints made to the U.S. Navy. This is not true. Salopek participated in complaints to the U.S. Navy on July 8 and 9, 2018, and he was not terminated until October 27, 2018—more than *four months* after making the complaint. Moreover, Salopek was terminated as a result of a meeting that Xcel Chief Executive Officer Michael Filibeck had with Contracting Officer Representative/Senior Performance Assessment Representative Richard Rake—a civilian employee of the U.S. Navy tasked with investigating the complaints raised by Salopek, Mullen, Lein and Schryver. Filibeck met with Rake and Contracting Officer Melissa Burris—also a civilian employee of the Navy—on October 26, 2018, at which point Rake requested that Xcel remove Salopek from the contract due to his dishonesty in the claims he raised, his lack of concern for safety and his general attitude and demeanor displayed during Rake’s investigation. Rake testified at length about his investigation and particularly about his interactions with Salopek, which ultimately led him not to trust Salopek and to want him off the contract. Indeed, virtually all of the allegations made by Salopek regarding weapons qualifications were not substantiated—and many were found to be flat out false. Rake spent several hundred hours investigating these

claims, including reviewing a plethora of training records and interviewing numerous people, only to conclude that Salopek simply had a vendetta against Xcel due to issues he had had in the past with Michael Terry.

In fact, Rake testified that he had previously directed Xcel to remove Salopek from the contract due to a serious incident during which Salopek left unattended and open a room containing numerous U.S. Navy weapons while he was the lieutenant on duty in charge of manning that room (“RFI incident”). However, Xcel contract manager Michael Terry had advocated for Salopek and enabled him to keep his job.

Rake also testified in detail about why he wanted Salopek removed from the contract. Besides his dishonesty in raising concerns in his complaint, Salopek also demonstrated a lack of concern for the safety of his fellow security guards. Salopek mentioned at least two incidents with fellow security guards where he allegedly felt they were handling their weapons in an unsafe manner, but he also made clear that he failed to address those issues when they occurred. Instead he simply raised them months after the fact, thereby showing a lack of concern for the safety of his fellow security guards—not to mention what can only be viewed as a desire to belittle and embarrass his colleagues. After all, if Salopek were truly concerned for their safety and the safety of those around them, he would have addressed the issues in the moment instead of simply tattling on his colleagues well after the fact. Rake also testified that Salopek raised the RFI incident on his own without being asked about it and completely downplayed the incident, which, as noted above, Rake had actually considered serious enough to warrant Salopek’s removal from the contract in 2015. Likewise, Rake testified that Salopek has posted and continues to post confidential security information on the internet despite being told by the Office of Inspector General in September 2018 to take down the information.

During the meeting with Xcel, Rake verbally reviewed the report he wrote regarding his investigation and then requested that Xcel remove Salopek from the contract. Filibeck testified that, when Rake made this request, Burris did not disagree,<sup>1</sup> leading Filibeck to the conclusion that this was a serious issue that required immediate attention. Thus, Filibeck met with Salopek the very next day to inform him that his employment was being terminated due to his dishonesty and lack of candor because, as Filibeck testified, when the Navy makes a request, it is not a polite suggestion; it is a demand.

Notably—and undermining the General Counsel’s claim that Salopek was terminated due to having made a complaint—Xcel did not discipline anyone else involved with the complaint—i.e., Lein, Mullen or Schryver. Rake felt strongly that Salopek should be removed from the contract for several reasons, and Xcel simply adhered to the Navy’s well-supported recommendation. The timing of Salopek’s discharge—i.e., the day after Filibeck met with Rake and Burris—makes clear that Xcel was simply following Rake’s direction to remove Salopek from the contract as opposed to terminating him for participating in two complaints back in July 2018. Filibeck did not know Salopek at all at the time that he terminated him, as Filibeck had only joined Xcel in September 2018 and assumed CEO duties in mid-October 2018, and was not even aware that Salopek had raised concerns about firearms qualifications until October 26, 2018. Moreover, Rake’s reasons for requesting that Salopek be removed from the contract were fully supported by a thorough and complete investigation. Xcel properly terminated Salopek’s employment in response to Rake’s direct and unequivocal recommendation to remove him from the contract, and in doing so did not violate the Act. Notably, Salopek testified that Michael Terry told him after

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<sup>1</sup> Both Rake and Filibeck testified that Rake asked Burris for permission at the meeting with Xcel to share details of the report with the company. Burris approved, which logically indicates that she wanted Xcel to hear the details of Rake's investigation and his recommendation to remove Salopek from the contract.

his termination that "all of this is coming from Richard Rake."

As set forth more fully below, these two claims, and the other three more minor claims, should all be dismissed. Xcel did not violate the Act, and it is entitled to judgment as a matter of law.

## **II. STIPULATIONS OF THE PARTIES REGARDING FACTS**

The parties agreed to the following stipulations:

1. International Union, Security, Police, and Fire Professionals of America, Local 5 ("Union"), through Scott Harger filed a grievance with Xcel Protective Services, Inc. ("Respondent") regarding Mark Salopek's termination and made a related request for information to Respondent on October 30, 2018. J-2<sup>2</sup>.
2. The parties, through Scott Harger, Michael Terry, and Mike Filibeck, exchanged e-mails regarding the information request described above in paragraph 1 between October 30, 2018, and December 20, 2018, during which time Respondent did not provide the requested information. J-3.
3. On January 18, 2019, Respondent, by Jason Bowles, e-mailed the Union with Stephen Mullen's personnel file and training records. J- 4.
4. On January 21, 2019, Respondent, by Jason Bowles, e-mailed the Union with Mark Salopek's personnel file. J- 5.
5. On January 21, 2019, the Union, by Rich Olszewski, made a second request for information related to Mr. Salopek's termination. J- 6.
6. On January 22, 2018, Respondent, by Jason Bowles, e-mailed the Union with additional documents, including additional personnel file information regarding Mr. Mullen. J-7.
7. On January 23, 2019, Respondent, by Jason Bowles, e-mailed the Union with additional documents. The documents included additional copies of personnel file information regarding Mr. Mullen previously sent on January 18 and 22, 2019 (Joint Exhibits 4 and 7) and regarding Mr. Salopek previously sent on January 21, 2019 (Joint Exhibit 5), but also new documents regarding Mr. Mullen and Mr. Salopek. J- 8.
8. Between January 21 and January 31, 2019, the parties, through Rich Olszewski and Jason Bowles, exchanged emails regarding the January 21, 2019, request. J- 9.

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<sup>2</sup> Exhibits will be referred to as follows: Joint Exhibit ("J"); General Counsel Exhibit ("GC"); and Respondent Exhibit ("R").

9. On January 24, 2019, Respondent, by Jason Bowles to Rich Olszewski, emailed the Union the report of U.S. Navy employee Richard Rake and Steve Manson, dated July 25, 2018. J-10.
10. On February 28, 2019, the Union, by Rich Olszewski, made a third request for information related to Mr. Salopek's termination. J-11.
11. On May 8, 2019, the Union, by Rich Olszewski, made a fourth request for information related to Mr. Salopek's termination. J-12.
12. On May 14, 2019, Respondent, by Jason Bowles, provided the Union with additional information regarding Mr. Salopek. The documents included additional copies of personnel file information regarding Mr. Salopek previously sent on January 21, 2019 (Joint Exhibit 5), but also an e-mail from Michael Terry dated January 3, 2019, regarding Mr. Salopek's termination. J-13.
13. On May 16, 2019, Respondent, by Jason Bowles, sent an e-mail to Rich Olszewski regarding the October 30, 2018, January 21, February 28, and May 8, 2019, requests for information, in which he stated that he had sent the Union all documents he had that were responsive to its requests for information. J-14.
14. No additional documents responsive to the requests for information referenced herein were provided by Respondent to the Union other than those set forth in the exhibits referenced herein.
15. The parties have executed a collective bargaining agreement (CBA) covering the security guards at Naval Magazine Indian Island ("Unit"), effective October 1, 2018, to September 30, 2021. J-15.
16. The previous CBA between the parties covering the Unit was effective October 1, 2015, to September 30, 2018. J-16.
17. In response to charges filed by Mark Salopek and Stephen Mullen with the Occupational Safety and Health Administration ("OSHA"), Respondent provided to OSHA position statements dated August 9, 2018, and January 11, 2019. J-17 and J-18.
18. An OSHA investigator provided the Navy report dated July 25, 2018, referenced above in item 9, to Respondent on December 3, 2018.
19. The parties agree that there are discrepancies in some of the time stamps on the emails contained in the joint exhibits. This is due to the time zones in which the emails were printed. The dates on the emails are correct.

See J-1.

### **III. FACTUAL BACKGROUND**

#### **A. Xcel Protective Services**

Xcel, formerly called Basic Contracting Services, Inc. (“BCSI”), is a government contractor that provides armed security services to the federal government. Tr.<sup>3</sup>, 980. The Board of Directors is comprised of John Kubiak, Belinda Melton and Michael Filibeck, and there are contract managers for each contract that Xcel maintains. *Id.*, 981. At the time of trial, Xcel had nine contracts with the federal government.<sup>4</sup> *Id.* John Morgan was previously the Chief Executive Officer for Xcel, and he resigned from his position in September 2018, which is when Filibeck started working for Xcel. *Id.*, 982. Filibeck “assumed the full duties from the former CEO on or about the 12th of October.” Tr., 60.

Xcel maintained the security contract at Indian Island until September 30, 2018, when it was subcontracted to another security company called Homeland Security Solutions, Inc. Tr., 983-84. Michael Terry was the contract manager for the contract at Indian Island, meaning he was the top-ranked Xcel official on-site at that location. Tr., 70, 987. Indian Island is roughly a couple of thousand acres. *Id.*, 45. There are two patrols on the Island: North patrol and South patrol. Tr., 46. The security guards were responsible for patrolling the island and protecting the assets, including munitions. Tr., 45, 81. The security guards reported to the lieutenants, who reported to Terry. Tr., 873.

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<sup>3</sup> All references to the transcript for this trial will be referred to as “Tr.”

<sup>4</sup> Xcel’s three government contracts geographically closest to the Indian Island contract are the contract in Oregon for the U.S. Army Corps of Engineers, the contract in North Dakota at Cavalier Air Force Base and the contract in Texas for the U.S. Army Corps of Engineers. Tr., 981.

At the time that trial commenced, Xcel employed 68 security guards who were covered by a collective bargaining agreement (“CBA”). Tr., 42; J-15. That CBA was effective October 1, 2018. The prior CBA was effective from October 1, 2015 through September 30, 2018. J-16.

Prior to Filibeck taking over Chief Executive Officer duties, he was unable to have a meeting with Morgan to review the status of Xcel’s contracts with the federal government, so he had to get up to speed on all of the contracts on his own. Tr., 986. A couple of weeks after Filibeck took over, he held a meeting with all of the project managers for each contract, including Terry. Tr., 988. During Filibeck’s meeting with Terry, Filibeck asked Terry about various issues, including personnel issues at Indian Island. *Id.*, 988-89. At no time did Terry mention any issues with Mark Salopek or Stephen Mullen. As outlined in detail below, Filibeck first learned of the Navy’s concerns about Salopek and Mullen when he attended a meeting with Contracting Officer Melissa Burris and Contracting Officer Representative/Senior Performance Assessment Representative Richard Rake on October 26, 2018. Tr., 989-90, 1022. At trial, Judge Giannopoulos asked Filibeck several questions about his familiarity with Xcel upon joining the company:

Q. . . . Mr. Filibeck, when you took over the first of September time frame, you’re coming into Xcel along with Indian Island how many other facilities that [sic] Xcel had? Facilities where they had guards, there were contracts, let’s say.

A. Sure. Let’s see, Indian Island, Cavalier, Galveston, Lower Columbia, 5 oil refineries and - - 14.

Q. 14. And about how many employees did they have?

A. 300 and change.

Q. Okay. And so when you were coming into this, did you know anything about Xcel? Did you know anything other than, you know, who they are? Did you know anything about their specific contracts?

A. Nothing.

Q. So you come in first day of work, you have to get information on all these different contracts?

A. And get up to speed.

Q. On all of the separate ones?

A. Yes, sir.

Tr., 1026-27.

**B. Scope of Work at Indian Island**

Xcel's contract with the Navy included a Performance Work Statement ("PWS"), which contained several provisions outlining the scope of the work to be performed by Xcel and operational requirements. R-43. For instance, the PWS contained the following provisions:

General Operations

1.2 Project Location – The work shall be performed at Naval Magazine Indian Island, Port Hadlock, WA. The Indian Island Complex encompasses 2,716 acres and is located approximately 46 miles northwest of Bremerton near Port Hadlock, Jefferson County. Indian Island Complex contains administration, security and a personnel support services and provides ordnance receipt, storage, issue, maintenance/overhaul, demilitarization, and disposal. A map of the contract performance area is provided in J-0401060-03.

2.7.2.3 Removal of Employees – The Contractor shall remove from the site any individual whose continued employment is deemed by the KO to be contrary to the public interest, or inconsistent with best interests of National Security, or not in accordance with the Standard of Conduct located in Attachment J-0401060-04.

2.8 Security Requirements – The Contractor shall comply with all federal, state, and local security statutes, regulations, and requirements. The Contractor shall become acquainted with and comply with all Government regulations as posted including but not limited to OPNAV 5530.14 series, or as required by the KO/SPAR/PAR/ISO when required to enter a Government site. The Contractor shall ensure that all security/entrance clearances are obtained. Neither the Contractor nor any of its employees shall disclose or cause to be disseminated any information concerning the operations of the activity which could result in or increase the possibility of a breach of the activity's security or interrupt the continuity of its operations. Disclosure of

information relating to the services hereunder to any person not entitled to receive it, or failure to safeguard any classified information that may come to the Contractor or any person under his control in connection with work under this contract, may subject the Contractor, his agents or employees, to criminal liability under 18 U.S.C., Sections 793 and 798. All inquiries, comments, or complaints arising from any matter observed, experienced, or learned as a result of or in connection with the performance of this contract, the resolution of which may require the dissemination of official information, will be directed to the activity Commanding Officer. Deviations from, or violations of, any of the provisions of this paragraph will, in addition to all other criminal and civil remedies provided by law, subject the Contractor to immediate termination for default and/or the individuals involved to a withdrawal of the Government's acceptance and approval of employment.

## Security Operations

- 1.2 Concept of Operations – This annex identifies the services required to provide a wide variety of security related services. Although the majority of the services defined in this annex are specified as watch standing requirements, the Contractor is responsible for ensuring that the integrity of the bases is not compromised at any time and that every effort is made to protect the base and the individuals working within the base confines. Authority to perform these security services is delegated by the Commanding Officer to the Contractor to exercise actions necessary to detect, deter, contain and mitigate security related situations. The majority of the functions defined in this annex are specified as armed security guard operational requirements. Such actions include access control, surveillance, screening, detaining and conducting preliminary investigations of real or potential violations of base orders and/or applicable regulations. The Contractor's personnel represent the Government and, as such, shall present a professional image at all times. Additional security forces that exist and interface with the Contractor on a regular basis provide law enforcement; Master at Arms, Explosive Ordnance Disposal, explosive handling, disarmament, disposal, etc.; Military Working Dogs (MWDs), assistance in drug investigations.
- 2.10 General Orders of a Sentry – The Contractor's guard personnel shall comply with the following General Orders.<sup>5</sup>
1. Take charge of this post and all government property in view.
  2. Walk my post in a military manner, keeping always on the alert and observing everything that takes place within sight or hearing.

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<sup>5</sup> Mark Salopek confirmed that employees are familiar with the General Orders and that Xcel supervisors would conduct spot checks to make sure guards knew the orders. Salopek confirmed further that employees must be relieved before leaving their post and likewise must get permission from their supervisor before leaving a post. Tr., 324-26.

3. Report all violations of orders I am instructed to enforce.
4. Repeat all calls more distant from the guardhouse than my own.
5. Quit my post only when properly relieved.
6. Receive, obey, and pass on to the sentry that relieves me, all orders received from those authorized by this contract.
7. Talk to no one except in the line of duty.
8. Give the alarm in case of fire or disorder.
9. Notify the Shift Supervisor in any case not covered by instructions.
10. Be especially watchful at night and during the time for challenging, to challenge all persons on or near my post, and to allow no one to pass without proper authority.

2.11 Standards of Conduct – The Contractor shall maintain satisfactory standards of employee competency, conduct, appearance, and integrity, and for taking such disciplinary action as needed. The Contractor shall adhere to standards of conduct included in J-0401060-04. Contractor employees shall display a friendly, helpful attitude when dealing with the public. The KO or his/her representative reserves the right to direct the Contractor to remove an employee from the work site for failure to comply with the standards of conduct. The Contractor shall initiate immediate action to replace such an employee to maintain continuity of services at no additional cost to the Government.

R-43.

The PWS also describes the work that the security guards were required to perform pursuant to the contract: entry control point services; identification checks; commercial vehicle inspection; roving guard services perimeter patrol; interior patrol; building checks and reaction patrol. R-43, pp. 25-29.

### **C. Requirements for Xcel Security Guards at Indian Island**

First, the security guards were required to meet certain physical fitness requirements while employed at Indian Island.<sup>6</sup> There are four separate physical fitness tests, the requirements for which are based on the guard's age and gender, that the guards had to pass: (1) a one and a half mile run; (2) push-ups; (3) sit-ups; and (4) sit-and-reach. Tr., 876. The guards were required to

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<sup>6</sup> See PWS, Section 2.12, 21 (R-43) (“Personnel Requirements – Contractor shall provide personnel who are physically fit per the fitness standards established in the Physical Fitness Program.”).

pass this test and meet these requirements once every six months. If they were unable to meet the physical requirements, or were unable to take the test for a legitimate reason, such as an injury, they were given a 60-day waiver, which enabled them to re-take the test sixty days later. If they failed again while on that 60-day waiver, they would be terminated. Tr., 876.

In addition to meeting certain physical fitness requirements, the Xcel security guards were also required to qualify for using their weapons. The security guards were required to qualify on their weapons twice a year: an annual qualification and a sustainment shoot. Tr., 891. The guards were equipped with three different weapons: the Beretta M9 (pistol); the Mossberg 500 (shotgun); and an M4 (rifle). *Id.* The security guards were required to pass five different courses for the annual qualification. *Id.*, 892. For the sustainment shoot, the security guards were required to shoot only the M4 and the Beretta M9 and had to do only a familiarization with the Mossberg 500. *Id.* The qualification and sustainment shoots generally occurred at the Bangor range, and the security guards were required to use Navy-issued weapons and ammunition for these shoots. Tr., 893.

Prior to January 1, 2018, the Navy permitted Xcel to conduct the annual qualification and sustainment shoots at any range, and Xcel was permitted to use non-Navy issued weapons, provided that they were comparable to those issued by the Navy. Tr., 893-94. After January 1, 2018, the Navy required Xcel to use Navy-issued weapons and ammunition for qualification shoots and to conduct the qualification shoots at Navy-sanctioned ranges. Tr., 895. Xcel, however, did not become aware of this change in policy until the Navy investigated the complaint raised by Mullen. Tr., 893. It bears emphasis that the Navy was aware of the fact that Xcel was permitting security guards to qualify with non-Navy-issued weapons and ammunition and at non-Navy-sanctioned ranges on occasion. Tr., 895. Moreover, when the Navy completed the questionnaire

for the Department of Homeland Security regarding Xcel's performance on the contract, in response to the question about Xcel's performance in keeping training records, the Navy stated the following: "The contractor's performance in keeping training records (electronic and hard copy), certifications, and related documents complete, accurate and current has been consistently excellent with the contract on some occasions exceeding contractual requirements to the government's benefit." R-22, p. 3. Performance Assessment Representative Steven Manson completed the questionnaire. R-22. As outlined below, Manson worked with Rake to investigate complaints made by Mullen and other employees.

#### **D. Employees**

As noted below, the following employees were named as complainants in the complaint that Stephen Mullen filed with the U.S. Navy on July 9, 2018. R-1.

##### **1. Stephen Mullen**

Mullen started with BCSI in July 2011 and continued with the company through December 2016. Tr., 215. Mullen left employment for six months because he could not pass the physical readiness test ("PRT"), however, he returned to the company in May 2017. Tr., 215-16. Mullen resigned his employment on July 17, 2018 shortly before he was scheduled to take another physical fitness test. While Mullen testified he expected to pass the test, he acknowledged that he "would've been terminated for not [successfully] completing the PRT." Tr., 222. Mullen clarified that he would have been provided a second opportunity to pass the test within the next 60 days, but that it would not be a big deal as he would just collect unemployment if he failed. Tr., 222 ("I would've applied for unemployment and would have gotten unemployment for not being able to meet the physical standards of employment.").

Mullen filed for unemployment after resigning from Xcel in July 2018. Tr., 222. He explained that his unemployment application was denied because he "didn't have a good enough

reason to quit." Tr., 222-23.

## 2. Mark Salopek

Salopek worked for Xcel from May 2013 until his termination on October 27, 2018. Tr., 73. Salopek served as a lieutenant until 2015 when he was disciplined and demoted for leaving "the weapons vault open and unattended." Tr., 204; Joint Exhibit 5 (Bates No. 1280). The disciplinary record for that incident states:

**DESCRIPTION OF INFRACTION:** On October 3, 2015 you neglected multiple duties at NavMag, Building 848, which could have resulted in a serious breach of security and a threat to the site. You left multiple doors open (one which led to the armory) and garage bay door raised completely. You left the building unsecured while another officer arrived and waited until you returned. You were careless and inattentive which reflects poorly on the company and our ability to provide the level of security contractually required by the Navy.

**PLAN OF IMPROVEMENT:** As a Lieutenant, Xcel expects you to set the standard for performance with providing security to the Navy. With the severity of this incident, you are hereby removed of all Lieutenants duties and responsibilities.

R-31.

Subsequently, as detailed below, a representative from the U.S. Navy recommended to Xcel that Salopek be removed from the contract at Indian Island. Filibeck removed him from the contract and terminated his employment on October 27, 2018. Salopek confirmed this last communication with John Morgan prior to his termination occurred in late June 2018. Tr., 268. In addition, Salopek confirmed that he did not communicate or share any information with Michael Filibeck until his termination meeting with Filibeck in late October 2018. Tr., 271. In fact, Salopek testified that he "didn't even know [Filibeck] existed." Tr. 272. Thus, Salopek confirmed that he had zero interaction with Xcel executives (Morgan and Filibeck) for nearly four months before his termination.

Salopek maintains a marine security business called Mjolnir Marine Security. Tr., 318. Mark Schryver is his current partner, and Stephen Mullen has been a partner in the past. Tr., 319.

Salopek maintains a website for his company and admitted that the website contains pictures that he took during his employment at Indian Island and that the pictures are the same as the pictures that he was previously told by the U.S. Navy in September 2018 to remove from his LinkedIn profile due to potential security concerns. Tr., 313-15; R-13; R-24. Notably, Salopek told OSHA investigators in September 2018 that he was concerned that he would be terminated for posting the pictures.<sup>7</sup> Richard Rake from the U.S. Navy testified at trial that the pictures remain posted and that they are in violation of the (then) contract between Xcel and the U.S. Navy. Tr., 597.

### **3. Daniel Lein**

Lein started with Xcel in April 2018 and was still employed by the company at the time of trial. Tr., 651-52. Xcel did not discipline Lein during the course of his employment. Tr., 303, 990.

### **4. Jacob Schryver**

At the time of trial, Schryver was employed as a guard and has never been disciplined by Xcel. Tr., 303, 990. He did not testify at the trial.

### **E. Guard Mount Pay**

Pursuant to the CBA, the Xcel security guards received what was called “guard mount pay” for the time it took them to arm themselves with their duty weapons:

Guard mount Pay: Employees are required to be in uniform, receive their duty weapons and pass downs prior to the start of each shift, and at the conclusion of each shift, must turn in their duty weapon and give pass down to their relief. To ensure safe weapons handling, Officer shall receive an additional 30 minutes pay per day at the applicable hourly wage rate.

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<sup>7</sup> However, Salopek testified at trial that the previous commanding officer of Indian Island told him "years ago" that it was ok to take pictures as "nothing on that boat is classified." Tr., 353-54. In addition, the General Counsel presented pictures from Xcel's website in an apparent effort to reduce the focus on Salopek's improper postings. Richard Rake from the U.S. Navy reviewed Xcel's material during his testimony and noted how, unlike with Salopek's postings, there was no concern with Xcel's website as it did not show the interior consoles of the security boats. Tr., 642-43; GC-12; GC-13. Salopek even agreed that the Company's website did not include pictures of interior console of any security boat. Tr., 441.

CBA, Article 12 (J-15).<sup>8</sup>

The standard duration of a shift was eight and a half hours, though there were occasionally four-hour shifts. Tr., 950. At one point there was some confusion over what the proper amount of guard mount pay should be for a four-hour shift. Some lieutenants determined that, if a guard was working a four-hour shift, he/she was entitled to receive only fifteen minutes of guard mount pay, instead of thirty minutes of guard mount pay. Tr., 950. Xcel was paid only a certain amount of money by the government for this contract, so the lieutenants were attempting to ensure that Xcel did not go over the amount Xcel was to be paid by the government. Tr., 951. However, when this issue was brought to Terry's attention, he spoke with the lieutenants and made it clear that the security guards were to receive thirty minutes of guard mount pay for each shift, regardless of the duration of the shift. *Id.* The General Counsel did not present any testimony of anyone being denied guard mount pay as provided by the CBA.

#### **F. Meeting with U.S. Navy Commanding Officer**

On July 8, 2018, Salopek met with Mullen and Lein, and they met with Commander Pulley, who is the Navy's commanding officer for Indian Island. They informed Commander Pulley that they were going to report a safety concern to the Inspector General ("IG"). Tr., 160-61. The commanding officer first responded by asking if anyone was in immediate danger, to which they replied no. *Id.*, 161. While Salopek, Mullen and Lein wanted to remain anonymous and report the concern only to the IG, the commanding officer eventually ordered them to tell him what was going on. *Id.*, 162. At that point, they told the commanding officer that the concern involved alternate site ranges, the alteration of targets and falsified training records. *Id.* The commanding officer responded that there would have to be an investigation done by Richard Rake and Steve

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<sup>8</sup> There is an identical provision in Article 12 of the CBA that was in effect from October 1, 2015 through September 30, 2018, as well. J-16.

Manson, contracting officers for the Navy. *Id.* Finally, the commanding officer asked that Mullen, Salopek and Lein send an e-mail to Michael Jones, the Installation Security Officer (“ISO”) at the U.S. Navy, to report what they had just reported to the commanding officer. *Id.*, 163.

#### **G. July 9, 2018 Complaint**

On July 9, 2018, Mullen sent an e-mail to ISO Jones, stating that he, and fellow Xcel security guards Salopek, Lein and Schryver<sup>9</sup> were reporting a safety issue concerning weapons qualifications. R-1. In this e-mail, Mullen set forth several allegations about his colleagues at Xcel:

- At an unknown date, Officer Cunningham failed at the range on his shotgun and was subsequently brought to either a gravel pit or another location by Officer Schryver who supplied his personally owned shotgun to Officer Cunningham to use. After that incident, Officer Cunningham was rendered “qualified.” When this was brought to Terry’s attention, he replied that it was allowed by the Navy.
- Lieutenant Gerald Powless asked Officer Schryver to bring officers to a gravel pit to qualify, but Officer Schryver said he was not comfortable doing this.
- On July 7, 2017, Officer Armstrong drove up and stated to Terry, who was standing next to Salopek, that he had the AR15 and a 9mm. When Salopek asked what he was talking about, Officer Armstrong stated that he was bringing those weapons for range at Officer Schroeder’s house.
- On May 9, 2018, three officers, Officer Lauritzen, Officer Cunningham and Officer David, did not pass their rifle qualification. Officer Cunningham could not pass his shotgun either, and his ability to effectively handle and manipulate the two weapons was called into question by Officer Mullen.
- At this time, Lieutenant Powless altered their targets by putting a large black cross with a black felt pen on the targets, and Lieutenant Mitch Vancura helped Officer Cunningham by putting a white piece of paper at the six o’clock position so that Officer Cunningham could see and aim his shotgun at the target. Officer Cunningham still did not pass with his rifle.

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<sup>9</sup> Salopek testified that the e-mail complaint was not shared with Schryver before or after it was sent to ISO Jones on July 9, 2018. Tr., 296. This is not surprising considering how Schryver disagreed with all of the allegations that were attributed to him when he was interviewed by the U.S. Navy.

- Officer Emily Coler was at the range and was struggling with how to handle both the rifle and the shotgun. She failed her M4 Rifle and shotgun qualification. Officer Daniel Lein did not pass the M4 rifle qualification.
- Officer Cunningham came back qualified with the rifle.
- Lieutenant Powless told Officer Lein and Officer Coler that they were going to be taken to a gravel pit to qualify with the M4 Rifle. Lieutenant Powless said they would not be paid for this. Officer Lein declined to go.
- After the “gravel pit range,” Officer Coler was allowed to work all posts with all weapons, as she had qualified with the rifle and the shotgun.

As outlined below, the Navy investigated and dismissed nearly all of these allegations without merit.

Notably, Salopek testified originally on cross-examination that he saw the July 9, 2018 e-mail only "fleetingly" and had "only briefly reviewed it" before Mullen sent it to ISO Jones. Tr., 294-95. He testified further that the e-mail was prepared solely by Mullen. Tr., 297. When pressed, however, Salopek confirmed that he personally drafted at least two-thirds of the document as the material was a cut and paste from a document he sent to John Morgan less than two weeks earlier. Tr., 298-99. Thus, while Mullen sent the e-mail to Jones, Salopek was the primary author, as the majority of the content came from the e-mail he sent to Morgan. Not only was Salopek less than truthful to Terry, he also attempted to mislead the parties at trial by saying that Mullen was the primary author of the July 9 e-mail and that he had only "fleetingly" and "briefly" reviewed the e-mail despite the fact that he wrote the majority of the content.

On July 9, 2018, at approximately 9:00 a.m., ISO Jones called Terry and told him that he had been told that an Xcel employee raised a concern with Commander Pulley, claiming that some Xcel employees were not qualified on their firearms.<sup>10</sup> Tr., 878, 885. Subsequently, at 11:33 a.m.

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<sup>10</sup> Prior to the phone call from ISO Jones, Terry received a phone call from Salopek, who informed Terry that someone had “turned in” Xcel to the commanding officer of the base. Tr., 885-86. Salopek did not mention who had made the complaint to the commanding officer. *Id.*, 885.

on the same date, ISO Jones sent Terry an e-mail asking Terry to obtain training records for and to remove from their post responsibilities the following security guards: Officer Cunningham, Officer Lauritzen, Officer David, Officer Coler and Officer Lein. R-8. Terry asked ISO Jones if Xcel could take a little time to find the training records for the named officers and show that they were qualified, and ISO Jones agreed to give Terry a little time to attempt to locate the records. Tr., 882.

After speaking with ISO Jones, Terry called his training lieutenant, Lieutenant Gerald Powless, and the shift lieutenant, Lieutenant Armondo Del Rosario, to let them know that he had received a complaint that the named security guards were not qualified on their weapons and to let them know that they needed to make logistical arrangements in case the guards had to be pulled off their posts. Tr., 883. Terry also asked Lieutenant Del Rosario to let the named security guards know that they may have to be pulled off of their posts. *Id.* Officers Cunningham and Lauritzen were on duty at that time, so coverage would have had to have been arranged for them if they had to be pulled off their posts. *Id.*, 883-84.

At 1:50 p.m. on July 9, 2019, Richard Rake, a Senior Performance Assessment Representative and Xcel's Contracting Officer's Representative for the Indian Island contract, sent an e-mail to Terry, forwarding the complaint sent by Mullen to ISO Jones. R-1. This was the first time that Terry had been notified of who had actually made the complaint. Tr., 888. Terry shared the complaint with CEO John Morgan.<sup>11</sup>

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<sup>11</sup> Mullen testified that he overheard Terry and Morgan speaking on the phone where Morgan allegedly stated that one of the employees was easy to get rid of because he was on probation and that the other two were "cancers" in the workplace. Tr., 467. Mullen did not hear the Morgan reference any employees by name. Tr., 759-60. Regardless of whether this statement occurred, it is of no relevancy, as Morgan did not take any adverse action against Mullen, Lein, Schryver or Salopek for filing a complaint with the U.S. Navy. Rather, Mullen resigned his employment even though Terry was conducting an investigation as directed by Morgan. Lein and Schryver were never disciplined. Likewise, Morgan left the company in early September and was not involved in the decision to terminate Salopek.

## **H. U.S. Navy Investigation, Report, and Written Recommendation to Remove Mark Salopek from the Contract**

### **1. Richard Rake**

Richard Rake is employed by the U.S. Navy in Bangor, Washington. Tr., 526. Rake holds various positions with the U.S. Navy, including acting as the Senior Performance Assessment Representative (“SPAR”) and the Contracting Officer Representative (“COR”). Tr., 526-27. As a SPAR, Rake supervises the Performance Assessment Representative Steve Manson, and is responsible for monitoring effectiveness of government contracts. In his COR role, Rake makes sure the government and the contractor “abide by the contract” and acts as a liaison between the contracting officer and the government. Tr., 531. Rake supervises various security contracts for the U.S. Navy, including Xcel’s security contract at Indian Island. Tr., 530-32. As part of his responsibilities as the SPAR and COR, Rake investigates complaints concerning contract compliance. Tr., 531, 534.

### **2. Investigation and Report Prepared for Contracting Officer and Commanding Officer of Indian Island**

In July 2018, Rake and Manson investigated two related complaints involving Xcel employees. The first matter involved a complaint that Mark Salopek, Stephen Mullen, and Daniel Lein had made directly to the commanding officer of Indian Island and the second complaint was related to the e-mail complaint that Mullen sent Installation Security Officer Michael Jones on July 9, 2018. Tr., 534-36. Jones e-mailed Mullen’s complaint to Rake, and Rake subsequently forwarded the e-mail to Terry at 1:50 p.m. Tr., 536; R-1. Earlier in the day, the commanding officer called Rake to tell him that he “was going to pull all of the contract guards [off post] until he was proven that they met the requirements to stand post.” Tr., 535-36, 563. Rake immediately contacted Manson and went through the firearms qualifications records for Xcel employees “standing post right at that moment” and then moved on to check the other shifts. Tr., 538.

Rake and Manson met with Terry and other company representatives the next day and started reviewing training records for all Xcel employees. Tr., 538-39. Rake and Manson also “set up appointments to interview . . . the initial three individuals to get their complaints.” Tr., 539. Rake scheduled interviews with Lein and Salopek and tried several times to get an appointment with Mullen. Rake testified that Mullen “called in sick” the “three different times [Rake] tried to schedule with him.” Tr., 540. Mullen then resigned the day before he was next scheduled to meet with Rake.<sup>12</sup> R-2. Subsequently, Rake and Manson met with all Xcel employees named in Mullen’s complaint and/or who were referenced in the interviews of the other employees. Tr., 541.

By July 25, 2018, Rake and Manson had completed an extensive report for the contracting officer and commanding officer. J-10. The report included the following preliminary sections covering its scope and purpose:

**SUBJECT:** Evaluation of email from contractor personnel to Security Officer at Indian Island and final disposition dated 9 July 2018 1000 regarding weapon qualifications at the Bangor Small Arms Training Center.

**Objective:** The objective of our evaluation was to determine whether the email dated 9 July and interviews that were conducted by 10 – 23 July were relevant or not with current contract language and current instructions. We reviewed these submissions for the period from 1 October 2014 – 24 July 2018.

**Background:** To establish if the contractor violated Navy policy and bypassed the minimum requirements for individuals qualifying on the small arms training center per references OPNAV 3591.1F Small Arms Training and Qualifications and OPNAVINST 5530.12C Department of the Navy Physical Security Instruction for Conventional Arms, Ammunition, and Explosives (AA&E). We conducted this evaluation in accordance with the requirement sets forth in the Indian Island

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<sup>12</sup> Rake testified that during the investigation he learned Mullen had abandoned his post in violation of General Order 5 in order to make a complaint with the Commanding Officer of Indian Island. In response, Rake informed Contracting Officer Burris that he planned to recommend Mullen’s removal from the contract. Tr., 589-90. He testified “I told Ms. Burris, I was going to make my recommendation in my report to remove him from the contract.” Tr., 592. Burris said “that was okay.” Tr., 592. However, Mullen resigned from Xcel before Rake could recommend his removal from the contract. Tr., 592.

Contract N44255-12-D-9021. Richard Rake and Steve Mason conducted interviews and Steve Manson conducted the research in the documents.

J-10 at Bates Number XCEL 01664.

The report proceeded to cover all of the allegations included in the July 9, 2018 e-mail from Mullen as well as additional allegations made by Salopek during his interview and in a supplemental e-mail from July 22, 2018. J-10 at Bates Numbers XCEL 016640 to 01674.

Rake testified that he and Manson interviewed Jacob Schryver, who was named as a co-complainant in the complaint that Mullen filed on July 9, 2018, but that Schryver “got very upset” with the allegations and “did not agree with a single one.” Tr., 584-86. Indeed, Schryver denied entire paragraphs of Mullen’s complaint even though many of the allegations were attributed to him. Tr., 588. For example, the following sections of the report highlight Schryver’s disagreement with Mullen’s allegations:

**Issue 2:** “The incidents that I am aware of is when Officer Cunningham failed the range with the M500 shotgun. Officer Cunningham was brought to either a gravel pit or other location by Officer Schryver who supplied his personally owned pistol grip shotgun to Officer Cunningham. Officer Cunningham came back “Qualified”. It was brought to Mr. Terry’s attention. Mr. Terry replied said that it was allowed by the Navy.”

**Finding 2:** Reviewed Officer Cunningham’s 3591.1 and ammo log, he shot with three other officers for his qualifications reshoot on 9 March 2018 within the time allotted for reshooting per instruction at the Bangor SATC which his 3591.1 form and gun card show. Officer Cunningham did state to us that he did go to an open area in the woods with Officer Schryver and did some practicing with a shotgun on his own time so we can become proficient at his reshoot since he doesn’t shoot shotguns that often. Officer Cunningham stated he was never told this would count as his officer qualifications shoot for the 3591.1 form. Officer Schryver was asked in his interview if he took Officer Cunningham out as a qualification shoot in an open area and stated he has never taken anyone out to qualify at any location except at the Port Townsend range or Bangor range. He has taken several people out to open areas to provide extra training to allow them to qualify at the range. Captain Terry denied the comment this was allowed for qualification with the 3591.1 form but was allowed for remedial training.

**Recommendation:** We recommend no action on this issue. Contractor or staff are permitted to take personal weapons and shoot offsite as much as they want which does not violate any contractual or GOV instructions.

**Issue 3:** “Officer Schryver said that he was asked to familiarize Officer Cunningham with the shotgun. He said Mr. Terry personally handed him shotgun rounds for this. When he returned to work he said he felt that Officer Cunningham did better. He said when he found out that they were considering that event a qualification, he said that he was not certified to qualify anyone, and that he thought that was just for familiarization with the weapon. The “qualification” status still stood according to Officer Schryver.”

**Finding 3:** Verified Officer Cunningham’s qualification shoot in Issue 2 above. Officer Schryver stated he never said that this was to count as a “qualification” status. Officer Cunningham would pass his qualification at the next date at the SATC. This whole paragraph was denied by Officer Schryver and Michael Terry (project manager). Captain Terry provided shotgun rounds for remedial training to assist in getting fully qualified at the range the next time.

**Recommendation:** We recommend no action on this issue.

**Issue 4:** “Officer Schryver said there was another time he was asked by Lt. Gerald Powless to bring officers to a gravel pit [to] qualify them. Officer Schryver said he was not comfortable with it. Lt. Powless said the would just schedule a range at Bangor Naval Base.”

**Finding 4:** Officer Schryver denied the entire paragraph as worded, he would never take anyone to a gravel pit to shoot (“this could lead to accidents due to ricochets and I know better”). He was never asked to qualify anyone but to provide remedial training to personnel who needed the extra time . . .”

**Recommendation:** We recommend no action on this issue.

J-10 at Bates Number XCEL 01666. In addition, while Mullen made several comments in his July 9, 2018 complaint about Cunningham’s inability to safely handle and unsling weapons at the range, Schryver disagreed and told Rake that “as the line coach for Cunningham if any safety issues would have arisen he would called out to stop the shoot.” J-10 (Issue / Finding 6) at Bates Numbers XCEL 01666-01667.

Overall, of the 12 different allegations made in the July 9, 2018 complaint, Rake and Manson found merit with respect to only one allegation, which is outlined as Finding 11 in the report:

**Finding 11:** Officer Coler's gun card that was issued only showed she was qualified with the M-9 weapon. She did not qualify with the M-500 or M-4. Upon review on weapons issued by the armory we found that officer Coler was issued an M-500 on the following dates by four different shift Lieutenants: 5 June 2018 (1230-1815), 12 June 2018 (1330-2015), 19 June 2018 (1400-2000), 23 June 2018 (1315-2200) and a M-4 on 12 June 2018 (0140-1415). On discussion with the different shift Lieutenants we discovered the loop holes that allowed officer Coler to be issued weapons she was not qualified on and suggested the following recommendations immediately. Steve checked back thru records and found this incident to be the only one that allowed a person to be issued weapons. The communication between the trainer and scheduler is critical and having the shift Lieutenants verify what is on the gun cards before issuance of weapons. Lt Lux stated that Officer Coler was issued the weapons but she was assigned with an officer that was qualified to use the weapon.

**Recommendation:** We recommended to the contractor several corrections that were resolved during the review:

1. No person is to be allowed to stand post until 100% weapons qualifications are completed.
2. Changed the process to for each yellow gun card to be placed as a place holder when a weapon is removed to show who the weapon was issued. This would alleviate a person getting a weapon even when assigned to stand a post with someone qualified to use that weapon.
3. Shared communication from the training officer to the person who is making the schedule to know who is 100% qualified. Found that when Officer Coler failed to qualify with other weapons (M500 and M4) the trainer LT. Powless went on a two week leave and didn't get her scheduled to take her requalification test for M500 and M4, back up trainer scheduled Officer Coler at the Bangor Range Facility 9 July 2018.

**Actions taken:**

1. Company will not allow personnel to stand post until 100% qualified.
2. Gun cards are placed in each gun slot to show who the weapons were issued to.
3. Communication will be better between trainer and scheduler.

J-10 at Bates Numbers XCEL 01668-01669. Notably, the report stated that, “No falsifying of any federal documents were found in reviewing armory records, training jackets, 3591.1 forms, SATC records or ammo draw. No one interviewed could provide any documents that GOV records were falsified, only comment was ‘that was what I heard.’” J-10 (Finding 12) at Bates Number XCEL 01669.

The report also reviewed nine specific issues raised in a supplemental e-mail from Salopek. Rake and Manson again concluded, that, except for the Coler-related allegations outlined above, no action was needed in response to Salopek’s allegations. Notably, the report covered multiple concerns about Salopek and how he conducted himself during the interview process. The report included the following conclusions and recommendations:

**Comments and our Response:** During the interviews we asked each person if they had a problem/issue did they know the proper process to bring them up in their chain of command within their company, most of them stated they would bring up any issues or concerns they had with their Shift Lieutenant, Project Manager (Michael Terry) and if any range issues with the Range Safety Officer Lieutenant Powless. We asked if they would bring up safety issues to their company safety officer, only some of the officers interviewed knew who that person was even though it was posted three different places on their Union/Safety board in the hallway. When the question was posed to each Officer interviewed if they had a problem with a shift Lieutenant or the Project Manager who would they go to, most of them were aware that the company CEO John Morgan has an open door policy for concerns or they could bring them to another shift Lieutenant. During the interviews no one could provide any facts except comments from third party he-said, she-said. *While I could not prove the following I had the feeling Officer Salopek was trying to get back at the company for some incidents that occurred with him since he brought up the following two incidents in our interview without any prodding by us which had nothing to do with the issues at hand, these incidents occurred in 2015, see below.*

**Incident 1:**

On 23 September 2015 during an IG investigation Mr. Salopek was asked to describe the escalation of force continuum for a waterborne threat. Mr. Salopek was unable to properly articulate the three protection zones promulgated in references Navy Tactics, Techniques and Procedures (NTTP) 3-20.6.29M, Tactical Boat Operations and NTTP 3-07.2.3, Law Enforcement and Physical Security, he did not know the distances involved, and stated that while he was authorized to fire

upon a vessel, as a practical matter he might not do so. It was clear to the investigator that Mr. Salopek had limited knowledge of the escalation of force continuum for a CONUS installation waterfront.

### **Incident 2:**

Officer Salopek on 5 October 2015 was a shift Lieutenant at that time. He had an inquiry into leaving the armory at building 848 unsecured for a determinate period of time. As a shift Lieutenant this position holds a great deal responsibility and trust which those duties include maintaining a locked armory when leaving the building. The GOV lost trust when he left the building with the armory unlocked and asked that he be removed as a shift Lieutenant. GOV could not allow this incident to happen again because the severity of this incident.

During our interviews with Officer Salopek he alluded that women were problems as security officers: Officer Owens gets pregnant and special treatment was provided to her to keep her job and to get her qualified incorrectly at a gravel pit (documents show she was qualified properly); LT/Officer Kirkpatrick was a dog groomer prior to working for the company and she is now a shift LT (she has been working for the company for eight years), this statement had no relevance to this case; Officer Coler was provided special treatment in getting qualified and rushed to put on post (she was mentioned 17 times in Officer Salopek's second statement); Officer Anglin and Officer Kitchen are provided special treatment when it comes to switching shifts (Captain Vancura on a phone interview verified that personnel can switch shifts with other officers after they submit the correct paperwork and if it doesn't cause any overtime, switching shifts does not require shift bidding per the union contract), this is a decision made between Officers and management.

*While conducting the interview with Officer Salopek he told us that when he was a police officer he was called upon by the courts as an expert witness many times and became well known with the judges that any information that he provided must be true since he has a high level of integrity and we didn't need to question his facts he provided to us.*

**Recommendation:** *I believe Officer Salopek should be removed from the contract for the following reasons: his own verbal statements provided to us stated called upon by the courts as an expert witness many times and became well known with the judges that any information that he provided must be true since he has a high level of integrity, as an expert witness he would have known that we would need facts to third party hearsay, he provided a common theme about third party comments without being able to provide a single document behind the allegations but letting the GOV waste time in running around to verify the hearsay comments. His disregard to Navy policy as discussed above with the Navy IG incident and the RFI incident with the fact he believed this to be minor incidents and was caused by someone else besides him, the facts state differently as provided in the interviews listed above for both incidents. The fact that he stated the RFI incident as minor leads me to believe he does take security*

*seriously even with what is stored within the RFI. This has led me to believe that I cannot trust (total confidence in the integrity, ability, and good character of another, one in whom confidence is placed) Officer Salopek to stand post or instill confidence to the GOV while standing post as a security officer in what he is doing. His on statement to us in the interview about being well known with the judges that any information that he provided must be true since he has a high level of integrity and we didn't need to question his facts he provided to us. That is exactly what we had to do, question his integrity, he didn't have the facts and as an expert witness in legal proceedings he would have been aware of the importance of facts and not third party hearsay. Officer Salopek I believe is the center to all the third part accusations to meet a hidden agenda of his own.*

J-10 at Bates Numbers 01672-01674 (emphasis added). During cross-examination, Salopek was asked about Incident 1 and Incident 2 as described above. Salopek testified that this information never came up during his interview with Rake and Manson. Tr., 421-22.

Finally, while the report recommended Salopek's removal from the contract, it did not recommend any action against Mullen, Lein, or Schryver. Rake and Manson, at the end of their report, summarized their information collection efforts as follows:

**Information Provided:** Information was gathered from written statement, verbal statements, record checks, OPNAV 5191.1 Weapons Qualifications form, personnel training jackets, North/South Patrol Post orders and Standard Operating Procedures, employee schedules, Range Facility Management Support System, Small Arms Training Center schedules, personnel training records, Ready for Issue logs, final personnel hard copies schedules, ammo allotment issues, and verbal over the phone interviews:

**Written interviews from the following:**

**Officer Schryver**

Officer Lein

LT / Officer Kilpatrick

Officer Salopek

Officer David

LT Powless

Officer Cunningham

Officer Coler

Officer Lauritzen

**Phone interviews:**

Office Gentry

Officer Everson  
Second interview Officer Coler  
Second interview Officer Lein  
LT Lux  
Captain Terry various times  
Captain Vancura (sitting in for Captain Terry on leave)

**Could not interview:**

Officer Eades (on leave)  
Officer Mullen (resigned the day before interview)  
Officer Schroeder (on leave)

J-10 at Bates Numbers 01674-01675. Overall, Rake and Manson spent “a little over 400 hours” investigating the allegations raised by the employees. Tr., 543.

**3. Testimony of Richard Rake Concerning Mark Salopek**

In response to direct examination questions from the General Counsel, Rake explained that in 2015 he had previously “asked the contracting officer for removal of Mr. Salopek from the contract because he left the ready for issue room open that contained over 5,000 rounds of ammo; M-9s, M4s, M500 shotguns, and most important, M240 belt-fed machine guns.” Tr., 554. The contracting officer approved Salopek’s removal, and Rake subsequently informed Xcel of the decision to remove Salopek from the contract. However, as Rake explained, “Mr. Terry, the contract security manager at the time, kind of pleaded a little case with me about [Salopek], and asked if he could be removed as the shift lieutenant but keep him as a contract guard, because he knew Mr. Salopek from the days when he was law enforcement in Nevada.” Tr., 554.

Rake explained that Salopek raised the 2015 incident when he was interviewed by Rake and Manson concerning the complaint Mullen filed on July 9, 2018. In regard to the “RFI incident” Rake was surprised by Salopek’s decision to raise the prior incident and how he described the incident during the interview:

Q. How would you describe Mr. Salopek’s demeanor during this first interview?

A. So Mr. Salopek's arrogant.

Q. Why would you say that?

A. So during the interview, we had questions that we drafted up that we were asking each individual. Mr. Salopek brought up himself about the incidents of the RFI in 2015. We - - weren't even - - that wasn't even on our radar to even ask. And to be honest with you, I had totally forgotten everything about the 2015 incident until he brought it up in the interview, about the RFI.

Q. And what did Mr. Salopek say about the RFI incident?

A. That it was blown out of proportion, that it wasn't such a big deal like everybody thought it was. And you know he went on to - - just to describe that, you, I walked out the door for a few minutes, and I got caught. And that - - and I happened to tell him that is not the case. During that time, he also expressed his - - I don't know if it is a good word it is hatred, but his dislike for Michael Terry. It was his assumption that Mr. Terry demoted him from a shift lieutenant down to a guard.

Q. He said that to you?

A. He said that to me. And I responded to him - - since he said that, I responded back to him saying, that was not Mr. Terry that demoted you. That was me who demoted you. My recommendation was to fire you from - - or excuse me - - fire's not the work to rem[o]ve you from the contract because of the incident, but Mr. Terry persuaded me to talk to the contracting officer to keep you on as a guard.

Tr., 608-9. Rake explained that Salopek never told him why he had raised this incident during his interview with Salopek. Salopek, during cross-examination, originally denied discussing this incident with Rake, even though it is outlined in detail in the July 25, 2018 report. Tr., 420-21. Subsequently, Salopek acknowledged it was discussed but that Rake had raised the prior incident. Tr., 428.

Rake explained further that "Steve [Manson] and I were perplexed over several things that Mr. Salopek brought up in our - - that he brought up that we never asked him during those interviews." Tr., 610. For example, Salopek stated to Rake and Manson that the Inspector General wrongly criticized him for certain comments he made about security boats a few years earlier

during an IG audit. Tr., 609-10. Rake testified that Salopek said “he knew more than the IG person that was doing the interviews on boats. But he did not know the IG guy that was doing it was of the Navy personnel who the harbor security boat instruction.” Tr., 615. Salopek also provided Rake and Manson with several examples of how he thought female officers were problems as security officers because they receive special treatment from the company. Tr., 611-12. Indeed, Salopek complained about how one female guard “used to be a dog groomer . . . and now she is a shift lieutenant.” Tr., 610-11. Salopek denied making this statement. Tr., 333.

Rake testified in detail about what he considered in making his recommendation to remove Salopek from the security contract at Indian Island:

Q. Now, I understand - - we all understand that there’s a recommendation in your report to remove Mr. Salopek from the contract. Can you explain to us how you arrived at that recommendation?

A. So it’s over several things. So one is the RFI issue came back up. We didn’t bring it up. He brought it up. Kind of treated it like it was nothing. I mean, to him, it was a small incident. The belt-fed machine guns that are in there is a big issue. The second part is the issue with the IG. You know, would shoot first and ask questions later instead of following the rules of engagement. That scares me . . .

...

A. And the other issues were - - he brought up to our attention about an individual, Ofc. Coler, point a rifle at her leg during a jam. He also brought up about Ofc. Cunningham - - it’s either Cunningham or Armstrong - - it’s in my report, I don’t remember - - with a shotgun, bringing it down to his shoulder and - - doing something with it, and might have blown his head off. So when those two incidents were brought to my attention, I checked with the line safety officer, who was Ofc. Schryver, and he did not know about them. And number two, I asked the range safety officer, who sits in a glass cage behind the range watching the entire range, and that was Mr. Powless, and he was not aware of the incident. And then I asked him, are you aware of the rules? When you see a safety issue, what are you supposed to do? And he’s aware of what the rules say, but he never yelled cease fire, cease fire, cease fire, three times to say there’s an incident - - there’s a safety incident. But he bring it up to me - - or brings it up to the CO two month or three months later to the CO.

Tr., 618-19; 620-21. In response to questioning from Judge Giannopoulos, Rake testified that whoever sees the safety issue must raise it immediately. Specifically:

A. And it was never brought up to the line safety officer, the range safety officer, or any SATC, small arms training center, personnel about any safety issue. So with all that combined, that's what made my - - my - - when I talked to Ms. Burris, I told her that was why I wanted him removed; I'm afraid, when I told Ms. Burris, I don't want to be the guy on TV 4 News saying the government was aware of problems with an individual with an out [sic] rifle, and someone got hurt.

Tr., 621. Rake explained additional reasons why he wanted Salopek off the contract:

Q. Mr. Rake, there's reference towards the end of your report concerning Mr. Salopek's prior experience with law enforcement. Do you recall that conversation with him?

A. Yes. That was my comment about earlier when he asked me what I thought of him, the arrogance. So he told Steve Manson or myself in the - - in the interview that he - - during his term as law enforcement he was well-known to go testify in cases, and the judge would tell the prosecutor and the - - the defense attorney that Mr. Salopek is an expert witness and we have - - he has proven himself over and over, and he says is - - is the truth. And Steve and I, when that was first come out - - and whatever his provided to us we should take as the truth. Steve and I both looked at each other and we just shook our heads, and then we excused ourselves for a minutes when that happened, went outside and talked about the incident, because we were a little concerned that no - - well, I'm not sure. I'm not a judge. But I'm sure that no judge would tell both counsels, whatever this guy says is the truth.

Q. And you outline that conversation in the very last - - your recommendation paragraph. Why did you deem it so important to include it in your recommendation?

A. Because that shows that I - - that I feel that the guys is not - - is unsafe. And you know, if I'm supposed to take everything he says as gospel, to me that's - - that's a safety issue right there.

Tr., 622.

Upon completion, the report was sent to the Commanding Officer Pulley and to Contracting Officer Melissa Burris. Tr., 545-46. Rake testified that he discussed the report with the commanding officer and the security officer and that they were in agreement with removing

Salopek from the contract. Tr., 623-24. The following questions and answer exchange occurred between Judge Giannopoulos and Rake:

Q: So before you go to that - - to that meeting [with Xcel], did you ever have a conversation with the commanding officer about your report?

A: Yes, sir.

Q: All right. And what did the commanding officer have to say?

A: He - - he actually stated that he - - liked all my recommendation and would go forward with the recommendations.

Q: All right.

A. So his - - when I told [contracting officer] Melissa Burris that the security officer - - and I going to add the security officer - - and the commanding officer were in enjoinder (sic) of mine of removing him from the contract - -

Q: In agreement - -

A: - - as a safety - -

Q: - - with you?

A: Or agreement?

Q: And you told Melissa Burris?

A: Yes, sir.

Tr. 623-24.

The Navy report was shared with OSHA Investigator Brian Morgan because Mullen and Salopek “made a complaint to OSHA about a Whistleblower Act.” Tr., 546-47. Notably, while these type of reports are “usually” shared “right away” with the contractor, the report was not shared with Xcel for several months because Contracting Officer Burris instructed Rake not to share the report with Xcel due to the pending OSHA investigation. Tr., 548. The report, however, included Rake’s “recommendation to remove Mr. Salopek” from Indian Island. Tr., 554, 581. In

response to questions from Judge Giannopoulos, Rake testified that while Burris did not require Xcel to remove Salopek from the contract at the time, she was “going to after the report was released.” Tr., 559. As noted above, the commanding officer and the security officer agreed with the recommendation to remove Salopek from the contract. Burris was also "sitting there" with Rake when he made his recommendation to Xcel.<sup>13</sup> Tr., 627.

#### **4. Rake Meets with Xcel on October 26, 2018 and Recommends Salopek’s Removal from Indian Island**

Several weeks after John Morgan’s resignation from Xcel, Filibeck – who had just recently joined the company, left a message with the previous contracting officer, Anna Cabella, to introduce himself. Tr., 992. Filibeck received a phone call back from Rake “[o]n or about 22nd or 23rd of October,” which was Filibeck’s very first interaction with Rake. Tr., 992. Filibeck did not know Rake prior to joining Xcel in September 2018. Tr., 992.

Q. . . . And tell us about that phone call?

A. Sure. So Mr. Rake called me, I said, you know, you know, nice to meet you. This get together, he wanted to know what happened to Johnny Morgan. I said well, Mr. Morgan, resigned, he was having some significant health issues and a few other things, and anything you need I’m the guy, I can help you out. He says well, you may want to have a discussion with Melissa Burris, the contracting officer at your earliest convenience. And I said well, how’s Friday? I think this was on a Tuesday, so well how’s Friday. And so I in very short order hopped on a plane and came out here.

Tr., 992. Filibeck subsequently called Burris to schedule a meeting as Rake had “recommended that [he] come out for a meet and greet to discuss some pending issues.” Tr., 993-94. When asked why he scheduled the meeting so quickly, Filibeck stated that “[a]nytime the Navy says well I would recommend you come out here, when the Navy says we recommend it’s not a polite suggestion, I understood.” Tr., 994.

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<sup>13</sup> Filibeck testified also that Burris was sitting next to Rake and as "not disagreeing" with him. Tr., 1004.

The meeting took place in Bangor in the contracting officer's office. Rake and Burris attended on behalf of the Navy.<sup>14</sup> Filibeck, John Kubiak, Belinda Melton, and Francesca Cubino attended on behalf of Xcel. Kubiak and Melton own the company, and Cubino is an administrative assistant. Tr., 995. The meeting lasted appropriately ninety minutes. Tr., 995. After opening pleasantries, Rake describes issues involving the Indian Island contract:

A. Mr. Rake asked me if I was aware of some of the issues that were going on Indian Island, and from my prior discussions with Michael Terry, I said no, I think everything's running about s - - about as well as it can be. He said well, we need to bring you up to speed on a few things. And he started discussing some performance issues we had with some of the security officers. And he says I'm not sure if - - let me see if I am at liberty to discuss this, he looks over and says Melissa, and she gives him the nod, and then he proceeds to discuss some of the performance issues that were happening at the time.

...

A. Yeah, so [Rake] proceeded to tell us we were having a lot of performance issues and that the Navy was - - had just completed a very significant investigation or what he described as wasted between four and five hundred hours of their time on alleged complaints that basically with few exceptions had no basis in reality. And they really did not appreciate it.

Tr., 996-98.<sup>15</sup> Indeed, Rake testified that his first comment to Filibeck was that "we have a safety issue" concerning Salopek and that he then "discussed everything that was in the report." Tr., 625. Likewise, Filibeck described further how Rake had a copy of a written report with him at the meeting and that he verbally reviewed the report with the Xcel representatives. Tr., 998. Rake

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<sup>14</sup> This meeting was the first time that Filibeck and Burris had met one another in person. Tr., 995.

<sup>15</sup> Rake also testified to the following, which corroborates Filibeck's account of what happened at the start of the meeting:

A: So we had a meet and greet. And towards the end of the meet and greet, Mr. Filibeck asked a question of how we are doing on the contract, or are there - - do you have any issues or concerns with the contract? I looked at Ms. Burris and - - said, can I tell them about the report? She said, yes, I could. So I told them - - briefly went over a lot of the information in the report, and my recommendation to remove Mr. Salopek.

Tr., 555-56.

outlined the allegations regarding firearms qualification that he believed were false and shared concerns specific to Salopek, including Salopek's use of "classified pictures" from security boats used at Indian Island. Tr., 999-1000.

In addition to concerns about firearms qualifications, Rake spoke to Xcel about how the IG found that Salopek had inappropriately posted "[f]or official use only" information on his LinkedIn page. Tr., 596; R-13. Rake explained that Salopek removed the information from LinkedIn "for a period of time" but then it showed back up a few weeks later. Tr., 597. Indeed, Rake testified that the material was still posted on Salopek's LinkedIn "as of a week-and-a-half ago, may two weeks ago now." Tr., 597. Notably, Rake explained that Salopek's actions – during and after his Xcel employment – violated Section 2.8 of the contract between Xcel and the U.S. Navy because the contract states that, "[n]either contractor nor any of its employees shall disclose or cause to be disseminated any information concerning the operation of the activity which could result in an increased possibility of the breach of the activities." Tr., 602-3. Specifically, Rake explained he was concerned that Salopek had posted pictures of "the inside of the security boats" including the "FLIR system." Tr., 604; R-13.

Filibeck provided extensive testimony concerning Rake's recommendation to remove Salopek from the contract at Indian Island. Notably, the General Counsel elected not to cross-examine Filibeck on this testimony.

Q. Did you receive any direction from Mr. Rake at this meeting concerning Mr. Salopek's position on Indian Island?

A. Yes, I did.

Q. And what direction if any did you receive from Mr. Rake?

A. We strongly recommend his immediate removal from the contract.

Q. And did he explain why he recommended immediate removal from the

contract?

A. Yes, he did. He's dishonest. He cannot be trusted, the Navy has lost all confidence in his ability to fulfill his duties at the jobsite and we don't want him, get rid of him.

Q. Now did you push back on Mr. Rake to make sure that he had a valid basis for these concerns?

A. I actually did. I couldn't believe I hadn't heard about this prior. I asked well, how I mean did you guys investigate this? I mean how extensive was the investigation? Was it one of these half hour things or did you spend some time? And he told me heh, the - - and again, I didn't know this at the time, they spent between four hundred and five hundred hours of investigative time because I wanted to make sure it was an accurate investigation and it was a fair investigation. And by the time I was done with speaking with Mr. Rake, I knew it was - - they did a thorough job and when they said get of him they weren't kidding. Because when the Navy asks you to immediately remove somebody, it's not a polite suggestion.

Tr., 1002-3. Notably, Rake provided similar testimony, when asked by the General Counsel if the company asked any questions in response to his recommendation to remove Salopek from the contract. Rake stated:

A. They asked me essentially, you know, all the information that I had provided in the report on what did I find, how - - you know, how deep did we dive into stuff, did I check with everybody, is there any other issues that we need to bring to our attention, is there any fixes we can do to help fix anything.

Tr., 557.<sup>16</sup>

Filibeck did not receive anything in writing from Rake or Burris directing removal, but explained why he moved forward with removing Salopek from the contract regardless:

Q. So does the government usually provide [a] contractor with something in writing directing removal?

A. They do.

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<sup>16</sup> The IG sent an e-mail, requesting additional information regarding the investigation done by Rake and Manson, including what percentage of Xcel employees' weapons-issuance records were reviewed and for what period of time. R-45. Rake and Manson reviewed 100% of the staff's records for the period of time of September 2017 through August 2018. *Id.* Rake and Manson also noted that they "interviewed everyone that was mentioned/connected in the fact finding and including additional as necessary. [They] interviewed everyone that Mr. Mullen/Mr. Salopek mentioned to [them] including interviewing personnel twice because Mr. Salopek said they had more to tell [Rake and Manson]." *Id.*

Q. And did you ever get that here?

A. I didn't.

Q. And why did you move forward with removing him from the contract and in fact terminate his employment?

A. Well, there's a couple of reasons: one, there were extremely serious allegations; two, they had clearly conducted a very thorough investigation even though I hadn't seen or received a written report of it at the time. But one of the contracting officers, the COR, was basically our direct boss says we recommend his immediate removal from the contract. And his boss's boss is sitting next to him and she's not disagreeing, it's pretty serious.

Q. Let me see this - -

A. And I want to keep the contract to keep the customer happy.

Q. When you say boss's boss, who are you referring to?

A. Melissa Burris, the senior contracting officer.

Q. And is there any - obviously, I think you've heard testimony there is a contract between - - well, there was a contract between Xcel and the Navy, correct?

A. Yes, sir.

Q. Was there anything in the contract that gives the Navy the right to direct the company to remove employees from the jobsite?

A. Sure. It's . . . the PWS which is the performance work statement.

Q. And what's your understanding of that contractual provision?

A. The Navy, or for that matter any part of the department of defense or the military, can remove for I think it's titled the convenience of the government any contract employee they want for any reason or no reason at all. But generally speaking at 27 years of experience, they really don't do that unless there's a really valid reason.

Tr., 1003-5.

Filibeck also acknowledged that he terminated Salopek's employment even though Rake had only recommended his removal from Indian Island:

Q. Now you told us that the Navy did not demand termination; just it was a recommendation to remove him the contract. Did you offer Mr. Salopek another position within the umbrella of Xcel Protective Services?

A. I did not.

Q. And why not, Mr. Filibeck?

A. Again, very serious allegations like this. The next closest contract we had was 10,080 [sic] miles away at the lower Columbia River, but there's a couple of issues with that. One, if this guy is going to do this kind of activity here, he's going to do it there. Two, there's still an ongoing - - actually, is my understanding as of this very day an active investigation regarding those classified photos that are still on his website. The contract at lower Columbia River is part of the U.S. Army; he's not going to be able to get a CAC card down there either.

Q. And what's your understanding of the - - to support that statement, that he would not be able to get a CAC card?

A. So any time an employee is removed for cause, unless they resign, they have to give the - - the government the official form we fill out and send in that details the reasons of why they are no longer on the contract. And they put that information on their federal file at OPM, office of personnel management. And if we tried to re-enlist him down there that would come up and there's know they would give him access to those facilities. But the truth of the matter is just based on his conduct and the fact that he still has classified photos up on his own personal website for another company, I could never employ him.

Tr., 1005-6. In discussing removal for cause and how it affected Salopek's CAC card, Judge Giannopoulos commented to Filibeck: "***But in your mind, I understand what your mind was. In your mind at least, the Navy told you to do it; you thought, I want to keep these guys happy, I'm going to do it.***" Tr., 1007 (emphasis added). Filibeck agreed with the judge's characterization of the decision-making process that led to Salopek's termination. Tr., 1007. Earlier Filibeck testified "[m]y primary focus is maintaining the relationship with customers. They were the most important aspect of what I do, that make sure Xcel keeps our contracts." Tr., 983.

### **I. Termination of Mark Salopek**

Filibeck and Kubiak met with Salopek the morning after Filibeck's meeting with Rake and Burris. Tr., 1014-15. Filibeck testified to the following version of events:

Q. Now tell us about the meeting you had with Mr. Salopek.

A. . . . I told him, I said I just had a meeting with the Navy, and I understand that you've been an employee of Xcel for some time. I said I don't know you, but I'm going to tell you the Navy has directed me to remove you from the contract and I went through the list, I said dishonestly and falsifying the reports, lack of candor during the investigation which caused them hundreds and hundreds of hours of investigative time. One of the phrases from Mr. Rake, chasing their tail. You have not done this company any favors, so I'm going to ask at this point in time would you like to resign, and he says I do not wish to resign. I said well you're terminated, effective immediately.

Tr., 1015-16. At the time Filibeck terminated Salopek, he was not aware that there was also a pending complaint at the Office of Inspector General.<sup>17</sup> Tr., 1018. In addition, prior to terminating Salopek, Filibeck had not seen the underlying complaint that Mullen had filed with ISO Jones on July 9, 2018. Tr., 1022. Filibeck testified that he first received the July 9 complaint, as well as Rake's report, from OSHA during early December 2018. Tr., 1022-23. Nonetheless, Filibeck testified that he did not discipline any other employees after his meeting with Rake in October 2018 or after obtaining Rake's report in December 2018. Tr., 1029-30.

Salopek denied during his testimony that Filibeck told him about his meeting with the Navy or how the Navy wanted him removed from the contract. Tr., 344. Salopek testified that Filibeck told him he was being terminated for being dishonest, for his lack of candor, and for going outside the chain of command.<sup>18</sup> Tr., 202, 347, 847. However, his testimony conflicts with the confidential affidavit he provided to the General Counsel and with at least three documents he prepared immediately after his termination in late October 2018. In regard to the General Counsel's affidavit, Salopek testified to the following:

Q. . . . And in this document, it outlined what you said to the investigator regarding Ms. Filibeck's reasons for termination, correct?

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<sup>17</sup> The IG conducted an investigation and dismissed the complaint. Tr., 311.

<sup>18</sup> Salopek testified that Filibeck was the only person who may have mentioned a "chain of command" violation. Tr., 347.

A. Correct.

Q. And it references dishonesty?

A. Uh-huh

Q. It references affecting morale of the workplace?

A. Yes.

Q. Okay. Do you see any reference at all in this document to a chain of command violation?

A. No, sir.

Q. Is there a particular reason you did not include that in – that allegation when you provided this affidavit to Ms. McConnell?

A. No, sir.

Tr., 351. In addition, Salopek wrote several emails to Scott Harger from the Union immediately after his termination outlining what Filibeck told him when explaining the reasons for termination. R-50; R-51. After reviewing the letters during his testimony, Salopek agreed that neither communication references any chain of command violation. Tr., 853. Indeed, Salopek agreed that he is not aware of any written communication between himself and the Union that references a chain of command violation. Tr., 853. He agreed further that, while he outlined several reasons for his termination in a three-page summary dated October 28, 2019, he did not reference any alleged chain-of-command violation. Tr., 854-58; R-52.

Salopek testified that he spoke to Terry about the reasons for his termination just a few minutes after his meeting with Filibeck and Kubiak. Tr., 355. According to Salopek, Terry told him “*this is all Rake. He said they went down and talked to Rake and called me and said you’re going to be fired.*” Tr., 355 (emphasis added). Terry did not give Salopek any other reason for his termination. Salopek testified:

Q. . . . I just want to confirm that Mr. Terry never said you're being terminated for filing a complaint with the Navy in this conversation?

A. No.

Q. And - -

A. Not that I recall.

Q. And he never said you're being terminated because Mr. Morgan is upset you filed a complaint with the Navy?

A. No.

Q. Okay. And never said Mr. Filibeck said you're being terminated because you're filing - you filed a complaint with the Navy?

A. No.

Q. So the only vague explanation that Mr. Terry gave you at the time was that this is all Richard Rake?

A. That's the only statement made.

Tr., 359; *see also* R-52 ("He additionally told me that all of this is coming from Richard Rake.").

Terry testified that he told Salopek "this was out of our hands. This is what the Navy requested."

Tr., 946.

## **J. Mullen's Harassment Complaint and Resignation**

On July 14, 2018, Mullen sent an e-mail to Terry, alleging that he was being harassed by his colleagues, Tom Cunningham and Kevin David, as a result of the complaint he had raised with ISO Jones on July 9, 2018. J-7 at Bates Number XCEL 1454-1455.

### **1. Allegations Regarding Cunningham and David**

Mullen made several allegations regarding Cunningham and David in his July 9, 2018 complaint. First, he claimed that at some point Cunningham failed on the range with the M500 shotgun and subsequently qualified at a "gravel pit or other location" with Officer Schryver. R-1.

Mullen also claimed that on May 9, 2018, Cunningham and David failed the qualification test for the shotgun. *Id.* These allegations turned out to be false.

Cunningham testified unequivocally that he never qualified on the rifle off base and/or at a gravel pit. Tr., 1068. Cunningham also testified that he was not even at the range on May 9, 2018, as he had previously qualified on all of the weapons at the range in January 2018. *Id.*, 1067-68; R-2, p. 21. Notably, Cunningham recalled that both Salopek and Mullen were present at the range in January 2018 when he qualified on his weapons. *Id.* Cunningham testified that he had, in fact, gone shooting with Schryver to get a “refresher course” on the shotgun because he had had some issues with it at the range. Tr., 1071. However, Cunningham testified clearly that he was not told that the shooting event off base with Schryver was a qualifying event: “I went out with him on my own time. I did not get paid. . . . We went out as a social thing.” *Id.*

David testified that when he was interviewed by Rake, Rake asked him if he was present at the range on May 9, 2018. Tr., 1044. David told Rake that he did not recall, and Rake informed him that, according to Xcel’s training records, David was not even present at the range on May 9, 2018. *Id.* Further, David testified that he qualified at the range on all weapons on February 21, 2018, as evidenced by his Small Arms Qualification Record. Tr., 1042-43; R-47.

## **2. Incident with Cunningham**

First, Mullen pointed to an interaction with Xcel employee Tom Cunningham on July 9, 2018, wherein Cunningham allegedly went into the training room where Mullen was at the time and demanded an apology from Mullen for lying about his range qualifications. J-7 at Bates Number XCEL 01455. Mullen further alleged that Cunningham “swept” him with the barrel of his shotgun.<sup>19</sup> *Id.*

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<sup>19</sup> Salopek and Cunningham confirmed it is not unusual for guards to have weapons with them in the training room. Tr., 367, 1062.

Mullen testified that he felt threatened by Cunningham during this incident: “He was standing over the top of me, . . . I had nowhere to go. There was a shotgun being pointed at me. It was very uncomfortable and very threatening.”<sup>20</sup> Tr., 474. Cunningham testified that, after hearing that Mullen had falsely reported that he was not qualified to carry his weapons, he was offended. Tr., 1060. As a result, after hearing about this, when he walked into the training room and saw Mullen there, Cunningham told Mullen that he wanted an apology. Tr., 1061. Mullen told him he was not getting one, and Cunningham continued to insist that he give him an apology. Mullen again told him he would not apologize, and Cunningham turned to walk out of the room. *Id.* At that point, Mullen said to Cunningham that he should not point his weapon at Mullen. *Id.* Cunningham, however, denies that he ever pointed his weapon at Mullen. *Id.*; Tr., 1062. Cunningham testified that he simply wanted an apology from Mullen. Tr., 1061.

After receiving this e-mail, Terry took statements from Cunningham and Norm Simons, who was present for the incident in the training room. Cunningham stated that he walked into the break room and asked him for an apology for remarks he had made about his gun range qualifications because he was offended by the false allegations. R-6; Tr., 1060. He also stated that Mullen said that he was pointing his shotgun at him, and Cunningham denied pointing his shotgun at Mullen. Mr. Simons confirmed that Cunningham was asking Mullen for an apology and that Mullen said he would not give him an apology. R-5. Simons also stated that he looked up when Mullen stated, “Don’t sweep me with the shotgun,” and Simons saw Cunningham’s shotgun pointed at the floor. *Id.* Finally, Simons stated that he did not “hear, or see, any communication of a threat by either party.” *Id.*

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<sup>20</sup> Notably, despite allegedly feeling threatened, Mullen failed to report this incident to anyone immediately after it occurred, including to Terry who called Mullen into his office within minutes of the end of the incident with Cunningham. Tr., 781. Rather, while the incident with Cunningham occurred on July 9, 2018, Mullen did not report it to anyone until July 14, 2018.

Notably, Mullen testified that he asked Simons to write a statement regarding the incident with Cunningham and Mullen, and Simons declined to write a statement. Tr., 790. In response to Mullen's request, Simons sent him a text message on July 10, 2018, saying,

I decided to forego the statement. After a lot of reflection. The only thing it will show is [Tom's] temper. Which is already well known. **I did not see him laser you with the shotgun. Nor did I see or hear or see him threaten you. Verbally or posturally.** From what I have heard and seen today, tomorrow will probably resolve this one way or another, and I don't see any benefit resulting from a statement I would submit. It would not be conclusive one way or another. That's my reflect as a former Des and County Deputy. And I just took a required County On Line course last Sat "Violence in the Workplace". Sorry. Norm.

Tr., 803; R-48 (emphasis added). Notably, this text message was just between the two employees (one of whom is former law enforcement and who had just completed a workplace violence class). No supervisors were included on the message.

When first told about this incident on Saturday, July 14, 2018, Terry immediately took action on the next business day to interview Simons and Cunningham on Monday, July 16, 2018. Terry was unable to take Mullen's statement because he was not at work on July 16, 2018, and he then resigned the following day. Tr., 922; R-32.

### **3. Incident with David**

With respect to the other incident mentioned by Mullen in his July 14, 2018 e-mail, Mullen claims that David threatened him via text message when he said, "So I'm on your little fucking list, your a fucking idiot & don't know what you have stepped in. Better call your butt buddy Mark. Slander with no proof dumb ass Stupid leading stupider." GC-6. Mullen testified that he interpreted this text message as a threat. Tr., 480.

Upon receiving this text message, Mullen called the on-duty lieutenant, Lieutenant Doug Lux, and informed him that David had sent him this text message. Tr., 481-82. Lieutenant Lux called Terry, who told Lieutenant Lux that he should advise Mullen to call local law enforcement

if he felt threatened by this text message, but that Xcel could not really address it, as it had not occurred in the workplace. Tr., 909. Lieutenant Lux relayed this advice to Mullen, who called local law enforcement. Tr., 482, 485. Mullen did, in fact, follow Terry's and Lieutenant Lux' advice and call local law enforcement, who told him that there was not much they could do about it. Tr., 488.

David testified that he was upset when he found out that Mullen and Salopek had falsely reported that he was not qualified on his weapons. Tr., 1037. As a result, he sent Mullen a "goofy text" and did not intend to threaten him in any way. *Id.*, 1038, 1040. Notably, David also testified that, within minutes of having sent the text to Mullen, he received a phone call from Lieutenant Lux, who told him not to send any additional text messages to Mullen. *Id.*, 1040. He then received additional phone calls from Lieutenant Vancura and Lieutenant Wilson, both telling him not to send additional text messages to Mullen. *Id.* David testified that, after sending those text messages to Mullen on July 10, 2018, he did not send him any additional text messages. Tr., 1043.

#### **4. Xcel's Response to Incidents**

Xcel took several immediate steps to address Mullen's complaints. As set forth above, at Terry's direction, Lieutenant Lux advised Mullen to call law enforcement if he felt threatened by the text messages, and Lieutenant Lux, along with two other lieutenants, immediately called David to direct him not to text Mullen anymore. In addition, Terry obtained witness statements from Cunningham and Simons regarding the incident with Mullen and Cunningham. Further, Terry also put Xcel's policy on standards of conduct in the training room and required all employees to read and sign off that they had read the policy. R-7. Thus, the record shows that Xcel immediately and effectively addressed Mullen's complaints. Salopek agreed that Terry was responsive to this incident. Tr., 370-71.

Xcel did not discipline either Cunningham or David as a result of these incidents. Terry testified that, after reviewing the witness statements from Cunningham and Simons, he did not believe that Cunningham had done anything wrong. Tr., 935. With respect to David, Terry did not discipline him because the actions he took were outside of the workplace, and Terry also did not construe David's text messages as a threat, but merely as his venting his frustration with Mullen. *Id.* Notably, local law enforcement agreed that the text messages did not pose a threat, as well. Tr., 488.

On July 17, 2018, Mullen sent an e-mail to Terry, informing him that he was resigning from his position with Xcel. J-4 at Bates Number XCEL 1225. In his e-mail he stated, "I am separating my employment with Xcel protective services (BCSI) effective immediately. The reason is for work place harassment and threats. . . ." *Id.*

Mullen filed for unemployment after resigning from Xcel in July 2018. Tr., 222. He explained that his unemployment application was denied as he "didn't have a good enough reason to quit." Tr., 222-23.

#### **K. OSHA Investigates and Dismisses Complaints Filed by Mullen and Salopek**

On July 11, 2018, Mullen filed a complaint with OSHA in which he claimed, as he did in his July 14, 2018 e-mail, that he was harassed by David and Cunningham after raising a complaint regarding weapons qualifications. He further alleged that he was constructively discharged based upon this conduct. R-12. OSHA conducted an investigation into Mullen's concerns and dismissed his complaint. Mullen then requested additional review, but OSHA maintained that his complaint had been dismissed. OSHA concluded on August 15, 2019 that, "the record shows that you voluntarily resigned from your employment on July 17, 2018, and the evidence does not support the allegation of constructive discharge." R-28.

On November 5, 2018, Salopek filed a complaint with OSHA, claiming that he was

terminated in retaliation for complaints he had made from 2017 through 2018 and for his participation in an investigation by the IG. R-26. OSHA dismissed his complaint, and he, too, requested review of the decision. OSHA issued a final determination on August 15, 2019 dismissing his case, concluding that his “protected activity was not the reason for [his termination]” and that “the evidence demonstrates that [Xcel] terminated [his] employment due to integrity issues and inappropriate statements to Navy investigators.” R-29.

#### **IV. COMPLAINT**

On July 31, 2019, the General Counsel issued a Complaint against Xcel, asserting five claims. (“Complaint”)

1. The General Counsel claimed that Xcel violated § 8(a)(1) of the Act when Michael Terry allegedly asked some Xcel employees why they raised pay issues with the Union and told them that if they had any pay issues they needed to bring those issues to him. Complaint, ¶¶ 6, 10.

2. The General Counsel claimed that Xcel violated § 8(a)(1) of the Act when it allegedly constructively discharged Stephen Mullen on July 17, 2018. Complaint, ¶¶ 7(b), 7(d) and 10.

3. The General Counsel claimed that Xcel violated § 8(a)(1) of the Act when it terminated Mark Salopek. Complaint, ¶¶ 7(c), 7(d) and 10.

4. The General Counsel claimed that Xcel violated §§ 8(a)(1) and (a)(3) of the Act when General Powless announced that, because someone had complained about arm-up time, no one would be allowed to go home early in response to Daniel Lein’s complaint about pay for arm-up time. Complaint, ¶¶ 8(a), 8(b) and 11.

5. The General Counsel claimed that Xcel violated §§ 8(a)(1) and (a)(5) of the Act when it failed to furnish documents requested by the Union. Complaint, ¶¶ 9, 12.

## V. ARGUMENT

### A. Xcel Did Not Violate the Act by Constructively Discharging Stephen Mullen

General Counsel alleges that Xcel constructively discharged Mullen after he, along with Salopek, reported to Xcel and to the United States Navy that Xcel was not following correct procedures for weapons qualifications. Complaint, ¶¶ 6(a) and 6(b). This claim must fail.

#### 1. Legal Standard

The legal standard regarding a claim of constructive discharge is well settled:<sup>21</sup>

Under the National Labor Relations Act, a traditional constructive discharge occurs when an employee quits because his employer has deliberately made the working conditions unbearable and it is proven that (1) the burden imposed on the employee caused, and was intended to cause, a change in the employee's working conditions so difficult or unpleasant that the employee is forced to resign, and (2) the burden was imposed because of the employee's union activities. *Grocers Supply Co.*, 294 NLRB 438, 439 (1989); and *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).

*Intercon I (Zercom)*, 333 NLRB 223, 226 (2001).<sup>22</sup>

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<sup>21</sup> Although not binding, federal law on this topic is instructive. *See, e.g., King v. AC & R Advert.*, 65 F.3d 764, 767–68 (9th Cir. 1995) (In order to amount to a constructive discharge, adverse working conditions must be unusually “aggravated” or amount to a “continuous pattern” before the situation will be deemed intolerable. In general, single, trivial, or isolated acts of misconduct are insufficient to support a constructive discharge claim.”); and *Matthiesen v. Autozoners, LLC*, 2016 WL 1559580, at \*6 (E.D. Wash. Apr. 18, 2016) (In case where employee resigned prior to permitting company to complete its investigation into her sexual harassment claim, Court held, “[employee] cannot now assert that [employer] failed to promptly and adequately respond to her sexual harassment claim when she quit before they had an opportunity to investigate the matter, verify [employee’s] allegations, and determine the best resolution for the issues between [her and the alleged harasser]. Accordingly, even if [employee] could demonstrate the other elements of a sexual harassment claim, her claim is not imputed to [employer].”

<sup>22</sup> The Board has also looked at another theory for proving a constructive discharge claim called the Hobson’s Choice theory. Under the Hobson’s Choice theory,

an employee's voluntary quit will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition.

*Intercon I (Zercom)*, *supra*, 333 NLRB at 226. However, this theory is not applicable here where there was no evidence presented to support it.

## 2. Argument

- a. **Mullen was not constructively discharged under the circumstances described because: (1) the conditions of his employment did not rise to the level of being unbearable or so difficult or unpleasant that he was forced to resign; (2) any issues Mullen experienced with his co-workers were not caused by Xcel; and (3) prior to Mullen's resignation, Xcel took immediate and significant steps to address the claims he raised of harassment.**

First, the General Counsel must show that the burdens imposed upon Mullen caused, and were intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. In his resignation e-mail, Mullen stated that he was resigning from Xcel due to “work place harassment and threats.” He further testified that he did not want to go back to work because it was “not safe” for him. Tr., 490. In support of his claim that he resigned due to difficult working conditions, Mullen has pointed to only two incidents of alleged harassment by his co-workers, Cunningham and David.

These two minor incidents, alone, simply do not suffice to constitute the establishment of unbearable working conditions “so difficult or unpleasant” that Mullen was forced to resign. In a similar case, *In re Grand Valley Health Center*, 333 NLRB 278 (2001), the Board upheld decision by the the Administrative Law Judge (“ALJ”), which held that the employee’s resignation was not the result of an unlawful constructive discharge. In that case, the employee resigned from his employment after the following occurrences: (1) receiving a number of harassing phone calls for a period of four days; (2) finding oil in his toolbox and broken light bulbs on his maintenance cart on two occasions; and (3) finding water in a pair of his work boots. *Id.* at 280. The ALJ found that these instances did not create working conditions that were so difficult or unpleasant as to force him to resign. *Id.* at 280-81. Indeed, the ALJ held that, “[w]hile [employee] experienced some annoying and unpleasant situations at work prior to his resignation, his working conditions

were not sufficiently difficult or unpleasant to force him to resign.” *Id.* at 281. Similarly, here, Mullen received one text message from David and had one encounter with Cunningham where Cunningham demanded an apology in response to a false statement made by Mullen about Cunningham. Further, neither of Mullen’s claims were viewed as legitimate threats.<sup>23</sup> Local law enforcement told him there was nothing they could do for him, where David did not state a true threat, and Simons confirmed multiple times in writing that Cunningham did not ever threaten Mullen verbally or physically. Simply put, the General Counsel has failed to meet the first burden of showing that Mullen experienced working conditions that were so unbearable, difficult or unpleasant that they forced him to resign.

Second, even if the General Counsel had met the first burden, it must also show that the employer created these unbearable conditions because of Mullen’s union activities. This it cannot do. Notably, the General Counsel presented absolutely no evidence that Xcel created these conditions, as it submitted no evidence to show that Xcel informed either David or Cunningham that Mullen had made a complaint regarding their alleged failed weapons qualifications. Further, David and Cunningham testified unequivocally—and unrebutted—that no one from management ever told them that Mullen made the complaint about their weapons qualifications. Tr., 1036; 1060. They both testified that they heard through rumors that Mullen had made the complaint.

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<sup>23</sup> Mullen claimed incredibly that the text message from David, in which he stated, “[you] don’t know what you have stepped in” particularly upset him because of a prior incident that occurred seventeen years prior while he was working as a correctional officer. Mullen had reported to his superior a comment his co-worker had made, and, after finding out about what he had said, she allegedly stated to him that he did not know what he stepped in. Tr., 228. He then testified that, a day or so after she made that comment to him, she purposefully closed the door on him in the prison, crushing his arm in the door and injuring him. *Id.* This incident has no bearing on Mullen’s constructive discharge claim, as was recognized by Judge Giannopoulos during the trial. Tr., 226 (In response to Xcel’s counsel’s relevance objection to this testimony, Judge Giannopoulos stated, “I don’t think that’s . . . what the Board standard is with respect to constructive discharge. I understand the relevance objections.”). The fact that Mullen had an unpleasant association with the benign phrase used by David—i.e., “you don’t know what you stepped in”—does not serve to elevate the text message to constitute evidence of unbearable conditions that led Mullen to resign.

*Id.*, 1036; 1058.<sup>24</sup> Finally, Terry testified that he did not tell either Cunningham or David that Mullen had raised the complaint about them. Tr., 937-38. Terry also testified that, at the time of the incident between Cunningham and Mullen, which occurred around 1:30-1:40 p.m. (R-5 and R-6), he was not even aware that Mullen had made the complaint, as he had not received the e-mail yet from Rake. Indeed, he did not become aware of who had made the complaint until Rake forwarded him Mullen's e-mail, which occurred at 1:50 p.m. R-1. As in *In re Grand Valley*, where there was no evidence that the employer created the conditions, there is similarly no evidence here that Xcel created in any way the two incidents that allegedly caused Mullen's resignation.

Finally, in *In re Grand Valley Health Center*, the ALJ noted that, if the employer, "due to antiunion animus, failed to take reasonable steps to stop the harassment and the harassment became unbearable, such inaction could constitute constructive discharge." 333 NLRB at 281. In *In re Grand Valley Health Center*, the employee allegedly received a number of harassing phone calls from December 6-10 and received no other phone calls after that. During that same week he also found oil in his toolbox and broken light bulbs on his maintenance cart on two occasions, and on December 17, he found water in a pair of his work boots. *Id.* at 280. He then resigned on December 20. *Id.* The ALJ found that the employer did not have any evidence to determine who was harassing the employee and/or how to make the harassment cease. Thus, the ALJ found that the employer was not guilty of failing to take reasonable steps to stop the harassment. *Id.*

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<sup>24</sup> While Cunningham and David could not specifically identify the individual(s) who informed them that Mullen had made a complaint, they both testified unequivocally that no one from Xcel management informed them that Mullen had made a complaint. Tr., 1036, 1060; J-17. Given that Cunningham and David are no longer employees of Xcel, their testimony should be entitled to a presumption of credibility.

Here, there is no dispute that Xcel took timely and significant steps to address Mullen's complaint of harassment. The timeline regarding the events leading to Mullen's resignation is not in dispute:

Monday, July 9, 2018	At 10:00 a.m., Mullen sent an e-mail to ISO Jones regarding alleged issues with weapons qualifications (R-1)
Monday, July 9, 2018	At 11:33 a.m., ISO Jones sent an email to Terry asking for training records for several Xcel security guards and asking Terry to remove them from post responsibilities (R-8)
Monday, July 9, 2018	Around 1:30 p.m., Cunningham spoke to Mullen, asking for an apology in response to Mullen's false allegations about Cunningham's weapons qualifications.
Monday, July 9, 2018	At 1:50 p.m., Rake sent an e-mail to Terry, forwarding the e-mail from Mullen regarding alleged issues with weapons qualifications. (R-1)
Tuesday, July 10, 2018	David sent Mullen a text message, saying "So I'm on your little fucking list, you're a fucking idiot & don't know what you have stepped in. Better call your butt buddy Mark. Slander with no proof dumb ass. Stupid leading stupider." (GC-6)
Tuesday, July 10, 2018	Mullen called Lieutenant Lux to report that David sent him text messages. After receiving advice from Terry, Lieutenant Lux told Mullen to call local law enforcement if he felt threatened.
Tuesday, July 10, 2018	Mullen called local law enforcement, who said there was not anything they could do.
Tuesday, July 10, 2018	Lieutenant Lux, Lieutenant Vancura and Lieutenant Wilson called David minutes after his text to Mullen to tell him not to text Mullen anymore.
Saturday, July 14, 2018	Mullen sent an e-mail to Terry describing two events involving his co-workers, Cunningham and David, speaking to him about his having lodged a complaint about their alleged falsified weapons qualifications. (J-7 – Bates Number XCEL 1454-1455)
Monday, July 16, 2018	Terry obtained statements from Cunningham and Simons. Simons was present for the event described by Mullen involving Cunningham. (R-5 and R-6)

Monday, July 16, 2018 Terry posted Workplace Guidelines from the Xcel Employee Manual regarding the expected standard of conduct and required all employees to read and sign them. Cunningham and David signed. (R-7)

Tuesday, July 17, 2018 Mullen sent an e-mail to Terry resigning from his position with Xcel. (J-4 – Bates Number XCEL 1225)

The timeline makes clear that the alleged harassment began on July 9, 2018, and Mullen resigned a mere eight days later on July 17, 2018. Further, it is clear that Xcel took immediate steps to address Mullen’s complaints. When Mullen first called Lieutenant Lux on July 10, 2018, Lieutenant Lux called Terry, who advised Lieutenant Lux to tell Mullen to call local law enforcement if he felt threatened by the text messages.<sup>25</sup> Moreover, Lieutenant Lux, Lieutenant Vancura and Lieutenant Wilson all called David within minutes of his sending the text messages to tell him to cease sending them. Thus, Xcel responded quickly and thoroughly to Mullen’s complaint about the text messages.

The timeline also shows that Xcel responded as quickly as possible to Mullen’s complaint regarding the incident with Cunningham. Mullen sent the e-mail to Terry on Saturday, July 14, 2018, despite knowing that Terry does not typically work on weekends. Tr., 783. Terry took statements from Cunningham and Simons on the next business day, Monday, July 16, 2018. On that same date, Xcel also put its standards of conduct from the Employee Handbook in the training room and required all employees to read them and sign to acknowledge they had done so.

Nevertheless, Mullen resigned on July 17, 2018—a mere *three days*, which included only *one business day*, after he submitted his complaint to Terry. Mullen failed ever to reach out to Terry prior to his resignation to address the situation or follow up on his complaint. Further, Mullen conceded that he failed to reach out to any of the following individuals to report that he

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<sup>25</sup> It bears noting that even Salopek agreed that Terry was responsive to Mullen’s complaint about the text messages from David. Tr., 371.

was being harassed: Rake; Manson; Morgan; or the commanding officer of the base. Tr., 75-86. Perhaps most importantly, Mullen testified that he would not have resigned from his employment if he had known that Xcel was investigating his allegation on the very first day that Terry was back to the office after Mullen had submitted his complaint:

Q: And if you had known that the company was investigating your allegation on the very first day Mr. Terry was back from work, would you have resigned your employment?

A: No, sir. I wouldn't.

...

Q: And why is that?

A: If – if they were actually doing something about it and notified me of that . . .

Q: So if you were aware that the statements were taken, and that the standards of conduct policy was being circulated, and people were being asked to review and sign it, you would not have resigned your employment, right?

A: That is correct.

Tr., 791-92.

Mullen made this same admission to the OSHA investigator who investigated the July 11, 2018 complaint he had made regarding the alleged harassment by Cunningham and David. R-12. In his September 16, 2018 written statement to the OSHA investigator, Mullen stated, “***I [resigned] on July 17th 2018. I would not have resigned if I had been notified that Mr. Terry had posted the workplace guidelines on the 16th. . . .***” R-49, p. 2 (emphasis added). Even Mullen’s testimony demonstrates that Xcel did not delay in responding to Mullen’s complaints here. It took timely action to address his complaints and did so effectively and thoroughly.

The General Counsel has failed to meet its burden of showing a constructive discharge here. The incidents described by Mullen did not rise to the level of creating working conditions

so unbearable, difficult or unpleasant that they forced him to resign, and there is no evidence to show that Xcel created these conditions, at any rate. Notably, on July 13, 2018, Mullen told Lieutenant Gerald Powless that he was not going to return to work until the “threats and harassment” were addressed. Tr., 489. Lieutenant Powless simply said, “Okay.” *Id.* Thus, Mullen was never compelled to return to work in what he allegedly felt was an unsafe environment. For all of the above reasons, this claim should be dismissed.

**b. The real reason for Mullen’s resignation was his recognition that he would not be able to pass the physical fitness requirement test.**

As Terry testified, Mullen had issues with passing the physical fitness requirement test during his tenures with Xcel. For instance, on October 4, 2016, Mullen received a notification that he had failed the physical fitness requirement test and had sixty days to pass the test. J- 4 – Bates Number XCEL 01216; Tr., 220. As a result of receiving this letter, Mullen resigned from his employment, recognizing he could not pass the physical fitness test. Tr., 220, 877. However, he took the physical fitness test again in May 2017 and passed the run by two seconds. J- 4 – Bates Numbers XCEL 01213.

Subsequently, in November 2017, Mullen again received a notification that he had failed the physical fitness requirement test and had sixty days to pass the test. J-4 – Bates Numbers XCEL 01215; Tr., 221. He took the test again on January 24, 2018 and barely passed the run by five seconds. J-4 – Bates Numbers XCEL 01213.

At the time of Mullen’s resignation, on July 17, 2018, he was scheduled to take another physical fitness test, which he was required to do every six months. Tr., 877. Terry testified that he believed that Mullen resigned because he knew he was going to be unable to perform the requirements of the physical fitness requirement test based on his past history of resigning when

he did not think he could pass the test and the fact that the last two times he had taken and passed the test he had passed the run by the very small margins of two and five seconds.

Mullen's claim that he resigned because he felt that he was not safe at work is simply not plausible and has not been proven. The idea that he resigned from his position because he did not feel he could pass the physical fitness requirement is a much more plausible explanation for his resignation.

**3. Prior to realizing that Mullen had resigned, the Navy intended to recommend removing Mullen from the Indian Island contract due to the fact that he had abandoned his post.**

Rake testified that he looked into the issue of whether Mullen left his post improperly when going to speak with Commander Pulley on July 8, 2018. Indeed, as Rake testified, one of the General Orders of Sentry set forth in the PWS mandates that security guards cannot leave their posts unless and until they are properly relieved. *See* PWS, Section 2.10 of Security Operations (R-43); Tr., 589. Rake testified that he checked the watch bill for Mullen, Salopek and Lein to determine whether any of them had left their post to speak with the Commanding Officer. Tr., 590. Rake determined that only Mullen had left his post without permission from the shift lieutenant to go speak with the Commanding Officer. *Id.* Rake further testified that he spoke with Mullen's shift lieutenant, Lieutenant Kirkpatrick, who confirmed that she did not give Mullen permission to leave his post to speak with the Commanding Officer on July 8, 2018.<sup>26</sup> *Id.*

After completing his investigation into the issue of whether Mullen had left his post, Rake spoke with Burris and informed her that he was going to make the recommendation in his report that Mullen be removed from the contract due to the fact that he had abandoned his post improperly. Tr., 592. Burris stated that she was fine with his making this recommendation. *Id.*

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<sup>26</sup> Rake noted that he was unable to speak with Mullen to determine his version of events because the three times Rake drove to Indian Island to speak with Mullen, Mullen had called out of work sick. Tr., 591.

However, Rake did not make this recommendation in his report because, by the time he wrote his report, he was informed that Mullen had resigned from Xcel.

Notably, Mullen admitted that he left his post, which was South Patrol, on July 8, 2018, when he went to speak with the Commanding Officer, and that he did not inform his shift lieutenant that he would be leaving his post. Tr., 515. Mullen claimed that he did not see a need to notify her because the Commanding Officer's office was in his patrol area. Tr., 515-16. However, Mullen then admitted that during his meeting with the Commanding Officer, which lasted twenty to thirty minutes, no one else from Xcel was patrolling the South Patrol. Tr., 516.

There is no dispute that Mullen left his post for twenty to thirty minutes without ever obtaining permission from—or even notifying—his shift lieutenant when he spoke with the Commanding Officer on July 8, 2018. As a result, Rake was going to recommend that Mullen be removed from the contract, until he was informed that Mullen had already resigned, thereby making the recommendation moot.

**B. Xcel Did Not Violate the Act when it Terminated Mark Salopek on October 27, 2018**

The General Counsel claims that Xcel violated § 8(a)(1) of the Act when it terminated Salopek's employment on October 27, 2018. Complaint, ¶¶ 7(c), 10.

**1. Legal Standard**

**a. 8(a)(1)**

The standard for determining whether Section 8(a)(1) of the Act has been violated is clear:

Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. . . . The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities.

*A.E. Frasz, Inc. & Int'l Union of Operating Engineers, Local 150, Afl-Cio*, 2013 WL 2353781 (May 28, 2013). A *Wright Line* analysis is also applied to this claim. *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984) (“In *Wright Line* the Board articulated a formula for determining causation in all cases alleging a violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation where an employer has both permissible and impermissible reasons under the Act for its action.” ). Under the *Wright Line* analysis, the General Counsel has to “make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Id.* (internal quotation marks omitted).

## **2. Argument**

The General Counsel claims that Xcel terminated Salopek’s employment due to the fact that he raised concerns regarding weapons qualifications of his fellow security guards. This claim must fail, as there is no proof that Xcel interfered with, restrained or coerced Salopek in the exercise of his Section 7 rights.

On July 8, 2018, Salopek, along with Mullen, Lein and Schryver, met with Commander Pulley and informed him that they were going to report a safety concern to the IG. Tr., 160-61. They eventually told him that their concern involved alternate site ranges, the alteration of targets and falsified training records. *Id.*, 162. Subsequently, Mullen sent an e-mail, as directed by Commander Pulley, to ISO Jones regarding their concerns. R-1. As a result, Rake and Manson conducted a thorough investigation into these complaints. J-10. At the conclusion of their report, Rake and Manson recommended to Xcel that Salopek be removed from the contract. J-10 – Bates Number XCEL 01674.

**a. Xcel terminated Salopek based on Rake's strong and unequivocal recommendation.**

First, the General Counsel's claim fails because the testimony and evidence demonstrate that Xcel terminated Salopek based on Rake's strong recommendation to remove him immediately from the contract. Rake testified at length regarding why he made the recommendation to remove Salopek from the contract. First, Rake recommend Salopek's removal from the contract based on his dishonesty with respect to the complaints he raised. Rake was able to confirm as true only the Coler-related allegations made by Salopek regarding the fact that Coler was issued weapons for which she had not qualified. J-10 – Bates Numbers 01668-01669. As to the other allegations, Rake was unable to substantiate them. In fact, he found many of them to be patently false. Notably, Schryver—who was a named complainant in the July 9, 2018 e-mail—denied all of the allegations, even those attributed to him. Tr., 584-86. Likewise, the allegations about three senior officers failing on the range on May 9, 2018 was also completely wrong. Salopek alleged he simply got the date wrong, but his underlying allegations were also wrong as per training records and witness testimony.

Rake and Manson spent hundreds of hours investigating these complaints, including reviewing training records for all Xcel employees and interviewing all Xcel employees named in Mullen's complaint and/or who were referenced in the interviews of the other employees. Tr., 538-59; 541. Thus, despite a thorough and time-consuming investigation, Rake was unable to confirm almost all of Salopek's allegations. Indeed, as Rake pointed out, Salopek "provided a common theme about third party comments without being able to provide a single document behind the allegations." J-10, Bates Number XCEL 01674. In other words, Salopek presented merely hearsay allegations without any proof to substantiate them, thereby wasting the government's time in investigating these baseless allegations.

In addition, Rake made the recommendation to remove Salopek from the contract based on his conduct and demeanor during the investigation. Salopek made numerous troubling comments. For instance, he told Rake and Manson that he felt female officers were “problems” as security officers because they receive special treatment from the company. Tr., 611-12. He also cited numerous alleged instances of female officers receiving special treatment to support his theory. J-10, XCEL 01673. His blatant dislike of and/or disrespect for female security guards was incredibly disturbing to Rake.

Salopek also displayed incredible arrogance while being interviewed with Rake and Manson. For instance, he claimed that, while he was a police officer, he was so well-respected that, when he testified in court, the judge informed the attorneys that Salopek was an expert witness and that everything he said should be taken as the truth. Tr., 622. Rake felt that Salopek’s unchecked arrogance was, in itself, a safety concern. *Id.*

Further, Rake was troubled by the fact that Salopek brought up two prior issues with Xcel, as he felt this was evidence that Salopek was trying to “get back at the company” for repercussions from prior incidents. J-10 – Bates Number XCEL 01673. For instance, during an IG investigation 2015, Salopek was unable to properly describe the escalation of force continuum for a waterborne threat. *Id.* He raised this issue with Rake—who prior to that conversation with Salopek was unaware of it—and stated that he IG took his comments out of context and said that it was “no big deal.” Tr., 610. Rake subsequently obtained documentation on this issue and discovered that Salopek had stated that he would “shoot first and ask questions later” without following the rules of engagement. Tr., 619. Rake found this comment scary for obvious reasons. *Id.*

In addition, Salopek raised the RFI issue without being asked about it, and Salopek “treated it like it was nothing.” Tr., 618. Not only did Salopek raise this incident that had absolutely no

bearing on the investigation at hand, but he also attempted to minimize it. Rake completely disagreed with his characterization of this incident as not being a big deal, as he actually recommended terminating Salopek because of the RFI incident. Indeed, the contracting officer had approved Salopek's removal from the contract based on this incident, and Rake informed Xcel of this decision. However, Terry advocated for Salopek being able to remain an employee but be demoted instead. Tr., 554. Salopek's dwelling on these prior incidents served to make Rake think he had a personal vendetta against Xcel and that he had filed these baseless complaints as revenge.

Finally, Rake recommended removal of Salopek from the contract based on his disregard for the safety of his colleagues. Indeed, Rake noted that Salopek described incidents when he had observed Coler and Cunningham improperly handling their weapons, claiming he saw Coler pointing a rifle at her leg and Cunningham handling the shotgun in a way that he might have "blown his head off." Tr., 619-20. However, Salopek failed to address these incidents at the time, despite a duty to do so as the safety officer. Rake asked Salopek if he was aware of his obligations when he sees a safety violation, and Salopek acknowledged that he was supposed to address the issues but also admitted that he never yelled "cease fire" in light of these alleged safety incidents. *Id.*, 620. The fact that Salopek observed these safety risks yet failed to address them in the moment was also troubling to Rake. *Id.* Indeed, Salopek merely reported them months after the fact, thereby evidencing only a likely desire to criticize and embarrass his colleagues, and not to assist and protect them. *Id.*, 620.

Rake relayed all of this to Filibeck when he met with Filibeck and Burris on October 26, 2018. Up to that point, Filibeck was unaware that any complaint had even been made by Salopek, Mullen and Lein, particularly as he only started with Xcel in September 2018 and assumed CEO duties in mid-October 2018. After hearing all of this, Filibeck asked Rake questions about the

investigation he did to ensure that it was a thorough investigation that led to this conclusion. Tr., 1002. Rake then strongly recommended immediate removal of Salopek from the contract based on the fact that he had been dishonest and the Navy had accordingly lost all confidence in his ability to perform his job. *Id.*

Filibeck admitted that Xcel removed Salopek from the contract without a written directive from the Navy, but he felt Xcel had good reason to do so. First, he felt that the allegations against Salopek were extremely serious and that the Navy had conducted a very thorough investigation into the complaints. Tr., 1003-04. Filibeck also testified that Burris did not disagree when Rake recommended removal of Salopek from the contract, which indicated to him that this was a very serious situation. *Id.*, 1004. Moreover, Filibeck stated that he wanted to keep the customer happy in order to keep the contract. *Id.*

Although Rake had only recommended removing Salopek from the contract, Xcel was not able to offer Salopek another position. First, there was no position in a geographically close location. Second, Filibeck felt that if he was going to behave in this manner at Indian Island—i.e., dishonestly, arrogantly and without regard for the safety of his colleagues—he would do so at another location, as well. *See PAE Applied Technologies, LLC*, 367 NLRB No. 105, at \*5 (2016) ("Employers have the right to discipline employees for being rude and discourteous towards a customer. This is especially true in the case of a government contractor that provides security services at military installations. In such circumstances, it is incumbent on employees to show proper respect towards government officers to provide the safety and security of the military installation, as well as to not place their employer at risk of losing its contract.") Finally, Filibeck noted that there was still an issue with Salopek maintaining classified pictures of a Navy boat on

his LinkedIn site, so they would not have wanted to continue to employ him at any rate. Tr., 1005. Thus, Xcel had no logical choice but to terminate Salopek's employment.

Rake made it abundantly clear that he wanted Salopek removed from the contract immediately for the various reasons set forth above. Therefore, although Rake did not issue a written directive<sup>27</sup> requiring Salopek's removal from the contract, Filibeck knew that Rake's request was really a direction that he had to follow in order to keep the customer happy and maintain the contract. Thus, Xcel did not in any way base its termination of Salopek on the fact that he had made a complaint with the Navy.<sup>28</sup>

**b. The General Counsel has shown no connection between Salopek's complaints and his termination—because it cannot.**

The General Counsel has presented no direct evidence to show any type of connection between Salopek having made a complaint with the Navy and Xcel's decision to terminate him. First, it bears emphasis that Salopek raised many issues regarding the terms and conditions of his and his co-workers' employment during his tenure with Xcel. For instance, Salopek testified that he brought concerns directly to Morgan who responded to and remediated his concerns. Tr., 260. Indeed, in 2014, Salopek sent a memorandum to Morgan addressing issues with the officers' boots and uniforms, and the issues were resolved. Tr., 88-89. Also, in 2014, Salopek sent a memorandum to Morgan regarding what he perceived as issues with training, and that issue was also subsequently resolved. Tr., 90, 93. Salopek also raised issues about obtaining ballistic vests for female guards, and those vests were eventually obtained. Tr., 94-95. Also, in 2016, Salopek

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<sup>27</sup> Neither Section 2.7.2.3 in the General Operations section of the PWS nor Section 2.11 of the Security Operations section of the PWS requires a directive concerning the removal of the employee to be in writing. *See* R-43 at 11 and 21.

<sup>28</sup> There can be no claim that the Navy requested Salopek's removal from the contract based on his having made a complaint with the Navy, as well. Indeed, Rake was very clear regarding the reasons he wanted Salopek removed from the contract: his dishonesty in filing false allegations supported only by hearsay; his conduct and demeanor during the investigation, including his incredibly obvious and troubling arrogance; and his complete disregard for the safety of his colleagues.

spoke with Terry regarding the fact that officers were conducting weapons qualifications events at locations other than approved sites. Tr., 107. Terry simply responded that the Navy permitted them to do that. *Id.* Thus, Salopek has a long history of raising issues with Xcel without any repercussions whatsoever. This begs the question why Xcel would suddenly decide to terminate his employment in 2018 based solely on the fact that he had raised a complaint. It simply defies logic to arrive at that conclusion.

Further, in discussing his conversation with Terry after his termination conversation with Filibeck, Salopek made clear that Terry stated to him with respect to why he was being terminated that, “there’s nothing in your file. . . except the vault incident. He said this is all Rake.” Tr., 355. Salopek also confirmed that Terry never told him that he was being fired because either Morgan or Filibeck was upset that he had filed a complaint with the Navy. *Id.*, 359.

In addition, the timing of Salopek’s termination evidences that his termination was related solely to the Navy’s recommendation to remove him immediately from the contract. Salopek first made a complaint with the Navy on July 8, 2018, and Mullen then sent his e-mail on July 9, 2018, which named Salopek as a complainant, as well. Xcel was first informed that Salopek was part of this complaint on July 9, 2018, when Rake forwarded Mullen’s e-mail to him. Salopek admitted that Xcel did not take any disciplinary action against him in July, August or September 2018. Tr., 303. Moreover, he was not terminated until October 27, 2018—more than four months after Xcel first was made aware of his complaint. Four months is simply too attenuated to draw any type of connection. Further, despite being aware that Mullen, Lein and Schryver were named complainants, Xcel did not take any disciplinary action against them either at any point after receiving the e-mail or after speaking with Rake. Tr., 303, 990. All of this evidence militates in

favor of finding that Xcel terminated Salopek solely in response to Rake's request that they remove him from the contract.

The only evidence presented by the General Counsel allegedly showing that Xcel terminated Salopek due to the fact that he had raised a complaint with the Navy is Salopek's self-serving and uncorroborated testimony that Filibeck told him he was being terminated for going outside of the chain of command. Tr., 847. This evidence does not even support the claim, though.

First, Salopek's testimony notably conflicts with several of his written accounts of what occurred during his meeting with Filibeck. For instance, in the confidential affidavit he executed for the General Counsel, he did not state that Filibeck told him he was being terminated for a chain of command violation, only that he was being terminated due to being dishonest and affecting the morale of the workplace. Tr., 351. In addition, Salopek wrote several e-mails to Harger immediately after his termination meeting with Filibeck in order to have a contemporaneous account of what occurred. R-50, R-51. Salopek agreed that neither of those letters referenced that Filibeck had stated that Salopek was being terminated due to a chain of command violation. Notably, after Salopek sent Harger his first version of the document, Harger asked him to add some additional details. R-51. Thus, Salopek revised his statement but did not add any verbiage regarding a chain of command violation. R-51. Finally, in Salopek's three-page summary dated October 28, 2019—one day after his termination meeting with Filibeck—he did not reference any chain of command violation. R-52. Clearly Salopek is re-writing history in now claiming that he was told by Filibeck that he was being terminated for a chain of command violation.

The change of status document for Salopek listing the reasons for his termination states that Salopek was terminated for the following reasons: chain of command violation and dishonesty. J-5 – Bates Number XCEL 01285. Terry testified that he did not write that language

but was instructed to do so. Tr., 948. Filibeck testified that the chain of command violation was included in the document because Salopek should have brought his complaint up through the appropriate *military* chain of command so that it could have been appropriately reported to the government. Tr., 1021. Indeed, Filibeck testified that Salopek should have brought the complaint to the IG, not to the Commanding Officer of the base.<sup>29</sup> *Id.*, 1022. Filibeck further testified that the chain of command violation was not a concern to him from an employee standpoint but it was from a contractual standpoint because “the military is a very rigid structure, and we have to operate inside of its confines because when you don’t what just happened to us is what happens. They will tell somebody something that turned out to be completely unfounded allegations for the most part, there’s a knee jerk reaction to problems.” Tr., 1017. If the employees had brought the complaint to the IG, he could have looked at it and then could have gone to the commanding officer if additional action were required. *Id.*

Although Salopek was never actually told that he was being terminated for a chain of command violation, the change of status form reflects that that was one of the reasons for his termination because of his failure to follow the appropriate *military* chain of command, not because he failed to raise the complaint with Xcel first. Indeed, if he had raised the complaint with the IG first, as he was supposed to do, he would not have committed a chain of command violation.

Simply put, the General Counsel has failed to demonstrate any connection—direct or otherwise—between Salopek’s filing his complaint with the Navy and his eventual termination *over four months later*.

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<sup>29</sup> Clearly recognizing that they were supposed to bring their complaint to the IG first, Salopek testified that they informed Commander Pulley that they wanted to remain anonymous and report the concern only to the IG. Tr., 162.

**c. Xcel had a legitimate, nondiscriminatory motive for its actions.**

As set forth above, Xcel had a legitimate, nondiscriminatory motive for its actions, as it was simply adhering to the Navy's request.<sup>30</sup> During the October 26, 2018 meeting, Rake evidenced an extreme distrust and dislike of Salopek based not only on the fact that he had forced the Navy to waste hundreds of hours investigating a baseless complaint based only on hearsay, but also based on the fact that he displayed a disturbing demeanor during the investigation process that led Rake to recommend his removal from the contract. Filibeck clearly had no choice but to "make the customer happy" and remove Salopek from the contract. Because of the seriousness of the allegations and the fact that Xcel did not have any position available that was geographically close to where Salopek was located, Xcel did not offer him another position.

The General Counsel and the Union are likely to contend that Burris never affirmatively directed Salopek's removal from the contract in accordance with PWS Section 2.7.2.3 ("The Contractor shall remove from the site any individuals whose continued employment is deemed by the KO to be contrary to the public interest, or inconsistent with the best interests of National Security, or not in accordance with the Standard of Conduct located in Attachment J-0401060-04). *See* R-43 at 11. Notably, nothing in the PWS required Burris to provide a directive in writing to Xcel. Further, the Standards of Conduct, Section 2.11, states further that "[t]he KO or his/her representative reserves the right to direct the Contractor to remove an employee from the work site for failure to comply with the standards of conduct." R-43 at 21." That is exactly what Rake did. But even if Rake did not have authority, which he did, Burris' conduct at the meeting confirmed that she agreed with his recommendation. First, she wanted the meeting to discuss performance

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<sup>30</sup> OSHA also dismissed Salopek's complaint of discrimination, finding that Xcel had no discriminatory motive in terminating his employment: "[Y]our protected activity was not the reason for the adverse action alleged. . . . Rather, the evidence demonstrates that Respondent terminated your employment due to integrity issues and inappropriate statements to Navy investigators." R-29.

concerns. Second, she granted Rake's request to share the content of the report with Xcel. Third, she did not disagree with Rake, or overrule him, when he made his recommendation to remove Salopek from the contract for the reasons described above. Indeed, Xcel, through Michael Filibeck, acted reasonably in light of the totality of the situation.

Xcel did not violate 8(a)(1) of the action when it terminated Salopek's employment. The decision was made directly in response to the Navy's request that he be removed from the contract, as is evidenced by a plethora of evidence, including the timing of the decision, Rake's report and Rake's testimony confirming the same. Salopek obviously displayed his arrogance in thinking that he would simply be believed by the Navy, despite the fact that he submitted allegations founded solely on hearsay and failed to submit even a single document in support thereof. His dishonest allegations coupled with his arrogant demeanor did not sit well with Rake who wanted him off the contract. Xcel had no choice but to comply.

**C. Xcel Did Not Violate the Act when it Changed Guard Mount Procedures for One-Shift in January 2019**

The General Counsel claimed that Xcel violated §§ 8(a)(1) and (a)(3) of the Act when General Powless announced that, because someone had complained about arm-up time, no one would be allowed to go home early in response to Lein's complaint about pay for arm-up time. Complaint, ¶¶ 8(a), 8(b) and 11.

**1. Legal Standard**

**a. 8(a)(1)**

The legal standard for evaluating an § 8(a)(1) claim is set forth above and is incorporated by reference herein.

**b. 8(a)(3)**

The Act prohibits “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). The Board has established a causation test for analyzing alleged violations of Sections 8(a)(3) of the Act. *Wright Line Inc.*, 251 NLRB 1083, 1089 (1980). Under the *Wright Line* test, a charging party must initially “make a prima facie showing sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision.” *Id.*

To establish the initial burden under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show activity exists that is protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee in question engaged in such protected activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action.

*River Falls Healthcare, LLC d/b/a Kinnic Health and Rehab and United Food and Commercial Workers, Local 1189*, 2014 WL 3347515. Further, “[i]f the government does not prove all four elements, it has not established a violation and the case must be dismissed.” *In Re Mississippi Action for Progress, Inc.*, 2002 WL 31386007 (NLRB Oct. 18, 2002).

“[I]n the absence of direct evidence [of anti-union animus], animus is not lightly to be inferred.” *CEC Chardon Electrical*, 302 NLRB 106, 107 (1991). Without proof of employer animus, it is irrelevant whether the employer would have taken that action absent protected activity. *See e.g., Upper Great Lakes Pilots, Inc.*, 311 NLRB 131, 136 (1993) (“[b]ecause we find that the evidence does not support a finding of retaliatory motive, we need not decide whether the Respondent established that it would have laid the pilots off and discharged them even if they had not engaged in protected activities”).

If the charging party meets this initial burden, only then does the burden shift to the employer to rebut the prima facie case, by demonstrating a legitimate, nondiscriminatory motive

for its actions. See *Upper Great Lakes Pilots*, 311 NLRB at 136; *Wright Line*, 251 NLRB at 1089. It is not for the Region or the Board to evaluate whether the reasons asserted make sound business sense. An employer need show only it was honestly motivated by legitimate, non-discriminatory business reasons. *Ryder Dist'n Res., Inc.*, 311 NLRB 814, 816-17 (1993) (“[T]he crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change.”), citing *NLRB v. Savoy Laundry*, 327 F.2d 370, 371 (2d Cir. 1964), enforcing in part 137 NLRB 306 (1962); see also, *Liberty Homes, Inc.*, 257 NLRB 1411, 1412 (1981) (explaining the Board should not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated); *Super Tire Stores*, 236 NLRB 877, 877 n.1 (1978) (stating that “Board law does not permit the trier of fact to substitute his own subjective impression of what he would have done were he in the Respondent’s position.”).

Throughout this burden shifting analysis, the ultimate burden remains on the charging party to prove the elements of an unfair labor practice by a preponderance of the evidence. *Wright Line*, 251 NLRB at 1088 n. 11.

## **2. Factual Background**

Lein testified that in December 2018, he worked a four-hour shift and put four and a half hours down on his timesheet, to include the guard mount pay. Tr., 710. Lein subsequently checked his timesheet and saw that someone had changed it to four and a quarter hours. *Id.* Accordingly, Lein spoke to the night shift lieutenant, Lieutenant Brogan Lont, and he asked Lieutenant Lont why he had changed the timesheet. Lieutenant Lont told Lein to talk to Terry if he had a question about it. Tr., 712. The following day, Lein went to speak to Terry about the issue, and Terry told him to put four and a half hours on his timesheet. Tr., 713.

Subsequently, the following month in January 2019, Lein had a four-hour shift that went from 2 a.m. to 6 a.m. He and the other security guard on that shift attempted to arm up at 1:30 a.m., but Lieutenant Lux would not let them arm up until 2:00. Tr., 715. The following day Lein went into work, and the guards were gathered in the lieutenant's office for a de-briefing. Tr., 717. Lieutenant Powless allegedly told the security guards that because someone had complained about the arm-up time, Terry decided that the security guards could no longer go home early. Tr., 718. In other words, after a security guard has completed his shift and has armed-down, there may be an extra five to ten minutes before the end of the 15-minute arm-down period, and they were typically permitted to leave despite the fact that those few minutes remained. *Id.*

Later that day, Lein spoke to Terry and said that he was upset about the fact that Terry had changed the policy on leaving early because his non-supervisory co-workers had been "harassing" him. Tr., 723. Terry responded that Lein's co-workers should be upset with Terry as he had directed the change. Tr., 723. Then, before Lein left that day, Lieutenant Powless told Lein that the security guards no longer had to stay once they had finished the arm-down process. Tr., 724. Therefore, "it was back to normal operations" at that point. Tr., 724.

Mr. Terry testified that, after he changed the policy, he began to re-think his decision, as he did not want the employees to feel as though they were being punished for some reason. Tr., 952. Terry also determined that, after completing the arm-down process, there was really no reason for the security guards to stay at work. Tr., 952. Therefore, *one day later*, he changed the policy back to how it had been—i.e., that guards were able to leave after arming-down, despite the fact that they may have had five to ten minutes left of their shift. Tr., 953.

### **3. Argument**

The General Counsel's claim here must fail. First, the General Counsel failed to show any evidence whatsoever of anti-union animus—because it cannot. In fact, Terry specifically testified

that he changed the policy back to permitting employees to leave prior to the end of their shifts because he did not want them to feel as though they were being punished. Tr., 952. Thus there is no evidence of a motivational link or nexus between Lein’s alleged protected activity in December 2018 and Terry’s decision in January 2019 to change *for a mere twenty-four hours* the policy regarding when the guards could leave after arming down.

More importantly, the General Counsel has failed to show that Lein suffered any adverse employment action, as Terry changed the policy for only twenty-four hours, before permitting the guards to return to leaving after completing the arm-down procedure. Indeed, “[t]o meet its burden of proving that an adverse employment action has taken place, the government must establish by a preponderance of the evidence that the individual's prospects for employment or continued employment have been diminished or that some legally cognizable term or condition of employment has changed for the worse.” *Ne. Iowa Tel. Co. & Teamsters 421, Affiliated with the Int'l Bhd. of Teamsters*, 346 NLRB 465, 476 (2006); *see also Schuff Steel and Derek Dixon, an Individual*, 2018 WL 4489339, n. 28 (NLRB Sept. 18, 2018). The General Counsel failed to meet this burden. Terry testified—and Lein agreed—that Terry changed the policy for a mere twenty-four hours, which affected only one shift. Tr., 743. Further, there was no testimony that the change in policy for the one shift even affected Lein. Finally, Lein testified that, since January 2019, he has not had any issues with arm-up or arm-down time being paid, and Xcel has not implemented any policy or practice whereby it does not allow people to go home early if they complete their guard mount responsibilities. Tr., 743. Thus, the General Counsel cannot possibly prove that Lein suffered any type of adverse employment action based on the fact that Terry changed this policy for *one shift*.<sup>31</sup>

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<sup>31</sup> Moreover, even if Lein or anyone else was affected by the implementation of this policy, any effect was *de minimis* and therefore cannot support a violation of 8(a)(1) or 8(a)(3). *See Dycora Transitional Health – Fresno, LLC*, 2019

Further, there is no evidence to show that the employees were even entitled to be able to go home after completing the arm-down process, if there was still time left at the end of their shifts. Indeed, there is nothing in the CBA or in any other written policy providing for this benefit. Lein also testified that whether the guards were permitted to leave after concluding their arm-down time was within the shift lieutenant's discretion: "When you get relieved from post, by the time you drive back, turn in your weapons, there could be five, seven minutes left on the clock possibly. It's up to the lieutenant – the shift lieutenant to say, hey, I'm going to use these seven minutes and, you know, put you to doing something—doing some kind of work. Or he can say, go ahead and go home. So it's at their discretion." Tr., 719. Further, Salopek testified, depending on the post assignment, the arm-down process may take the full fifteen minutes or it may not. Tr., 267.

Finally, even if the General Counsel could meet the burden of showing a *prima facie* case of retaliation—and it cannot—Terry had a legitimate, nonretaliatory reason for changing the policy, albeit for a mere twenty-four hours. Terry testified that he decided to change the policy because of all of the confusion going on regarding the guard mount pay. Tr., 952. Indeed, some lieutenants believed that the guards were entitled to only .25 hour of guard mount pay if they were working a four-hour shift, as opposed to .5 hour of guard mount pay. Tr., 951. Thus, he wanted to clarify the policy so that everyone was on the same page and to avoid confusion. *Id.*, 952. In no way can his motivation be construed as retaliatory, and there was no evidence offered to show a retaliatory motive at any rate. Not only did the short-lived change in policy not affect Lein, but he also was never subjected to discipline during his employment with Xcel. Tr., 744.

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WL 995648 (NLRB Div. of Judges Feb. 28, 2019) (Calling *de minimis* a 15-minute shift change that affected only eight employees and was in place for a couple of hours and then rescinded after a request from the Union).

Simply put, the General Counsel’s claim of retaliation pursuant to § 8(a)(3) must fail where there is no evidence that Lein suffered any type of adverse employment action, and Terry’s motivation in changing the policy for a mere twenty-four hours was legitimate and nonretaliatory.

**D. Xcel Did Not Violate the Act when Michael Terry Asked Daniel Lein to Bring Pay Issues Directly to Him**

The General Counsel claimed that Xcel violated § 8(a)(1) of the Act when Mr. Terry allegedly asked some Xcel employees why they raised pay issues with the Union and told them that if they had any pay issues they needed to bring those issues to him<sup>32</sup>. Complaint, ¶¶ 6, 10.

**1. Legal Standard**

The legal standard for evaluating an § 8(a)(1) claim is set forth above and is incorporated by reference herein.

**2. Factual Background**

In September 2018, Lein called the Union president, Scott Harger, to ask him about whether he was being paid the proper wage and whether Xcel should have been taking the full amount for union dues out of his paycheck during the “in-hire” or training period. Tr., 696. Harger told Lein that he did not believe Xcel should have taken out the full amount for Union dues, but that if Lein wanted to get compensated he would have to go through the International Union. *Id.*

A couple of days later, Lein was called into Terry’s office. Tr., 697. Lein claims that Terry stated to him that if he had pay issues, he should talk to him (Terry), not the Union. Tr., 698. Terry denied telling Lein that he should only come to him, and not the Union, if he had issues with his pay. Tr., 956. Terry stated that he told Lein—who was a newer employee—that if he had any issues with his pay or his uniform to please let Terry know to see if he could solve the problem.

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<sup>32</sup> The General Counsel presented evidence of Terry allegedly making these comments to only one employee—Daniel Lein. There was no evidence presented that Terry allegedly made these comments to any other employees.

Tr., 956. Terry further stated that other employees had come to him with pay-related issues and that he had addressed them “every time.”<sup>33</sup> For instance, Salopek testified that another Xcel security guard, Emily Coler, had informed him that she had reached out to Terry after being concerned that she was not going to be paid for five hours of shooting practice time, and Terry told her that she would, indeed, be paid for that time. Tr., 262-63. Salopek also testified that security guards could go directly to Terry to address issues regarding being compensated properly. *Id.*, 263. Further, as set forth above, when Lein addressed the issue of receiving guard mount pay on a four-hour shift, Terry told him he would be paid the full .5 hour for guard mount pay on the four-hour shift. Tr., 713.

### **3. Argument**

The General Counsel has failed to show that Terry’s comments to Lein in any way interfered with, restrained or coerced union or protected activities. Indeed, Terry merely asked Lein to bring any issues involving his pay or his uniform or anything else to Terry, as Terry may be able to solve the problem for him as he has for other employees. Tr. 956. Knowing that Lein was a new employee, Terry wanted to make him aware that he was willing to assist Lein with any issues. Indeed, other employees had come to him with pay-related issues many times, and he had addressed those issues for him. *Id.* Terry denied ever telling Lein that he should not bring issues to the Union. *Id.*

To the extent the General Counsel is also claiming that Terry attempted to deal directly with Lein, as opposed to dealing with the Union on this issue, that argument must also fail. Terry’s offer to assist Lein with any pay-related or other issues was simply Terry’s attempt to help Lein.

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<sup>33</sup> It bears noting that the CBA required that the parties “attempt to resolve all disputes arising in connection with this Agreement on an informal basis.” J-16, Article #9. The party making a claim was only able to file a written grievance after attempting to resolve the issue informally first. *Id.*

Lein was obviously very well-aware of how to contact the Union, and even testified that he was familiar with Harger from his prior employment with another company. Tr., 696. Moreover, other than this limited testimony from Lein, there was no other evidence presented to show any attempt by Terry to deal directly with Lein or any other employee. Thus, there is simply not sufficient evidence to show that Terry's statement to Lein, asking him to raise issues with him so he could attempt to resolve them interfered with, restrained or coerced union or protected activities.

**E. Xcel Did Not Violate the Act By Failing to Respond to Multiple Requests for Information Submitted by the Union**

The Complaint alleges that the Union served four different requests for information on Xcel on the following dates: October 30, 2018; January 21, 2019; February 28, 2019; and May 8, 2019. Complaint, ¶¶ (9)(a), (b), (c) and (d). The Complaint further alleges that Xcel “failed and refused” to provide the Union with many of the documents requested. Complaint, ¶¶ 9(f)-9(1).

**1. Legal Standard**

An employer's obligation to provide relevant information necessary to a union's performance of its duties as a collective bargaining representative is well-established. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Section 8(a)(5) provides that it shall be an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” The Board, with Supreme Court approval, has determined that an employer violates Section 8(a)(5) if it refuses to provide the union with information that is relevant to and necessary for the union to properly discharge its statutory obligations to represent the employees in the bargaining unit regarding contract negotiations or contract enforcement. *Id.* However, an employer's refusal to provide requested information is not a per se violation of Section 8(a)(5). As the Supreme Court stated in *Detroit Edison*, “[t]he duty to supply information

under § 8(a)(5) turns upon ‘the circumstances of the particular case’ . . . and much the same may be said for the type of disclosure that will satisfy that duty.” 440 U.S. at 314 (quoting *NLRB v. Truitt Mfg. Co.*, 351 U.S. at 153). Thus, these authorities establish that an employer's failure to provide requested information will violate the Act only if the withholding of the information frustrates collective bargaining or contract administration.

Moreover, “it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow.” *House of Good Samaritan*, 319 NLRB 392, 398 (1995). Moreover,

[i]n determining whether a party has failed to produce information in a timely manner, the Board considers a variety of factors, including the nature of the information sought (including whether the requested information is time sensitive); the difficulty in obtaining it (including the complexity and extent of the requested information); the amount of time the party takes to provide it; the reasons for the delay in providing it; and whether the party contemporaneously communicates these reasons to the requesting party. . . .

*American Medical Response West and United EMS Workers, AFSCME Local 4911*, 2019 WL 4014837 (NLRB Div. of Judges Aug. 23, 2019) (internal quotation marks omitted). It is against this framework that the Board must consider Xcel’s compliance with Section 8(a)(5).

**2. Xcel did not violate the Act in its good faith efforts to respond to the Union’s numerous requests for information.**

The parties stipulated to a plethora of facts regarding the allegations concerning the Union’s requests for information. *See* J-1. For instance, the parties stipulated to the following facts:

- Xcel sent the Union information on the following dates: January 18, 2019; January 21, 2019; January 22, 2019; January 23, 2019; January 24, 2019; and May 14, 2019.

- Xcel provided to the Union the following documents: Mullen’s personnel file (J-4); Salopek’s personnel file (J-5); additional documentation regarding Mullen (J-7); additional documentation regarding Salopek and Mullen (J-8); the U.S. Navy Report (J-10); and Additional information regarding Salopek (J-13).
- On May 16, 2019, Xcel’s counsel sent an e-mail to the Union’s counsel stating that he had sent the Union all of the documents that he had that were responsive to their requests for information. J-14.

Despite these stipulations, Xcel takes issue with the allegations in the Complaint, as it produced responsive documents and/or informed the Union that it had no responsive documents and therefore did not refuse and/or fail to provide documents it did not possess. Because the complaint as written is confusing with respect to what documents it alleges were provided and when they were provided, Xcel presents the below charts as a much more clear representation of the circumstances surrounding the requests for information from the Union and Xcel’s responses thereto.

**October 30, 2018 Request for Information**

	Document	Date Provided per Complaint	Respondent’s Position on when Documents were Provided
1	Grievant’s Personnel File	1/21/2019 (¶ 9(f))	1/21/2019 (Salopek’s Personnel File – J-5)
2	A copy of Rule, procedure, policy or requirement that the Grievant is accused of violating	Not provided (¶ 9(h))	Xcel provided the excerpt from the CBA in 1/21/19 email (Salopek’s personnel file – J-5)
3	Any document signed by the Grievant during the investigation and processing of the case	Not provided (¶ 9(h))	Xcel provided grievance signed by Salopek in 1/21/19 email (Salopek’s personnel file – J-5)

4	Copy of any document given to the Grievant by the Employer relating to this case	Not provided (¶ 9(h))	Xcel notified the Union in writing on May 16, 2018 that it had no responsive documents (J-14).
5	Any written or taped witness statement including copies of any email communications	Not provided (¶ 9(h))	Xcel notified the Union in writing on May 16, 2018 that it had no responsive documents (J-14).
6	The written investigation or other record (including but not limited to video evidence) made by or provided to the Employer relating to this case from any source including but not limited to United States Government employees and or representatives	1/24/2019 (¶ 9(g))	Xcel sent U.S. Navy Report in 1/24/2019 e-mail (J-10). Xcel did not obtain the Navy report until December 2018.
7	Any list of witnesses compiled for this case	Not provided (¶ 9(h))	Xcel notified the Union in writing on May 16, 2018 that it had no responsive documents (J-14).
8	Record of any prior disciplinary warnings or notifications given to the Grievant	1/21/2019 (¶ 9(f))	Xcel sent any responsive documents in 1/21/2019 e-mail (Salopek's personnel file – J-5)
9	Anything else especially relevant in this case, including any communications (copies of emails etc.) between the Company, its managers, employees and or US Government employees, agencies and or contractors	Not provided (¶ 9(h))	Xcel notified the Union in writing on May 16, 2018 that it had no responsive documents (J-14).

**January 21, 2019 Request for Information**

	Document	Date provided per complaint	Date Provided
1	Any and all documents, including witness statements and /or investigatory reports supporting the Employer's stated reason for terminating Mr. Salopek's employment: "chain of command violation and dishonesty"	5/16/2019 (¶ 9(i))	Xcel provided the U.S. Navy report in 1/24/19 e- mail (J-10)
2	Any and all documents, including without limitations, post orders and company	5/16/2019 (¶ 9(i))	

	policies, defining “chain of command violations”		
3	From 2009 to present, any and all documents relating to discipline imposed against employees other than Salopek for alleged dishonesty and/or chain of command violations and/or weapons mishandling allegations, including without limitation an incident in or around 2013 where Cody Owns allegedly handled a shotgun in an unsafe manner	5/16/2019 (¶ 9(i))	

**February 28, 2019 Request for Information**

	Document	Date provided per complaint	Date provided
1	Any and all documents relating to any requests by the Government client to the Employer to remove Salopek from the contract and /or a revocation of his clearance /site access.  **This was included in the complaint as having been in the 1/21/19 RFI when it was not included in the original 1/21/19 RFI. It was included in the 2/28/19 RFI.	Not provided (¶ 9(j))	Xcel provided an email terminating Salopek’s Common Access Card on 5/14/18 (J-13). Xcel had already provided the Navy report on 1/24/19.
2	Whether, at any time prior to Salopek’s discharge in October 2018, the Government client required Xcel to remove Salopek from the contract and /or revoked his clearance or site access	Not provided (¶ 9(k))	Xcel provided an email terminating Salopek’s Common Access Card on 5/14/18 (J-13). Xcel had already provided the Navy report on 1/24/19.

**May 8, 2019 Request for Information**

	Document	Date provided per complaint	Date Provided
1	All documents relating to the Employer's assertion in its attached Amended Answer 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."	Not provided (¶ 9 (l))	Xcel notified the Union in writing on May 16, 2018 that it had no responsive documents (J-14). <sup>34</sup>
2	The date and reason(s) stated by the Navy for the alleged revocation in item no. 1	Not provided (¶ 9 (l))	Xcel notified the Union in writing on May 16, 2018 that it had no responsive documents (J-14).
3	The names of Navy personnel having allegedly revoked Salopek's security clearance	Not provided (¶ 9 (l))	Xcel notified the Union in writing on May 16, 2018 that it had no responsive documents (J-14).
4	Whether, since Salopek's complaints to the Navy in about July 2018, the Employer has changed its procedures for qualifying officers on range, including without limitation whether the Navy permits the Employer to alter targets with black x's to permit officers to more easily "qualify"	Not provided (¶ 9 (l))	Xcel notified the Union in writing on May 16, 2018 that it had no responsive documents (J-14).
5	Whether, from June 2018 to present, the Employer permits its employees to man a rifle post where they lack a valid rifle "range" qualification.	Not provided (¶ 9 (l))	Xcel notified the Union in writing on May 16, 2018 that it had no responsive documents (J-14).
6	Any and all documents from Navy personnel Rake and Manson to the Employer from July 2018 to present regarding range qualifications procedures, including without	Not provided (¶ 9 (l))	Xcel notified the Union in writing on May 16, 2018 that it had no responsive documents (J-14).

<sup>34</sup> Xcel did not have any responsive documents because the Navy did not revoke Salopek's security clearance. Indeed, as Rake testified, "I cannot revoke [Salopek's] security clearance. I can only revoke his CAC card." Tr., 573. Rake further clarified that a CAC card is a common access card that permits individuals to obtain access to the base. *Id.*

	limitations, any documents stating that where an officer lacks a “range qualification” for a given firearm, the officer is not permitted to work posts that require use of the firearm for which the officer lacks the qualification		
7	All documents relating to complaints made in or around March 2019 by Offcs Kitchen and Coler to Commanding Officer Pulley concerning investigations against Lt. Commander McCright regarding his alleged stalking and other misconduct toward former supervisees	Not provided (¶ 9 (l))	Xcel notified the Union in writing on May 16, 2018 that it had no responsive documents (J-14).
8	Whether Kitchen and Coler made the complaints in item no. 9 to the Employer before making them to the Navy	Not provided (¶ 9 (l))	Xcel notified the Union in writing on May 16, 2018 that it had no responsive documents (J-14).
9	Whether Kitchen and /or Coler was disciplined for their complaints in items nos. 7 and 8	Not provided (¶ 9 (l))	Xcel notified the Union in writing on May 16, 2018 that it had no responsive documents (J-14).
10	Supporting documents, in any, for item no. 9	Not provided (¶ 9 (l))	Xcel notified the Union in writing on May 16, 2018 that it had no responsive documents (J-14).

As is evidenced from these charts, Xcel either provided responsive documents, or it simply did not have responsive documents, as represented by Xcel’s counsel in his May 16, 2019 e-mail. It also bears emphasis that the General Counsel did not present any evidence that Xcel failed to furnish documents that it either had within its possession or had the ability to obtain. Indeed, the General Counsel presented the testimony of both Scott Harger, Union President, and Richard Olszewski, counsel for the Union. Neither testified that they were aware that Xcel failed to produce documentation and/or information within its possession and/or within its ability to obtain.

*See* Tr., 821-27; 832-843. Moreover, the General Counsel called Filibeck as Xcel’s custodian of records but failed ever to ask him any questions on this issue, including whether Xcel had additional responsive documents that it failed to produce. Thus, there can be no claim that Xcel withheld requested documents.

Further, Xcel did not unreasonably delay its responses to the requests for information. First, there is no claim that these requests were time-sensitive, and the fact that the requests spanned from October 2018 through May 2019 demonstrates that they were not. Further, the requests were incredibly broad and numerous, rendering them difficult to comply with in an expedited fashion. Moreover, once Xcel’s outside counsel, Jason Bowles, became involved in the matter, he corresponded repeatedly with Union’s counsel to address issues with confidentiality of the production and with the scope of the requests. *See* J-9. Attorney Bowles further contemporaneously informed Union counsel that he was working on producing the requested documents and asked for some additional time due to various scheduling conflicts of his own, as well as due to the fact that the voluminous nature of the requests rendered the information difficult to obtain. *Id.* Attorney Bowles also kept Union counsel apprised of his progress on obtaining documents, as he informed Union counsel on January 31, 2019, that he had produced everything Xcel had found so far, and eventually, on May 16, 2019, told Union counsel that he had sent him everything that Xcel had in response to his requests. J-9; J-14. At no point did Attorney Bowles refuse to produce the requested voluminous documentation. Instead, Attorney Bowles requested some additional time to provide documents, and Union counsel agreed. J-9. It is clear that Xcel made continuing and good faith efforts to respond to the broad and numerous requests for information “as promptly as circumstances allow[ed]”—and the General Counsel did not submit any evidence to the contrary. *House of Good Samaritan, supra*, 319 NLRB at 398.

Finally, it bears emphasis that the General Counsel failed to offer any evidence to show that any inadvertent delay on the part of Xcel to produce the requested documents frustrated collective bargaining or contract administration. Indeed, the Union ultimately withdrew its demand to arbitrate Salopek's termination. Tr., 346. Under these circumstances, the General Counsel's claim that Xcel violated § 8(a)(5) of the Act must fail.

## **VI. CONCLUSION**

For the reasons set forth fully above, Xcel requests that all of the General Counsel's claims be dismissed and that judgment be entered in favor of Xcel.

XCEL PROTECTIVE SERVICE, INC.,

*/s/ Jason R. Stanevich*

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**CERTIFICATION**

This is to certify that a copy of the foregoing document has been delivered, via e-mail,, on this 14th day of January 2020, via e-mail to all counsel and *pro se* parties of record as follows:

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*/s/ Jason R. Stanevich*  
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