

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

In the matter of:	:	
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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 19, 2021

Charging Party

**RESPONDENT’S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE’S DECISION**

Pursuant to Section 102.46(a) of the National Labor Relations Board’s Rules and Regulations, Respondent Xcel Protective Services, Inc. (“Xcel”) respectfully files the following Exceptions to the Administrative Law Judge’s (“ALJ”) decision in this matter (“Decision”) issued on December 7, 2020. The rationale and legal authority supporting Xcel’s Exceptions are set forth in Xcel’s supporting memorandum of law, filed simultaneously herewith.

**I. Xcel Excepts to the Following Findings of Fact and Conclusions of Law**

1. Xcel excepts to the ALJ’s finding that, “there is no evidence that the statements made in the complaints to Cdr. Pulley and ISO Jones were maliciously false.” Decision, p. 46. Xcel excepts to this finding, as it submits that the statements made in the complaints were maliciously false, in that they were made either with knowledge of their falsity, or with reckless disregard as to their truth or falsity.
2. Xcel excepts to the ALJ’s finding that, “the evidence shows that the core issues raised in complaints were, in fact, true.” Decision, p. 46. Xcel excepts to this finding, as it

- submits that most of the issues raised in the complaints were either unsubstantiated or proven false.
3. Xcel excepts to the ALJ's finding that "Respondent has not even shown that the primary allegations in the complaints were false, let alone that they were made with malicious intent." Decision, p. 47. Xcel excepts to this finding because it submits that it has proven that most of the allegations in the complaints were false and/or made with malicious intent.
  4. Xcel excepts to the conclusion that, "the complaints made by Mullen, Salopek, and Lein did not lose the protection of the Act." Decision, p. 47; *see* also Decision, p. 50. Xcel excepts to this conclusion because it submits that, because the statements were maliciously untrue, they lost the protection of the Act.
  5. Xcel excepts to the conclusion that, "[t]he credited evidence shows that Filibeck fired Salopek for violating the chain of command and for dishonesty." Decision, p. 50. Xcel excepts to this conclusion because it submits that Filibeck terminated Salopek for dishonesty in making his complaints, as well as his conduct, demeanor and statements made during the investigation.
  6. Xcel excepts to the finding that, "there is no doubt that Salopek's jumping the chain of command, by joining his coworkers to meet with Cdr. Pulley and complaining to ISO Jones, was a motivating reason for Salopek's discharge." Decision, p. 50. Xcel excepts to this conclusion because it submits that Filibeck terminated Salopek for dishonesty in making his complaints, as well as his conduct, demeanor and statements made during the investigation.

7. Xcel excepts to the following conclusion: “Where a case turns on the alleged misconduct that is part of the res gestae of activity protected by Section 7 of the Act, the proper inquiry is whether the employee lost the Act’s protections in the course of that activity.’ . . . I believe that this is the proper standard through which to analyze Salopek’s discharge.” Decision, p. 50. Xcel excepts to this conclusion because it submits that this case does not turn solely on the complaints made by Salopek. Instead, Xcel submits that Filibeck terminated Salopek for dishonesty in making his complaints, as well as his conduct, demeanor and statements made during the investigation.
8. Xcel excepts to the conclusion that, “[b]ecause neither Salopek, Mullen, nor Lein lost the protection of the Act when they engaged in protected concerted activities, Respondent violated Section 8(a)(1) of the Act when it terminated Salopek for alleged misconduct that was part of the res gestae of his protected concerted activities.” Decision, p. 51. Xcel excepts to this conclusion because (a) it submits that Salopek lost the protection of the Act when he submitted complaints to the Commanding Officer and ISO Jones; and (b) Xcel submits that it did not terminate Salopek solely for misconduct that was part of the res gestae of his protected concerted activities.
9. Xcel excepts to the conclusion that, “[t]he same conclusion is warranted even when applying the burden shifting framework set forth in *Wright Line*.” Decision, p. 51. Xcel excepts to this conclusion because not only did the General Counsel fail to show animus on the part of Filibeck in his termination of Salopek, but Xcel also demonstrated that it would have terminated Salopek even absent his protected, concerted activities.
10. Xcel excepts to the finding that, “[t]he evidence also supports a finding of animus on behalf [of] Respondent generally and Filibeck in particular.” Decision, p. 51. Xcel

excepts to this finding because it submits that the evidence did not support a finding of animus on the part of Xcel and/or Filibeck.

11. Xcel excepts to the finding that, “Filibeck’s testimony clearly showed that he looked upon the actions of the three guards, in taking their complaints to Cdr. Pulley and then to ISO Jones, with disfavor and believed it was done in violation of the chain of command. This is sufficient to establish animus that can be considered in determining the motive for Salopek’s discharge.” Decision, p. 51. Xcel excepts to this finding because it submits that the evidence showed that Filibeck took issue with the three guards violating the *military* chain of command, and, moreover, that was not the reason for Salopek’s termination.
12. Xcel excepts to the finding that, “[f]urther animus is shown by Filibeck’s fictional explanation regarding one of the reasons why Salopek could not be transferred to another Xcel contract. Filibeck testified that one of the reasons Salopek could not be transferred was because Respondent’s next closest contract was 10,080 miles away, with the Army Corps of Engineers on a series of dams on the lower Columbia River.” Decision, p. 52. Xcel excepts to this finding because it submits that Filibeck did not actually state “10,080 miles away,” and that that number was simply either an obvious typo or an error in translation. Thus, Xcel submits that this testimony cannot form the basis for a finding of animus, particularly as Filibeck listed the specific locations where Xcel had other government contracts.
13. Xcel excepts to the finding that, “there were multiple statements by Respondent’s officials that further establish the company’s animus against the fact that the three guards engaged in protected concerted activity by complaining directly to Cdr. Pulley

and ISO Jones including: Powless telling Lein that Respondent was going to fire him for ‘jumping the chain of command’ but since it was his first time he would get a second chance; Morgan saying that Lein was easy to get rid of because he was on probation and that Salopek and Mullen are a cancer; Morgan asking Mullen if he met with Cdr. Pulley and saying that Mullen could possibly face disciplinary action; Terry asking Lein whether he met with Cdr. Pulley, inquiring who accompanied him to the meeting, and saying that Lein made a big mistake and was going to be pulled off post and off the contract; and Morgan telling Lein that he was mad because he broke the chain of command.” Decision, p. 52. Xcel excepts to this finding, as it submits that these statements, which were made by individuals not involved in the decision to terminate Salopek and related, for the most part, to individuals other than Salopek—do not establish that Filibeck’s decision to terminate Salopek was motivated by discriminatory animus.

14. Xcel excepts to the conclusion that the General Counsel “presented a prima facie case that Salopek’s discharge was discriminatorily motivated.” Decision, p. 52. Xcel excepts to this conclusion because it submits that the General Counsel failed to show that Salopek’s discharge was discriminatorily motivated.
15. Xcel excepts to the finding that, “[i]t was clear Filibeck did not want to employ someone who, like Salopek, might violate the chain of command and go directly to the head of a client agency with concerted complaints about working conditions.” Decision, p. 52. Xcel excepts to this finding based on the fact that it submits that this finding is not supported by the evidence.

16. Xcel excepts to the conclusion that, “Respondent cannot rely upon Rake’s recommendation to remove Salopek from the contract to escape liability.” Decision, p. 53. Xcel excepts to this conclusion, as Xcel submits that it can rely on Rake’s recommendation to justify its termination of Salopek.
17. Xcel excepts to the finding that, “it is clear that Rake was motivated by animus against the fact that Mullen, Salopek and Lein complained directly to Cdr. Pulley and Jones, instead of coming first to Rake or Manson, when he recommended that Salopek be removed from the contract.” Decision, p. 53. Xcel excepts to this finding, as it submits that the evidence did not support that Rake was motivated by animus against the three guards.
18. Xcel excepts to the finding that, “[f]urther evidence [of] Rake’s animus is shown by the mischaracterizations in his report, and in his email to his supervisors, which were specifically contradicted by the written statement of the various guards and by the trial evidence.” Decision, p. 54. Xcel excepts to this finding based on the fact that it submits that Rake did not mischaracterize the evidence he gathered during his investigation in completing his report.
19. Xcel excepts to the conclusion that, “[a]ll of this leads me to the inescapable conclusion that Rake harbored animus against the fact that the three guards went directly to Cdr. Pulley and to ISO Jones, and he sought to have both Mullen and Salopek removed from the contract and used as scapegoats to obscure the fact that the Navy’s Contracting Office knew of, and had been condoning for years, Respondent’s practice of using unauthorized ranges and personal weapons for their qualifications.” Decision, p. 55. Xcel excepts to this conclusion because the evidence does not support this finding.

20. Xcel excepts to the finding that, “I credit Terry’s testimony that he received a call from Filibeck on October 26 and that Filibeck said he had just finished meeting with the Navy and that they wanted Salopek “gone” because he was the person responsible for the months-long investigation over weapons qualifications. This shows both Rake’s animus, and the fact that Filibeck knew Rake wanted Salopek ‘gone’ because he was involved in the concerted complaints which resulted in the Navy’s investigation.” Decision, p. 55. Xcel excepts to this finding, as it mischaracterizes Terry’s testimony.
21. Xcel excepts to the conclusion that, “the recommendation that Salopek be removed from the contract was based upon Rake’s animus against his concerted activities, and Filibeck knew this.” Decision, p. 55. Excel excepts to this conclusion, as it submits that the recommendation that Salopek be removed from the contract was not based on Rake’s animus, and the record does not demonstrate that Filibeck was aware of any alleged animus at any rate.

## **II. Conclusion**

For the reasons set forth above and in the supporting brief, Xcel respectfully requests that the Board sustain Xcel’s Exceptions and overturn the Decision.

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 19th day of January 2021, via e-mail to all counsel and *pro se* parties of record as follows:

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