

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

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 19, 2021

Charging Party

**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

Jason R. Stanevich
Maura A. Mastrony
LITTLER MENDELSON, P.C.
One Century Tower
265 Church Street, Suite 300
New Haven, CT 06510

Attorneys for Respondent
Xcel Protective Services, Inc.

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I. INTRODUCTION

Pursuant to Section 102.46(a)(2) of the National Labor Relations Board’s (“Board”) Rules and Regulations, Xcel Protective Services, Inc. (“Xcel”) submits this Brief in Support of its Exceptions to the Administrative Law Judge’s (“ALJ”) Decision (“Decision”) dated December 7, 2020.¹

The Decision addresses the five claims lodged against Xcel in the Complaint issued on July 31, 2019. However, Xcel excepts to the ALJ’s decision with respect to only one of the claims: that Xcel improperly terminated Mark 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 complaints. Moreover, Xcel terminated Salopek 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. Xcel, a government contractor, provided security services to the U.S. Navy at the time. 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

¹ On December 22, 2020, the Board granted Xcel’s request for an extension of time to file Exceptions and a Brief in Support of Exceptions up to and including January 19, 2021.

and to want him off the contract. Indeed, virtually all of the allegations made by Salopek to the U.S. Navy regarding weapons qualifications were not substantiated—and many were found to be 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 government 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 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 reporting his colleagues well after the fact.

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,² 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. This was the first time that Filibeck has met Rake or Burris.

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., Daniel Lein, Stephen Mullen or Jacob Schryver. Indeed, the written complaint was filed by Mullen and not Salopek. 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—an investigation that the ALJ now second guesses to find that it was Rake who harbored animus towards Salopek. 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 his termination that "all of this is coming from Richard Rake."

² 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.

As set forth more fully below, the decision regarding Salopek's termination should be overturned.

II. STATEMENT OF THE CASE

A. Xcel Protective Services and Scope of Work at Indian Island

Xcel, formerly called Basic Contracting Services, Inc. ("BCSI"), is a government contractor that provides armed security services to the federal government. Tr.³, 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.⁴ *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.

³ All references to the transcript for this trial will be referred to as "Tr."

⁴ 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.

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. 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-43⁵, pp. 25-29.

B. Meeting with U.S. Navy Commanding Officer

On July 8, 2018, Salopek, Mullen and Lein 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"). Hearing Transcript ("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 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.

⁵ Exhibits will be referred to as follows: Joint Exhibit ("J"); General Counsel Exhibit ("GC"); and Respondent Exhibit ("R").

C. 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 Schryver⁶ 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.
- 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.

⁶ 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.

- 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 on cross examination, 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 Morgan⁷ 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. But notably, Xcel did not know until trial that Salopek was the primary author of the complaint that Mullen e-mailed to the U.S. Navy.

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

⁷ 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. Tr., 982.

Xcel employees were not qualified on their firearms.⁸ Tr., 878, 885. Subsequently, at 11:33 a.m. 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.⁹

⁸ 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.

⁹ 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

D. 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 Pulley called Rake to tell him that he “was going to pull all of the contract guards [off post]

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.

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, for unrelated reasons according to his testimony, the day before he was next scheduled to meet with Rake. 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 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 he 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 have 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 of 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)¹⁰

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”

¹⁰ It bears noting that the ALJ stated that neither Mullen nor Schroeder were interviewed by Rake. Decision, p. 54. However, it is clear that Mullen resigned the day before his interview, and Schroeder was not interviewed due to the fact that he was on a leave of absence at the time.

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 question 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.”¹¹ 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 ALJ 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.¹² 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 and had no knowledge whatsoever of any pending complaint by Mullen or Salopek, 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?

¹¹ 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 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.

¹² Filibeck testified also that Burris was sitting next to Rake and as "not disagreeing" with him. Tr., 1004.

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.

The meeting took place in Bangor in the contracting officer's office. Rake and Burris attended on behalf of the Navy.¹³ 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.

¹³ This meeting was the first time that Filibeck and Burris had met one another in person. Tr., 995.

Tr., 996-98.¹⁴ 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 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 Filibeck 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. 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-

¹⁴ 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.

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., 557.¹⁵

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.

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.

¹⁵ 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. 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, ALJ 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 ALJ'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.

E. 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 U.S. Navy's Office of Inspector General.¹⁶ Tr., 1018. In addition, prior

¹⁶ The IG conducted an investigation and dismissed the complaint. Tr., 311. This included a review of Rake's report. Also, the IG posted a number of written questions to Rake. 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.* Finally, in response to the IG's question

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.¹⁷ 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?

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.

about whether any guards were issued weapons for which they were not qualified, they noted that Coler had been issued weapons for which she was not qualified.

¹⁷ Salopek testified that Filibeck was the only person who may have mentioned a "chain of command" violation. Tr., 347.

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 referenced 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.

III. PROCEDURAL HISTORY

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.

In the Decision, the ALJ concluded that Xcel committed the following unfair labor practices:

1. Telling employees that they will no longer be allowed to go home early because someone complained about guard mount pay;

2. Discriminating against Salopek because he engaged in protected concerted activities; and

3. Failing and refusing to provide the Union with information it requested and unreasonably delaying providing the Union with the information it requested.

Decision, p. 60.

The ALJ dismissed the remaining allegations regarding the alleged constructive discharge of Mullen and Terry's comment related to raising issues directly with him. *See* Decision, pp. 50, 56, respectively.

IV. QUESTIONS PRESENTED

1. Did the ALJ err as a matter of law in failing to apply the *Wright Line* analysis to the determination of whether Xcel violated the Act in terminating Salopek's employment?

(Exception 7)

2. Did the ALJ err as a matter of law in determining that, under the *Wright Line* analysis, Xcel violated the Act in terminating Salopek's employment? (Exceptions 5, 6, 9, 10, 11,

12, 13, 14, 15, 16, 17, 18, 19, 20 and 21)

3. Did the ALJ err as a matter of law in holding that Salopek's actions did not lose the protection of the Act? (Exceptions 1, 2, 3, 4 and 8)

V. ARGUMENT

A. **The *Wright Line* analysis is the proper standard here for determining whether Xcel violated the Act in terminating Salopek's employment.**

The Decision states that, “[w]here 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.” Decision, p. 50. Even if the Board decides that Salopek’s complaint to the Commanding Officer and ISO Jones constituted protected concerted activity, this case does not “turn on” that conduct, alone. Indeed, Xcel’s reasons for terminating Salopek extended beyond actions related to his complaints. Thus, the *Wright Line* analysis is applicable here.

Rake testified at length regarding why he made the recommendation to remove Salopek from the contract. First, Rake recommend Salopek’s removal from the government 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.¹⁸ In fact, he found many of them to be patently false. 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. While Salopek’s dishonesty in the complaint allegations was part of Rake’s justification for removal of Salopek from the contract, it was not the sole reason.

¹⁸ Likewise, the IG did not substantiate the complaint either. Tr., 311.

Rake also 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. During this 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.

Because Xcel relied on *both* Salopek's allegations in his complaint, which constituted protected concerted activity, as well as his demeanor and comments during the investigation, as justification for his termination, this case does not turn solely on activities protected by Section 7. Thus, the *Wright Line* analysis is applicable here.

B. Under the *Wright Line* test, Xcel did not violate the Act by terminating Salopek's employment.

As the Decision noted, under a *Wright Line* analysis, the General Counsel must prove by a preponderance of the evidence that employee protected activity was a motivating factor for the employer's actions. To support such a showing, the elements of protected activity, knowledge of that activity and animus on the part of the employer are required. Decision, p. 51.

i. The decision to terminate Salopek was not discriminatorily-motivated.

The ALJ first found that Salopek's termination was discriminatorily-motivated based on three main factors. First, the ALJ found that Filibeck "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." Decision, p. 51.

Admittedly, 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.¹⁹ *Id.*, 1022. Filibeck testified further 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” 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.

The ALJ also found that animus was shown by Filibeck’s “fictional explanation regarding one of the reasons Salopek could not be transferred to another Xcel contract.” Decision, p. 52. The ALJ cited to Filibeck’s testimony that Xcel could not transfer Salopek to another contract because the next closest contract was 10,080 miles away. *Id.* Clearly this was either a typo or a translation error. It defies logic to believe that Filibeck claimed that the nearest contract was *10,080 miles away*, as that would mean that Xcel does not have any contracts within the United

¹⁹ 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.

States. Moreover, as the ALJ points out, the dams at which Xcel had contracts were 245 and 330 miles away—clearly geographically too far at any rate, as Filibeck testified. Notably, in addition to mentioning the contract related to the dams, Filibeck also mentioned two other contract locations: Cavalier Air Force Base in North Dakota and U.S. Army Corps of Engineers in Galveston, Texas. Tr., 981.

Finally, the ALJ pointed to the following statements from “Respondent’s officials” as evidence of the company’s animus against the fact that three guards engaged in protected concerted activity by complaining directly to Commander Pulley and ISO Jones: (1) a statement by Powless to Lien; (2) a statement by Morgan about Lein, Salopek and Morgan; (3) a statement by Terry to Lien; and (4) a statement by Morgan to Lien. First, most of these statements concerned Lien, who was not even disciplined for any actions he took in connection with lodging a complaint with the Commanding Officer and the ISO. Second, not one of these statements was made by the individual who made the decision to terminate Salopek’s employment – i.e., Filibeck. All of the alleged statements pre-dated Filibeck’s employment by several months. Thus, alleged animus on the part of Powless, Lien or Morgan—who was not even employed by Xcel at the time that Salopek was terminated—really has no relevance to whether Xcel’s decision to terminate Salopek was motivated by discriminatory animus.

The ALJ’s reasons for finding animus on the part of Xcel simply do not suffice. This means that the General Counsel did not meet its burden of showing that Salopek’s termination was discriminatorily-motivated.

- ii. **Even if the General Counsel did prove discriminatory animus in Xcel’s decision to terminate Salopek’s employment, Xcel has demonstrated that it would have terminated Salopek, even absent his allegedly protected concerted activities.**

The ALJ held that Xcel failed to show that it would have terminated Salopek notwithstanding his protected concerted activities. Decision, p. 52. First, the ALJ held that Xcel cannot rely on Rake’s recommendation to remove Salopek from the contract to escape liability. Decision, p. 53. Citing *Paragon Systems, Inc.*, 362 NLRB 1561 (2015), the ALJ reasoned that, “the recommendation that Salopek be removed from the contract was based upon Rake’s animus against his concerted activities, and Filibeck knew this.”²⁰ *Id.*, p. 55. There is no evidence in the record to support these two assertions.

Paragon, to which the ALJ cites, is distinguishable from the present case. In *Paragon*, the Federal Protective Service was delivering security services to a federal facility that housed the Army Corps of Engineers. The contracting officer’s technical representative, Jennie Dingman, conducted an investigation into conduct by three Protective Security Officers (“PSOs”), Blake, Baker and Holland, as one of the PSOs had delivered a strike notice to the highest ranking federal official at the Army Corps of Engineers at the federal facility. After she completed her investigation, she produced a report recommending that those three PSOs be removed from the contract because they had committed various infractions, including unauthorized access to the federal building and dishonesty. *Id.* at 1562.

²⁰ Notably, the ALJ arrived at a conclusion that was unsupported by any evidence or testimony and constitutes pure speculation. He found 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 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, pp. 54-55. Also, notably, during the trial, the ALJ made the following statement: “Respondent, if you want to argue that the Navy had actual knowledge that . . . the company was using private ranges, and was qualifying people at private ranges, you’re going to have to bring someone from the Navy to testify to that. . . .” Tr., p. 899. Xcel did not have any direct testimony from the Navy regarding this fact. Thus, the ALJ’s ultimate conclusion is puzzling. Moreover, it bears emphasis that the IG did not substantiate the complaints either.

The Board upheld the ALJ's finding that the Respondent violated the Act by suspending and discharging the three PSOs. In its decision, the Board focused on the fact that Respondent was aware of Dingman's animus towards the PSOs for their protected activity. Indeed, the Respondent's assistant contract manager, Victoria Edmiston, was present for the interviews conducted by Dingman and "witnessed Dingman's animus firsthand during the . . . interviews." *Paragon, supra*, 362 NLRB at 1565. Moreover, the Board held that, "Dingman's investigation was aimed at uncovering whether and which PSOs had engaged in protected activity, and her interviews of the three PSOs included interrogations of the PSOs about that protected activity." *Id.*

Moreover, the Board rejected the Respondent's argument that it would have taken the same action in the absence of the PSOs' protected activities. Indeed, the Board held that the Respondent knew that Dingman's recommendation of discipline of PSOs Baker and Holland was based on their lack of candor about their protected activity, "yet it followed her recommendation and unlawfully discharged them." *Paragon, supra*, at 1565-66. Indeed, Dingman asked the PSOs questions about their protected activity, which they were not required to answer, and, as the Board noted, "[a]n employer may not discharge an employee for lying in response to such questions." *Id.* at 1565.

The circumstances in *Paragon* are markedly different than those presented here. Here, there is no support for the finding that Filibeck was aware that Rake allegedly harbored animus towards Salopek, Mullen and Lien based on the fact that they had brought a complaint to the Commanding Officer and ISO Jones.²¹ Indeed, neither Filibeck, nor anyone from Respondent,

²¹ The ALJ claimed 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. The ALJ cited to testimony from Terry. Decision, p. 55; TR, p. 945. The ALJ mischaracterizes the testimony, which was as follows:

was present for Rake's interviews of the employees and/or was involved in the writing of the report. Moreover, Filibeck did not receive Rake's report related to his investigation until well after Salopek was terminated. Thus, while Rake reviewed his findings with Filibeck during their meeting in late October 2018, Filibeck did not have access to the full report until *after* Salopek was terminated. Thus, Xcel, unlike Respondent in *Paragon*, is able to rely on Rake's recommendation to remove Salopek from the contract where it was unaware of any alleged animus on the part of Rake.

In addition, even absent any dishonesty Salopek displayed in the allegations he made to the Commanding Officer and ISO Jones, Xcel would have terminated his employment anyway. Rake made the recommendation to remove Salopek from the contract based on his conduct and demeanor *during the investigation*, as well, including his arrogance, his downplaying of his prior disciplinary issues and his apparent lack of concern for the safety of his colleagues. *See* Section VI(A), pp. 32-35, *supra*, incorporated by reference herein.

Q: Okay. Did anybody tell you that Mr. Salopek was going to be terminated?

A: Yes.

Q: Okay. And who told you that?

A: Mr. Filibeck.

Q: And do you recall approximately when it was? Month, time of the month?

A: I think it was on a Friday on October 26th of last year.

Q: Okay. And what did Mr. Filibeck tell you?

A: That he had just got through with a meeting with the Navy and that they had mentioned the person that was responsible for this investigation over the qualified individuals -- or the weapons quals they'd been investigating over the last few months, and they basically wanted him gone.

Clearly, this testimony provides that Filibeck stated that, at the meeting with the Navy they simply mentioned the individual who was responsible for sparking the investigation and that they wanted him gone. Terry did not state that Filibeck said that the Navy said they wanted Salopek gone *because* he was responsible for sparking the investigation.

Case law is clear that Xcel was permitted to terminate Salopek based on his conduct during the investigation. In *Fresenius USA Manufacturing, Inc.*, 362 NLRB 1065 (2015), the Board held that the Respondent met its burden under *Wright Line* of showing that it would have terminated the employee even in the absence of his alleged protected activity.²² In *Fresenius*, the employee made handwritten comments on union flyers and some other employees complained that the comments were inappropriate. The company did an investigation and in the course of doing so, the employee lied about being the author of the statements and then lied again when he unwittingly confessed by trying to conceal his identity as the confessor. The company suspended and discharged the employee for both his handwritten comments and for his dishonesty during the investigation. The Board assumed without deciding that the employee's handwritten statements constituted protected, concerted activity and that they did not lose the protection of the Act and therefore concluded that the General Counsel had met its burden of showing that the protected activity was a motivating factor in the employee's suspension and termination. *Id.* at 1066. However, the Board found that dishonesty was not protected activity and that the company had met its burden of showing that it would have taken the same action even in the absence of the handwritten statements based on the employee's dishonesty during the investigation. *Id.*

The facts here are similar. Salopek's conduct and demeanor during the investigation were part of Xcel's reasoning for terminating his employment. This is considered a proper reason for termination, even if the other part of Xcel's reasoning—i.e., Salopek's dishonesty in making his complaint to the Commanding Officer and ISO Jones—is considered protected concerted activity that did not lose its protection under the Act.

²² Notably, the Board here held that *Wright Line* was the relevant standard, even though the company's decision to terminate the employee was based, in part, on his protected, concerted activities.

Finally, although Rake had only recommended removing Salopek from the contract, Xcel had legitimate business reasons to terminate his employment. Indeed, it 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.²³ 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.") Thus, Xcel really had no choice but to terminate Salopek's employment.

C. Salopek's actions lost the protection of the Act when he made numerous statements with knowledge of their falsity or, at least, with reckless disregard for their truth or falsity.

The ALJ held that the proper inquiry here is "whether the employee lost the Act's protections in the course of [his Section 7] activity" because the case turns on the "alleged misconduct that is part of the res geste of activity protected by Section 7." Decision, p. 50. Even if this is the proper standard to apply to Salopek's termination—and Xcel disputes that it is—Xcel submits that Salopek's remarks lost the protection of the Act.

The ALJ found that the complaints made by Mullen, Salopek and Lein were protected

²³ The ALJ interpreted Filibeck's comment that he did not want to transfer Salopek because "if this guy is going to do this kind of activity here, he's going to do it there" to mean that 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. The ALJ's interpretation here is not supported by any evidence or testimony and is simply an assumption. It is not a credibility determination.

concerted activity. Decision, p. 45. However, as the Decision notes, “[o]therwise protected communications with third parties may be so disloyal, reckless, or maliciously untrue [as] to lose the Act's protection.” *Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250, 1252 (2007) (internal quotation marks omitted.). Further, statements are not protected by the Act “if they are maliciously untrue, i.e., if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity.” *Id.* The ALJ improperly found that the complaints made by Salopek, Mullen and Lein did not lose the protection of the Act because, “the evidence shows that the core issues raised in complaints were, in fact, true.” Decision, p. 46. This finding does not comport with the evidence.

First, the ALJ points to the alleged fact that, “[b]oth Coler and Lein failed their initial weapon qualifications in early May and were told they would have the chance to shoot again at a gravel pit to qualify. Decision, p. 46. However, Rake’s report does not bear that out:

Issue 10: Officer Lein, a retired Navy Chief, has been working Government Contract Security for the last 10 years. Said that he was told by Lt. Powless that he and Officer Emily Coler were going to be taken to a gravel pit to be qualified with the M4 Rifle. He told me he asked if he was going to be paid for it, and Lt. Powless said “no.” Lein said that he was extremely uncomfortable with this plan and was not going to go. Officer Lein qualified at the next properly scheduled range.

Finding 10: In the interview with Officer Lein he stated he was never told that it was going to be a qualification shoot but remedial training to allow more time with a rifle. He stated since he wasn’t going to be paid he would take his chances at the range the next time. Officer Coler also stated she was never told that going to the “gravel pit” was to qualify but for remedial training to allow her to qualify.

R-2, p. 5. Thus, Rake found this allegation to be unsubstantiated and hence false based on statements from Lein and Coler.²⁴

²⁴ The ALJ criticizes Rake based on the fact that his report regarding this finding contradicts written statements from Lien and Coler. Decision, p. 54. However, Rake’s report states that, “*in the interview* with Officer Lein” and “Officer Coler *also stated.*” Thus, Rake’s report was based on *in-person witness interviews*, which he apparently (and understandably) deemed more reliable and credible than written statements.

In addition, the Decision states that, “the evidence shows that at least one weapons qualification Form 3591.1 contained false information. The Form 3591.1 signed by Powless for the July 7, 2017 qualification states that it occurred at the Bangor range. However, the qualification shoot actually occurred in Schroder’s backyard.” Decision, p. 46. Notably, Rake’s report found this allegation to be false, as well:

Issue 1: Myself and three other officers, Mark Salopek, Dan Lein and Jakd Schriver are coming forward with a safety issue concerning weapons qualifications. This is in regards to a gravel pit to qualify. *This has happened on several occasions.*

Finding 1: All 3591.1 qualifications forms were reviewed for authenticity that the actual qualifications shooting was conducted at the Bangor or a the alternate range at Port Townsend when government notifications to the contractor that the Bangor rang was not available as designated in the contract. Specific long term dates the range at Bangor was not available: 3 Nov 2016 – 23 Jan 2017 (ventilation issues) and 1 Aug 2017 – 30 Sep 2017 (unburned explosive power residue). During the ten interviews of contract personnel including Officer Salopek/Lein on the email complaint, no one but the training officer and contract manager were aware of those dates (proper personnel to know so scheduling could be conducted). When Officer Salopek was asked employee since 5/23/2013 if he was aware of dates when the Bangor SATC was down he was not aware of any of the dates. Officer Dan Lein employee since 4/18/2018 was not around during those times. No officer has come forth with any documentation to show any falsifying of the actual qualifications of the 3591.1 form (small arms qualification record) did not occur at the proper range (he said, she said, I heard no names), no one could produce any documents to prove the accusations. Contractor did hold remedial training to allow personnel extra training to pass qualifications at the range; this is in no way violated any contract language or instructions.

R-2, pp. 1-2. (Emphasis added.)

Notably, Rake concluded in his report that no 3591.1 forms were falsified. Xcel acknowledges, however, that a 3591.1 form was produced at trial, showing that a qualification for several officers happened at an off-site range, as opposed to one of the Navy-approved ranges, on July 7, 2017²⁵. See R-42. Nevertheless, this was the *sole* incorrect 3591.1 form that was

²⁵ The ALJ correctly notes that Rake stated that the Bangor Range was closed on July 7, 2017 in his report on page 9, he also did not include July 7, 2017 as a date on which Bangor was closed on page 1 of his report, cited above.

discovered. Thus, Salopek's claim that Xcel permitted officers to qualify at gravel pit ranges "on several occasions" is simply not true. Nor did Salopek have any evidence—documentary or otherwise—to support this assertion.

Finally, the Decision notes that Salopek accurately reported that targets were being altered during qualifications. Decision, p. 46. Rake's report made it clear that altering targets is not prohibited. R-2, p. 4. Moreover, Rake reported that Salopek had not actually read the instructions pertaining to the altering of targets, rendering his report of the issue reckless at best. *Id.*

More importantly, the Decision does not address the numerous allegations lodged by Salopek, Mullen and Lein that were found to be unsubstantiated and/or simply untrue. As noted above, there were several allegations related to Schryver that Schryver flat-out denied, including allegations that he had qualified Cunningham at a gravel pit range and that he had been asked by Lt. Powless to qualify other officers at a gravel pit range. *See* Section II(C)(2), *supra*, pp. 10-11, incorporated by reference herein.

In addition, Rake's report and investigation refuted several more allegations.

Issue 6: On 5/9/2018, I attended range, at this range we had 13 people on the range. During this range three senior officers (in seniority) could not pass their rifle qualification. Those officers were officers Lauritzen, Cunningham, and David. Officer Cunningham could not pass his shotgun either. Officer Cunningham's ability to effectively handle, and manipulate the two weapons came into question by me and a few others at the range especially when unslinging his weapons.

Finding 6: On 9 May 2018 only 11 people shot, Lauritzen, Cunningham and David were not shooting on the range on this date; Lauritzen was Post 2 (Main Gate), Cunningham was Post 1 (Reaction Force) and David was on a regular scheduled day off. Actual dates all three shot on the range was 21 February 2018; Officers Lauritzen and David qualified on 21 Feb but Cunningham did not pass all qualifications and shot again to pass his qualifications on 9 March 2018. On 9 May 2018 the SATC Range RSO Armstrong, Line coaches, Officer Schryver, Lux, LT Powless stated that Lauritzen, Cunningham and David were not on the range to shoot this day. On 21 February 2018 RSO Armstrong, Line coaches Officer Schryver, Lux, Powless did not notice any problems or issues with Cunningham's ability to effectively handle, and manipulate the two weapons. Officer Schryver

stated as the line coach for Cunningham if any safety issues would have arisen he would have called out to stop the shoot.

R-2, pp. 3-4. Even after realizing that the date provided by Salopek, Mullen and Lein was incorrect, Rake proceeded to verify that Lauritzen, Cunningham and David had qualified—which they did. Indeed, Salopek alleged he simply got the date wrong, but his underlying allegations were also wrong as per training records and witness testimony. Also, Rake was not able to substantiate the claim that Cunningham was unable to effectively handle and manipulate the two weapons.

Issue 8: Officer Coler struggled horribly with how to handle both the rifle and the shotgun, Officer Salopek said that she should be taken off the range because of unsafe handling with the shotgun. Officer Coler failed her M4 Rifle and shotgun qualification and by a large margin with the shotgun.

Finding 8: Interviewed line coach for Officer Coler on the day of the shoot 9 May 2018 and Officer Schryver stated he did not see any unsafe handling conditions with the shotgun or rifle nor did anyone bring to his attention any such issue. He would have stopped the shoot if any unsafe handling with the shotgun presented themselves as a safety issue. Not sure the point of the last sentence “Officer Coler failed her M4 Rifle and shotgun qualification and by a large margin with the shotgun.” Personnel do not pass qualifications all the time and that is why they are allowed by the instruction to retake the course again to qualify.

R-2, p. 4. Again, Rake’s investigation refuted Salopek, Mullen and Lein’s comments, which were designed to criticize and disparage their colleague.

Issue 12: We feel this practice is unsafe, against Navy policy, and illegal, by falsifying federal documents. Mr. Morgan the CEO of Xcel has been given a detailed memo of these practices. Now it seems that they are trying to cover this up. We cannot continue to let this go on without reporting it to you. This is an abridged version of what is going on.

Finding 12: 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.”

R-2, p. 6. Again, while the evidence at trial revealed *one* 3591.1 form that incorrectly reflected a

qualification shoot had occurred at Bangor, which had actually not occurred there, that was only *one instance* of incorrect documentation related to weapons qualifications. This is a far cry from the hyperbolic allegation that Xcel was “falsifying federal documents.”

Finally, Salopek, Mullen and Lein made several complaints about Officer Coler’s having been issued a weapon for which she was not qualified, which were not true. R-2, pp. 6-7.

Simply put, the allegations lodged by Salopek, Mullen and Lein were, on a whole, not substantiated. Nevertheless, the statements do not lose the protection of the Act if they are not true; they must be maliciously untrue, meaning they were made with knowledge of their falsity or with reckless disregard for their truth or falsity. *Valley Hosp. Med. Ctr., Inc., supra*, 351 NLRB at 1252. Salopek, in conjunction with Mullen and Lein, made many of these statements with at least reckless disregard for their truth or falsity. Indeed, Salopek was apparently aware of only *one* instance of a qualification outside of a Navy-approved range and yet stated that Xcel was “falsifying federal documents” and that qualifications at a gravel pit range had occurred “on several occasions.” R. 2. Further, the many statements and observations they attributed to Schryver were made, at least, with reckless disregard for their truth or falsity, given that Schryver flat-out denied those statements. Finally, even their statements related to the alteration of targets were made with reckless disregard for their truth or falsity, given that Salopek admitted that he had not read the rules related to the alteration of targets.

Because of the seriousness of Salopek, Mullen and Lein’s allegations, upon receiving their complaint, the Commanding Officer called Rake to tell him that he was going to pull *all of the contract guards* off post until an investigation proved that they had met the qualification requirements. TR., pp. 535-36, 563. Clearly, the exaggerated allegations about falsification of documents and several occurrences of improper qualifications led the Navy to believe that there

was a serious issue with falsified weapons qualifications among the Xcel guards, which was simply not the case.

Moreover, after completing the investigation, Rake concluded that Salopek “had a hidden agenda of his own,” in that he seemed to be “trying to get back at the company for some [prior] incidents that occurred with him,” namely his prior discipline and demotion. R-2, pp. 11. 10. This finding is directly relevant to Salopek’s intent in raising the predominantly false claims.

Contrary to the ALJ’s findings, the “core issues” in the complaint lodged by Salopek, Mullen and Lein were *not* true. As evidenced above, most of the issues raised were false and/or not substantiated. Further, Salopek’s exaggeration of the issues without any proof, repeating of statements allegedly made by Schryver that were wholly untrue and alleging issues with alteration of targets without even reading the relevant rules on the topic—coupled with his demonstrated agenda to “get back at the company”—clearly show that Salopek’s allegations were maliciously untrue. Indeed, they were made with knowledge of their falsity and/or with reckless disregard for their truth or falsity. Under these circumstances, Salopek’s comments lose the protection of the Act.

VI. CONCLUSION

For the reasons set forth fully above, Xcel requests that the Board overturn the ALJ’s decision regarding the fact that Xcel violated the Act in terminating Salopek’s employment.

XCEL PROTECTIVE SERVICE, INC.,

/s/ Jason R. Stanevich

Jason R. Stanevich

Maura A. Mastrony

LITTLER MENDELSON, P.C.

One Century Tower

265 Church Street; Suite 300

New Haven, CT 06510

Telephone: 203.974.8700

Facsimile: 203.974.8799

jstanevich@littler.com

mmastrony@littler.com

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:

Richard M. Olszewski, Esq.
Krakow, Souris & Landry, LLC
rich@unionlaw.net

Attorney Carolyn McConnell
Field Attorney, National Labor Relations Board, Region 19
Carolyn.McConnell@nlrb.gov

/s/ Jason R. Stanevich _____
Jason R. Stanevich