Akal Security, Inc. *and* United Government Security Officers of America, Local 118. Cases 19–CA–30891, 19–CA–30892, and 19–CA–30950

April 30, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On September 23, 2008, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.[1]

The National Labor Relations Board[2] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) by discharging employees Lee Ryan and Stephen Winther for engaging in protected concerted activity by holding a meeting while on duty to discuss their concerns about the performance of another employee, Bill Lopez. Applying *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), the judge found that the Respondent had a good-faith belief that Ryan and Winther engaged in misconduct by harassing and intimidating Lopez during the meeting, but that the General Counsel proved that the misconduct did not occur.

Even assuming the judge is correct as to the alleged harassment and intimidation, we find that the Respondent had a good-faith belief that Ryan and Winther engaged in other misconduct by neglecting their duties and the Respondent's security procedures during the meeting. The General Counsel failed to prove that this alleged misconduct did not occur. We therefore dismiss the allegation that the Respondent violated Section 8(a)(1) by discharging Ryan and Winther.

I. FACTS

A. General Background

The Respondent contracts with the United States Marshals Service (USMS) to provide security services at Federal courthouses throughout the Ninth Circuit, including in Coeur D'Alene, Idaho. The Respondent employed Ryan and Winther as court security officers (CSOs) at the Coeur D'Alene courthouse. The Union represents the Coeur D'Alene CSOs. CSOs cannot work in the courthouse without credentials, which are issued by the USMS.

Denny Scieszinski, the Respondent's lead CSO at the courthouse, supervises the CSOs. The Respondent employs a site supervisor, George Mathews, who is Scieszinski's superior. Mathews' office is 400 miles away in Boise. He visits the Coeur D'Alene courthouse once a month.

During their shifts, the CSOs are assigned to various "posts" in the courthouse. Post 1 is located at the front entrance and comprises an x-ray machine, a magnetometer, and a small "control room" housing cameras, the x-ray monitor, and a telephone. Post 2 is on the second floor of the courthouse. Posts 3 and 5 are "roving" posts; CSOs assigned to those posts walk around inside the courthouse to check for security risks.[3] Multiple CSOs are assigned to post 1 at any given time. Each post assignment lasts a certain number of hours. A CSO is not assigned to the same post for an entire shift.

B. CSOs' Concerns About Lopez

In July 2005, the Respondent hired Bill Lopez as a CSO. Over the next 18 months, Winther and Ryan became concerned that Lopez had trouble performing his duties and jeopardized other CSOs' safety. In their view, Lopez let courthouse visitors get close enough to seize his weapon, failed to attend carefully to the X-ray ma-

[1] The Respondent excepts to the judge's findings that Lead Court Security Officer Denny Scieszinski is a supervisor and agent within the meaning of Sec. 2(11) and (13) of the Act. The Respondent, however, presented no argument in support of those exceptions. Therefore, in accordance with Sec. 102.46(b)(2) of the Board's Rules and Regulations, we disregard those exceptions. *GFC Crane Consultants, Inc.*, 352 NLRB 1236, 1236 fn. 3 (2008); *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

Other than the exceptions to Scieszinski's status as a supervisor and agent, discussed above, there are no exceptions to the judge's findings that the Respondent, through Scieszinski, violated Sec. 8(a)(1) by threatening employees with discharge if they spoke to the Board and by directing employees not to speak to anyone regarding employees' discharges.

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

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] There is no post 4.

chine and magnetometer, was easily diverted, failed to recognize court officials, and sometimes appeared to sleep at his post. Winther and Ryan repeatedly reported their concerns to Scieszinski and discussed them with fellow CSOs Curtis Exley and Dan Schierman, who shared many of them. According to Winther and Ryan, Scieszinski told them not to burden Mathews with the problem.

In or about early February 2007, Winther and Ryan continued to complain about Lopez. In response, Lead CSO Scieszinski told them separately that he had talked to Lopez twice already and that "you guys" need to "talk to" Lopez and to start formally documenting any incidents, on forms known as "210" reports. Scieszinski did not specify when they should talk to Lopez and did not give permission for them to convene a meeting with the other CSOs on working time.

C. The CSOs' February 7 Meeting With Lopez

The courthouse opens for business at 8 a.m. On the morning of February 7, sometime after 7:30 a.m., Winther and Ryan arranged a meeting for the purpose of confronting Lopez. They did not seek Scieszinski's permission or notify him in advance. When Lopez arrived at work, Winther asked him to join the other CSOs at post 1. Starting between 8:15 and 8:30 a.m., Winther, Ryan, and Schierman met with Lopez in the control room for about 30 minutes. Winther, Ryan, and Schierman voiced their concerns to Lopez about his performance and told him that they wanted to help him improve. Exley joined the meeting when he came on duty, about 3 to 5 minutes before the meeting ended. At the time of the meeting, Ryan, Exley, and Schierman were assigned to post 1, Lopez to post 2, and Winther to post 3.

In late March and early April, perceiving no sustained improvement in Lopez' performance, the CSOs submitted 210s to Scieszinski describing the February meeting and their concerns about Lopez. Scieszinski forwarded the 210s to Site Supervisor Mathews.

D. Site Supervisor Mathews' Investigation

The Respondent's contract with the USMS sets forth "performance standards" with which the CSOs are required to comply.[4] Mathews testified that the contract requires the Respondent to report all potential violations of performance standards to the USMS.

On April 19, Mathews visited the courthouse and separately interviewed Ryan, Winther, Schierman, Exley, and Lopez about the February 7 meeting. Mathews told Winther that it was not the CSOs' job to evaluate Lopez' performance, and that he was disappointed that they had held the meeting. Mathews told Ryan that Ryan had violated "procedural and conduct standards."

Mathews then "briefed" the USMS on the situation. The content of the briefing is unknown, but in a letter to the Respondent dated April 25, the USMS acknowledged that it had received a report of "allegedly inappropriate conduct" that might violate performance standard 17, which prohibits "discriminat[ing] against or sexually harass[ing] members of the public, the judiciary, other employees or engag[ing] in any prohibited activities." The letter asked the Respondent to investigate and report the results.

On April 26, Mathews notified CSOs Ryan, Winther, Schierman, and Exley that he would meet with them on April 30 to discuss alleged violations of performance standards 17, 38 ("Refrain from neglecting duties . . ."), 39 ("Refrain from use of abusive or offensive language . . ."), and 43 ("Follow employer's chain of command procedures on all work related issues"). Mathews notified CSO Lopez that he would meet with him to discuss certain other performance standards.

1. April 30 meetings with the CSOs

On April 30, Mathews met separately with Lopez, Winther, Ryan, Schierman, Exley, and Scieszinski, and obtained a written statement from each of them concerning the February 7 meeting. Lopez' statement claimed that the other CSOs had made him feel "harassed and mistreated" during the meeting. Schierman's statement claimed that Winther and Ryan had been "gruff and threatening in manner" toward Lopez. Winther and Ryan each denied engaging in any intimidating conduct or harassment.

Scieszinski, in his interview with Mathews and in his written statement, denied seeing Lopez violate any performance standards and denied any advance knowledge of the February 7 meeting. Ryan testified that he told Mathews on April 30 that Scieszinski had told the CSOs to "get together with [Lopez] and try to get him on board." Mathews did not believe Ryan.

2. Investigative findings and discipline

On May 2, Mathews submitted an initial investigatory report to the USMS, finding that the meeting "was at least uncomfortable" for Lopez, that it "may have also been threatening," and that Ryan, Winther, and Schierman had created "a hostile work place." The report further found:

> Given that the meeting in question was held at Security Post #1, during operational hours, for a period of 30

[4] The contract itself is not in evidence, but the existence of performance standards is referred to in the collective-bargaining agreement. Many of the standards are quoted in the Respondent's investigative reports, discussed below.

> minutes, I have concluded there was a complete break down [sic] of security during this period of time. The Control room is small, having only one window to observe the front entrance of the facility, cameras and monitoring equipment are positioned in such away [sic] that observation would have been difficult to impossible given the number of officers in such a confined small space, therefore, it is unlikely given the nature of the meeting, that officers were prepared or in position to properly maintain the level of security required. In addition, other required security posts went unmanned, in which the attending CSOs were assigned, during this breach of security.

The report found that Ryan, Winther, and Schierman had violated various performance standards by holding the meeting, including performance standards 17 (prohibiting harassment) and performance standards 30, 31, 32, and 38 (requiring adherence to "security procedures or regulations," prohibiting desertion of posts, prohibiting "neglecting duties," and requiring CSOs to "perform assignments in accordance with prescribed regulations . . . and in accordance with safe and secure working procedures and practices"). The report also found that Ryan, Winther, and Schierman had violated "post orders" requiring that two CSOs be stationed at the courthouse entrance and one in the control room.

On May 7, the Respondent submitted another investigatory report to the USMS, stating its final conclusions and recommending discipline. The May 7 report found that all of the participants in the February 7 meeting except Lopez had violated, inter alia, performance standards 30, 32, and 38. The report concluded that Ryan and Winther (but neither Schierman nor Exley) had also "engaged in harassing and intimidating actions" toward Lopez, thereby violating performance standards 2 and 39, which require CSOs to "maintain a respectful and helpful attitude" and to "refrain from use of abusive or offensive language, quarreling, [or] intimidation . . . ." The report found that Ryan "abandoned his roving post" during the meeting and therefore violated the performance standard prohibiting CSOs from "clos[ing] or desert[ing] any post." The report proposed that Exley be suspended for 1 day, Schierman for 3 days, Winther for 7 days, and Ryan for 10 days.[5]

In a letter dated May 14, the USMS disagreed with the Respondent's proposals and recommended that "a stronger warning be reconsidered." The Respondent declined to change its disciplinary recommendation, except to add a proposal for "retraining" the CSOs on proper performance of their duties.

By letter dated May 16, the USMS concurred in the Respondent's disciplinary recommendations for Exley and Scheirman, but found that Ryan and Winther should be immediately removed from service on the USMS contract. That same day, USMS Deputy Marshals confiscated Ryan's and Winther's credentials.

By letter dated May 17, the Respondent terminated Winther and Ryan. The Respondent suggested that they contact the Respondent if they were interested in working for Akal under a different contract, but noted that there were no such contracts in the Coeur D'Alene area. Winther and Ryan requested reconsideration. The Respondent forwarded their requests to the USMS, which affirmed the removal decision.

II. JUDGE'S DECISION AND EXCEPTIONS

The judge found that the terminations of Ryan and Winther should be analyzed under *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), rather than *Wright Line,*[6] because the terminations were admittedly motivated by the employees' participation in the February 7 meeting, which the judge found was protected concerted activity. Under *Burnup & Sims*, "[Section] 8(a)(1) is violated if it is shown that the discharged employee was at the time

[5] The May 7 report differed from the May 2 report regarding the timing of the meeting. The May 2 report found that the meeting occurred sometime between 8:30 and 9:30 a.m., while the May 7 report found that it occurred between 8:30 and 9 a.m. The two reports also differed as to exactly which performance standards had been violated. For example, the May 2 report found that the alleged harassment of Lopez violated Performance Standard 17 (the no-harassment standard), but the May 7 report found that it violated Performance Standards 2 and 39 (quoted above in the text). The May 2 report found that Ryan, Winther, and Schierman had violated Performance Standard 31 (prohibiting the desertion of any post), but the May 7 report found that only Ryan had done so. Nevertheless, the May 2 and May 7 reports are consistent in finding that Ryan, Winther, and Schierman violated certain other standards, including Performance Standards 30, 32, and 38.

The different findings as to the desertion of posts appear to stem from the timing of the meeting: the May 7 report found that Ryan was assigned to a roving position until 9 a.m., at which time he was assigned to post 1. As stated above, however, the judge found that Ryan was assigned to post 1 at the time of the meeting. There are no exceptions to that finding, and we therefore adopt it. Based on that finding, it was Winther, not Ryan, who arguably "abandoned his roving post." This error in the Respondent's report does not affect our decision, because we find below that the General Counsel failed to prove that Ryan's alleged misconduct in violating other performance standards did not occur.

[6] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Under *Wright Line*, the General Counsel must prove that antiunion animus was a substantial or motivating factor in the employment action. If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of employee union activity. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), affd. 127 F.3d 34 (5th Cir. 1997).

engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct." Id. at 23. It is the Respondent's burden to show that it had an honest belief that the employee engaged in misconduct. The burden then shifts to the General Counsel to prove by a preponderance of the evidence that the employee did not, in fact, engage in that misconduct. *Marshall Engineered Products Co.*, 351 NLRB 767 (2007); *Pepsi-Cola Co.*, 330 NLRB 474, 475 fn. 7 (2000).

The judge found that the February 7 meeting was protected, because its purpose was to address the CSOs' common concern that Lopez' performance posed a safety risk to them. Reasoning that the alleged harassment of Lopez was the "dominant basis" for the discipline, the judge found it unnecessary to decide whether Ryan and Winther lost the Act's protection by abandoning their assigned posts or neglecting their duties. In any event, she found it "unclear" whether such misconduct had occurred. She noted that that Scieszinski sometimes conducted meetings with the CSOs at post 1 and that there was no evidence that CSOs were not permitted to interact with one another while on duty.

With respect to the alleged harassment, the judge found that it did not occur. She concluded that the terminations were based on a good-faith but mistaken belief that Ryan and Winther had engaged in misconduct in the course of their protected activity, and that the terminations therefore violated Section 8(a)(1).

The Respondent excepts. It argues, inter alia, that the judge's application of *Burnup & Sims* deprived the Respondent of due process and that Ryan and Winther lost the protection of the Act by directing the other CSOs to leave their assigned posts, resulting in a security breach.

III. DISCUSSION

For the reasons stated below, we reject the Respondent's due process argument, but we disagree with the judge's finding that the discharges were unlawful.

A. The Respondent's Due Process Argument

The Respondent contends that the judge's application of *Burnup & Sims* deprived the Respondent of due process, because the General Counsel litigated the case as a *Wright Line* violation and failed to contend that the Respondent's investigative report, a stipulated exhibit, was mistaken.[7] We disagree. The Respondent referred to *Burnup & Sims* in its opening statement, contending that *Wright Line* was the appropriate standard but that *Burnup & Sims* would also require dismissal of the complaint. In its posthearing brief, the Respondent again argued that the complaint should be dismissed under either standard. Thus, the Respondent clearly anticipated that *Burnup & Sims* could apply and litigated accordingly.

The Respondent erroneously states that the General Counsel never asserted that the investigative report was inaccurate. The parties stipulated that the Respondent's report was authentic and admissible, but not that it was an accurate record of the events or that its conclusions were correct. Although the General Counsel stated that he was not contending that the investigation and report were independent violations, he also stated that he intended to argue that there were "discrepancies" between the Respondent's investigative report and the actual facts, even if the report was not intentionally false.[8]

Accordingly, we find no due process violation in applying *Burnup & Sims*.

B. Application of Burnup & Sims

Applying *Burnup & Sims*, we agree with the judge that the purpose of the February 7 meeting was protected, and we further find that the Respondent was aware of that purpose. CSOs Ryan and Winther informed Site Supervisor Mathews during his investigation that the meeting was intended to discuss performance issues that the CSOs felt affected their safety.[9]

We disagree, however, with the judge's finding that the alleged harassment was the "dominant basis" for the discipline and that it was therefore unnecessary to decide whether Ryan and Winther's alleged neglect of duties during the meeting constituted misconduct that would deprive them of the Act's protection. We find that the Respondent had a good-faith belief that Ryan and Winther engaged in such misconduct, and that this belief was a significant factor in the disciplinary decision.

Site Supervisor Mathews believed, based on the statements he obtained from Scieszinski and the CSOs, that Ryan and Winther had created a security risk by convening a meeting of the CSOs in the control room during

[7] The General Counsel does not except to the judge's application of *Burnup & Sims* instead of *Wright Line*.

[8] The cases the Respondent cites are inapposite. In *New York Post*, 353 NLRB No. 30 (2008), the General Counsel's theory was that an employee was discharged for his own union activities. The judge improperly found a violation under a different theory: that the respondent sought to make a scapegoat of the employee for sabotage committed by *other* union supporters. In *Lamar Advertising*, 343 NLRB 261, 265 (2004), the complaint alleged that an employee was terminated for cooperating with the Board's investigation. The Board found that the General Counsel improperly attempted to expand the complaint to allege that the employee was terminated for threatening to retain counsel. Thus, both cases involved a change in the theory of the violation that would have required litigation of a different set of facts, not just a change in the analytical framework.

[9] *Jhirmack Enterprises*, 283 NLRB 609, 609 fn. 2 (1987). Indeed, the Respondent does not except to that finding.

operational hours, a location from which they could not fully and effectively monitor the courthouse. The Respondent's May 2 and May 7 reports found violations of the performance standards prohibiting employees from neglecting their duties or the Respondent's security procedures. The narrative in the May 2 report said that the small size of the control room at post 1 made proper monitoring of that post during the meeting "unlikely"; found that "other required security posts went unmanned"; and concluded that the meeting resulted in a "complete break down [sic] of security."[10]

We further find that the General Counsel failed to prove that the foregoing misconduct did not occur. Although Sciesinski directed Ryan and Winther to talk to Lopez, it is undisputed that Ryan and Winther never sought, and Scieszinski never granted, permission to gather the CSOs for a 30-minute meeting while on duty. The judge observed that there is no evidence that the Respondent prohibited the CSOs from "interacting" while working, but that begs the question of whether the interaction interfered with the CSOs' work. The Respondent believed that it did, and, given the nature of the CSOs's duties, the General Counsel failed to prove otherwise. The Respondent is responsible for maintaining security at a Federal courthouse. The CSOs' attentiveness is critical.[11] Ryan testified that the CSOs could have seen through the control room window if anyone was approaching the courthouse entrance, at which point the CSOs would have tended to the magnetometer and x-ray machine. The control room, however, is about 15 feet from the magnetometer. On cross-examination, Winther conceded that it is unsafe to leave the magnetometer unattended. The judge reasoned that no visitors to the courthouse were expected and that none tried to enter during the meeting, but the record fails to establish that the CSOs were permitted to relax the security procedures simply because no visitors were anticipated.

Moreover, according to the Respondent's May 2 and May 7 reports, the Respondent's rules require that one or two of the CSOs assigned to post 1 be stationed outside the control room. Yet, during the meeting, four CSOs (five after Exley arrived) were in the control room, and no one was stationed outside it.[12]

Finally, and in disagreement with the judge, we decline to accord significance to the fact that Lead CSO Scieszinski sometimes held meetings at post 1. Scieszinski is a supervisor. The fact that he may have conducted employee meetings at post 1 on occasion did not entitle the CSOs to do so on their own initiative.

We find, therefore, that the General Counsel failed to prove by a preponderance of the evidence that Ryan and Winther did not engage in misconduct by neglecting their duties and failing to follow security procedures at the courthouse during the February 7 meeting. Accordingly, we dismiss the allegation that the Respondent violated Section 8(a)(1) by terminating Ryan and Winther.[13]

AMENDED CONCLUSIONS OF LAW

Delete the judge's Conclusion of Law 3(a) and reletter the subsequent paragraph.

ORDER

The National Labor Relations Board orders that the Respondent, Akal Security, Inc., Boise, Idaho and Coeur D'Alene, Idaho, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening any employee with discharge or discipline if the employee speaks to an agent of the National Labor Relations Board.

(b) Directing any employee not to speak to others regarding discharges of employees.

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

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

[10] It is true that the Respondent found that all participants in the meeting except Lopez had neglected their duties, but recommended stronger discipline for Ryan and Winther (who the Respondent found had harassed and intimidated Lopez) than for Schierman and Exley (who it ultimately concluded had not). However, that does not establish that the alleged neglect of duties was not a critical factor in the disciplinary decision. The May 2 report discusses the alleged neglect of duties at length. Furthermore, Exley arrived at the meeting late and, as the May 7 report notes, neglected his duties for only 3 to 5 minutes. Schierman attended the entire meeting, but did not initiate it. Lopez was not disciplined even though he left post 2 unattended during the meeting, but the Respondent's report addressed and ultimately excused this infraction on the basis that Lopez was brought to the meeting by Winther without knowing the purpose of the meeting.

[11] Indeed, some of the CSOs' complaints about Lopez involved his perceived inattentiveness.

[12] In addition, Winther, who was assigned to a roving post during the time of the meeting, was not in fact "roving" during the 30-minute meeting. Winther admitted on cross-examination that a CSO assigned to a roving post is supposed to walk around inside the courthouse to check for security risks.

[13] Having dismissed the 8(a)(1) discharge allegation on that basis, we need not pass on the Respondent's contention that it was not responsible for the discharges because it merely implemented the USMS's decision to revoke Ryan's and Winther's credentials. For the same reasons, we need not pass on the Respondent's exception to the judge's recommended remedy, the Respondent's motion to supplement the record concerning the remedy, or the General Counsel's motion to strike "Exhibit 3" (a document cited in support of the Respondent's remedial argument) from the Respondent's Brief in Support of Exceptions.

(a) Within 14 days after service by the Region, post at its facilities in Boise, Idaho and Coeur d'Alene, Idaho copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 26, 2007.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 30, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten any employee with discharge or discipline if the employee speaks to an agent of the National Labor Relations Board.

WE WILL NOT direct any employee not to speak to others regarding discharges of employees.

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

AKAL SECURITY, INC.

Ryan Connolly and *Peter Finch, Attys.,* for the General Counsel.
Patrick Scully and *Emily Keimig, Attys. (Sherman & Howard),* of Denver, Colorado, for the Respondent.
John A. Tucker, Atty. (John A. Tucker Co., L.P.A.), of Akron, Ohio, for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This matter was tried in Coeur d' Alene, Idaho on May 13 and 14, 2008 upon orders further consolidating cases, notice of hearing, and amendment to consolidated complaint issued on January 31, 2008 by the Regional Director of Region 19 (the Regional Director) of the National Labor Relations Board (the Board), which consolidated for hearing order consolidating cases, consolidated complaint and notice of hearing in Cases 19–CA–30891 and 19–CA–30892 (issued on December 28) and Cases 19–CA–30950 and 19–RD–3769.[1] The complaint, based upon charges filed by the United Government Security Officers of America, Local 118 (the Union) alleges Akal Security, Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent essentially denied all allegations of unlawful conduct.

II. ISSUES

1. Did the Respondent violate Section 8(a)(1) of the Act by terminating employees Lee Ryan and Stephen Winther from their positions as security officers at the United States District Court for Idaho located in Coeur d' Alene, Idaho because they engaged in protected concerted activity and/or to discourage other employees from engaging in protected concerted activity?

2. Did the Respondent violate Section 8(a)(1) of the Act by threatening employees with discharge or discipline if they spoke to an agent of the Board and by directing employees not to speak to anyone regarding discharges of employees?

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] The unfair labor practice pleadings are collectively referred to herein as "the complaint." By order dated May 12, 2008, the Regional Director severed Case 19–RD–3769 from the complaint and approved the Union's request to proceed in that matter.

III. JURISDICTION

At all relevant times, the Respondent, a New Mexico corporation with offices and places of business in Boise, Idaho and in the United States District Court for Idaho located in Coeur d' Alene, Idaho (the Courthouse), has been engaged in the business of providing uniformed security personnel to the United States Marshals Service (the USMS).[2] During the representative 12-month period preceding December 28, 2007,[3] in the course and conduct of its business operations, the Respondent performed services valued in excess of $50,000 in States other than the State of Idaho. Respondent admits, and I find, the Respondent has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has at all relevant times been a labor organization within the meaning of Section 2(5) of the Act.

IV. FINDINGS OF FACT[44]

A. Authority of Denny Scieszinski

Since October 1, 2000, the Respondent has contracted with the USMS to provide security services to Federal courthouses throughout the jurisdiction of the Ninth Circuit Court of Appeals, including the Courthouse (the USMS Security Contract). Kevin George Mathews (Mathews) stationed in Boise, Idaho, is the Respondent's site supervisor for the District of Idaho. Mathews manages the Respondent's employees at all five Idaho Federal courthouses and visits the Courthouse monthly. The USMS provides credentials for Court Security Officers (CSOs), without which CSOs cannot be employed in federal courthouses. Successive collective-bargaining agreements between the Union and the Respondent (collectively effective 2002 to 2010 (the bargaining agreements) have provided that the grievance procedures contained therein shall not be utilized to grieve any employee removal order of the USMS or any USMS revocation of CSO credentials.

During the period relevant to the complaint, the Respondent employed the following CSOs at the Courthouse:

Denny Scieszinski (Officer Scieszinski)	
Lee Matthew Ryan (Officer Ryan)	Employed at the Courthouse since 1994
Stephen G. Winther (Officer Winther)	Employed at the Courthouse since 1999
Curtis Exley (Officer Exley)	
Dan Schierman (Officer Schierman)	
Bill Lopez (Officer Lopez)	
Bob Guzman (Officer Guzman)	

At all times relevant, Officer Scieszinski served as lead CSO. The bargaining agreement includes the lead CSO in the CSO bargaining unit and prohibits the lead CSO from performing supervisory duties. The USMS security contract requires the lead CSO to assume, in pertinent part, the following duties: provide direct supervision to all CSOs; assure all posts are covered as directed by the Government; assure all CSOs are present and in proper uniform; determine any changes that may be required in the daily routine.

As lead CSO during the relevant period, Officer Scieszinski had no authority to discipline employees. In about June 2006, Officer Exley submitted an application for employment to Officer Scieszinski who thereafter notified Officer Exley that he was hired.[5] Officer Scieszinski scheduled the CSOs' work shifts, assigning them to the following duty posts or moving them to specific locations in the Courthouse as courthouse schedules or circumstances dictated:

> Post 1—comprising (1) the Courthouse entryway, where CSOs operate an X-ray and magnetometer machine; (2) a small windowed control room, containing a monitor and permitting full view of and communication with persons in the entryway.
>
> Post 2—comprising the second floor of the Courthouse where the courtroom is located.
>
> Posts 3 and 5—comprising rover positions, responsive to any area where additional manpower is needed.

In the event of "high profile" cases[6] or criminal trials, Officer Scieszinski might reassign CSOs to courthouse locations where courthouse-visitor activity or prisoner/jury contact could be closely monitored. When overtime work was required for which no employee volunteered, Officer Scieszinski selected overtime candidates.[7] Officer Scieszinski granted and denied employee requests for time off and held CSO meetings in the control room at Post 1 to discuss work issues and to disseminate information received from Boise management. Officer Scieszinski assigned Officer Ryan to oversee new-employee training of Officer Lopez. Except for the occasions of Mr. Mathews' monthly visits, Officer Scieszinski was the only person in charge of the Respondent's employees at the Courthouse.

B. Terminations of Stephen G. Winther and Lee Matthew Ryan

In July 2005, the Respondent hired Officer Lopez to work at the Courthouse. Over the ensuing 18 months, Officers Winther and Ryan observed Officer Lopez' work with increasing concern. They felt Officer Lopez jeopardized his and others'

[2] The USMS is exempt from the Board's jurisdiction under the provisions of Sec. 2(2) of the Act, which states: "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . .

[3] All dates herein are 2007 unless otherwise specified.

[4] Unless otherwise explained, findings of fact herein are based on party admission, stipulations, and uncontroverted testimony.

[5] There is no direct evidence that Officer Scieszinski effected Officer Exley's employment; he later told Officer Exley that if he did not like an employment candidate, the candidate would not be employed at the Courthouse.

[6] A high profile case draws numerous family members and/or spectators to the Court.

[7] Disputes concerning overtime assignments could be brought to the attention of Mathews for resolution.

safety by, among other things, letting courthouse visitors get close enough to him to be able to seize his weapon, failing to attend carefully to items coming through the X-ray machine or to individuals coming through the magnetometer, being easily diverted, letting unauthorized persons enter through the back door without screening, and directing visitors with immoderate gestures that distracted both security personnel and visitors and posed safety risks. Officer Ryan also allegedly noted two instances of Officer Lopez sleeping while on duty at Post 2. Officers Winther and Ryan repeatedly reported their concerns to Officer Scieszinski and discussed them with Officers Exley and

Schierman, who shared many of them. According to Officer Ryan, Officer Scieszinski told him not to burden Mr. Mathews with the problem, saying he would handle it. To Officers Winther and Ryan's observations, however, the problems continued.[8]

At some point, Officer Scieszinski told the CSOs, excepting Officer Lopez, that he needed documentation of incidents Officer Lopez was involved in and requested them to fill out "210s" on Officer Lopez. A "210" refers to the USMS Form-210, entitled "Field Report," which Courthouse employees use to report onsite incidents (210-report) and which are submitted to the U.S. Marshals Service.[9] In a conversation occurring in early February, Officer Scieszinski told Officers Winther and Ryan they needed to talk to Officer Lopez and then write their complaints on a 210-Report.[10] Officer Winther asked Officers Exley and Schierman if they thought it was a good idea to meet with Officer Lopez because "everybody was complaining about him within the ranks on a daily basis, and [Officer Scieszinski] had told us to go talk to him." Officers Exley and Schierman agreed to meet with Officer Lopez.[11]

On the morning of February 6 or 7, Officers Winther and Ryan arranged a meeting among themselves and other CSOs for the purpose of confronting Officer Lopez about his job performance.[12] No Courthouse activity was scheduled for that day, which meant minimal visitors to the Courthouse. When Officer Lopez arrived at work later that morning, Officer Winther asked him to join his fellow officers at Post 1, as they wanted to talk to him. Officer Lopez agreed, meeting with Officers Winther, Ryan, and Schierman in the control room at Post 1 commencing sometime between 8:15 and 8:30 a.m. (the Lopez Meeting).[13] At the time of the meeting, Officers Ryan, Exley, and Schierman were assigned to Post 1, Officer Lopez to Post 2, and Officer Winther to Post 3, a rover position.

At the Lopez Meeting, Officers Winther, Ryan, and Schierman told Officer Lopez that his coworkers had complaints about his work, that he needed to get up to speed, that his job performance was lacking, and that he needed a better grasp of his duties. The men told Officer Lopez they hoped to help him improve and were there to offer assistance. Officer Ryan said that Officer Scieszinski had indicated he wanted to fire Officer Lopez. At about 9 a.m., Officer Winther left the Lopez Meeting, as Officer Exley joined it. Officer Ryan summarized the discussion for Officer Exley's benefit, and Officer Exley said he had already discussed his safety concerns with Officer Lopez. Officer Ryan told Officer Lopez the CSOs would try to get back together with him in about 30 days to review with him and see if there had been any improvement. Officer Lopez said that if he couldn't do the job, perhaps he should just quit; he also expressed appreciation for the Officers' comments and said he would try to do better.[14]

In the weeks following, Officers Winther and Ryan saw no improvement in Officer Lopez' performance. On March 25, Officer Winther submitted a 210-report to Officer Scieszinski regarding Officer Lopez' "Inability to Perform CSP Duties," (Officer Winther's 210-report). The narrative portion of Officer Winther's 210-report stated, in pertinent part, "The purpose of this report is to begin documenting continuing incidents of Wm. Lopez' inability to perform officer duties. Lopez has had difficulty grasping the duties of officer work since he began 2 years ago. Lopez has been continually instructed by other Officers including myself with less than satisfactory results." Officer Winther listed 14 specific examples of what he considered to be Officer Lopez' unprofessional and safety-compromising behavior, including standing too close to visitors, inability to remember faces and names, making distracting gestures, failure to read the events list or understand the scheduling process, and uncertainty in making simple decisions.

On March 26, Officer Ryan signed a 210-report regarding "Observation of Officer Bill Lopez" (Officer Ryan's 210-

[8] The recounting of Officers Winther and Ryan's concerns about Officer Lopez' job performance does not constitute any finding that Officer Lopez was, in fact, derelict in any of his job duties. Such a finding is unnecessary to the issues herein, and in any event the evidence establishes only the sincerity of, not the actuality of, Officers Winther and Ryan's beliefs.

[9] It is unclear when Officer Scieszinski requested 210-reports. Officer Winther places the request as shortly before February 6. Officer Exley testified Officer Scieszinski made the request on two occasions around the end of 2006 or the first of 2007 to him and Officer Ryan and to Officer Winther or Officer Schierman.

[10] Officer Scieszinski did not testify about events relating to the Lopez Meeting, and the testimony of Officers Winther and Ryan is uncontroverted. The evidence supports a finding that Officer Scieszinski suggested Officers Winther and Ryan "talk" to Officer Lopez about their concerns; the evidence does not demonstrate that he authorized any work time CSO meeting with Officer Lopez.

[11] In a later written statement provided to the Respondent, detailed below, Officer Exley stated he had not been "previously informed of the meeting." Officer Exley's statement does not preclude his having been consulted about a potential meeting, and I credit Officer Winther's testimony that Officer Exley agreed to meet with Officer Lopez.

[12] Some CSOs place this meeting on February 6. According to the Respondent, Post records and sign-in sheets show the meeting most likely occurred on February 7. It is unnecessary to extablish the exact date.

[13] Officer Exley joined the meeting a few minutes before it ended.

[14] In its posthearing brief, the Respondent asserts that Officer Ryan admitted he called the Lopez meeting because he wanted Officer Lopez fired. The record does not reflect any such admission. Officer Ryan testified that in his April meeting with Mathews, he told Mathews, "[Officer Lopez] needs to be fired if he's going to continue to jeopardize the other employees and personnel in this courthouse. He's a safety hazard. He's going to get us in a shooting, and I don't want to work with him. He needs to either pick up the pace or get fired." Officer Ryan's testimony does not justify the inference the Respondent apparently asks me to draw

report).[15] The narrative portion of the 210-report summarized Officer Ryan's earlier expressed criticism of Officer Lopez and stated:

> On 2/6/07 all Officers talked with Bill as a group to attempt to help him better understand the scope of the job and bring him up to speed. The following issues were discussed with Bill: 1. Unprofessional demeanor dealing with Court family, attorneys and the public. 2. He does not follow officer safety procedures at Post 1, Main entry screening area. 3. Use of foul language, has been told numerous times to refrain from using bad language. 4. Late to arrive on post, states he forgets where he is to be assigned. 5. He continually asks the same questions day after day about courtroom activity, prisoner movement. He is unable to remember the names of Federal Judges and the names of staff members. 6. Officer Lopez will not assume the responsibility of the Control Room he will stand in the doorway for 1 hour instead of assuming the responsibility. 7. When the Officer gives a briefing on activities around the courthouse Officer Lopez will burst out in laughter then look at other Officer's and stop.

Officer Ryan's 210-report concluded, in pertinent part, "In my opinion, if a hostile situation were to develop at Post 1, I strongly doubt Officer Lopez will have the presence of mind or the ability to react in a timely manner."

On April 6, Officer Exley submitted to Officer Scieszinski a 210-report describing allegedly unsafe procedures practiced by Officer Lopez on March 26 at Post 1. On April 9, Officer Schierman submitted to Officer Scieszinski a 210-report describing the Lopez Meeting and detailing additional complaints about Officer Lopez relating to use of profanity and perceived memory problems.

On April 12, Officer Winther submitted a continuation of his March 25 210-report to Officer Scieszinski, which read in pertinent part, "The purpose of this report is to continue to document CSO Lopez's inability to remember and or retain information pertaining to his duties as an Officer at the Coeur D'Alene Federal Courthouse." Officer Winther detailed an April 12 incident in which he allegedly observed Officer Lopez fail to recognize the District of Idaho District Attorney who had been a frequent visitor to the Courthouse during Officer Lopez' employment.

Sometime prior to April 19, Mathews reviewed the 210-reports of Officers Winther, Ryan, Exley, and Schierman. On April 19, Mr. Mathews visited the Courthouse and separately interviewed each complainant as well as Officer Lopez. Meeting with Officer Winther, Mathews told Officer Winther he was disappointed that he had held the Lopez meeting. Mathews asked who had authorized the meeting. Officer Winther said he did not know; he explained that when the CSOs complained about Officer Lopez to Officer Scieszinski, he told them to talk to Officer Lopez about his performance. Officer Winther told Mathews the CSOs had held the meeting with the good intention of helping Officer Lopez. Mathews said it was not the CSOs' job to evaluate Officer Lopez' performance. Officer Winther disagreed, saying that when it came to CSO safety issues, CSOs should have a say in another CSO's performance.

Meeting with Officer Ryan, Mathews told him that his 210-report was "way out there" compared to the others and that he was out of line. Mathews said if he were to send anybody home, it would be Officer Ryan, not Bill Lopez. Officer Ryan said he thought the investigation was about Officer Lopez and his inability to do the job and asked how it had suddenly focused on him. Mathews said, "There's procedural and conduct standards that you violated." Officer Ryan complained that Officer Lopez was a walking hazard to the other CSOs.

After interviewing the CSOs on April 19, Mathews told Larry Homenick, the Respondent's contract manager, what he had learned, advising him there appeared to be violations of CSO performance standards that would have to be investigated, and of which the USMS would have to be informed under the terms of the USMS Security Contract. Thereafter, Mathews "briefed" Deputy Dave Meyer of the USMS Judicial Security Division on the situation. No evidence was provided as to what information or details Mathews communicated to the USMS Judicial Security Division, but it is reasonable to infer from the following April 25 USMS letter that Mathews told Deputy Meyer the circumstances of the Lopez Meeting.

By letter dated April 25, the Judicial Security Division of the USMS wrote to the Respondent, in pertinent part, as follows:

> The Government is in receipt of a report of the allegedly inappropriate conduct of your employees: CSOs Ryan, Winther, Schierman, and Exley . . . . Allegedly, the four CSOs have conspired to harass a fellow CSO, Bill Lopez . . . . Under the terms of the contract, your employees are required to meet the performance standards as set forth in the CSO Standards of Performance. In accordance with…the contract, *Removal of CSOs and Other Contractor Personnel,* you are requested to investigate the alleged actions, and report the results of the investigation to the contracting officer. Please provide your report within five business days of the date of this letter. Your findings should include any disciplinary action taken, should such be warranted.

By memorandum dated April 26, Mathews notified Officers Winther, Ryan, Schierman, and Exley that he would meet with them on April 30 to discuss alleged violations of the following sections of the Respondent's Performance Standards, as stated:

> #17 Not discriminate against [or sexually harass members of the public, the judiciary, other employees] or engage in any prohibited personnel practice.
>
> #38 Refrain from neglecting duties…
>
> #39 Refrain from use of abusive or offensive language…
>
> #43 Follow employer's chain of command procedures on all work related issues.

On April 30 Mathews met with Officer Lopez, who submitted a written "Employee Statement" in which he denied dereliction of duty and described the Lopez Meeting, in pertinent part, as follows:

[15] Officer Ryan had given this report in "rough" a week earlier to Officer Scieszinski who thereafter typed it in final for Officer Ryan's signature because the report needed to be submitted to Mr. Mathews immediately.

> [Officer Ryan] said they were having this meeting without [Officer Scieszinski] or any other supervisor being present because they were helping me and they did not tell [Officer Scieszinski] of this meeting. The meeting covered their idea of how I was supposed to perform my duties according to them, and [Officer Winther] said that I did the job opposite of how they did it and that I was doing it wrong. I was talked down to and basically scolded by the individuals of the group. The meeting made me feel harassed and mistreated. I felt that the method used was very degrading to me and shameful on them in working around [Officer Scieszinski]. He never treated me like the group did . . . . I took this job to help the Federal Court to be safe not to be harassed and treated like a second class citizen by my fellow security officer[s].

Mathews also met separately with Officers Winther, Ryan, Schierman, Exley, and Scieszinski, obtaining written statements from them. Officer Schierman's statement included his opinion: "I felt [Officers Winther and Ryan] were gruff and threatening in manner while talking to [Officer Lopez]."[16] Officer Exley's statement described the Lopez Meeting, in pertinent part, as follows:

> I was not previously informed of the meeting [which] lasted approximately 3–5 minutes after I arrived . . . CSO Ryan, Winther, Schierman and Lopez were present. CSO Ryan informed me that they had met with CSO Lopez regarding his work performance, had discussed all issues with him and would revisit the issues in 30 or so days. CSO Ryan advised he called the meeting as the Union President to assist CSO Lopez in realizing what issues were at hand and how we could assist in helping him change or learn.[17] CSO Lopez didn't have any rebuttal except to say that he would try to change.

During Mathews' meeting with Officer Ryan, Officer Ryan told Mathews that sometime in the previous 6-month period, Officer Scieszinski had agreed with Officer Ryan that Officer Lopez did not practice good officer safety conduct and had said the CSOs needed to "get together with [Officer Lopez] and try to get him on board." Mathews declined to believe Officer Ryan.

On May 2, Mathews submitted a 10-page investigative report to the USMS, detailing the information gathered and stating, in pertinent part:

> *Summary:* On 5/02/07, this investigation concluded the allegation that CSOs Ryan, Winther and Schierman engaged in a prohibited activity, an unauthorized meeting to critique the job performance of [Officer Lopez], thereby creating a hostile work place, was SUSTAINED. (Performance Standard #17)
>
> . . . .
>
> The investigation has shown that clearly CSO Lopez was the victim of harassment in the work place. He had become compliant with his attackers I what he (Lopez) felt was the only way to get along, even to the point of thanking those who had taken advantage of him. It is believed that he (Lopez) was not a willing participant in the meeting, but the object of the meeting.
>
> *Conclusion*:
>
> . . . .
>
> The tone of the [Lopez Meeting] was at least uncomfortable for CSO Lopez. There is a suggestion that it may have also been threatening…As a result I believe that CSO Lopez has been the subject of a hostile work place having been created by the meeting in question…Given that the meeting in question was held at Security Post #1, during operational hours, for a period of 30 minutes, I have concluded there was a complete breakdown of security during this period of time.

By letter dated May 7, the Respondent proposed the following CSO disciplinary actions to the USMS:

> *Officer Exley and Schierman*: one-day and three-day suspensions, respectively, along with a warning that future substantiated violations of the CSO Performance Standards, post orders, or Akal or USMD policies would result in additional disciplinary action.
>
> *Officer Winther*: seven-day suspension, a warning that future substantiated violations of the CSO Performance Standards, post orders, or Akal or USMD policies would result in additional disciplinary action, and a final warning that future substantiated incidents where it is determined that CSO Winther has engaged in actions that contribute to a hostile work environment would result in termination of employment.
>
> *Officer Ryan*: ten-day suspension and a final warning that future substantiated violations of the CSO Performance Standards, post orders, or Akal or USMD policies would result in termination of employment. Specific Notification to be given that actions contributing to a hostile work environment will not be tolerated.[18]

By letter dated May 16, the USMS notified the Respondent that it did not concur with the Respondent's proposed discipline of Officers Winther and Ryan and stated:

> [Officers Winther and Ryan] shall be immediately removed from performing under [the USMS Security Contract] . . . Please be aware that this action does not, in any way, prevent [Officers Winther and Ryan] from continued employment with Akal; it only prevents them from performing services

[16] Called as a rebuttal witness by the General Counsel, Officer Schierman was not questioned about the Lopez Meeting. I find his unsworn, out-of-court opinion of Officers Winther and Ryan's "gruff and threatening" manner to be too subjective to be accorded any weight.

[17] In his written statement, Officer Schierman said he "believe[d] [Officer Ryan called the meeting] because as Union president he thought he had some type of authority to do this." Officer Exley testified that when he joined the Lopez Meeting, Officer Ryan said, "Being I'm the union president, I'll tell you what we were doing here, talking about Bill's performance issues." The evidence does not support a finding that Officer Ryan conducted the meeting as a union-authorized assembly.

[18] The complaint does not allege that any of the proposed suspensions violates the Act.

> under [the USMS Security Contract . . . [Officers Winther and Ryan] shall relinquish all Government furnished property to the [USMS].

On the same date, USMS deputy marshals collected Officers Winther and Ryan's credentials and firearms, all of which had been furnished by the USMS.

By letters dated May 17, the Respondent informed Officers Winther and Ryan of the USMS decision, attaching to each letter a copy of the USMS' May 16 letter, and stated in pertinent part:

> Akal Security, Inc. has received . . . communications from the U.S. Marshals Service dated May 16, 2007, indicating that they have ordered your permanent removal from the position of [CSO]. As Akal is under contract to the U.S. Marshals Service, we are required by contract to comply with the directives issued under the terms of that contract by removing you from the position of CSO. As a direct result of the Government's order of removal, your employment as a CSO with Akal Security is terminated effective May 16, 2007 . . . Akal Security, Inc. would like to inform you that should you be interested in maintaining a position with Akal Security, Inc. on a different contract, please contact Justinder Singh Reilly. Please note that Akal currently does not have other options of employment in the Coeur d'Alene area and maintaining employment with Akal on a different contract will require that you relocate.[19]

C. Alleged Threats to Employees for Speaking with Agents of the NLRB

The Charging Party filed unfair labor practice charges alleging unlawful termination on June 7. Officer Scieszinski spoke to the CSOs about talking to the NLRB agent investigating the charges herein on the following occasions:

> June 26: While at work, Officer Scieszinski told Officer Exley that if he spoke to the NLRB agent he would be fired.
>
> July 2: Officer Scieszinski called CSOs Exley, Guzman, Schierman, and Lopez together for a 30-minute employee meeting at Post 1. In the course of the meeting, Officer Scieszinski told the CSOs they were not to talk to the NLRB agent or they could be fired.

July 2: Following the employee meeting, Officer Scieszinski told Officer Exley that after Mr. Mathews contacted the NLRB agent, the Respondent would let employees know if they could say anything.

> July 16: Officer Scieszinski again called CSOs Exley, Guzman, Schierman, and Lopez together for a 30-minute employee meeting at Post 1. In the course of the meeting, Officer Scieszinski told the CSOs the NLRB subpoenas they had received were worthless. He told the CSOs they could talk to the NLRB agent about the NLRB issues but could not divulge any operational information, post orders, or anything about security procedures, adding, "In other words, you really can't say anything."

On July 19, Mathews informed Officer Exley by telephone that Officer Scieszinski had given the CSOs bad information. Mathews assured Officer Exley he could talk to the NLRB agent about anything, as the company wanted to be open about the NLRB issues.

V. DISCUSSION

A. Supervisory and/or Agency Status of Officer Scieszinski

Section 2(11) of the Act defines a supervisor as:

> Any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The General Counsel asserts Officer Scieszinski's supervisory status and bears the burden of proving it. See *Oakwood Healthcare, Inc.,* 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NRLB 717 (2006); and *Golden Crest Healthcare Center,* 348 NLRB 727 (2006), which also addressed the meaning of terms "assign," "responsibly to direct," and "independent judgment," as used in Section 2(11) of the Act, under the framework of the Supreme Court's decision in *NLRB v. Kentucky River Community Care,* 532 U.S. 706 (2001).

As lead CSO during the relevant period, Officer Scieszinski had no authority to discipline employees. Although Officer Scieszinski accepted an employment application from Officer Exley and later communicated to him an offer of employment, there is no clear evidence Officer Scieszinski had authority to hire or to recommend the hire of employees.[20] Officer Scieszinski was the only on-site officer in charge of the Respondent's employees at the Courthouse. As such, he scheduled the CSOs' work shifts, assigning them to duty posts or moving them to specific locations in the Courthouse as the Courthouse activity schedules or unexpected incidents dictated, assigned overtime, granted/denied time off, and held employee meetings to discuss work issues. While most of Officer Scieszinski's duty post assignments appear to involve the performance of routine tasks and responsibilities, that fact "does not preclude the possibility that such regular assignments require the exercise of independent judgment." *Loyalhanna Care Center,* 352 NLRB 863, 864 fn. 4 (2008). Given the potential ramification of security assignments in a federal courthouse setting, particularly during "high profile" cases or criminal trials, the authority to make such assignments requires independent judgment. See *RCC*

[19] The Respondent's nearest non-USMS security contract operates in Seattle, Washington.

[20] Officer Scieszinski told Officer Exley that if he did not like an employment candidate, the candidate would not be employed at the Courthouse. If Officer Scieszinski's statement accurately reflected his employment veto power, it would establish his supervisory authority. See *Sheraton Universal Hotel,* 350 NLRB 1114, 1117–1118 (2007). However, without more direct evidence of such authority, I cannot find Officer Scieszinski could, in fact, positively or negatively influence hiring decisions.

Fabricators, Inc., 352 NLRB 701 (2008).

I find Officer Scieszinski possessed and exercised supervisory authority to assign CSOs to their daily posts and to significant duties and responsibilities as normal or exigent security demands required. The extent and complexity of his authority necessarily entailed independent judgment as to those assignments. Ibid. Accordingly, at all times relevant hereto, Officer Scieszinski was a supervisor with the meaning of Section 2(11) of the Act.

Counsel for the General Counsel asserts that irrespective of supervisory authority, Officer Scieszinski acted as the agent of the Respondent in actions relevant to this matter. The General Counsel bears the burden of proving the agency allegation. With regard to agency, Section 2(13) of the Act provides:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The Board adopts the concept of apparent authority and applies the common law principles of agency when determining whether apparent authority is created: "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief. The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Albertson's Inc.,* 344 NLRB 1172 (2005), citing *Pan-Osten Co.,* 336 NLRB 305, 305–306 (2001); *L.B.&B. Associates, Inc*., 346 NLRB 1025 fn. 17 (2006). Employees who regularly fn. . communicate management's directives to employees act as agents in furnishing employment-related information to employees in the course of his or her regular duties. *Pan-Osten,* supra.

As Lead CSO, Officer Scieszinski was generally the highest ranking officer at the Courthouse. Officer Scieszinski assigned CSO duties and communicated management decisions to the CSOs, holding periodic employee meetings to cover employment topics. As Respondent made Officer Scieszinski a "conduit of information to employees on their day-to-day duties," Respondent placed him in a position where the CSOs could reasonably believe he spoke for management. *Mid-South Drywall Co.*, 339 NLRB 480, 480–481 (2003).[21] Accordingly, I find the General Counsel met his burden of proving the Respondent vested Officer Scieszinski with apparent authority to act as its agent at relevant times and his conduct at issue herein is attributable to the Respondent.

[21] Mathews reinforced the appearance of Officer Scieszinski's authority to speak for management when on July 19, he told Officer Exley that Officer Scieszinski had given the CSOs bad information, but failed to deny that Officer Scieszinski was authorized to give information.

B. Terminations of Stephen G. Winther and Lee Matthew Ryan

Strictly speaking, the Respondent did not terminate Officers Winther and Ryan from employment with the Respondent. The USMS revocation of Officers Winther and Ryan's credentials meant the Respondent could no longer employ the two CSOs at the Courthouse, but the Respondent did not terminate their employment opportunities at non-USMS locations. However, when Officers Winther and Ryan's employment at the Courthouse ended, since the Respondent's nearest non-USMS security contract was several hundred miles from Coeur d'Alene, continued employment with the Respondent was essentially unavailable to them. For convenience, I refer to the Respondent's inability to employ Officers Winther and Ryan at the Courthouse as the Courthouse terminations. The complaint does not allege that the Respondent's investigation or proposed suspensions of Officers Winther and Ryan are unlawful; accordingly, I address only their Courthouse terminations.

No party disputes that Officers Winther and Ryan engaged in concerted activity when they organized and conducted the Lopez meeting for the purpose of discussing with Officer Lopez his alleged performance shortcomings that assertedly impacted CSO safety. The question is whether their conduct was protected.

The General Counsel argues that Officers Winther and Ryan's participation in the Lopez meeting was protected by the Act and that the Respondent's adverse action against them violates Section 8(a)(1) of the Act.[22] The General Counsel further argues that the Respondent improperly targeted Officers Winther and Ryan's protected activity by its investigation of the Lopez Meeting and resultant recommended discipline. Since the USMS' revocation of Officers Winther and Ryan's credentials was based on the Respondent's investigatory report and recommendation, the Respondent is ultimately responsible for the officers' Courthouse terminations. Having no jurisdiction to require the USMS to rescind its revocation of Officers Winther and Ryan's credentials, the General Counsel does not seek reinstatement for the two officers but asks that the Respondent be required to seek USMS restoration of Officers Winther and Ryan's credentials and to make the two employees whole for lost wages and benefits.

The Respondent argues that Officers Winther and Ryan were not engaged in protected activity by arranging and conducting the Lopez Meeting. The Respondent contends the two officers' pre-meeting failure to complain through official channels about Officer Lopez' job performance shows they were not addressing employee safety concerns but were conducting "a sort of hazing designed…to facilitate [Officer Lopez'] resignation or removal from the Courthouse...[which] arguably constituted

[22] The General Counsel maintains that Officers Winther and Ryan's supervisor, Officer Scieszinski, directed the two officers to speak to Officer Lopez regarding their concerns about his job performance, and "[t]hus, the meeting at issue was undertaken at [Officer] Scieszinski's suggestion." Impliedly, the General Counsel argues that Officer Scieszinski's direction conferred protection on Officers Winther and Ryan's participation. Since I have found that although Officer Scieszinski recommended the CSOs speak to Officer Lopez about their complaints, he did not authorize the Lopez Meeting, I do not address this argument.

harassment of a fellow employee."

Counsel for the General Counsel asks me to apply the analysis prescribed by *Wright Line*[23] to determine whether the Courthouse terminations of Officers Winther and Ryan violate the Act. The *Wright Line* analysis is appropriately used in cases that turn on motive. Here the existence or lack of unlawful animus is not relevant as the Respondent's adverse employment actions against Officers Winther and Ryan were admittedly motivated by the two officers' involvement in the Lopez Meeting. See *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964); *CGLM, Inc.,* 350 NLRB 974 fn. 2 (2007); *Phoenix Transit System*, 337 NLRB 510, 510 (2002); *Shamrock Foods Co.,* 337 NLRB 915 (2002). An employer independently violates Section 8(a)(1) of the Act if, "having knowledge of an employee's activity, it takes adverse employment action that is 'motivated by the employee's protected concerted activity.'" *CGLM, Inc.,* at 979, quoting *Meyer Industries*, 268 NLRB 493, 497 (1984). Therefore, the *Wright Line* analysis is not appropriate here.

Under the legal framework of *Burnup & Sims*, supra, the General Counsel must establish that the disciplined employees engaged in protected activity, that the employer was aware of said activity,[24] that the basis for the adverse employment actions was an alleged act of misconduct arising in the course of the activity, and that the employees were not guilty of the alleged misconduct.

The Respondent admits that it initially proposed to suspend Officers Winther and Ryan, and later implemented the USMS' revocation of their credentials, because the two officers planned and conducted the Lopez Meeting. The Respondent's censure of the Lopez meeting falls, essentially, into two categories: (1) Officers Winther and Ryan allegedly created a hostile work environment by their unauthorized critique of Officer Lopez' job performance and their correlative failure to follow chain of command in reporting rules violations rather than addressing Officer Lopez directly; and (2) Officers Winther and Ryan conducted the Lopez meeting during courthouse operational hours, resulting in a breakdown of security procedures when security posts were left unmanned. Since the Act's protections may not apply uniformly to the two categories, it is necessary to determine, if possible, which category was the critical basis for the discipline imposed on Officers Winther and Ryan.

The evidence warrants a finding that Officers Winther and Ryan would not have been terminated from their courthouse positions but for their meeting with Officer Lopez to express their dissatisfaction with his job performance. The Respondent's May 2 Investigation Report focuses on Officers Winther and Ryan having allegedly created a hostile work environment by holding the Lopez Meeting, and, in its posthearing brief, the Respondent notes that specific conduct as the dominant basis for its proposed discipline: "Primarily, Mathews determined that Ryan, Winther, and Schierman had violated Performance Standard 17 by creating a hostile work environment." Further, the Respondent did not terminate Officers Schierman, Exley, or Lopez although all three were, by the Respondent's definition, absent from their duty posts during the Lopez Meeting. The evidence as a whole therefore supports a finding that Officers Winther and Ryan would have been disciplined for their roles in the Lopez Meeting regardless of whether they violated work rules by deserting their posts and neglecting their duties during the meeting. Since the sine qua non of Officers Winther and Ryan's Courthouse terminations is their February confrontation of Officer Lopez, the issue is whether the confrontation is protected by the Act. See *Valley Hospital Medical Center, Inc.,* 351 NLRB 1250, 1251 fn. 5 (2007). It is unnecessary to resolve whether Officers Winther and Ryan's alleged inattention to security post assignments during the Lopez Meeting was unprotected by the Act.[25]

Section 7 of the Act provides, in pertinent part, that "[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." The protection afforded by Section 7 extends to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees. No one disputes that the health and safety of employees are significant terms and conditions of employment. See *American National Can Co.,* 293 NLRB 901, 904 (1989). It follows that when the CSOs discussed among themselves and with Officer Scieszinski safety problems allegedly created by Officer Lopez, Section 7 protected their discussions. The question is whether their communications continued to be protected when they presented their criticisms directly to Officer Lopez at the Lopez Meeting.

In *NLRB v. Robertson Industries*, 560 F.2d 396, 398 (9th Cir. 1976),[26] the court stated that for concerted activity to be protected, the activity: (1) must involve a work-related complaint or grievance; (2) the activity must further some group interest; (3) a specific remedy or result must be sought through the activity; and (4) the activity must not be unlawful or otherwise improper. The first three factors specified by the court are

[23] 251 NLRB 1083 (1980) enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[24] It is not necessary for the General Counsel to show that the Respondent knew Officers Winther and Ryan's conduct was protected, as evidence of employer knowledge is not a necessary element of an 8(a)(1) violation. See *Meijer, Inc.,* 344 NLRB 916 (2005).

[25] It is unclear that Officers Winther and Ryan were impermissibly absent from their posts during the Lopez Meeting. Officer Ryan was assigned to Post 1 where the meeting was held, while Officer Winther was assigned to a rover position, which, arguably, could legitimately put him at the Post 1 area. The meeting was held in the windowed control room at Post 1 from which the entrance to the Courthouse could be monitored and where management meetings with CSOs were customarily held. The Respondent bears the burden of proving misconduct. The Respondent has adduced no evidence that it prohibited CSOs from interacting with one another while on duty, particularly in the absence of courthouse visitors as was the case the morning of the Lopez Meeting, or that it considered even extended CSO interaction while on duty to be misconduct. Strict adherence to post assignment does not appear to have been a security absolute for the Respondent; as needed, Officer Scieszinski gathered CSOs to Post 1 to discuss work issues and disseminate employment information. The General Counsel does not raise, and I do not consider, any theory that the period during which the Lopez Meeting occurred constituted a protected work stoppage as contemplated by *NLRB v. Washington Aluminum Co.,* 370 U.S. 9 (1962).

[26] Cited with approval by the Board in *Northeast Beverage Corp.* 349 NLRB 1166, 1167 fn. 9 (2007).

clearly present in the arrangement and conduct of the Lopez Meeting: (1) Officers Winther and Ryan organized, and Officers Winther, Ryan, Schierman, and Exley attended, the Lopez Meeting to address their work-related concern that Officer Lopez' job performance presented a security risk to all CSOs; (2) the presentation of coworker concerns to Officer Lopez furthered the valid group interest in safety; and (3) the CSOs hoped the confrontation would motivate Officer Lopez to change his allegedly dangerous work habits. The remaining question is whether the Lopez meeting and Officers Winther and Ryan's participation in it, was, in itself, unlawful or otherwise improper.

Counsel for the General Counsel cites *Jhirmack Enterprises,* 283 NLRB 609 fn. 2 (1987), for the proposition that an employee engages in protected, concerted activity when he or she advises a coworker of complaints about his job performance when the performance affects others' terms and conditions of employment. In *Jhirmack,* the Board concluded an alleged discriminatee engaged in protected concerted activity when, motivated by a desire to protect a fellow employee's employment, she advised a coworker that other employees had complained to management about his slow job performance, which performance affected certain of their employment conditions. *Jhirmack* establishes that an employee is protected by the Act in advising a coworker of job performance problems that affect other workers.[27] See also *Cadbury Beverages, Inc.,* 324 NLRB 1213 (1997), enfd. *Cadbury Beverages, Inc. v. NLRB,* 333 U.S.App.D.C. 94, (D.C.Cir. 1998).

The Respondent argues that Officers Winther and Ryan's conduct was unprotected as (1) it violated explicit contractual prohibitions; (2) the officers were not motivated by any valid, work-related concern; (3) the Lopez Meeting was a manifestation of malicious hazing and harassment of Officer Lopez, and (4) the officers' conduct had the improper design of effecting Officer Lopez's removal from the Courthouse.

The Respondent contends that Officers Winther and Ryan improperly failed to utilize internal complaint or union grievance procedures to address their safety issues with Officer Lopez's work. I have found that the officers did, in fact, raise their safety concerns with Officer Scieszinski without resolution, but even if they had not, employees engaged in protected activity generally do not lose the protection of the Act simply because their activity contravenes an employer's rules or policies. "[A]n employer may not interfere with an employee's right to engage in Section 7 activity by requiring that the employee take all work-related concerns through a specific internal process." *Valley Hospital Medical Center, Inc.,* supra at 1254 (2007), and cases cited therein.[28] As to the Respondent's argument that Officers Winther and Ryan were improperly motivated in addressing safety complaints to Officer Lopez, there is no evidence of malice or other inappropriate motivation. The evidence demonstrates that Officers Winther, Ryan, Schierman, and Exley were concerned about perceived safety blunders endangering them all.[29] There is no evidence any CSO bore personal animosity toward Officer Lopez. The fact that Officer Ryan may have desired Officer Lopez' removal if Officer Lopez did not correct his alleged safety violations, does not show an improper motive.[30]

Finally, the Respondent argues the Lopez Meeting was unprotected as an act of harassment of Officer Lopez. The Board has found that even when an employee is engaged in protected activity, he or she may lose the protection of the Act by egregious behavior, including displaying "an opprobrious or abusive manner." *Verizon Wireless,* 349 NLRB 640, 646 (2007). Here, although Officers Winther, Ryan, Schierman, and Exley may have presented some unpalatable criticisms to Officer Lopez, there is no evidence their opinions were delivered in other than a civil and temperate manner. Although Officer Lopez complained in his written statement to the Respondent that he was "talked down to and basically scolded [making him] feel harassed and mistreated…and treated like a second class citizen," he pointed to no offensive, intimidating, or threatening behavior by the CSOs and agreed that Officer Ryan said the object of the meeting was to help him. Following the meeting, Officer Lopez thanked the CSOs for their advice, which further weakens a harassment accusation. Although an employer has a valid interest in protecting its employees from coworker persecution, "[l]egitimate managerial concerns to prevent harassment do not justify...discipline on the basis of the subjective reactions of others to [employees'] protected activity." *Consolidated Diesel Co.,* 332 NLRB 1019, 1020 (2000). Accordingly, Officers Winther and Ryan's organization and conduct of the Lopez Meeting did not lose the Act's protection because of Officer Lopez' subjective reaction to the meeting.

The General Counsel has established that Officers Winther and Ryan engaged in protected activity when they affected the Lopez Meeting. The evidence further shows that neither officer

[27] *Jhirmack* does not answer whether the General Counsel must show a benign and helpful motive for the communication or simply disprove employee misconduct in the delivery of it. Two of the Board's panel members in *Jhirmack* found the conduct was undertaken for the mutual aid and protection of a fellow employee, noting that the employee complaints were prompted by employees' concern that poor job performance adversely affected their employment terms and that the alleged discriminatee's purpose in relaying the complaints was to encourage her coworker to take corrective action to protect his job. The concurring Board member addressed the employer's good-faith belief that the alleged discriminatee had engaged in misconduct by, in part, deliberately inflicting emotional harm on her coworker, but concluded the General Counsel had proven the alleged discriminatee had not, in fact, engaged in misconduct.

[28] Moreover, Officer Scieszinski suggested the CSOs approach Officer Lopez directly with their complaints, and the Respondent cannot now justifiably complain they did so.

[29] It is irrelevant that the Respondent did not, apparently, concur with the officers' perception of Officer Lopez' job performance. Protected activity does not depend upon the merit or lack of merit of the grievance. *Skrl Die Casting, Inc.*, 222, NLRB 85, 89 (1976).

[30] The situation is analogous to cases in which employees seek the removal of a supervisor. When the supervisor's capability has a direct impact on the employees' own job interests and the protest is motivated by legitimate employee concerns, it is protected. See *Trompler, Inc.,* 335 NLRB 478, 479 (2001), which cites, inter alia, *NLRB v. Leslie Metal Arts Co.*, 509 F.2d 811 (6th Cir. 1975)

engaged in any misconduct that removed their activities from the protections of the Act. It follows that adverse employment consequences based on Officers Winther and Ryan's protected activity, even though grounded on a good faith albeit mistaken belief that they engaged in misconduct in the course of their protected activity, violates Section 8(a)(1) of the Act. See *NLRB v. Burnup & Sims,* supra. The next question is whether the Respondent can be held responsible for the adverse employment consequences, i.e. the Courthouse terminations, to Officers Winther and Ryan.

In the Courthouse terminations of Officers Winther and Ryan, the Respondent was the nonacting entity. The USMS, over which the Board has no jurisdiction, prohibited Officers Winther and Ryan's continued employment at the Courthouse by revoking their credentials. The Board has considered the obligations of nonacting employers in fashioning remedies for violations of the Act. In *Federal Security, Inc.,*[31] the employer of security guards provided to the Chicago Housing Authority (CHA),[32] misinformed the CHA as to the nature of a walkout by the guards, with the result that participants were barred from working at the CHA properties. The Board found that since the employer's erroneous report to the CHA led the CHA to bar certain of the security guards from employment, the employer "must bear the burden of fully remedying, so far as possible, its unlawful conduct by attempting to have these names removed from the bar list, in furtherance of its reinstatement obligation." Further, the employer would be required to make whole the affected security guards, irrespective of whether the CHA granted permission for their deployment on CHA properties. The present case is analogous to *Federal Security.* By its May 2 investigative report to the USMS, the Respondent informed the USMS that Officers Winther and Ryan had (1) "engaged in a prohibited activity, an unauthorized meeting to critique the job performance of [Officer Lopez], thereby creating a hostile work place" in violation of Performance Standard #17; (2) harassed Officer Lopez in the work place; and (3) while subjecting Officer Lopez to a "hostile work place," created "a complete breakdown of security." The Respondent's characterization of Officers Winther and Ryan's conduct as "prohibited activity" that "creat[ed] a hostile work place" and caused "a complete breakdown of security" was inaccurate. The Respondent thereby misinformed the USMS of the nature of Officers Winther and Ryan's conduct. In the absence of evidence to the contrary, it is reasonable to infer that the USMS based its revocation of Officers Winther and Ryan's credentials on the misinformation supplied by the Respondent.

The Board has noted that a successful request for termination of an employee for discriminatory reasons violates the Act even if made by an entity other than an employee's employer. Further, an employing entity acquiescing in a discriminatory termination request is guilty of an unfair labor practice if it is aware of the motive behind the request. See *Capitol EMI Music,* 311 NLRB 997 fn. 22 (1993), enfd. 23 F3d 399 (4th Cir. 1994), citing *Flav-O-Rich,* 309 NLRB 262, 265–266 (1992). Here the Respondent itself supplied the USMS with an unlawful motive to revoke Officers Winther and Ryan's credentials, and there is no evidence the Respondent resisted the credential revocations in any way. Accordingly, the Respondent is responsible for the adverse employment consequences flowing from its investigative report to the USMS and for remedying the unlawful employment actions taken against Officers Winther and Ryan in violation of Section 8(a)(1) of the Act.

C. Alleged Threats to Employees for Speaking with Agents of the NLRB

After the Charging Party filed unfair labor practice charges against the Respondent on June 7, Officer Scieszinski threatened the following employees as follows:

> On June 26, told Officer Exley that if he spoke to the NLRB agent he would be fired.
>
> On July 2, told Officers Exley, Guzman, Schierman, and Lopez they were not to talk to the NLRB agent or they could be fired and told Officer Exley that the Respondent would thereafter let employees know if they could say anything.
>
> On July 16, told Officers Exley, Guzman, Schierman, and Lopez that the NLRB subpoenas they had received were worthless and that although the CSOs could talk to the NLRB agent, they could not divulge any operational information, post orders, or anything about security procedures, adding, "In other words, you really can't say anything."

As a supervisor and/or agent of the Respondent, Officer Scieszinski's statements constitute threats, both explicit and implied, to employees and restrain and coerce employees in the exercise of their rights under the Act. See *Management Consulting, Inc. (MANCON),* 249 NLRB 249, 250 (2007) and cases cited therein.

The Respondent contends that Officer Scieszinski's statements were immediately and effectively repudiated by. Mathews when, On July 19, Mr. Mathews told Officer Exley he could talk to the Board agent about anything, as the company wanted to be open about the NLRB issues. Mr. Mathews' statement, addressed as it was only to Officer Exley, did not adequately publish a repudiation of Officer Scieszinski's threats to the CSOs and did not clearly reflect assurances that the Respondent would not thereafter interfere with the CSOs' exercise of Section 7 rights. See *Sam's Club,* 322 NLRB 8, 9 (1996), citing *Passavant Memorial Area Hospital,* 237 NLRB 138, 138–139 (1978). Accordingly, by Officer Scieszinski's statements detailed above, the Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Akal Security, Inc. (the Respondent) is and has been at all times material an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Government Security Officers of America,

[31] 318 NLRB 413 (1995), enf. denied *NLRB. v. Federal Security, Inc.*, 154 F.3d 751 (7th Cir.) 1998) (the court found the walkout by security guards unprotected.)

[32] CHA was a governmental entity over which the Board had no jurisdiction.

Local 118 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by

(a) Terminating employees Lee Ryan and Stephen Winther from their positions at the United States District Court for Idaho located in Coeur d' Alene, Idaho because they engaged in protected concerted activity and/or to discourage other employees from engaging in protected concerted activity.

(b) Threatening employees with discharge or discipline if they spoke to an agent of the National Labor Relations Board and by directing employees not to speak to anyone regarding discharges of employees.

4. The unfair labor practices set forth above affect commerce within the meaning of Sections 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The conclusion that the Respondent violated Section 8(a)(1) of the Act by terminating Officers Winther and Ryan from their CSO positions requires remedial action by the Respondent, the normal provisions for which would include reinstatement and backpay. Here, the Respondent need not offer Officers Winther and Ryan reinstatement to their general employment with the Respondent, as the Respondent never terminated them from that employment. Meaningful reinstatement, however, means that Officers Winther and Ryan must be returned to their former positions at the Courthouse, which the Respondent cannot do unless the USMS rescinds its revocation of the officers' credentials. Inasmuch as the USMS is not a charged party and as the Board has no jurisdiction over the USMS in any event, no Board order can avail against the USMS. It does not follow, however, that Officers Winther and Ryan must suffer the consequences of the Act's violation without remedy.

The General Counsel proposes, in pertinent part, the following remedy: (1) Respondent be required to seek USMS restoration of Officers Winther and Ryan's credentials; (2) Respondent make Officers Winther and Ryan whole for all lost wages and benefits from the time of their Courthouse terminations until reinstatement, or, if the USMS bars reinstatement, then until they obtain substantially equivalent employment elsewhere; and (3) remove from its files and records any reference to Officers Winther and Ryan's Courthouse terminations. Only the General Counsel's second proposal requires further discussion. If, in response to application by the Respondent, the USMS should refuse to restore Officers Winther and Ryan's credentials, the proposed make-whole remedy may require the Respondent to pay Officers Winther and Ryan indefinitely the earnings they would have had but for the Respondent's unfair labor practices. Nevertheless, the Board has ordered just such a remedy in a similar situation. See Federal Security, Inc. at 414 and fn. 4, and the Respondent has offered no persuasive argument why that remedy should not attach here.[33]

Accordingly, the Respondent, having unlawfully terminated Officers Winther and Ryan from their positions of employment at the United States District Court for Idaho located in Coeur d' Alene, Idaho must seek restoration by the United States Marshals Service of Officers Winther and Ryan's security credentials and, if successful, offer Officers Winther and Ryan immediate and full reinstatement to their positions of employment at the Courthouse, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges that would exist but for its unlawful actions and make them whole for any loss of earnings and other benefits, computed from the date of termination from their positions of employment at the Courthouse to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

The Respondent, Akal Security, Inc., Boise, Idaho, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating any employee from any assigned position because the employee engaged in protected concerted activity and/or to discourage other employees from engaging in protected concerted activity.

(b) Threatening any employee with discharge or discipline if the employee speaks to an agent of the National Labor Relations Board.

(c) Directing any employee not to speak to others regarding discharges of employees.

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

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

(a) Within 14 days from the date of this Order, seek restoration by the United States Marshals Service of Lee Ryan and Steven Winther's security credentials and, if successful, offer Officers Winther and Ryan immediate and full reinstatement to their positions of employment at the United States District Court for Idaho located in Coeur d' Alene, Idaho, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges that would exist but for its unlawful actions.

(b) Make Lee Ryan and Steven Winther whole, with interest, for any loss of earnings or benefits suffered as a result of

[33] The Respondent has provided no authority for its contention that any remedy should be limited in accordance with the parties' bargaining agreement and *H.K. Porter Co., Inc. v. NLRB,* 397 U.S. 99 (1970).

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Remove from its files any reference to the unlawful terminations of Lee Ryan and Steven Winther from the United States District Court for Idaho located in Coeur d' Alene, Idaho and thereafter notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Coeur d' Alene and Boise, Idaho copies of the attached notice marked "Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 19 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since May 16, 2007.

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

Dated: Washington, D.C. September 23, 2008

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. More particularly,

WE WILL NOT terminate any employee because the employee engaged in protected concerted activity and/or to discourage other employees from engaging in protected concerted activity.

WE WILL NOT threaten any employee with discharge or discipline if the employee speaks to an agent of the National Labor Relations Board.

WE WILL NOT tell any employee not to speak to others about discharges of employees.

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

WE WILL seek to have the United States Marshals Service restore Lee Ryan and Steven Winther's security credentials and, if successful, offer Lee Ryan and Steven Winther immediate and full reinstatement to their positions of employment at the United States District Court for Idaho located in Coeur d' Alene, Idaho, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges that would exist but for our unlawful actions.

WE WILL make Lee Ryan and Steven Winther whole, with interest, for any loss of earnings or benefits suffered as a result of our unlawful actions.

WE WILL remove from our files any reference to our unlawful terminations of Lee Ryan and Steven Winther from their positions of employment at the United States District Court for Idaho located in Coeur d' Alene, Idaho, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the terminations will not be used against them in any way.

AKAI SECURITY, INC.

[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."