

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 25
SUB REGION 33

THE HOPE INSTITUTE FOR CHILDREN)
AND FAMILIES,)
Employer,)
and) Case No.: 25-RC-085832
AMERICAN FEDERATION OF STATE,)
COUNTY AND MUNICIPAL EMPLOYEES,)
COUNCIL 31, AFL-CIO,)
Petitioner.)

OPPOSITION TO PETITIONER'S REQUEST FOR REVIEW

In response to the Request for Review filed on by Petitioner, American Federation of State, County and Municipal Employees, Council 31, AFL-CIO ("AFSCME"), The Hope Institute for Children and Families ("The Hope Institute" or "Hope") submits the following response in opposition to Petitioner's request:

INTRODUCTION

Having elected to present little to no evidence of its own at the August 2, 2012 certification hearing and offering no challenge to the overwhelming evidence presented by The Hope Institute, AFSCME now seeks review of the Board's decision finding that the unit of employees it sought to represent were, in fact, guards under Section 9(b)(3) of the National Labor Relations Act. AFSCME's Request for Review misconstrues record evidence to reduce the role of the four security guards it seeks to represent as "clerical" in nature in an effort to cast the Board's decision as clearly erroneous and a misapplication of prior Board precedent. This effort ignores the undisputed evidence presented to the Board and the clear precedent within

which the Board's decision rests. As such, The Hope Institute respectfully requests this Request for Review be denied for the reasons set forth below.

UNDISPUTED FACTS SUPPORTING BOARD DECISION

1. Safety and Security Associates ("SSAs") are given a week-long in-service training on these safety and security duties, separate and apart from the general employee training. (TR. at p. 56).

2. If a SSA is unable to work a shift and/or something unforeseen happens, no other staff performs the role of the SSA. (TR. at p. 81-82).

3. The Safety and Security Department provides security for the entire institution in terms of ground security. (TR. at p. 20).

4. The job posting for the SSA position states that the position is responsible for making rounds of the campus buildings, ensuring that appropriate security measures are in place, and report any incidents for follow up, which would include incidents with staff as well as visitors or strangers to the property. (TR. at 38-39; ER Exhibit 4).

5. SSAs are also responsible for vehicle security and oversight, they are the first responders in an emergency situation, and they patrol the grounds to make sure doors are locked or if there is any other problem that might present a danger to youth or staff. (Tr. at p. 20-21).

6. On each of the three shifts, SSAs are required to conduct rounds, which include perimeter rounds to patrol and secure the physical grounds, check to make sure all doors are locked, check and inventory Hope's vehicles, and check for any other problem that might present a danger to the youth or employees. (TR. at p. 21, 40; ER Exhibit 13. at p. 2-3)¹.

7. While conducting rounds, SSAs on the second and third shift are required to check several staff monitor stations, locations within the living areas where staff are mandated to be placed at night while the youth sleep. (TR. at p. 59-60).

8. If SSAs observe a monitor station un-staffed, the SSA records the absence in the appropriate log and the violations are turned in to the Director of Residential Services. The SSAs reports have been used to discipline AFSCME members for violating Hope's policy. (TR. at pp. 22-23, 61-65; ER Exhs. 2, 10).

9. When not conducting rounds, SSAs sit at a station where they monitor Hope's internal and external security cameras, employee entrance cameras, and a monitor which tracks employee key card swipes for entry and exit. (TR. at pp. 43-45; ER Exh. 5).

¹ Citations to employer exhibits are identified as ER Exhibit _____.

10. Additionally, from this station, SSAs control all the locks to the facility as well as the electronic keying of employee's access cards. (TR. at p. 46).

11. SSAs monitor the coming and going of staff members with this screen, which electronically displays the staff member's entry "swipe." (TR. at p. 45, 47).

12. If something unusual was seen on the security camera monitors, SSAs are to immediately respond to the area and investigate the occurrence. The SSA can also alert support staff and residential support staff for help. (TR. at p. 44).

13. SSAs may be required to preserve a scene or take photographs following an incident. (TR. at p. 67).

14. SSAs are the only employees with full access to the Hope facility, and the only employees with access to the "black boxes," locked boxes where incident reports or abuse reports relating to staff and youth may be made. (TR. at p. 69-70).

15. AFSCME members have been disciplined based on reports issued by SSAs for conduct observed on rounds. (TR. at p. 22-23).

16. When not conducting rounds, SSAs oversee the use of Hope's vehicle fleet. Specifically, the SSAs oversee the checking out of vehicles and the return of company vehicles. (Tr. at p. 41).

17. Hope has a transportation policy which the SSAs are required to enforce in the course of their duties. (TR. at p. 41-42, 52-54; ER Exh. 7).

18. If an SSA believes a staff member is in violation of this policy, the SSA will investigate the staff trip at issue, contact the staff member responsible for the violation, attempt to correct the problem, and, if not resolved, write-up the offending staff member for the policy violation (TR. at p. 41-42, 54-55, 85-86; ER Exhs. 7, 8).

19. Hope has a strike plan in place, which places additional responsibilities on the SSA staff, including controlling egress and ingress to the facility, monitoring staff to ensure safety of staff and youth during picketing, maintaining Hope's vehicle fleet and building security. (TR. at p. 102 105; ER Exh. 15).

20. Under the strike plan, the Safety and Security Department becomes the central command or headquarters for all issues relating to the strike response. (TR. at p. 106; ER Exh. 15).

ARGUMENT

AFSCME's requests review of the Board's August 28, 2012 decision and order on the grounds that the Board's factual conclusions were clearly erroneous and that the decision

misapplies Board precedent applying guard status under Section 9(b)(3). Each of these arguments is misplaced.

A. Board's Factual Conclusions Were Not Clearly Erroneous

The only issue presented for decision in this matter was whether The Hope Institute's Safety and Security Associates ("SSAs") are guards within the meaning of Section 9(b)(3) of the Act. After a day-long hearing in which testimony and evidence were presented by the Employer, in addition to closing briefs submitted by the parties, the Board properly determined that the SSAs were guards within the meaning of the Act. As AFSCME represents a majority of Hope's non-guard staff, AFSCME was precluded from representing this unit of SSAs and the petition for certification was denied.

That decision was soundly supported by the evidence in the record. Hope is engaged in the business of providing residential, educational and health services to disabled youth. (Tr. at p. 15). The SSAs in question have no direct care duties or responsibilities with respect to these services, a role instead performed by the staff currently represented by AFSCME. (Tr. at pp. 16-17). Instead, as the Board properly concluded, the Safety and Security Department, within which the SSAs are employed, as a whole enforces rules against employees and others designed to protect the employer's property and/or for the protection and safety of those on premises. (Ruling, at p. 7). The Board concluded that the SSAs perform rounds and perimeter patrols during each shift, the purpose of which was to detect any safety or security violations. (Ruling at p. 7; see Undisputed Facts at ¶¶ 3, 4). The SSAs enforce Hope's transportation policy, which requires that they inspect the employer's vehicles for compliance with the policy, document violations and submit reports to management. (Ruling at p. 7; Undisputed Facts, at ¶¶ 13-15). The SSAs monitor surveillance cameras which cover the facility entrances and screens which

track employee entrance and “time clocks.” (Ruling at p. 7; Undisputed Facts, at ¶¶ 6, 8). SSAs are asked to verify employee arrival times by reviewing the surveillance cameras. (Ruling at p. 7; TR. at 45). On nightly rounds, SSAs patrol the facilities to ensure that monitoring stations are properly covered by staff and that the employees assigned to same are alert. (Ruling at p. 7; Undisputed Facts, at ¶ 5). Hope presented evidence at the hearing that an SSA’s report of a monitor found sleeping on the job resulted in discipline to the offending employee. (Ruling at 7; Undisputed Facts, at ¶ 12).

SSAs can take actions directly with the offending staff, i.e. enforcing vehicle policy and waking the sleeping employee. They question employees concerning cash discrepancies as part of their duties in handling the cash advances for work related activities. (TR. at p. 42). There are no other employees employed to perform these security functions and these functions are not incidental to the SSAs duties and responsibilities. SSAs are specifically charged with making rounds to check for security issues such as unlocked doors, unauthorized people, absent staff or damage to Employer property (i.e. facility vehicles). The SSAs record any violations and results of their inspections and submit the reports to the Safety and Security Director. (Undisputed Facts, at ¶¶ 15, 17-18).

AFSCME attempts to suggest that because all employees have a reporting obligation to DCFS concerning the abuse of children on site, the security guards are nothing more than clerical employees. This unsupported assertion ignores the sound and undisputed evidence presented to the Board. The Hope Institute is in the business of educating, training and housing children with disabilities – with legal obligations imparted to all staff because of the nature of this work. AFSCME attempts to take this basic fact and convert every duty entrusted to the security guards as a duty performed by all staff, without any record evidence to support this assertion.

Additionally, the safety and security associate (SSA) position is not a scribe taking notes at a desk that just happens to be in view of facility and entrance security cameras and time card monitoring screens, as ASFME would have one believe. Trivializing these and other responsibilities does not diminish the regular security and guard functions of the SSA position, particularly the role they play in enforcing Hope's rules against employees. SSAs are the only employees charged with enforcing Hope's transportation policy. Though AFSCME would like to cast the transportation policy responsibility as nothing more than a rental car employee, the critical point the union misses is that an employee may be held accountable for the policy violations found by the SSA directly. It is undisputed that where violations of the policy are found, the SSA has the authority to identify the offending employee and investigate the circumstances or require the employee to correct the infraction. (TR. at p. 42). The SSA has the authority to write-up the employee for the violation, which may be used to discipline the employee.

There is no dispute that the guards conduct rounds of the entire facility and conduct perimeter checks. There is no evidence in the record to suggest that any other staff member at The Hope Institute has these responsibilities. In fact, the evidence is to the contrary. SSAs are the only employees with full access to the entire facility, necessary to conduct their rounds and perimeter patrols. There is also no evidence to support the assertion that conducting rounds and perimeter patrols are "clerical functions." Apparently, having the obligation to complete logs and incident reports is sufficient, in AFSCME's estimation, to convert the security position to one of a secretary, without any legal or factual support. Additionally, the fact that the SSAs are not making the substantive decision as to the extent of facility access a given title will have, does

not diminish the security role played by the SSAs in having the responsibility to program and de-program the access keys.

AFSCME offered little in response to Hope's evidence. The first of its two witnesses was a direct care staff employee, and union steward, who testified that a Crisis Response Team comprised of direct care staff has primary responsibility for intervening when a behavioral incident arises with a child. (TR. at p. 111-112). Ms. Garrett-Brown also testified that direct care staff are responsible for searching the belongings of youth, when necessary, and that employee's supply their own locks for their lockers, which are not searched by SSAs. (TR. at p. 112-113). Further, Ms. Garrett-Brown offered that Residential Service Managers are responsible for assigning staff to the monitoring stations and will also make a round to check whether staff is sleeping. (TR. 114). This testimony is a far cry from AFSCME's assertion that all staff have the obligation to monitor staff and report on violations or the claim that night staff conduct rounds, as asserted at page 8 of the Request for Review. She also only assumed that the managers could write up any infractions and did not offer any personal knowledge of their role in this regard. (TR. at 114-115). This testimony does not discredit nor even relate to the key considerations concerning whether the SSAs are guards under § 9(b)(3).

Finally, AFSCME relied on the testimony of John Bartley, who has worked as an SSA for the past year. (TR. at p. 117). Mr. Bartley confirmed that he has the responsibility to activate and deactivate an employees access card, based on instructions from the Safety Director. (TR. at p. 118). He also confirmed that no other employees have access to this computer. (TR. at 123). If someone's personal safety became an issue on site, Mr. Bartley confirmed he was more likely to get involved as an SSA. (TR. at p. 119). If he sees a rule infraction, he is supposed to report that infraction. (TR. at 120). When enforcing the duties to oversee approved trip expenses, if a

shortage is noted, he has the authority to investigate by asking the employee directly to explain the shortage and, if needed, write an incident report about the incident. (TR. at p. 121-122, 125-126). If an individual is on site after hours, Mr. Bartley agreed that he had a duty to report that individual to his Director, but was unclear as to his authority to ask the individual to leave. (TR. 122). However, in describing a specific incident with a neighbor on site with a dog, Mr. Bartley confirmed that he instructed the neighbor to leave the property for the safety of the youth. (TR. at 127). Mr. Bartley also confirmed that in his duties of patrolling the property, if he saw an individual coming up around the buildings, he would have the authority to approach the individual to say something. (TR. at 126).

In short, when faced with the evidence of the substantive roles and responsibilities of the SSA position, the Board properly concluded that the SSAs regularly perform duties solely for safety and security purposes. These roles are not incidental to any other responsibilities; they are the primary duties and responsibilities for the SSA position. The Board's factual findings are overwhelmingly supported by the record and Petitioner's request for review on the grounds that the decision is based on clearly erroneous factual conclusions should be denied.

B. In Light of the Factual Record, the Board's Decision Is Squarely In Line with Prior Precedent

AFSCME also requests review of the Board's decision on the grounds that the Decision misapplies prior Board precedent. AFSCME ignores the clear and valid precedent cited by the Board, attempting to argue that the Board's decision improperly focuses on isolated tasks contained within the supporting precedent. (Request for Review at p. 13). AFSCME attempts to bolster its legal argument by relying on *McDonald Aircraft*, 279 NLRB 357 (1986) in apparent disregard for the fact that this decision was reversed on appeal and enforcement of the Board's

order was denied. Critically, this subsequent ruling in *McDonald* further supports the Board's decision.

AFSCME cites to *McDonald Aircraft Company and Teamsters Local Union No. 682*, 279 NLRB 357 (1986) for the proposition that this decision limited the holding of *MGM Grand Hotel, Las Vegas*, 274 NLRB 139 (1985), a case relied upon by the Board in reaching its decision in this matter. However, AFSCME wholly overlooks the ultimate ruling in *McDonald Aircraft Company*, 827 F.2d 324 (8th Cir. 1987). In this decision, the Eight Circuit granted the employer's request for review of the Board decision finding that firefighter positions in question were not "guards" within the meaning of the Act. In holding that the position in question did fall within the meaning of "guard," and denying the petition for enforcement of the Board's order, the court noted:

The difficulty of section 9(b)(3) analysis arises in the appropriate characterization of a particular bargaining unit given the equivocal nature of a statutory guard. The Board and reviewing courts have consistently declined to restrict the application of section 9(b)(3) to "plant security guard,": *Truck Drivers Local 807 v. NLRB*, 755 F.2d 5, 9 (2nd Cir.), *cert. denied*, 474 U.S. 901, 106 S.Ct. 225, 88 L.Ed.2d 225 (1985), finding on various occasions that unarmed courier service drivers, *Local 851, Int'l Brotherhood of Teamsters v. NLRB*, 732 F.2d 43, 44 (2nd Cir. 1984); fitting room checkers, *Broadway Hale Stores, Inc.*, 215 NLRB 46 (1974); timekeepers, *Tulsa Hotel Management Copr.*, 135 NLRB 968, 971 n. 8 (1962); armored car guards, *Armored Motor Service Co.*, 106 NLRB 1139, 1140 (1953); and receptionists, fire patrolmen, chauffeurs and investigators, *Republic Aviation Corp.*, 106 NLRB 91 (1953) come within the ambit of the section 9(b)(3) definition of 'guard.' 827 F.2d at 326.

Despite Petitioner's attempts to cast the decision as outside clear Board precedent, *McDonald* makes clear that this area of determinations of guard status has historically presented close, factual questions in an area where there is little uniform policy. *Id.* at 326.

Although uniform criteria have not been established in regard to the characterization of employees under section 9(b)(3), the

common theme which runs throughout Board and reviewing court decision is the legislative policy of avoiding the potential of divided loyalty in any employee who is vested with the authority to enforce rules and regulations for the protection of company property.
827 F.2d at 326.

In highlighting Board precedent, the Eight Circuit also noted the Board's tendency to interpret rule enforcement broadly, "finding it sufficient that the employee's only responsibility is to report rule infractions to his supervisor where no element of personal confrontation is involved." *Id.* at 327. This is Board precedent AFSCME apparently elects not to highlight in support of its argument.

AFSCME's contention that the decision is unsupported by Board precedent is based on nothing more than its reliance on factually dissimilar cases reaching different conclusions based on those facts. See, *55 Liberty Owners Corp.*, 318 NLRB 308 (1995)(doormen and related positions did not make rounds, enforced no rules against employees and performed primarily customer service work for tenants in residential building); *Ford Motor Company*, 116 NLRB 1995 (1956)(receptionist did not conduct rounds, did not enforce rules and served primarily in courtesy role); *Wolverine Dispatch and International Union, United Plant Guard Workers of America*, 321 NLRB 796 (1996)(receptionist positions conducted no rounds, enforced no rules against employees, and limited guard duties over seeing entrance were incidental to main clerical duties); *Arcus Data Security*, 324 NLRB 496 (1997)(customer service representatives responsible for data storage conducted no rounds, enforced no rules against employees, and had no responsibility to protect the facility).

Additionally, AFSCME's reliance on the *Purolator Courier* line of cases is also misplaced. See, *Purolator Courier Corporation and Communication Workers of America*, 300 NLRB 812 (1990); *Pony Express Coureri Corp. and Joint Council of Teamsters No. 28, et al.*,

310 NLRB 102 (1993). These decisions can be noted for their attempts to limit the expanding definition of “guard” as that term was being applied to couriers and armored guard employees. AFSCME attempts to expand this line of decisions surrounding a courier-guard position. The only trend in the recognition of “guard” positions addressed by *Purolator* and *Pony Express* is limited to common courier positions primarily in the business of transportation and delivery services. Courier-guards, armored car guards and similar positions employed by companies whose primary business is to offer transportation and delivery services offer little in the way of persuasive precedent. The consistent fact with each of these decisions is that the courier-guard provided no security function with respect to the employer’s property. In each case, the courier-guard did not conduct rounds, did not conduct perimeter checks, did not enforce any rules against employees and had no substantive role in the protection of the employer’s property. Rather, the courier-guard is employed to transport and protect the customer’s property, a position that offers little comparison to a true security guard employed by a company to patrol and protect the employer’s facilities and enforce rules against co-workers. These latter responsibilities, unquestionably possessed by the SSAs, are universally absent in the cases upon which AFSCME relies. These decisions, therefore, offer little support for the claim that the Board’s decision is impermissibly outside established Board precedent.

The cases relied upon by the Board squarely support the finding that the SSA position falls within the meaning of “guard” as set forth in the Act. As noted in *McDonald*, the point to these detailed factual analyses, in the end, is simply to ensure that the potential of divided loyalty is avoided. SSAs conduct rounds, patrol the perimeter and are tasked with the responsibility to enforce rules and policies against staff, including the transportation policy and loss prevention procedures for the return of expenses. SSAs have the authority and do enforce these policies by

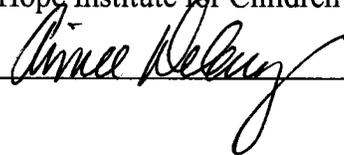
questioning the staff member first. Incident reports are prepared if the matter is not resolved, with the understanding that discipline may result. SSAs are to check the staff monitoring stations on their shift perimeter patrols and rounds and are to issue an incident report, which has resulted in discipline to AFSCME members. In the event of a strike, the SSAs will be called upon to control access to the facility and ensure the safety of the residents. These added responsibilities in the event of labor unrest, in addition to the rules enforcement typically expected of the SSAs, implicate the divided loyalty concerns at the heart of § 9(b)(3). The fact that the SSAs have not been alerted to the details of the strike plan is irrelevant to this issue and AFSCME presents no precedent stating otherwise.

CONCLUSION

The overwhelming evidence supports the Board's decision that the SSAs in question are clearly "guards" within the meaning of § 9(b)(3). This decision was supported by both the factual record, as well as the legal precedent relied upon. As such, The Hope Institute requests that the Petitioner's Request for Review be denied.

Respectfully submitted,
The Hope Institute for Children and Families

By: _____



Tom H. Luetkemeyer
Aimee E. Delaney
Hinshaw & Culbertson LLP
222 N. LaSalle, Suite 300
Chicago, IL 60601
312-704-3258

CERTIFICATE OF SERVICE

The undersigned counsel for Employer, The Hope Institute for Families and Children, hereby certifies that on the 18th day of September, 2012, I served Employer's Brief in Opposition to Request for Review by electronic means to counsel of record for Petitioner as identified below:

Jacob Pomeranz
Cornfield & Feldman
25 East Washington Street, Suite 1400
Chicago, IL 60602-1708
jpomeranz@cornfieldandfeldman.com



Aimee E. Delaney, Counsel for Employer