Xcel Protective Services, Inc. *and* International Union, Security, Police, and Fire Professionals of America, Local 5. Cases 19–CA–232786, 19–CA–233141, 19–CA–234438, and 19–CA–237861

September 8, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING AND WILCOX

On December 7, 2020, Administrative Law Judge John T. Giannopoulos issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel and the Charging Party filed answering briefs. The Charging Party filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

The case before us includes allegations that the Respondent, a military contractor, violated Section 8(a)(1) of the National Labor Relations Act by retaliating against two of its security officer employees, Mark Salopek and Steve Mullen, for raising safety concerns about the Respondent's refusal to follow the Navy's weapons-qualification practices. We adopt the judge's finding, for the reasons stated in his decision, that the Respondent did not unlawfully constructively discharge Mullen. As discussed below, and contrary to our dissenting colleague, we also adopt the judge's finding that the Respondent unlawfully discharged Salopek.

I. FACTS RELEVANT TO SALOPEK'S DISCHARGE

Until September 2019, the Respondent was a contractor for the United States Navy providing armed security services at Naval Magazine Indian Island, a naval base, port, and munitions storage facility in Puget Sound near Seattle, Washington. The base is the largest of its kind on the West Coast, and access is tightly regulated. The Union represented a unit of about 50 of the Respondent's security officers, armed personnel tasked with staffing and monitoring key checkpoints around the base.

Security officers on patrol carried a Navy-issued pistol and, depending on their shift assignment, a shotgun or assault rifle. As a condition of employment, the Navy required the security officers to pass a shooting test for each type of weapon every 6 months at a Navy-approved shooting range using weapons, ammunition, and targets provided by the Navy. Security officers on guard duty were prohibited from carrying the weapon(s) for which they failed to qualify. The Navy relied on the Respondent's managers to properly administer the tests and certify their successful completion. However, in spite of Navy requirements, the Respondent at times allowed security officers to qualify on unapproved ranges with unapproved weapons and ammunition. On at least one weapons-qualification form, the Respondent incorrectly certified that it had conformed to the Navy's testing requirements.

Salopek began working for the Respondent as a security officer in 2013. In 2016–2017, he learned that the Respondent was conducting shooting tests at unapproved ranges, including gravel pits and the backyard of one security officer's house. While serving as a line safety officer/line coach monitoring shooting tests at an approved shooting range around February 2018, Salopek saw three security officers fail multiple shooting tests. Gerald Powless, the Respondent's shooting instructor, then altered the targets to make them easier to see, and the security officers passed their tests. Salopek was concerned that such potential breaches of protocol could compromise safety at

[1] The Respondent has 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.

There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by telling employees that they would no longer be allowed to go home early because someone complained about guard mount pay, and Sec. 8(a)(5) and (1) by failing to provide the Union with information it requested on October 30, 2018, or delaying in providing that information for 3 months. There are also no exceptions to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(3) and (1) by retaliating against employee Daniel Lein because he complained about guard mount pay, and Sec. 8(a)(5) and (1) by failing to provide information requested by the Union on January 21, February 28, and May 8, 2019.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), and to conform to the Board's standard remedial language for the violations found. Because the uncontradicted record evidence shows that the Respondent no longer provides contract services at the facility involved in these proceedings, we shall order it to mail copies of the notice to unit employees employed by the Respondent at any time from October 27, 2018, until the date the notices are mailed. See, e.g., *Strategic Resources, Inc.*, 364 NLRB No. 42, slip op. at 2 (2016); *Bergensons Property Services*, 338 NLRB 883, 883 (2003). We shall substitute a new notice to conform to the Order as modified.

the base and spoke about it to coworkers, including Mullen, who shared his concerns.

On March 9, 2018,[3] Salopek informed John Morgan, the Respondent's CEO, of the Respondent's use of unapproved ranges and altered targets. Several days later, Morgan told Salopek that he had instructed the Respondent's operations manager to follow all proper range policies and procedures. However, in mid-May, probationary employee Daniel Lein failed one of his shooting tests, and Powless proposed that Lein retake the test later that month at an unapproved range using an unapproved weapon. Lein asked coworkers, including Salopek and Mullen, whether this was the Respondent's standard practice. Salopek shared his concerns about the Respondent's weapons-qualification practices with Lein, who ultimately declined Powless' offer based on his belief that the Navy had not authorized tests under those conditions.

After speaking with Mullen and another employee, Jacob Schryver, Salopek emailed a letter to Morgan on June 28. In the letter, Salopek recounted several examples of the Respondent failing to follow shooting test protocols and offered several reasons why he was contacting Morgan directly, starting with the following (emphasis in original):

> 1. First and foremost someone could have gotten hurt from a ricochet, or a twisted ankle, or tripping and accidental discharge. Secondly any number [of] things could place this company in civil liability.
>
> 2. We believe we <u>may</u> have [security] officers that *may* be unable to safely fire their weapons accurately and handle them properly in the event we have a critical incident on the base, especially at the ECP (Entry Control Point).

Morgan replied the next day, stating that

> I read the first part of your letter. So much was misinterpreted that I don't know where to begin. I will work with [operations manager Michael Terry] to see what we need to do. It's unfortunate the message was confused, it was our intent to include your talent [in] training especially compliance but it seems there is a major disconnect between you[] and your Captain. I don't know if you realize it but that man has stepped up for you on many occasions just as you have for this company. We need to fix this relationship. I will be in touch.

Salopek was dissatisfied with Morgan's response, and he, Mullen, and Lein resolved to raise their concerns to the base commanding officer, Rocky Pulley.

On July 8, Salopek, Mullen, and Lein informed Commander Pulley of the Respondent's use of unapproved shooting ranges and ammunition, as well as their safety concerns. Commander Pulley asked them to notify the Navy's installation security officer, Mike Jones. The next day, Mullen emailed Jones on behalf of himself, Salopek, Lein, and another security officer, stating that they were "coming forward with a safety [i]ssue concerning Weapons qualifications." The email mentioned several incidents in which the Respondent used unapproved ranges, weapons, and altered targets to help security officers pass their shooting tests. On one test day, according to the email, a security officer's "ability to effectively handle, and manipulate [an assault rifle and a shotgun] came into question," and the security officer could not qualify on the assault rifle even after Powless altered the target. That same day, according to Salopek, another security officer "struggled horribly," "should be taken off the range because of unsafe handling with the shotgun," and failed assault rifle and shotgun tests. The email further alleged that these security officers passed rescheduled shooting tests shortly thereafter using altered targets or unauthorized ranges and were allowed to continue their security patrols at the base. The email concluded that "[w]e feel this practice is unsafe, against Navy policy, and illegal, by falsifying federal documents," noting that "[t]his is an abridged version of what is going on." Jones forwarded the email to Richard Rake, a Navy civilian employee who helped oversee the Respondent's contract. Rake forwarded the email to operations manager Terry, who then forwarded it to CEO Morgan. Neither Jones nor any other Navy representative responded to the email.

Rake and Steve Manson, the Navy's performance assessment representative, investigated and ultimately found no merit to these allegations. They recommended in a July 25 report that the Respondent remove Salopek from his position. In response to what he perceived to be bias in Rake and Manson's investigation, Salopek filed a complaint with the Navy's Office of the Inspector General (OIG) on August 15. He attached a letter to the complaint in which he discussed the Respondent's unauthorized range practices and expressed his concerns. He "doubted [one security officer's] ability to defend herself; her coworkers and especially with the risk of a public park directly across the street from the Main Gate [of the base]." He maintained that the Respondent's use of gravel pits for shooting tests "is unsafe [due to the possibility] of ricochets, it's against [Navy] Policy, accidents from an unimproved range like tripping and falling, and no medical [personnel] present," noting one security officer's

[3] The following dates are in 2018.

admission that a ricochet had struck him in the chest at a gravel pit shooting range. Salopek also recounted a conversation he had with Rake and Manson as part of the investigation, asserting that one security officer "was never given the eight hours of safety and familiarization, and that she has a right to defend herself, we have a right to be confident she can defend us, and the public has a right to be safe." Salopek mentioned that he told Rake and Manson that "gravel pits are dangerous," and Rake "agreed immediately and stated he would never shoot at a gravel pit because of . . . 'ricochets.'" In a September 11 email, the OIG acknowledged Salopek's "concerns regarding [the Respondent's] weapons qualification methods, documentation, and processes" but "determined this case is not appropriate for an IG investigation." The OIG further stated that it had referred Salopek's allegations to Navy leadership at the Indian Island base, including the commanding officer.

As discussed at length in the judge's decision, the Respondent and Navy leadership both reacted unfavorably to Salopek's allegations. In late October, Rake again recommended that the Respondent remove Salopek from his position based on Rake's view that the allegations were false. The Respondent discharged Salopek on October 27, citing his alleged dishonesty, violation of the Navy chain of command, and lack of candor in response to the investigation of his actions.

II. ANALYSIS

The judge found, and we agree, that Salopek's discharge was unlawful under *Wright Line*.[4] Under *Wright Line*, the General Counsel has the initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action against the employee. The General Counsel sustains this burden by proving that (1) the employee engaged in union or other protected concerted activity, (2) the employer had knowledge of that activity, and (3) the employer harbored animus against union or other protected concerted activity.[5] Id. at 1089. Once the General Counsel sustains her initial burden, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the union or other protected concerted activity. Id.

We agree with the judge that the General Counsel sustained her initial burden under *Wright Line*, and that the Respondent failed to sustain its defense burden. The judge found, and the Respondent does not dispute, that Salopek engaged in protected concerted activity by raising safety concerns about the Respondent's weapons-qualification practices to Navy leadership and that the Respondent had knowledge of that activity. Further, we agree with the judge, for the reasons stated in his decision, that the Respondent acted with significant animus against Salopek's protected concerted activity, and we find that the Respondent's exceptions to the judge's animus findings are without merit. We likewise find no merit in the Respondent's exceptions to the judge's finding that the Respondent failed to establish that it would have discharged Salopek even absent his protected concerted activity based on his conduct during the investigation into his actions, his failure to follow the Navy's chain of command, and Rake's recommendation that the Respondent remove him from the contract. We therefore affirm the judge's finding that the Respondent violated Section 8(a)(1) by discharging Salopek.

Our dissenting colleague first suggests that Salopek did not engage in protected activity by raising group safety concerns with Navy leadership because, in his view, it is questionable whether the purpose of Salopek's communications was for "mutual aid or protection" within the meaning of Section 7.[6] Further, relying on *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), and *Mountain Shadows Golf Resort*, 330 NLRB 1238 (2000),[7] our dissenting colleague argues that even assuming Salopek's communications were initially protected under Section 7, they did not retain the protection of the Act because Salopek failed to adequately apprise the Navy of the existence of an ongoing labor dispute related to employees' terms and conditions of

[4] We note that all parties agree that this allegation should be considered under *Wright Line*, 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, 399–403 (1983), and we therefore find that standard appropriate here.

Member Wilcox further notes that because any such analysis would not warrant a different result, she finds it unnecessary to consider whether *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), should apply to the factual circumstances presented here.

[5] In *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 1, 6 (2019), the Board stated the view that "the evidence of animus must support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." Chairman McFerran adheres to her views expressed in *Tschiggfrie* that the "clarifications" that decision purported to make to the General Counsel's initial *Wright Line* burden were unnecessary, as the relevant "clarifying" concepts were already embedded in the *Wright Line* framework and reflected in the Board's body of *Wright Line* cases. As noted in prior decisions, Member Wilcox agrees with the Chairman's concurring opinion in *Tschiggfrie*.

[6] Our dissenting colleague does not dispute that Salopek engaged in concerted activity.

[7] As stated in *Mountain Shadows*, "the Board has held that employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection." Id. at 1240.

employment. We disagree with our colleague's arguments, as they are procedurally improper, disregard facts supporting the judge's finding, and take an overly narrow view of Section 7's "mutual aid or protection" clause and the manner in which an employee must disclose the existence of a labor dispute when appealing to a third party for support.

To begin, unlike our dissenting colleague, the Respondent makes no argument in its exceptions or supporting brief that Salopek's communications with Navy leadership were not for the purpose of mutual aid or protection or that Salopek lost the protection of the Act by failing to disclose the existence of an ongoing labor dispute between security officers and the Respondent.[8] Under Section 102.46(a)(1)(ii) and (f) of the Board's Rules and Regulations, "[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived" and "[m]atters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding." Thus, our dissenting colleague's argument is not properly before the Board.[9] See, e.g., *Lou's Transport, Inc. v. NLRB*, 644 Fed.Appx. 690, 694-695 (6th Cir. 2016) (finding that employer's failure to except to judge's finding that employee did not engage in protected concerted activity waived argument); *MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort & Casino/HG Staffing, LLC*, 365 NLRB No. 76, slip op. at 2 (2017) (finding respondent waived argument raised by dissenting Board member, where party failed to raise argument on exception).

Moreover, even assuming the Respondent had properly raised these arguments, we would find that they lack merit. First, Salopek's communications with Navy leadership were for the purpose of "mutual aid or protection" because they concerned the security officers' safety in their workplace. Salopek did not merely criticize the Respondent's weapons-qualification practices or raise concerns regarding potential consequences the Respondent might face because of those practices, as the dissent contends. Rather, as set forth above, in a series of communications, Salopek directly and explicitly informed Navy leadership—which prescribed the security officers' weapons-qualification requirements and had significant authority over these particular terms and conditions of employment—that he and other security officers believed that the Respondent had failed to comply with the Navy contract, and that this compromised their safety both at the range and while on guard duty. It required no inferential leap for Navy leadership to understand that Salopek's references to weapons-qualification practices and other security officers' inability to operate certain weapons, particularly in the event of a base emergency, pertained to concerns about the risk of workplace injuries by, for example, improperly-qualified coworkers misfiring their weapons or failing to neutralize a threat. On this record, it is clear that Salopek requested the Navy's assistance in changing what he and others perceived to be unsafe working conditions at the base. See, e.g., *North West Rural Electric Cooperative*, 366 NLRB No. 132, slip op. at 12-13, 17 (2018) (public Facebook posts criticizing employer's safety practices and training and advocating for better accident prevention were protected because their purpose was to "seek and provide mutual support toward group action" encouraging the employer and others to improve working conditions); *Riverboat Services of Indiana, Inc.*, 345 NLRB 1286, 1294 (2005) (entreaties for Coast Guard to upgrade licensing requirements for riverboat engineers were protected in part due to object of ensuring employee and passenger safety).

We also find misplaced the dissent's reliance on the fact that Salopek presented Navy leadership with certain concerns that were not directly related to employees' terms and conditions of employment. Contrary to the dissent, Salopek's isolated references to a public park across the street from the base's main gate do not detract from the clear concerns about employee safety he communicated. Likewise, they certainly do not diminish the Act's protection of those concerns. See, e.g., *Springfield Air Center*, 311 NLRB 1151, 1155 (1993) (employees "acted together for a protected purpose concerning both their conditions and terms of employment and for the protection of [t]he public over a perceived unlawful and unsafe violation of [federal] regulations"). For that reason, *Five Star Transportation, Inc.*, 349 NLRB 42, 45 (2007), enfd. 522 F.3d 46 (1st Cir. 2008), cited by our colleague, is readily

[8] The Respondent instead argues that Salopek lost the protection of the Act by making statements with reckless disregard for their truth or falsity. As explained above, because we adopt the judge's finding that the core issues Salopek raised with Navy leadership were true, we find no merit in the Respondent's arguments to the contrary. We further note that our dissenting colleague does not contend that Salopek's statements were maliciously false.

[9] We reject our colleague's apparent suggestion that it is an appropriate exercise of his discretion to freely rely on legal theories not raised by the Respondent. Such discretion should be based upon a party having properly raised the underlying issue, which the Respondent failed to do here. Indeed, the decisions our colleague relies on recognize that resolving an issue on a theory different from that raised by a party is limited to situations where the party properly raises the issue to the adjudicating body. See *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991) ("*When an issue or claim is properly before the court*, the court is not limited to the particular legal theories advanced by the parties . . . . (emphasis added)); *Electrical Workers IBEW Local 58 (Paramount Industries.)*, 365 NLRB No. 30, slip op. at 4 fn. 17 (2017) (finding violation on legal theory different from that of judge or General Counsel where issue was properly raised in complaint allegations).

distinguishable. There, the Board found that employees' letters to a client were not protected because they raised only nonspecific safety concerns on behalf of the general public with no apparent relationship to employees' terms and conditions of employment. Id. at 44-45. Here, as discussed, Salopek and other security officers raised specific employee safety concerns with the Navy that directly affected their terms and conditions of employment.[10] We accordingly reject our colleague's suggestion that Salopek's communications were not for mutual aid or protection.

We similarly reject our dissenting colleague's argument that, under the first prong of *Mountain Shadows*, supra, Salopek needed to provide Navy leadership additional information to establish a nexus between his concerns about the Respondent's weapons-qualification practices and an ongoing labor dispute.[11] As described above, Salopek put Navy leadership on sufficient notice of the security officers' ongoing labor dispute with the Respondent by describing the negative effect the Respondent's weapons-qualification practices had on the officers' safety on the job. In arguing that Salopek's communications with Navy leadership failed to establish the necessary nexus to employees' labor dispute with the Respondent, our dissenting colleague notes that the judge found that Salopek's initial communication with Commander Pulley included vague concerns about a "safety issue," and that Salopek did not tell Commander Pulley that security officers had already raised their concerns to the Respondent. However, the dissent's limited reliance on Salopek's initial conversation with Commander Pulley is misplaced, as Salopek's actions "must be viewed 'in [their] entirety and in context,' in order to determine whether there is a nexus to terms and conditions of employment." See *Five Star Transportation, Inc.*, supra at 45. To the extent the concerns expressed by Salopek in his initial conversation with Commander Pulley were vague, Salopek's subsequent communications with Navy leadership and the dissemination of that information to Commander Pulley and others cured any ambiguity and established a clear nexus to employees' terms and conditions of employment and their dispute with the Respondent. In addition, contrary to our colleague's argument, Salopek did not need to tell Commander Pulley that he and others had already taken their concerns to the Respondent for that conversation to be protected or to establish the existence of a labor dispute. See generally *Arlington Electric*, 332 NLRB 845, 846 (2000) (no requirement that employee first raise issue with employer to establish a labor dispute).[12] Accordingly, we find that Salopek's communications with the Navy satisfied the first prong of *Mountain Shadows*.[13]

In sum, we agree with the judge that Salopek engaged in protected concerted activity and retained the protection of the Act at all relevant times. We further find that Salopek's protected concerted activity was a motivating factor in his discharge, and the Respondent failed to establish that it would have discharged him in the absence of his protected concerted activity. The Respondent's exceptions are unavailing, and our dissenting colleague has otherwise presented no basis for reversal. For the foregoing reasons, we affirm the judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging Salopek.

[10] For the same reason, our dissenting colleague's contention that Salopek was solely acting as a whistleblower is unfounded. While Salopek and his coworkers raised a range of concerns about the Respondent's weapons-qualification practices, they consistently emphasized their personal concerns about workplace safety, bringing their communications squarely within the ambit of Sec. 7.

[11] Because the Respondent did not raise any issue regarding whether Salopek sufficiently disclosed the existence of a labor dispute on exception, we limit our response here to the arguments raised by our dissenting colleague. In this regard, we note that our dissenting colleague does not argue that the General Counsel bears the burden of showing that an employee making an appeal to a third party indicated that there was an ongoing labor dispute. Like our dissenting colleague, we do not address this issue, which remains pending before the Board on remand. See *Oncor Electric Delivery Co. LLC v. NLRB*, 887 F.3d 488 (D.C. Cir. 2018).

[12] We find no merit in our dissenting colleague's apparent suggestion that the general principle for which we cite *Arlington Electric* was dependent upon the specific facts in that case.

[13] We agree with our dissenting colleague that, under the first prong of *Mountain Shadows*, employees must provide enough information about the existence of a labor dispute to allow third parties to "filter the information critically" when they appeal to those third parties for support. *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989). But we emphasize that this requirement is not onerous and does not require employees to use particular words or phrases. While our dissenting colleague acknowledges that Board law did not require Salopek to file a grievance or otherwise avail himself of the Union's assistance in pursuing his safety concerns, Board law similarly provides no support for our colleague's suggestion that Salopek's failure to reference the union contract or "the traditional apparatus of labor disputes" has any bearing on either the existence of a labor dispute or whether Salopek provided sufficient context regarding his dispute with the Respondent to apprise Navy leadership of that dispute. Our colleague's formalistic view of the first prong of *Mountain Shadows* runs the risk of impairing employees' ability to exercise their Sec. 7 rights, because if employees "are not permitted to address matters that are of direct interest to third parties in addition to complaining about their own working conditions, it is unlikely that workers' undisputed right to make third party appeals in pursuit of better working conditions would be anything but an empty provision." Id. Here, Salopek and his coworkers provided sufficient context regarding their dispute with the Respondent for the Navy to filter their complaints critically.

We note again that neither the Respondent nor our dissenting colleague argues that the second prong of *Mountain Shadows* is not satisfied, and we affirm the judge's findings that Salopek's statements were not disloyal or recklessly or maliciously untrue.

ORDER

The National Labor Relations Board orders that the Respondent, Xcel Protective Services, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with reprisals if they engage in protected concerted activities.

(b) Discharging employees because they engage in protected concerted activities.

(c) Refusing to bargain collectively with International Union, Security, Police, and Fire Professionals of America, Local 5 (the Union) by failing or refusing to furnish it with requested information, or unreasonably delaying in furnishing it with requested information, that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the employees in the following appropriate unit:

> All federal contract security officers employed by the Company at the Indian Island Naval Magazine in the State of Washington. Excluding all other employees, employed in any capacity such as Area Managers, Captains, Lieutenants, office or clerical employees, and professional employees as defined in the National Labor Relations Act.

(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) Provide to the Union in a timely manner the information requested by the Union on October 30, 2018, to the extent that it has not already done so.

(b) Within 14 days from the date of this Order, offer Mark Salopek full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Mark Salopek whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(d) Compensate Mark Salopek for any adverse tax consequences of receiving a lump-sum backpay award, and, within 21 days of the date the amount of backpay is fixed by agreement or Board order, file with the Regional Director for Region 19 a report allocating the backpay award to the appropriate calendar year(s).

(e) File with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Mark Salopek's corresponding W-2 form(s) reflecting the backpay award.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Mark Salopek, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(g) 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.

(h) Within 14 days after service by the Region, duplicate and mail, at the Respondent's own expense, a copy of the attached notice marked "Appendix"[14] to the Union and to all former bargaining unit employees employed by the Respondent at any time since October 27, 2018. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative. In addition to mailing paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicated with its former bargaining unit employees by such means.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 19 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.

Dated, Washington, D.C. September 8, 2022

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Lauren McFerran, Chairman

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Gwynne A. Wilcox, Member

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

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER RING, dissenting in part.

Mark Salopek, a guard employed by Xcel Protective Services (Respondent or Xcel) at a United States Navy ammunitions installation, believed that the Respondent was violating Navy regulations by letting guards complete required weapons-qualification testing at unauthorized sites, using unauthorized weapons and ammunition, and shooting at improperly altered targets. He also believed that at least one report documenting weapons-qualification testing contained a false statement. Salopek was troubled by these practices, and he discussed his concerns with fellow guards and communicated them to the Respondent. Dissatisfied with the response he received, Salopek decided to present his concerns directly to the commanding officer at the Navy installation. During his interactions with the Navy, Salopek disparaged Xcel's weapons-qualification practices, broadly criticizing the Respondent for violating Navy regulations and accusing the Respondent of committing illegal conduct, falsifying records, and engaging in a cover up. Although Salopek also vaguely referred to safety concerns, he never indicated to the Navy that Xcel's weapons-qualification practices posed a threat to the guards' safety. The Respondent subsequently discharged Salopek for violating its chain of command by taking these disparaging criticisms to the Navy.

The National Labor Relations Act (the Act) gives employees the right, among others, to engage in concerted activities for the purpose of mutual aid or protection, and such activities can include appeals to third parties for support. The Act also recognizes employers' right to discharge employees "for cause," and disloyalty is one such cause. Both of these rights may be implicated when employees concertedly disparage their employer to a third party to gain support in an ongoing labor dispute, and the employer discharges the employees for disloyalty. The Supreme Court addressed this situation in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1952), and based on *Jefferson Standard*, the Board set forth a framework for dealing with these types of cases in *Mountain Shadows Golf Resort*, 330 NLRB 1238 (2000). Under the *Mountain Shadows* framework, employees' otherwise-protected disparagement of their employer, directed to a third party, loses the Act's protection if the communication fails to indicate to the third party that it is related to an ongoing labor dispute between the employer and employees.[1]

The reason for this requirement is plain. As the Board and courts have emphasized, without such a disclosure the third party will not have the information it needs to critically filter the employees' seemingly disloyal conduct. To put it colloquially, the third party must be able to put the disparaging things the employees are saying about their employer in context, understanding that the employees have an axe to grind with their employer over the terms and conditions of their employment.

My colleagues adopt the judge's finding that Salopek was protected by the Act during his interactions with the Navy. On this basis, they agree with the judge that the Respondent violated the Act by discharging Salopek because of that activity. In my view, it is questionable whether those interactions, although concerted, were undertaken for the purpose of mutual aid or protection, and therefore whether Salopek was protected by Section 7 as a threshold matter. But even assuming he was, Salopek did not retain the Act's protection because his communications to the Navy did not indicate that the criticisms of the Respondent's weapons-qualification practices were related to an ongoing dispute with the Respondent over the guards' working conditions. Salopek lost the protection of the Act—if he ever had it to begin with—under the requirements of *Jefferson Standard* and *Mountain Shadows*. Accordingly, his discharge did not violate the Act, and I dissent from my colleagues' contrary conclusion.[2] Whether it might have violated a whistleblower law is another matter, and one over which the Board has no jurisdiction.

Facts and Background

The Respondent, a security services contractor, provided security at Naval Magazine Indian Island (Indian

[1] By "otherwise-protected disparagement," I mean that the threshold requirements for Sec. 7 protection are satisfied. That is, in disparaging their employer to a third party, the employee or employees doing so are engaged in either union activity or concerted activity for the purpose of mutual aid or protection. If the threshold requirements for protection are not satisfied, the employee or employees are unprotected regardless of whether the disparagement would retain protection under *Jefferson Standard* and *Mountain Shadows*. In those circumstances, there would be no Sec. 7 protection *to* retain.

[2] In all other respects, I join my colleagues' decision.

The majority observes that the Respondent has not advanced the arguments I rely on and therefore has waived them. Be that as it may, the Respondent's theory of the case does not constrain me. An appellate court, and by extension an appellate-court-like administrative agency such as the NLRB, "is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991). Moreover, "[t]he Board, with court approval, has repeatedly found violations for different reasons and on different *theories* from those of administrative law judges or the General Counsel, even in the absence of exceptions . . . ." *Electrical Workers IBEW Local 58 (Paramount Industries)*, 365 NLRB No. 30, slip op. at 4 fn. 17 (2017) (collecting cases) (emphasis in original). By parity of reasoning, and consistent with *Kamen*, the Board should be able to dismiss alleged violations for different reasons and on different theories from those advanced by respondents.

Island), the only deep-water naval ammunitions port on the West Coast. The Respondent's guards, who patrolled Indian Island and manned security checkpoints, were armed with weapons and ammunition provided by the United States Navy. Under Navy regulations, guards were required to qualify every 6 months on several different firearms at Navy-approved shooting ranges, using Navy-authorized targets, weapons, and ammunition.[3] Two failed weapons-qualification tests resulted in a guard's removal from the contract. Xcel Lieutenant Gerald Powless was responsible for administering weapons-qualification tests and certifying guards' successful completion.

Mark Salopek worked for the Respondent as a guard at Indian Island from May 2013 until his discharge in October 2018. Salopek testified that beginning around February 2018, he observed Powless altering targets after guards failed a weapons-qualification test, and the guards then passing the test using the altered targets. Salopek further testified that Powless qualified guards using privately-owned, unauthorized weapons at unauthorized shooting ranges, including gravel pits. Salopek testified that he believed these practices were unsafe and contrary to Navy regulations. Salopek discussed the Respondent's weapons-qualification practices with coworkers, including guard Steve Mullen. On March 9, 2018, Salopek reported these practices to the Respondent's Chief Executive Officer John Morgan, who promised to address them. Guard Daniel Lein testified that in May 2018, he and another newly-hired guard failed their weapons-qualification tests, but then qualified a few weeks later at an unauthorized range with unauthorized weapons. Lein testified that he discussed this with Salopek and other guards.

On June 28, 2018, Salopek sent an email to Morgan about the Respondent's weapons-qualification practices. The judge found that in this email, Salopek raised seven concerns:

> (1) someone could get hurt and the company could potentially be liable; (2) guards might be unable to handle their weapons properly, or fire them accurately, if there was a critical incident on the base; (3) the practices violated the Navy's "OPNAV" safety and operating procedures and ethics; (4) if discovered by the Navy, or an Inspector General complaint was made, the consequences could be "catastrophic" for the company and tarnish the company's name as well the names of Respondent's guards; (5) Xcel's rating with the government could be affected; (6) criminal actions may have occurred; and (7) violations of State law may have happened which could jeopardize the company's ability to conduct business and the Navy's reputation.

Morgan responded to the email, but Salopek was dissatisfied with his response. Although the Respondent's employees were represented by a union and covered by a collective-bargaining agreement at the time, nothing in the record indicates that Salopek consulted with the Union or filed a grievance over the weapons-qualification practices.

Instead, on July 8, Salopek, Mullen, and Lein took their complaint to Commander Rocky Pulley, the Navy's commanding officer at Indian Island. No party disputes the judge's brief findings concerning this meeting. The three guards told Pulley they had a "safety issue," but they were "vague regarding the exact issue." After a few minutes "going back and forth with generalities," the guards told Pulley "about the gravel pit ranges using nonmilitary weapons and personal ammunition for qualification shoots."

The testimony of Salopek, Mullen, and Lein concerning the meeting with Pulley supplements the judge's terse findings. Salopek testified that the three advised Pulley that they "were planning on coming forward with a concern of safety to the Inspector General." Salopek explained that they told Pulley the concern "involved alternate sites ranges [and] the alteration of targets," and they also told him that "the July 7th . . . range sheet is falsified. They weren't at Bangor.[4] They were at a gravel pit." Mullen similarly testified that the three told Pulley they "had a safety concern," but he conceded that "[w]e were vague on what [it] was . . . [w]e were just, you know, wanting to get some advice, you know, how to . . . pursue this." Mullen explained that they "told [Pulley] about the gravel pit ranges with – with non-military weapons, non-military ammunition." Lein testified that Salopek told Pulley "we have a big safety issue" and that Salopek "was trying to get direction on how to go about fixing it." Lein further testified that Salopek explained to Pulley that "we've had unauthorized weapon shoots. We have people that are not qualified that are standing post. And we have a public park across the street, which is a big concern." Pulley instructed the guards to email Navy Installation Security Officer Mike Jones.

On July 9, Mullen sent an email to Jones stating that several guards, including Salopek, were "coming forward with a safety [i]ssue concerning [w]eapons' qualifications." Salopek reviewed Mullen's email before it was sent. The email outlined specific instances of the Respondent's weapons-qualification practices, including the

[3] The guards had to qualify on the Beretta nine-millimeter pistol, the Mossberg M500 12-gauge pump-action shotgun, and the M-4 assault rifle.

[4] One of the approved shooting ranges for weapons-qualification testing was at Naval Base Kitsap in Bangor, Washington, about 30 miles south of Indian Island.

use of unauthorized ranges and weapons, altered targets, and guards failing weapons-qualification tests. Mullen reported that Salopek contacted CEO Morgan, who promised "everything would be conducted according to procedure." Mullen concluded: "We feel this practice is unsafe, against Navy policy, and illegal, by falsifying federal documents. Mr. Morgan [t]he CEO of Xcel has been given a detailed memo of these practices. Now it seems that they are trying to cover this up."

On October 27, 2018, the Respondent discharged Salopek for dishonesty and violation of the chain of command by taking his criticisms to the Navy instead of exhausting internal channels. The Respondent asserted that Salopek's criticisms were false and could get it into a "lot of trouble."

Applying *Jefferson Standard*, the judge pertinently found that Salopek's complaints made to Pulley and (via Mullen) to Jones "related directly to the guards' working conditions," and nothing in those complaints was so disloyal as to lose the protection of the Act. The judge found that in complaining to the Navy, Salopek wanted to pressure the Respondent to change its weapons-qualification practices to comport with Navy regulations, thereby improving guard safety. The judge further found that the core issues raised by Salopek to the Respondent and the Navy were in fact true, a finding that was contrary to the conclusions the Navy reached based on an internal investigation of the matter.

Excepting, the Respondent asserts that Salopek was not protected by the Act in his interactions with the Navy. For the following reasons, I agree with the Respondent.

Analysis

1. The legal framework

Under Section 7 of the Act, employees have a protected right to engage in "concerted activities for the purpose of . . . mutual aid or protection." Concerted activity is undertaken for the purpose of mutual aid or protection where employees are seeking to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). And as the Court held in *Eastex*, employees exercise their right to engage in concerted activity for mutual aid or protection when they concertedly seek to "improve their lot as employees through channels outside the immediate employee-employer relationship." Id.

Where employees disparage their employer to a third party, however, the foregoing principles are necessary but not sufficient to the analysis. Even if employees, when disparaging their employer to a third party, are acting concertedly and for mutual aid or protection, they may still be unprotected by the Act. The leading case in this area is, of course, the Supreme Court's decision in *Jefferson Standard*, supra. Under Section 10(c) of the Act, the Court explained, the Board may not require an employer to reinstate an employee who has been "suspended or discharged for cause," and "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer." The Act, said the Court, "seeks to strengthen, rather than weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise." 346 U.S. at 472.

Jefferson Standard arose from a union's efforts to secure an existing, favorable arbitration provision in a successor collective-bargaining agreement with a television station. 346 U.S. at 466–467. Without controversy, the union first picketed outside the station, displaying placards and distributing handbills that named the union as the representative of the station's employees, charged the employer with unfairness, and emphasized the employer's refusal to renew the arbitration provision. Id. at 467. Later, however, the union distributed new handbills, which "made no reference to the union, a labor controversy or to collective bargaining." Id. at 468. Instead, these new handbills launched "a sharp, public, disparaging attack upon the quality of the company's reputation and its business policies." Id. at 472.[5] The station discharged the employees associated with the new handbills, and the Board found the discharges lawful on the basis that the employees' conduct lost them the protection of the Act. Id. at 472, 477–478.[6]

The Court upheld the Board's decision. It emphasized that the "fortuity of the coexistence of a labor dispute afforded [the employees] no substantial defense" because the new handbill "related itself to no labor practice of the

[5] The new handbills chastised the station for failing to "purchase the needed equipment to bring [viewers] the same type of programs enjoyed by other leading American cities" and questioned whether the station "consider[ed] Charlotte a second-class community." Id. at 468.

[6] The Board explained:

> In short, the employees in this case deliberately undertook to alienate their employer's customers by impugning the technical quality of his product. . . . [T]hey did not misrepresent, at least wilfully, the facts they cited to support their disparaging report. And their ultimate purpose—to extract a concession from the employer with respect to the terms of their employment—was lawful. *That purpose, however, was undisclosed*; the employees purported to speak as experts, in the interest of consumers and the public at large. They did not indicate that they sought to secure any benefit for themselves, as employees, by casting discredit upon their employer.

Id. at 472–473 (quoting *Jefferson Standard Broadcasting Co.*, 94 NLRB 1507, 1511 (1951) (emphasis added)).

company. It made no reference to wages, hours or working conditions." Id. at 476. "The attack asked for no public sympathy or support," the Court observed, and the "policies attacked were those of finance and public relations for which management, not [employees] must be responsible." Id. Far from disclosing the existence of a labor dispute, the handbills "diverted attention away from the labor controversy [by] attack[ing] public policies of the company which had no discernible relation to that controversy." Id. at 472. The Court concluded that the employees had demonstrated "such detrimental disloyalty as to provide 'cause'" for discharge. Id. at 476.

Consistent with the teachings of *Jefferson Standard*, the Board formulated a two-prong test for determining whether employees' otherwise-protected disparagement of their employer, directed to a third party, retains or loses the protection of the Act. Under this test, such a communication is protected only if (1) it indicates to the third party that it is related to an ongoing labor dispute between the employer and employees, and (2) it is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection. *Mountain Shadows Golf Resort*, 330 NLRB at 1240.

Two points warrant emphasis. First, the standard is conjunctive. Both prongs must be met; protection is lost if either prong is not met. Whether the second step of this test has been met is more often at issue in the Board's cases, but both steps must be met to retain protection, and the first step is equally important. See *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989) (whether employee appeals to third parties disclose that they are related to a labor dispute was "central to the Supreme Court's reasoning in *Jefferson Standard*"). Second, the first prong of the *Mountain Shadows* test is analytically distinct from whether employees otherwise would be protected by Section 7. As a threshold matter, when employees criticize their employer to a third party, that criticism must constitute union or protected concerted activity to enjoy the Act's protection. But even where these threshold requirements are met, the Board in *Mountain Shadows*, implementing the Court's teaching in *Jefferson Standard*, held that employees leveling such criticism will *not* enjoy the Act's protection if they fail to disclose to the third party that their communication is related to an ongoing labor dispute.[7]

The Board later clarified that to satisfy the first prong of its *Mountain Shadows* test, employee communications to a third party that criticize the employee's employer must disclose a connection or nexus with terms and conditions of employment such that the third party "can grasp the connection." *Endicott Interconnect Technologies, Inc.*, 345 NLRB 448, 451 (2005), enf. denied on other grounds 453 F.3d 532 (D.C. Cir. 2006). It is imperative that an employee's third-party appeal establish this nexus because "[t]he purpose of the first [prong of the *Mountain Shadows* standard] . . . is of course to enable the recipients to evaluate the statements in a fuller context, applying what the listener or reader regards as a suitable discount or enhancement." *Oncor Electric Delivery Co. v. NLRB*, 887 F.3d at 492.[8] Otherwise stated, where an employee's appeal to a third party disparages the employer and thus appears disloyal, the employee must make the third party "aware [that the appeal] is generated out of" a "pursuit of better working conditions" so that the party can "filter [the appeal] critically." *Sierra Publishing*, 889 F.2d at 217.

Application of *Mountain Shadows*' first prong is illustrated in *Mountain Shadows* itself. There, a maintenance

[7] And under the second prong of the *Mountain Shadows* test, even if disparagement of an employer directed to a third party is otherwise protected and the employees disclose to the third party that the disparagement is related to an ongoing labor dispute, the employees will be vulnerable to lawful discipline or discharge if what they communicate to the third party is so disloyal, reckless, or maliciously untrue as to lose the Act's protection.

In *Oncor Electric Delivery Co. LLC v. NLRB*, 887 F.3d 488 (D.C. Cir. 2018), the United States Court of Appeals for the District of Columbia Circuit drew attention to an unsettled burden-of-proof issue related to the first prong of the *Mountain Shadows* test: "whether the Board's General Counsel bears the burden to show that a third-party appeal has 'indicated' its connection to an ongoing labor controversy, or whether the absence of any such indication serves as a defense for the employer where an appeal to third parties would otherwise be protected under § 7." Id. at 495. The court left that issue for the Board to address on remand. Because the *Oncor Electric* case remains pending before the Board on remand, I take no position at present on the burden-of-proof issue.

[8] The D.C. Circuit's decision in *Oncor Electric* points up the fact that a failure to satisfy the first prong of the *Mountain Shadows* standard is independently sufficient to deprive an employee of the Act's protection. At issue in *Oncor* was whether employee Bobby Reed's discharge for statements he made to a committee of the Texas Senate, in which he asserted that Oncor's smart meters at customers' homes posed a fire hazard, violated the Act. In the underlying decision, the Board concluded that Reed's discharge did violate the Act, finding that Reed was engaged in protected concerted activity when making the statements, and his statements were not maliciously false and therefore Reed did not lose the Act's protection. (Oncor Electric did not contend that Reed's statements were unprotected as disloyal.) See *Oncor Electric Delivery Co. LLC*, 364 NLRB 677, 677-681 (2016). On review, the D.C. Circuit upheld both of these findings. See *Oncor Electric*, 887 F.3d at 494 (rejecting Oncor's contention that Reed did not have a purpose of mutual aid or protection), id. at 499 (finding that substantial evidence supported Board's finding that Reed's statements were not maliciously false). If being otherwise protected and not so disloyal, reckless, or maliciously untrue as to lose the Act's protection ended the analysis, it would have made no difference that the Board failed to address whether Reed, in making his statements to the Texas Senate, disclosed that they were related to an ongoing labor dispute. But the court made clear that it did make a difference, and the court remanded the case to the Board to address the first prong of the *Jefferson Standard*/*Mountain Shadows* framework—and, in doing so, to resolve the burden-of-proof issue discussed above in footnote 7. See id. at 498.

employee employed by the respondent, a company that managed a public golf course, complained to city officials about the slow progress of negotiations for a collective-bargaining agreement and the impact of the respondent's practices on the availability of maintenance work. 330 NLRB at 1238. These communications disclosed their "nexus with terms and conditions of employment . . . and were protected under Section 7 of the Act," but one handbill distributed by this employee did not. Id. at 1238, 1241. That handbill "did not mention the problems the employees' union was having with negotiating with the [r]espondent," but instead "related solely to the impact of the company's capital investment and other business practices on the quality of the service provided to the customers." Id. at 1241. Although the handbill referred to the respondent ignoring proper maintenance practices, "an issue with an actual nexus to the employment concerns of the maintenance workers," it suggested that the city address this problem not by supporting the employees in their labor dispute with the respondent, but by turning over management of the golf course to a different company. Id. The Board found the employee's distribution of the handbill "was 'not part of an appeal for support in the pending dispute' but rather was a 'separable attack purporting to be made in the interest of the public rather than in that of the employees.'" Id. (quoting *Jefferson Standard*, 346 U.S. at 477).

2. Application of the legal framework to the facts of this case

Turning to the instant case, the threshold issue is whether Salopek's conduct was "otherwise protected" as that term is used herein—i.e., whether, in his communications with the Navy, Salopek engaged in concerted activity for the purpose of mutual aid or protection. Because Salopek acted with fellow guards Mullen and Lein, there is no question that his activities were concerted.[9] Less clear—much less clear—is whether he engaged in *protected* concerted activity.

Again, concerted activity has a purpose of mutual aid or protection where employees seek to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. at 565. Judging from Salopek's email to Morgan, the Respondent's CEO, one would be hard pressed to find that Salopek was seeking to improve a term or condition of employment or the guards' lot as employees. Of the seven concerns Salopek raised in that email, the only one that had any bearing on conditions of employment was the first one, where he asserted that "someone could have gotten hurt" as a result of weapons-qualification shoots being conducted at a gravel pit, where guards might trip or twist an ankle or a bullet might ricochet off a piece of gravel. Salopek raised no comparable employee safety concerns, however, related to the use of unauthorized weapons and ammunition and the alteration of targets, and he immediately segued to the *Respondent's* concerns, stating that "any number [of] things could place this company in civil liability." Indeed, the concerns mentioned in Salopek's email to Morgan chiefly focused on Xcel's interests, and to a lesser extent, the Navy's. As summarized by the judge, Salopek warned that "the consequences could be 'catastrophic' for the company" if the Navy found out what it was doing, "Xcel's rating with the government could be affected," and "violations of State law may have happened which could jeopardize the company's ability to conduct business and the Navy's reputation." Salopek also observed that Xcel's practices might have made the base vulnerable to a successful attack: "guards might be unable to handle their weapons properly, or fire them accurately, if there was a critical incident on the base." The email did express concern about potential harm to the guards' reputations, but protection against reputational injury is not a term or condition of employment. Perhaps Salopek was contemplating his prospects for employment with a successor security contractor if Xcel's violations of Navy regulations ended up costing Xcel the Indian Island contract. If so, he did not make the point explicitly (for obvious reasons), and in any event, expressing concerns about getting hired by the *next* security contractor would not have been aimed at improving the guards' terms and conditions of employment *with Xcel*.

The evidence also fails to establish that Salopek was seeking to improve the guards' lot as employees when he, Mullen, and Lein met with Commander Pulley. The evidence shows that although Salopek referred vaguely to safety during that meeting, he never specified that it was the *guards'* safety that prompted him to turn to the Navy for support. To the contrary, when Salopek did particularize the safety concern, he linked it to the safety of visitors to the park across the street from the naval base—*public* safety, not the guards' safety. In sum, I believe there is simply insufficient evidence upon which to base a

[9] "In general," for activity to be concerted, it must "be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), review granted and remanded sub nom. *Prill v. NLRB*, 755 F.2d 941, 948 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB,* 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Salopek contacted Commander Pulley with other employees, and the email to Security Officer Jones represented that several employees were coming forward to express their concerns.

reasonable finding that in communicating with the Navy, Salopek was protected by the Act as a threshold matter. While he certainly engaged in concerted activity, the evidence fails to establish that he engaged in *protected* concerted activity, i.e., concerted activity for the purpose of mutual aid or protection.

But even assuming that Salopek's fleeting references to injuries that might result from conducting qualifying shoots at gravel pits were sufficient to render his communications with the Navy otherwise protected, they were unprotected under the first prong of the *Mountain Shadows* test. Salopek took his criticisms of the Respondent's weapons-qualification practices to a third party, the United States Navy. During his conversation with Commander Pulley, Salopek accused the Respondent of violating Navy regulations by using unauthorized weapons-qualification sites, altering targets, and falsifying records. In the guards' letter to Navy Officer Jones, Salopek and his co-workers again accused the Respondent of "falsifying federal documents," and they ratcheted up their attack by accusing the Respondent of engaging in a cover up. Arguably, these statements were sufficiently disloyal to lose Salopek the Act's protection under *Jefferson Standard* and the second prong of the *Mountain Shadows* test. But setting that aside, the Navy needed to understand the fuller context of Salopek's disparaging statements to critically filter them, and Salopek failed to provide that necessary context.

Salopek's communications with the Navy did not establish the necessary nexus between his criticisms and a dispute with Xcel over the working conditions of its guard employees. To begin with, the evidence fails to show that in what was said to Commander Pulley, either Salopek, Mullen, or Lein disclosed *any* ongoing dispute with Xcel, let alone an ongoing labor dispute. The guards reported to Pulley weapons-qualification practices that violated Navy regulations, but there is no evidence they told Pulley that they had taken their concerns about those practices *to Xcel* before coming to him.[10]

But regardless whether Salopek disclosed to the Navy the existence of an ongoing dispute between the guards and Xcel, the evidence fails to show that he disclosed to the Navy the existence of an ongoing *labor* dispute, i.e., a dispute with Xcel over the impact of its weapons-qualification practices on the guards' on-the-job safety. Salopek's purpose in communicating with the Navy might have been to pressure the Respondent to stop practices that could have impacted the guards' safety, but if so, "[t]hat purpose . . . was undisclosed." *Jefferson Standard*, 346 U.S. at 472. The judge found that Salopek presented Pulley with "generalities" about a "vague" concern involving a "safety issue." This opaque reference to "safety" was unprotected because it addressed "general safety concerns and did not indicate that [Salopek's] concerns were related to the safety of the [guards]." *Five Star Transportation, Inc.*, 349 NLRB 42, 44 (2007), enfd. 522 F.3d 46 (1st Cir. 2008). Salopek also advised Pulley that the guards' concern "involved alternate sites ranges [and] the alteration of targets," and he told Pulley that "the July 7th . . . range sheet [was] falsified." Nothing in this additional disclosure made clear that these practices were being brought to Pulley's attention because they threatened the guards' safety. Indeed, the only specific connection Salopek articulated between safety and the Respondent's weapons-qualification practices involved the safety of members of the public, not the Respondent's guards. Salopek told Pulley that the Respondent's practices created a "big concern" because "we have a public park across the street." Salopek was also unprotected in stating this concern because it "was not part of an appeal for support in [any] pending dispute" between the guards and Xcel but rather was a "separable attack purporting to be made in the interest of the public rather than in that of the employees." *Jefferson Standard*, 346 U.S. at 477. Moreover, as evident in the email to Jones, the guards' purpose was to blow the whistle on Xcel's violations of Navy regulations and federal law, "not . . . to change labor practices at [Indian Island]." *Mountain Shadows*, 330 NLRB at 1241. In that email, guard Mullen—on behalf of Salopek among others—asserted that the Respondent's practices were "against Navy policy, and illegal, by falsifying federal documents," and he accused the Respondent of "trying to cover this up." Even assuming Salopek's interaction with the Navy constituted protected concerted activity—I believe it did not, as explained above—his disparagement of Xcel's weapons-qualification practices lost the Act's

[10] The subsequent email to Officer Jones did disclose that "Mr. Morgan [t]he CEO of Xcel has been given a detailed memo of these practices," but nothing in that email made clear that the guards had a *labor* dispute with Xcel—i.e., a dispute with Xcel over the impact of its weapons-qualification practices on the guards' on-the-job safety—as opposed to concerns that Xcel was violating naval regulations and over Xcel's potential exposure to liability, the port's lack of preparedness in case of attack, and so forth.

My colleagues say that Salopek did not have to disclose to the Navy the existence of an ongoing dispute with Xcel, citing *Arlington Electric*, 332 NLRB 845, 846 (2000). The respondent in *Arlington Electric* was a subcontractor on a construction project at a hospital. An employee of the respondent distributed flyers to members of the public, urging them not to use the hospital because the respondent did not provide paid family health care. *Arlington Hospital* is distinguishable from this case because recipients of those flyers would have inferred the existence of a labor dispute between the employee and the respondent from the face of the flyer itself.

protection because it "related itself to no labor practice of the company. It made no reference to wages, hours or working conditions." *Jefferson Standard*, 346 U.S. at 476.[11]

Conclusion

As a threshold matter, an employee's statements to a third party must constitute either union activity or concerted activity for the purpose of mutual aid or protection for the employee to be protected by Section 7 of the Act when making those statements. But even if this threshold requirement is met, *Jefferson Standard* made clear that employees' disparaging statements about their employers, made to a third party, do not retain the Act's protection if employees fail to relate such statements to an ongoing dispute with their employer over their terms and conditions of employment. Salopek's communications to the Navy were unprotected on both counts. The evidence fails to demonstrate a purpose of mutual aid or protection, and even assuming otherwise, at best Salopek conveyed to the Navy only vague, generalized safety concerns, without linking those concerns to the guards' on-the-job safety or any other working conditions. Indeed, when he spoke with Commander Pulley, Salopek evidently did not disclose the existence of *any* ongoing dispute with Xcel over its weapons-qualification practices, let alone an ongoing *labor* dispute. Simply put, Salopek brought a whistleblower complaint to the Navy—and as a former member of the Board correctly observed, "the National Labor Relations Act is not a general whistleblowers' statute." *Waters of Orchard Park*, 341 NLRB 642, 645 (2004) (Member Meisburg, concurring). I would find that Salopek's conduct was not protected by Section 7 of the Act, and I would dismiss the allegation that the Respondent violated Section 8(a)(1) by discharging Salopek for that conduct. Accordingly, in relevant part, I respectfully dissent.

Dated, Washington, D.C. September 8, 2022

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John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

[11] Although Board precedent does not require represented employees to engage with their union or to file a grievance for their concerted conduct to be protected, it is notable that Salopek made no reference to the union representing the Respondent's guards while meeting with Commander Pulley. Even a brief mention of the Union, the union contract, or the requirements of the union contract likely would have put Commander Pulley and the Navy on notice that Salopek's complaints related to a labor dispute and established the nexus required to satisfy *Jefferson Standard* and the *Mountain Shadows* test. The absence of any reference to the traditional apparatus of labor disputes, while not dispositive, cannot be overlooked, and it bolsters the conclusion that Salopek failed to disclose that his complaints related to a labor dispute.

APPENDIX

NOTICE TO EMPLOYEES
MAILED 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 mail 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 you with reprisals if you engage in protected concerted activities.

WE WILL NOT discharge any of you for engaging in protected concerted activities.

WE WILL NOT refuse to bargain collectively with International Union, Security, Police, and Fire Professionals of America, Local 5 (the Union) by failing or refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our employees in the following appropriate unit:

> All federal contract security officers employed by the Company at the Indian Island Naval Magazine in the State of Washington. Excluding all other employees, employed in any capacity such as Area Managers, Captains, Lieutenants, office or clerical employees, and professional employees as defined in the National Labor Relations Act.

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

WE WILL provide to the Union in a timely manner the information requested by the Union on October 30, 2018, to the extent that we have not already done so.

WE WILL, within 14 days from the date of the Board's Order, offer Mark Salopek full reinstatement to his former

job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Mark Salopek whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Mark Salopek for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Mark Salopek's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Mark Salopek, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

XCEL PROTECTIVE SERVICES, INC.

The Board's decision can be found at www.nlrb.gov/case/19-CA-232786 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Carolyn A. McConnell, Esq., for the General Counsel.
Jason R. Stanevich, Esq. and *Maura A. Mastrony, Esq. (Littler Mendleson, P.C),* for the Respondent.
Richard M. Olszewski, Esq. (Gregory, Moore, Jeakle & Brooks P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge. As the first line of defense to guard one of our Nation's most important naval facilities, the United States Navy uses private contractors. This case involves claims that contractors used to guard Naval Magazine Indian Island could not shoot straight. It was tried before me in Seattle, Washington, over 6 days in September and November 2019. Based on charges filed by the International Union, Security, Police, and Fire Professionals of America, Local 5 (Union), an Order Further Consolidating Cases, Consolidated Complaint and Notice of Hearing (Complaint) issued on July 31, 2019, alleging that Xcel Protective Services, Inc. (Respondent or Xcel) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by: interrogating employees, prohibiting employees from discussing wages, constructively discharging employees, and refusing to provide the Union with information. Respondent denies the unfair labor practice allegations.

Based upon the entire record, including my observation of witness demeanor, and after considering the briefs filed by all the parties, I make the following findings of fact and conclusions of law.[1]

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a New Mexico Corporation that provides contract security services to the United States Government. At all times relevant herein, Respondent provided contract security services to the United States Navy, in connection with the national defense of the United States, at Naval Magazine Indian Island. While performing these services for the United States Navy, Respondent purchased and received goods and materials valued in excess of $50,000 directly from points outside the State of Washington. Based upon the foregoing, Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the International Union, Security, Police, and Fire Professionals of America, Local 5 (Union) is a labor organization within the meaning of Section 2(5) of the Act.[2] (GC 1(bbb), 1(ddd).) Accordingly, I find that this dispute affects commerce and the National Labor Relations Board has jurisdiction pursuant to Section 10(a) of the Act. *Old Dominion Security*, 289 NLRB 81 (1988) (Board asserts jurisdiction over employer that provides contract security services for the U.S. Navy).

[1] Testimony contrary to my findings has been specifically considered and discredited. Witness demeanor was the primary consideration used in making all credibility resolutions.

[2] Transcript citations are denoted by "Tr." with the appropriate page number. Citations to the General Counsel, Respondent, and Joint exhibits are denoted by "GC," "R," and "JX" respectively. Transcript and exhibit citations are intended as an aid only. Factual findings are based upon the entire record and may include parts of the record that are not specifically cited.

II. FACTS INVOLVING THE 8(A)(1) AND (3) ALLEGATIONS

A. Background

Naval Magazine Indian Island (Indian Island) is the United States Navy's only deep-water ammunitions port on the West Coast. It supports the largest Navy and commercial vessels afloat, including aircraft carriers, guided missile destroyers, submarines, ammunition ships, supply ships, container ships, patrol boats, and commercial barges all of which stop at Indian Island throughout the year.[3] The naval base encompasses the entire island, approximately 2,700 square acres, and is located in the Puget Sound, across the bay from Port Townsend, Washington. Various types of munitions are stored at Indian Island in underground bunkers; the port facility is used to off-load the ordnance for storage or to load them onto ships for military use. (Tr. 46, 532, 641; R. 22, p. 3.)

Because Indian Island is the Department of Defense's largest conventional ordnance storage site on the West Coast, access to the facility is tightly regulated. The Navy relies on private contractors as "the primary security source" to provide armed security services at the base. (R. 22, p. 3.) These security contractors staff key checkpoints on the island, ensuring only authorized personnel are allowed to enter and that commercial vehicles entering the base do not contain any unauthorized items. They also conduct roving patrols using vehicles to drive around the island to various checkpoints. There are two roving patrols–North Patrol and South Patrol. During these roving patrols guards check the various buildings, facilities, and fence lines, along with the beaches around the perimeter of the island. (Tr. 48, 79–81, 217, 473, 748; R 44.)

At the time the Complaint in this matter issued, Respondent had been providing contract security services for the Navy at Indian Island for 20 years, under a series of 5-year contracts. Originally, Respondent provided these services under the name "Basic Contracting Services, Inc.," or "BCSI." (Tr. 41, 980.) In about 2015 Respondent changed its name to Xcel. Xcel's most recent 5-year contract with the Navy expired on September 30, 2019. Although Xcel submitted a bid for the contract's renewal in July 2018, the Navy chose another contractor. Xcel no longer provides security services for the Navy at Indian Island. (Tr. 41, 874, 980–994, 1007; R 43–44; GC 1(v).)

Navy civilian employees manage the various contracts the Navy has with private companies on government installations (referred to as the "Navy Contracting Office"). At Indian Island Melissa Burris (Burris), who had the title of Contracting Officer, was responsible for overseeing the contract between Xcel and the Navy. The Contracting Officer is the individual responsible for signing the contract between the Navy and Xcel and is ultimately the responsible party on the government's behalf for the contract. In this capacity Burris also had the authority to require that a contractor remove individual employees from working on the contract. That being said, while Burris could request employees be removed from the contract, she did not have the authority to require that Xcel fire anyone. (Tr. 531, 545–551, 558–559, 571.)

Richard Rake (Rake) worked directly under Burris in the hierarchy of the Navy civilian employees overseeing the Xcel contract; his office was located at the Navy submarine base in Bangor, Washington. Rake, who had worked as a Navy civilian employee since 2002, oversaw multiple contracts for the Navy including the one with Xcel. In this capacity he held various job titles, including Senior Performance Assessment Representative and Contracting Officer Representative. (Tr. 162, 526–531, 546, 556, 994–995.)

Along with supervising subordinates on each of his individual contracts, Rake also responded to "customer complaints" regarding the contracts themselves. (Tr. 531.) Rake testified that these complaints could come from anybody including contractors, visitors, government employees, Navy personnel, or Navy employees. Rake said that his job was to make sure the government and the contractor abided by the contract. On the Xcel contract, Rake supervised Steve Manson (Manson), who was responsible for performing monthly assessments of the contract. Manson had the title of Performance Assessment Representative. (Tr. 531, 534.)

B. Respondent's Operations at Indian Island

Respondent's security guards who worked at Indian Island were covered by a collective-bargaining agreement (CBA) between Respondent and the Union. Approximately 50 of the guards worked at the base over three different shifts: day shift (5:45 a.m.–2;15 p.m.); swing shift (1:45 p.m.–10:15 p.m.); and graveyard or night shift: (9:45 p.m.–6:15 a.m.).[4] (Tr. 233, 444, 873–874; R 7, R 32; JX 15–16.)

Xcel conducted its operations at Indian Island out of a building shared with the Navy referred to as "Building 848." (Tr. 198, 912, 660.) Respondent's offices, training room, employee locker room, and armory were located on one side of the building, while the Navy's used the other side. Respondent's training room was a type of all-purpose room used daily for employee briefings. Guards also used the training room, which contained computers, as a type of break and lunchroom. Because Respondent's guards were armed, it was not uncommon for them to be in the training room with their weapons. (Tr. 431–432, 911–912.)

John Morgan was Respondent's Chief Executive Officer until September 2018, when he was replaced by Michael Filibeck (Filibeck). Filibeck was a member of Xcel's Board of Directors, and also held the title of Senior Vice President. Filibeck was new to Xcel, having started with the company on September 3, 2018.[5] He fully assumed all of Morgan's former duties around October 12. Neither Morgan nor Filibeck were physically located at

[3] I take administrative notice of the information provided by the United States Navy about Indian Island. See https://www.cnic.navy.mil/regions/cnrnw/installations/naval_magazine_indian_island.html (last visited on November 30, 2020); *Phillips v. Spencer*, 390 F.Supp.3d. 136, 149 fn. 7 (DDC 2019) (Court takes judicial notice of report located on Navy's website); Fed.R.Evid. 201(b)(2).

[4] The relevant unit is defined in the CBA as: "all federal contract security officers employed by the Company at the Indian Island Naval Magazine in the State of Washington. Excluding all other employees, employed in any capacity such as Area Managers, Captains, Lieutenants, office or clerical employees, and professional employees as defined in the National Labor Relations Act." (JX 16.)

[5] All dates refer to 2018 unless otherwise indicated.

Indian Island; Filibeck's office was in Albuquerque, New Mexico. (Tr. 39, 60, 74, 980–982, 987–988.)

Respondent assigned military-style titles to its managers and supervisors working at Indian Island. Michael Terry (Terry) was in charge of all of the company's operations at Indian Island and held the title of "Captain." Terry had worked for Respondent in various capacities since 2005 and assumed his duties as Xcel's Captain at Indian Island in February 2015. Terry reported directly to Morgan and then to Filibeck when Morgan was replaced. Respondent's shift-supervisors were given the title of "Lieutenant." Respondent had between three to four full-time Lieutenants who reported directly to Terry. Because a supervisor was required to be working at all times, Respondent had four guards who worked as "acting" or "alternate" Lieutenants. These were bargaining unit employees who worked as acting Lieutenants when needed.[6] (Tr. 73–77, 156–157, 278, 869–874, 909, 987.)

Some of Xcel's full-time Lieutenants had specific assignments. One such Lieutenant was Gerald Powless (Powless), who worked was Respondent's training officer. As part of his duties as training officer, Powless was the shooting range instructor and in charge of performing Respondent's firearm qualifications. Powless had been performing this assignment for years and was designated as Respondent's "range master." (Tr. 456, 888, 969.) As the range master, Powless would complete, and sign, the Navy's official shooting-range qualification forms ("Form 3591.1"), which would be completed whenever a qualification shoot occurred.[7] Form 3591.1 showed the name of the guard qualifying, the location of the shooting range where the qualification occurred, the date of the shooting range, the weapon(s) and the range course used, the shooter's score, and whether the individual did or did not qualify with a particular weapon. A copy of Form 3591.1 would go into each guard's file to show that they had properly qualified for each particular weapon. (Tr. 147, 278, 509, 560, 882–883, 902, 987, 1015, 1045–46; R. 42.)

C. Weapon Assignments and Shooting Qualification Tests

1. Weapon assignments

Respondent's guards were assigned various weapons to use during their workday; everyone carried a Beretta M9 nine-millimeter pistol as their standard weapon. A Mossberg M500 12-gage pump-action shotgun, and an M-4 assault rifle were also assigned to guards, depending upon the post they were working on any given day. Guards started their shift with a daily briefing. After the briefing they would go directly to the "armory" or "cage" to check out their weapons for the day.[8] Each guard who qualified for a particular weapon was given a yellow weapons card. At the cage, the guard turned in a weapons card for each specific weapon he/she was assigned to carry that day, depending upon their post. A Lieutenant or acting Lieutenant then issued the guard their weapon(s) and ammunition. At the end of the day, the process was repeated, but in reverse. Weapons and ammunition were returned to the armory, and the guards received their weapons card in return. (Tr. 78, 217–218, 233, 265, 448, 454, 456, 533, 654–655, 891, 1074.)

The weapons the guards carried at work and the ammunition for those weapons belonged to the Navy. Xcel employees were not allowed to leave Indian Island with any of these weapons, unless the weapons were going to be used for an official qualification at a shooting range. And then, the weapons were transported to the shooting range under strict procedures in locked cases. (Tr. 52–53, 132–133, 233–234, 444–445, 511, 533, 654, 667.)

2. Shooting qualification tests

Guards at Indian Island were obligated to pass shooting tests every 6 months to show that they were properly qualified to carry each type of Navy issued weapon. The Navy required that these tests occurred at specific shooting ranges approved by the Navy, using only government-owned weapons, and ammunition provided by the Navy. The Navy also provided the targets to be used for qualifications. (Tr. 53–54, 105, 514, 533, 891, 893, 895; R. 43 pp. 22–23.)

The Navy had approved two shooting ranges for guards at Indian Island to use for weapons qualifications. The official shooting range was located at Naval Base Kitsap, a submarine base in Bangor, Washington, about 30 miles south of Indian Island. The Navy had also approved the Port Townsend shooting range for use during special circumstances or when the Bangor range was closed. (Tr. 53–54, 447, 511, 612–613, 656, 995, 1071; R. 2.)

For the shooting qualification tests, the Navy set the specific standards for each test. However, the tests themselves were administered an Xcel employee. As the range master, Powless was the person generally responsible for overseeing the ranges and completing the corresponding paperwork. Other Xcel employees also assisted at the range, serving as safety officers or line coaches. When Xcel guards were qualifying at the Bangor range, nobody from the Navy was present to keep a list of who was shooting that day. However, the guards would sign-in on a weapons training roster form that Respondent would maintain. Powless would also sign the form as the instructor, certifying that the weapons training requirements were completed. (Tr. 110, 121, 133–134, 235, 446, 495–496, 508–510, 656, 905, 969, 1046; R. 14; JX. 4 #1235, JX. 5 #1305, #1307.)

The shooting qualification tests occurred twice a year. Every guard was required to pass a primary firearms qualification annually, and then a sustainment test 6 months later. Shooting range days were considered workdays and guards would be paid during weapons qualifications. During these tests, guards need to achieve a certain score, based upon their shooting accuracy, to qualify. (Tr. 103–104, 656, 807, 891, 893.)

[6] The full-time lieutenants were not part of the bargaining unit, and in its Answer Respondent admitted that the full-time Lieutenants, including Gerald Powless, Doug Lux, and Armando del Rosario, were statutory supervisors and/or agents of Respondent within Sections 2(11) and 2(13) of the Act. (GC. 1(bbb); GC. 1(eee))

[7] Xcel Lieutenant John Armstrong was also authorized to sign these forms. (JX. 4 #1233, JX. 5 #1304)

[8] According to Rake, the correct name for this location was the "ready for issue room," as the main armory at Indian Island was technically located in another area. (Tr. 539, 552–553.) Nevertheless, in this decision the area where the guards received their weapons on a daily basis is referred to as the "armory" or the "cage" which is consistent with the testimony of the various witnesses. (Tr. 78, 218, 264–266, 445, 510, 655, 672, 709, 715, 939; JX. 5 #1281)

The annual qualification test consists of two M9 pistol courses, a regular course firing 50 rounds, and a low-light shoot. There was also a shotgun qualification course, where guards were required to shoot at three different targets with the M500. Finally, the M4 rifle course consisted of shooting the rifle in a prone, kneeling, and standing position at three different yardages. For the M4, guards also needed to pass a separate low-light shooting test. The 6-month sustainment test was a scaled down version of the annual qualification. Guards only needed to qualify with the M9 pistol and the M4 rifle, and they used larger targets. There was no M500 shotgun course during the sustainment shoot; guards only had to show a familiarization with the weapon. (Tr. 104, 446, 805–806, 891–893, 901.)

Guards received two opportunities to pass their qualification tests. If a guard failed, they had 60 days to complete their second test to qualify. If a guard did not qualify after their second try, the guard was supposed to be removed from the contract. That being said, it appears Xcel's general practice was that, if a guard passed their pistol qualification, but failed the rifle/shotgun qualification twice, the guard was allowed to continue working at posts that only required an M9 pistol until the guard was eventually able to qualify with the M4 rifle and M500 shotgun. (Tr. 67–68, 566, 657–658, 733–734, 807–808.)

D. Respondent's Use of Alternate Sites for Weapon Qualifications

Terry admitted during his testimony that, prior to July 2018 when a group of Respondent's guards complained to the base commander, Respondent sometimes used areas other than the official Navy designated ranges at Bangor or Port Townsend to qualify guards on their weapons.[9] Sometimes they used the backyard of a guard's house for weapons qualifications, "or anywhere [they] needed to," in order to qualify their guards. (Tr. 894–896, 962–968.) Terry testified that, in these circumstances, rather than using official Navy issued weapons, Respondent would provide its own weapons for the shooting range, which he said were comparable to Navy weapons: a 9-millimeter pistol, a 12-guage shotgun, and an AR-15 or something similar to the M-4 rifle.[10] (Tr. 894–896, 978.)

Terry said that, while Xcel had been doing "this for years," (Tr. 894) these alternate site shooting ranges would only occur after a guard did not qualify initially at the official Navy designated shooting range, or if a guard had to do a "make-up shoot." (Tr. 895) Terry testified that both Rake and Manson were aware of Respondent's practice, including the fact that Respondent had been using someone's backyard for weapons qualifications.[11] According to Terry, neither Rake nor Manson had objected to this practice.[12] Terry said that Respondent believed it was working within the parameters of the Navy's instructions, because Xcel would set up the exact same shooting course, albeit at an alternate site and using non-Navy issued weapons/ammunition. (Tr. 894–896, 963.)

During his testimony, Terry identified at least one weapons qualification Form 3591.1, that was signed by Powless, where the information in the document was incorrect. The form states that five guards, including a guard named Evan Schroder (Schroder), successfully completed the handgun qualification course, the rifle qualification course, and also qualified with the shotgun, at the Bangor range on July 7, 2017. Terry admitted that this qualification shoot did not occur at the Bangor range as the document states. Instead, it occurred at Schroder's house, in his backyard. According to Terry, having a sustainment qualification shoot occur in Schroder's backyard was consistent with Xcel's practice at the time. (Tr. 895–898, 900, 967–969; R. 42.)

Terry testified that it was only after Xcel's guards complained to the base commander, and the subsequent investigation, that he learned Respondent could only use Navy approved shooting ranges for official weapons qualifications and that only Navy issued weapons and ammunition could be used during qualifications. As part of the investigation into the complaints lodged by Xcel employees in July 2018, Terry said that Respondent got their "hand slapped" by the Navy because these qualification tests were not occurring at authorized shooting ranges; Xcel then stopped the practice. (Tr. 963, 977–978.)

E. Guards Complain about Xcel's Weapons Qualification Practices

1. Xcel guards Mark Salopek, Steve Mullen, and Daniel Lein

Mark Salopek (Salopek) worked for Xcel as a guard at Indian Island from May 2013 until he was fired on October 27, 2018. Previously, Salopek had worked for 22 years as a police officer with various state or local jurisdictions in California and Nevada. He then moved to Washington State. (Tr. 943) Terry and Salopek were friends, having worked together in law enforcement, and Terry helped Salopek get a job as a guard with Xcel. After Terry took over as the Xcel Captain at Indian Island in early 2015, he promoted Salopek to acting Lieutenant. (Tr. 72–73, 324, 938–943.)

While working for Xcel, Salopek was active in the Union. He was a steward in 2014, and his signature was on the most recent CBA, along with the predecessor agreement, as a member of the Union's bargaining committee. (Tr. 82–83, 258–259; JX 15–16.)

Before he was fired in October 2018, Salopek only had one prior discipline in his record, a three-day suspension that occurred in October 2015 which also resulted in his being demoted

[9] Terry testified that this practice may still have been occurring as late as July 2018. (Tr. 978.)

[10] The term "AR-15" is often used to refer to the semiautomatic version of M16 or M4 type rifles/carbines that may be purchased by civilians. See *Colt Def. LLC v. Bushmaster Firearms, Inc.*, No. CIV.04-240-P-S, 2005 WL 2293909, at *14 (D. Me. Sept. 20, 2005), subsequently affd. 486 F.3d 701 (1st Cir. 2007). The M16 and M4 used by the military are both derived from the original AR-15 developed by a company named Armalite. Id.

[11] P. 895, line 9 of the transcript reads "Port Townsend range or the Pier (phonetic) range." It should read "Port Townsend range or the Bangor range. Also, Page 895, line 13 reads "Steve Matts (phonetic) and Richard Rake." It should read "Steve Manson and Richard Rake."

[12] This testimony was originally elicited by Respondent's counsel, but without proper foundation as to how Manson and Rake knew these qualification ranges were occurring on unauthorized sites. (Tr. 895, 899.) However, Terry later testified that he personally told both Rake and Manson about these practices. (Tr. 963.) I credit Terry's testimony about this matter.

back to a regular guard. Regarding the incident, on October 3, 2015, Salopek was on duty and left various doors to the armory open and unattended. Rake was involved in reviewing what occurred and recommended to the Contracting Officer that Salopek be removed from the contract because the open and unattended armory contained 5,000 rounds of ammunition, along with M9 pistols, M4 rifles, M500 shotguns, and M240 belt-fed machine guns. Ultimately Salopek was not removed from the contract, as Terry intervened on his behalf. Instead of removing him from the contract, it was decided that Salopek would be suspended for 3 days and demoted back to a guard. (Tr. 204–206, 554, 939–942; JX. 5 #1280–1282.)

Steve Mullen (Mullen) started working as a guard for Xcel in July 2011 and worked for Respondent until December 2016 when he left the company because he could not pass his Physical Readiness Test (PRT). Respondent's employees are required to pass a PRT every 6 months; for the test each guard is required to do a certain number of sit-ups, push-ups, and sitting toe-touches. Guards also have to complete a 1 ½ mile run within an allotted period of time. If a guard fails a PRT they get a 60-day waiver and then must retake the test. If they are again unable to pass the PRT a second time they are terminated. (Tr. 56–57, 215–218, 875–876.)

According to Mullen, he failed the PRT in 2016 due to a knee injury caused by a blood disease. After he left the company, Mullen received treatment for the disease, was able to pass the PRT, and was rehired by Xcel in May 2017. After resuming his employment with Xcel in 2017, he continued working for the company until July 17, 2018, when he resigned claiming he was subjected to workplace harassment and an unsafe work atmosphere. At various times during his employment with Xcel, including from May 2017 through May 2018, Mullen worked as an acting Lieutenant. (Tr. 215–221, 457, 490, 874; JX 4 #1225; Tr. 215–216.)

Before working for Xcel, Mullen was employed as an armed security guard for another government contractor. He had also worked as a police officer with various local jurisdictions in California. Mullen is also a retired California Department of Corrections prison guard, having received a medical retirement in 1991. His medical retirement was due to a workplace injury that occurred when a steel door crushed his shoulder. Regarding this incident, Mullen testified that he had reported a coworker named Yolanda to his superiors for certain inappropriate statements. Yolanda then told Mullen that he "did not know what [he] had stepped in." (Tr. 228.) A few days later, Mullen said that he and Yolanda were working the same shift; Mullen was counting prisoners while Yolanda was controlling the cell doors. As Mullen was walking through the steel doors accessing the prisoner housing unit, Yolanda closed the door on him, crushing his arm/shoulder in the door and his back against the door jam. Mullen testified that yelled for Yolanda to open the door, but she replied saying "don't tell me what to do." (Tr. 228) Mullen implied that Yolanda purposely closed the door on him, saying that the only way the door could close was if Yolanda had removed her hand from a button which kept the door open. According to Mullen, after he was hired with Xcel, he told Terry about his injury and how it occurred. (Tr. 223–224, 228–232.)

Daniel Lein ("Lein") started working for Xcel as a guard at Indian Island in April 2018. Lein had previously worked contract security at other military installations for over 9 years, including at the Navy submarine base in Bangor. Lein had a friend working at Xcel who told him good things about the company. Lein wanted a change of pace, so he applied to work for Xcel and was hired. Lein is also a retired Navy Chief Petty Officer, having spent 20 years in the Navy. (Tr. 651–653, 728–729.)

2. Salopek speaks to Morgan about weapon qualification issues

Salopek testified that, sometime around February 2018 he was serving as a line safety officer/line coach at the Bangor range and he witnessed three guards fail their M4 rifle qualifications twice. After they failed, he saw Powless alter their qualification targets by drawing a large black cross on each target with a marker so the shooters could better see the target; the center point of the cross intersected the center circle of each target. Apparently the guards were then allowed to re-shoot and they qualified using the altered targets. (Tr. 110–111, 778.)

Salopek questioned whether it was proper to alter a qualification target; he had never seen anything like this before. Salopek believed that, as per Navy training documents, after two failed attempts a guard was supposed to be removed from the range, and evaluated or remediated before having another qualification attempt, as opposed to shooting with an altered target. He was concerned the guards were being denied this training and was worried about their ability to shoot accurately. In a real-life situation potential threats would not be approaching the base outlined with a large cross, and there was a public park near the base with cars driving by all the time. Salopek spoke to some of his coworkers, including Mullen, about Xcel using altered targets. Mullen had also witnessed the use of altered targets and did not think that a guard's shooting qualifications were valid if they qualified using an altered target. (Tr. 112–115, 778.)

Along with the use of altered targets, Salopek heard from some of his coworkers that Respondent had been using alternative sites, not authorized by the Navy, for weapon qualifications. According to Salopek, he had heard about coworkers qualifying at a gravel pit going as far back as 2016.[13] Salopek testified that, in 2016 a coworker named Jacob Schryver (Schryver) said he was asked to take a guard named Tom Cunningham (Cunningham), who had failed his shotgun qualification, to a gravel pit or forested area to teach him shotgun fundamentals.[14] Schryver did

[13] The term "gravel pit range" was used throughout the hearing. As used herein the term refers to weapon qualification shooting ranges occurring at locations not authorized by the Navy.

[14] At various points Salopek mistakenly referred to Jacob Schryver as "Jacob Schroeder" during his testimony. (Tr. 106, 114, 121, 142.) Schroeder's first name is Evan. (R 7, Tr. 447–449.) Salopek was not the only person who confused the two names during the hearing. Another guard confused the two first names, as did Respondent's counsel. (Tr. 987, 990, 1080.) It was clear that whenever Salopek testified about "Jacob Schroeder" he was referring to Schryver. Schryver's written statement to Rake discusses the same incident that Salopek attributed to "Jacob Schroeder," other guards testified they discussed Xcel's practice of using gravel pit ranges with Salopek/Schryver and Schryver was specifically mentioned in Salopek's June 28, 2018 email to Morgan. (Tr. 458–459, 679; GC 3.)

so, and afterwards saw Cunningham standing post with a shotgun. According to Salopek, Schryver was upset. Schryver believed Xcel counted the remedial training he did with Cunningham as an official qualification since Cunningham thereafter was allowed to stand post using a shotgun. Also, Salopek testified that, in July 2017 Powless told him that he was taking five guards to qualify using a shooting range at Schroder's house. Salopek's coworkers also told him about the qualification shoot at Schroder's house, the personal weapons that were used, and Terry told him about ammunition he had purchased at Walmart to use at Schroder's house.[15] (Tr. 106–109, 151–152, 277–283, 286–288, 416.)

Salopek therefore decided to speak with Morgan, Xcel's CEO. Salopek telephoned Morgan on March 9, 2018 and told him about the gravel pit ranges and the use of altered targets. Morgan asked whether Powless was doing these things on his own initiative, without Terry's consent, and Salopek said that Terry was aware of what was happening. Morgan told Salopek that he would call Terry and resolve the matter. A few days later, Salopek testified that he received a call from Morgan who said that he had instructed Terry to follow all the proper policies and procedures regarding range operations. (Tr. 115–116, 120, 290.)

3. Powless schedules Lein to qualify at a gravel pit range

After Lein was hired, his initial weapons qualification shoot was scheduled for May 9 at the Bangor range. Along with Lein, other Xcel guards were shooting, including another newly hired guard named Emily Coler (Coler). Mullen was also at the range that day, as was Salopek who was serving as a safety officer/line coach. Lein passed his pistol and shotgun tests but failed his M4 rifle qualification. Coler passed her M9 pistol test but failed her M4 rifle test and her M500 shotgun test. (Tr. 122–126, 454, 657–658, 454, 732–733; R 4; R 14.)

Lein was still a probationary employee at the time,[16] and based upon his experience working with other government contractors, Lein thought he would be fired because he could not pass the rifle test. Therefore, Lein asked Powless when he would be able to qualify again. Powless said that he would speak to Terry and get back with him. Powless also told Lein that, since he had passed the pistol and shotgun tests, he could continue working at posts that only required an M9 pistol and/or an M500 shotgun; he could not work on any post however that required an M4 rifle. While this practice did not conform with his past experiences, Lein continued working for Xcel standing posts that only required a pistol and/or shotgun. (Tr. 657–660, 733, 739, 760.)

A few days later, Lein asked Powless if there was any news from Terry about when the next qualification range would occur. Powless had not heard back from Terry. After 2 or 3 days had passed, Lein and Powless were standing outside the armory. Powless told Lein that he was going to take both Lein and Coler to "get you guys qualified." (Tr. 661.) However, Powless did not explain when or where the qualification range would occur. A few weeks later, Powless told Lein that he and Coler were to meet him at a U-Haul facility on May 27; from there they would ride with Powless to a gravel pit/rock slab for a qualification shoot. Lein asked Powless if the gravel pit shoot was for practice or qualification, and Powless said the shoot was to qualify Lein with the M4. But, instead of shooting an M4, Powless said that Lein would be shooting an AR-15 owned by a coworker named Robert Armstrong (Armstrong). Lein thought this was strange, as he had never experienced anything like this while working as a security contractor. Therefore, Lein spoke with some of his coworkers, including Salopek and Mullen, and asked whether shooting at a gravel pit was standard practice at Xcel. When Salopek heard about the scheduled gravel pit range he became angry. Salopek told Lein that gravel pit ranges had occurred in the past, but they were not allowed and needed to stop. (Tr. 126, 455, 660–665, R 2 p. 16.)

Before the scheduled gravel pit range, both Mullen and Lein overheard Powless speaking with Armstrong about an getting an AR-15 for use at the range. And, Salopek testified that Powless specifically told him that he had borrowed an AR-15 from Armstrong for use at the gravel pit range. According to Salopek, Powless was excited because the rifle had multiple attachments. (Tr. 127–128, 456–457, 667–668.)

After speaking with Salopek, Lein decided that he would not attend the gravel pit range but would instead wait for the next official range to occur at Bangor. On the day he was supposed to meet Powless and Coler, Lein called Powless and said he was not comfortable shooting at a gravel pit. Powless did not object. During their conversation, Lein asked Powless whether the gravel pit range was going to be "a legal shoot." (Tr. 671.) Powless said yes and told Lein that Armstrong had seen something in writing that this was authorized by the Navy. Lein then asked Powless if the guards were going to be paid for this shoot, and Powless said no, it was going to be unpaid. Lein believed that qualifying at a gravel pit was not authorized by the Navy; it was not an authorized location and employees were not being paid. He also thought it strange that Powless, who was a Lieutenant, was asking Armstrong about whether qualifying at a gravel pit was authorized. (Tr. 666, 670–671.)

A few days after May 27, Lein was returning his weapon and saw Powless at the armory. He asked Powless how Coler did at the shoot, and Powless said that Coler passed. Lein then asked Powless how Coler scored with the rifle, and Powless said that she shot a 141, one point over the passing mark of 140. Lein walked away; he thought that there was no way Coler could have passed. (Tr. 672–673.)

On about May 31, Lein testified that he was working when he saw Coler loading her bag into one of the patrol trucks. He said to Coler "hey I heard you passed your quals." (Tr. 674.) Coler replied saying that she was happy about passing and this was her first day working South Patrol, which required a shotgun. After his conversation, Lein saw that Coler was on the work schedule assigned to different posts that required a shotgun. Mullen testified that on June 12, he was scheduled to relieve Coler and saw that she had been issued an M4 rifle along with her M9 pistol.

[15] Mullen testified that he had also heard from his coworkers about the range at Schroder's house in July 2017, and that the guards qualified using non-Navy issued weapons and ammunition. (Tr. 447–449, 504.)

[16] Respondent's employees have a 180-day probationary period, pursuant to their union contract. And any discipline or discharge issued during the probationary period is not subject to the contract's grievance and arbitration provision. (Tr. 760, 965; JX 16, Art. #6.)

(Tr. 458, 673–675.)

Lein eventually qualified with the M4 on June 20, at the Bangor range, with a score of 157. Originally, the qualification shoot was scheduled to occur on June 13, and both Lein and Coler were listed on the email delineating the guards scheduled to shoot. However, the range was cancelled and rescheduled for June 20; again both Lein and Coler were on the list of people scheduled to qualify. While Lein qualified at the Bangor range on June 20, Coler was not at the range that day. Lein thought the entire episode did not make sense. If the May 27 gravel pit range was an authorized shoot, as stated by Powless, and Coler qualified with her shotgun and rifle, he questioned why would Coler's name appear on the list for both the June 13 and 20 qualifications at Bangor. Lein thought this was especially odd since Coler was already working posts that required her to have a shotgun and/or rifle. (Tr. 675–678, 733; R 2, p. 17.)

4. Mullen and Salopek speak with an Xcel Lieutenant about weapon qualifications

On June 25, Salopek, Mullen, and another guard were at the armory turning in their weapons. An Xcel Lieutenant named Doug Lux (Lux) was present and asked the guards if they had any concerns or complaints. Mullen brought up the issue of Respondent using a gravel pit for weapon qualifications. Salopek and the other guard confirmed that this practice was, in fact, occurring. Lux said he would look into it. Later that evening, Salopek testified that Lux called him at home and said he had spoken with Morgan who confirmed that guards cannot be qualified at a gravel pit range. Lux then said that Morgan asked whether Salopek would be willing to help with the company's training program; Salopek agreed to help. (Tr. 137–39, 459–461.)

The next day, Salopek was scheduled to work with Coler; the assignment required Coler to carry a shotgun. At the start of their shift, the Lieutenant in charge switched their positions. Salopek was assigned the shotgun instead of Coler. Salopek testified that, as they drove to their post, Coler told him that she was angry because she had spent 5 hours at the gravel pit without getting paid, and now she had to get requalified. (Tr. 139–140.)

After finishing his shift with Coler, Salopek went to Lux's office and asked about the training program they had spoken about the previous day. Lux told Salopek that things had changed. Salopek was to bring whatever issues he had directly to Lux instead of to Morgan. Lux then said that Powless should have known better than to take people to qualify at a gravel pit based upon something another guard had told him. Salopek told Lux that Powless was not the only person involved, and the practice was being condoned by Terry and others. Lux again said that Powless should have known better. Salopek told Lux, "you're going to dump this whole thing on Gerald [Powless], aren't you?" (Tr. 141–142.) Lux did not answer. Salopek then told Lux that he was going to write a memo to Morgan regarding the entire matter. (Tr. 141–142.)

5. Salopek drafts a letter to Morgan

From the time Lein first learned about the gravel pit range in May, through the end of June, Lein, Salopek, Mullen, and Schryver, at various times had discussed amongst themselves what was happening with respect to Xcel using unauthorized locations, including a gravel pit, for weapon qualifications. They felt it was unsafe and wrong; these were not approved shooting ranges and guards were not being paid. They did not know who was acting as a safety officer at the unauthorized range sites, and no medical personnel or safety equipment was available if something occurred. Moreover, at these unauthorized range sites, guards were shooting civilian weapons, which were different than the actual weapons assigned by the Navy. They decided that something had to be done. So after speaking with Lux, Salopek drafted a letter to Morgan and emailed it to him on June 28, 2018. (Tr. 129, 142, 458–459, 678–679.)

Before finalizing the letter, Salopek testified that he spoke with Mullen and Schryver who looked at the letter for content, and also provided him with information to include in the document. (Tr. 142.) Salopek's June 28 email to Morgan reads as follows: "I know you are very busy. And I know rather long memos take up your time. But a few of us are asking for you to take a few minutes and review this with our concerns. We are hoping you will understand once you read it and understand our concerns." (GC 4.)

Attached to the email was a five-page, single spaced, letter. The letter is, at times, rambling and discusses a multitude of issues. The letter starts with a recitation of various conversations between Salopek, Morgan, and Lux. It goes on to discuss instances when qualifications occurred at gravel pit ranges, along with a timeline claiming the practice started when Terry was an acting Lieutenant, that it had stopped for some time, but then restarted again. The letter describes the incident involving Schryver familiarizing Cunningham with the shotgun, claiming it resulted with Cunningham's qualification, and Terry saying that the practice was allowed by the Navy. (Tr. 143–46; GC 3.)

Salopek's letter also discusses the shooting range at Schroder's house, where personal weapons were used to qualify, and the ammunition was purchased by Terry. The letter names three "senior guards" who could not pass their rifle and/or shotgun qualifications at Bangor on May 8, saying that Powless then drew a large cross on the rifle targets, and another Lieutenant put a white piece of paper on a the shotgun silhouette target, to enhance the visibility of the targets, resulting in the guards then passing 4 out of 5 of their shooting tests. (GC 3)

The letter discussed Coler and Lein failing their respective qualifications and Powless wanting to take them to a gravel pit, on their own time, to qualify with a personal weapon provided by another guard. Regarding Coler, Salopek wrote that after the gravel pit range Respondent considered her qualified on all weapons and she was allowed to work all posts. When Coler found out she had to requalify, she was upset because she spent 5 hours at the gravel pit without being paid. In the letter Salopek states that a coworker, who was recently retired from the Navy where he served as a range safety officer, said that qualifying guards at a gravel pit was against the law, because Respondent would have had to complete and submit qualification forms containing false information. (GC 3.)

In conclusion, Salopek wrote that there were seven reasons why they were bringing the issue of unsanctioned ranges/bad range practices to Morgan's attention: (1) someone could get hurt and the company could potentially be liable; (2) guards might be unable to handle their weapons properly, or fire them accurately, if there was a critical incident on the base; (3) the

practices violated the Navy's "OPNAV" safety and operating procedures and ethics; (4) if discovered by the Navy, or an Inspector General complaint was made, the consequences could be "catastrophic" for the company and tarnish the company's name as well the names of Respondent's guards; (5) Xcel's rating with the government could be affected; (6) criminal actions may have occurred; and (7) violations of State law may have happened which could jeopardize the company's ability to conduct business and the Navy's reputation. (GC 3.)

Morgan replied to Salopek by email on June 29. The email reads as follows:

> I read the first part of your letter. So much was misinterpreted that I don't know where to begin. I will work with Michael [Terry] to see what we need to do. It's unfortunate the message was confused, it was our intent to include your talent I [sic] training especially compliance but it seems there is a major disconnect between your [sic] and your Captain. I don't know if you realize it but that man has stepped up for you on many occasions just as you have for this company. We need to fix this relationship. I will be in touch.

Salopek testified that he was concerned about Morgan's response. Morgan was discussing Salopek's relationship with Terry, while Salopek was concerned about stopping dangerous practices from occurring. Salopek replied to Morgan by email dated June 30, expressing his concerns. Salopek also spoke about the issue with Lein and Mullen. They discussed whether it was time to make an official report and decided they needed to see the base commander who was going to be in his office on July 8. (Tr. 153, 159–160, 462, 679; GC 4; GC 5.)

6. Salopek, Mullen, and Lein complain to the base commander

On Sunday July 8, at about 3 p.m. Mullen, Salopek, and Lein went to see the base commander. It was Salopek's day off and Lein had just finished his shift. Mullen was on duty that day and assigned South Patrol, which involved patrolling the south side of the base, an area of about 5–6 square miles. (Tr. 80, 159, 164, 462, 680–681, 746–747.)

The guard on South Patrol drives a patrol truck and has a checklist with items that need to be reviewed during the shift, and the specific times the checks need to occur. These include checking certain buildings and ammunition magazines to make sure they are locked, and monitoring beaches and fence lines. The guard on South Patrol enters the exact time each item on the checklist is reviewed. Because there are not very many items that need to be checked during a shift, the guard on South Patrol sometimes gives bathroom breaks for other guards on post, or is "just killing time" by either parking somewhere on the island to save on fuel, or parking on a beach to watch for boats. (Tr. 750.) Other times they are backtracking to double check items that they have already checked. Also, about a half hour before their shift ends, many times the guard on South Patrol will wash the patrol truck because it gets dusty. Guards on South Patrol do not need to call-in for relief when they take a bathroom break or eat lunch. So long as they have their radio and pistol with them, they can take these breaks anytime they want. Because the base commander's office is located within South Patrol, and is inside one of the buildings that Mullen needed to check, he did not call for anyone to relieve him when he went to see the base commander with Salopek and Lein. (Tr. 462–464, 688, 701–702, 734–736, 746–752.)

The Navy's commanding officer at Indian Island was Commander Rocky Pulley ("Cdr. Pulley"). Mullen, Lein, and Salopek met outside the administration building and then went to Pulley's office, asking if they could speak with him about a safety concern. The guards told Cdr. Pully they had a safety issue and were trying to get direction on how to resolve the matter but were vague regarding the exact issue. After a few minutes of going back and forth with generalities, Cdr. Pulley demanded they tell him exactly what was going on. The guards told him about the gravel pit ranges using nonmilitary weapons and personal ammunition for qualification shoots. Cdr. Pulley asked if they had reported the issue up their chain of command, and they said yes. Cdr. Pulley then asked if they had spoken with Mike Jones, a Naval officer who was designated as the Installation Security Officer at Indian Island (ISO Jones or Jones). The guards had not informed ISO Jones, so Cdr. Pulley said that they needed to immediately send an email to Jones advising him of the issues.[17] Pulley also asked that they needed to inform Terry before contacting ISO Jones. (Tr. 163.) During the discussion, Salopek mentioned the possibly of going to the Navy's Office of the Inspector General (OIG) and asked about whistleblower protections. Cdr. Pulley said that all three of the guards were protected under the whistleblower program. The meeting with Cdr. Pulley lasted between 15–30 minutes. Mullen did not miss any of his scheduled checks on South Patrol during the time that he was meeting with Cdr. Pulley. (Tr. 160–165, 334–335, 463–464, 562, 647, 684–688, 734.)

After the meeting with Cdr. Pulley, Salopek, Lein, and Mullen went outside and discussed their next step; someone needed to contact Jones as per Cdr. Pulley's instructions. Lein and Salopek were scheduled to work on day shift the next day. Because Mullen was not scheduled to work until the swing shift, it was decided that he would draft and send the email to ISO Jones. (Tr. 464–465; R 1.)

F. The Events of July 9

1. Mullen emails ISO Jones

As instructed by Cdr. Pulley, on July 9 Mullen sent an email to ISO Jones saying that himself, Salopek, Lein, and Schryver were coming forward with a safety issue regarding weapon qualifications and using a gravel pit range on several occasions to qualify guards.[18] Before he sent the email, Mullen waited for Salopek to call Terry and notify him that a complaint was forthcoming. (Tr. 165, 465–466, 736–737; R 1.)

The morning of July 9, Salopek was at the Bangor range with a group of Respondent's guards including Coler, who was

[17] Transcript page 687, line 11 should read "None of us had spoken to Mike Jones" instead of "One of us had spoke to Mike Jones."

[18] Although Schryver's name is in the email, and he had discussed these issues with Mullen, Salopek, and Lein, it does not appear that he was actively involved in the complaint to either Pulley or Jones. (Tr. 294–296, 516–517.)

requalifying with the M4 rifle. Salopek said that he saw Mullen's email to Jones before it was sent, but only briefly. At about 9:00 a.m. Salopek called Terry. Salopek testified he told Terry that guards were coming forward with a complaint about his range practices, and that he owed it to Terry to tell him that a complaint was forthcoming. According to Salopek, Terry replied by saying that he already knew. (Tr. 165–166, 301, 885–886, 924–925; R 22, p. 22.)

Terry testified that he received two telephone calls at about 9:00 a.m. on the morning of July 9, one from ISO Jones and one from Salopek. Jones called to give Terry a "heads up" that Cdr. Pulley received a "walk-in" complaint that some of Xcel's guards were not properly qualified with their assigned weapons. (Tr. 878.) As part of his job duties Terry worked closely with ISO Jones and they would generally meet once a week to resolve any problems that might be occurring on base. During this call, Jones also told Terry that he wanted to look at Respondent's weapons training records. After getting the call from ISO Jones, Terry called Morgan to tell him what was happening and ask him for direction moving forward. As for his call with Salopek, Terry testified that Salopek told him somebody had turned Xcel into Cdr. Pulley. Terry said he told Salopek that he would deal with the matter. (Tr. 879–890.)

At 10 a.m. on July 9 Mullen sent the email to ISO Jones. The email is, for the most part, a condensed version of the letter that Salopek sent to Morgan on June 28. In the email, Mullen states that himself, Salopek, Lein, and Schryver were coming forward with a safety issue concerning weapon qualifications and Respondent's use of gravel pit ranges to qualify guards. Mullen's email describes the incident where Schryver took Cunningham to a gravel pit to shoot using Schryver's shotgun with ammunition provided by Terry. While Schryver thought the shoot was a "familiarization," Respondent considered it a qualification shoot even though Schryver was not certified to qualify anyone. And, when it was brought to his attention, Terry said that the practice was allowed by the Navy. The email also discusses Powless asking Schryver to qualify guards at a gravel pit, and a coworker saying that he brought personal weapons to work for use at a range occurring at another guard's house. (Tr. 297–298, 465; R. 1.)

The email discusses a range at Bangor on May 9, where Powless altered the rifle targets for Cunningham, Terry Lauritzen (Lauritzen), and Kevin David (David) with a large black cross, while Cunningham's shotgun target was altered by another Lieutenant with a white piece of paper. While Cunningham could still not pass his rifle test, the other guards qualified using the altered targets. (R 1.)

The email also discusses, in detail, the qualification shoot involving Lein and Coler, with Powless telling Lein that he would go to a gravel pit with Coler to qualify, but they would not be paid for their time. While Lein did not go to the gravel pit, Coler did and was qualified using a personal shotgun and an AR-15 supplied by a coworker; she was then allowed to stand posts that required being qualified with an M4 rifle and/or M500 shotgun. The email ends by saying that Morgan has been informed about these practices, and that it seemed Respondent was trying to cover up what had occurred. Therefore, Mullen wrote, "[w]e feel this practice is unsafe, against Navy policy, and illegal, by falsifying federal documents . . . We cannot continue to let this go on without reporting it to you." (R 1.)

At about 11:30 a.m. on July 9, Terry received an email from ISO Jones asking for Respondent's training records for five guards: Lauritzen, Cunningham, Lein, Coler, and David. In the email, Jones asked that the five guards be removed from their post responsibilities and that their gun cards will be pulled until further notice. After receiving the email, Terry did not remove the guards. Instead, spoke with Jones and asked if he could have more time to sort things out and provide Jones with the proper records; Jones agreed. Terry then called Powless, who was at the range with Salopek, and told him what was occurring. He also contacted Lieutenant Armando Del Rosario (Del Rosario), who was the shift Lieutenant that day. Terry told Del Rosario about Jones' email, saying there was an allegation that Lauritzen and Cunningham, who were currently on duty at the main gate, were not qualified, and told Del Rosario to let them know that they may be pulled off their post. He also told Del Rosario to make the appropriate arrangements to find replacements to cover these posts if needed. (Tr. 882–885, 890.) (R. 8; JX 9.)

After ISO Jones received Mullen's email, he forwarded it to Rake. At about the same time he received the email from Jones, Rake testified that he got a call from Cdr. Pulley. Cdr. Pulley told Rake that he wanted all of Respondent's guards taken off their posts until it could be proven that they had met all the necessary requirements to stand post. Rake said that he then called Jones to find out more about the complaint. Rake also called Terry and left him a voicemail saying that he would be at Indian Island the next morning to meet with him. Rake testified that he called Terry because, whenever he gets a complaint he will "partner" with his contractors to find out about the complaint and work through the matter. (Tr. 537.) Just before 2 p.m. on July 9, Rake forwarded Mullen's email to Terry. At some point that evening Terry left Rake a voicemail saying that he was looking into the complaint and would see Rake the next day. (Tr. 534–539; R 1.)

Terry read Mullen's email immediately after he received it from Rake. He then forwarded it to Morgan. Terry testified that he was surprised with the allegations in the email. Terry said that Powless had been in charge of Respondent's firearms qualifications for years and had done nothing that would lead Terry to question his integrity. As for Mullen, he never received a reply to the email he sent to ISO Jones, nor did he ever hear back from anybody at the Navy about the complaint. (Tr. 476–477, 887–890, 918.)

Lein was working the morning shift on July 9, at the vehicle inspection post. At about 1 p.m. that day Cunningham arrived at Lein's post "armed up" and was calling everybody fucking rats. (Tr. 691.) Then, at some point Lein received a telephone call from Terry, who was angry. Terry asked Lein if he had spoken with Cdr. Pulley, and Lein said yes. Terry then asked Lein "who did you go with" and Lein said that he went with Salopek and Mullen. (Tr. 725.) Terry told Lein that he was pulling him off his post and off the contract. Terry also said that Lein had made a big mistake and then hung up the phone. After speaking with Terry, Lein called Mullen and relayed the conversation to him. Mullen, then called Salopek and told him about the conversation between Lein and Terry. (Tr. 166–167, 724–725, 737, 762–763,

931–932; R 32.)

2. Shotgun incident involving Mullen and Cunningham

Mullen worked the swing shift on July 9; the swing shift goes from 1:45 to 10:15 p.m. He arrived at work around 1 p.m. and went straight to the training room, which is located about 8–10 feet across from Terry's office. Terry's office door was open. While Mullen was in the training room he could hear Terry on the speakerphone with Morgan talking about the three guards who went to Cdr. Pulley's office the previous day. Mullen heard Morgan say that one of the guards was on probation and was easy to get rid of. He also heard Morgan say that the other two officers "are a cancer." (Tr. 467, 797–798.) At the time, Lein was still a probationary employee. (Tr. 466–467, 759–760; R 32.)

As Mullen was waiting for his shift to begin, he eventually sat in a chair in the corner if the training room. Mullen testified that, as he was sitting in the chair, Cunningham came into the room and started yelling at him, demanding an apology. Cunningham, who was still on duty at the time, was armed with an M9 pistol and carrying an M500 shotgun. According to Mullen, Cunningham was yelling "you're a fucking rat. You're a fucking skell."[19] Mullen did not know the meaning of the word "skell" but knew it was being used in a derogatory manner as Cunningham was once a dockworker in New York.[20] Mullen testified that Cunningham stood over him while holding the shotgun, was yelling and demanding an apology, and while he was doing so the shotgun barrel was moving across Mullen's legs and thighs. Mullen told Cunningham to point the gun elsewhere and said he was not going to get an apology. According to Mullen, Cunningham replied saying that the gun was pointed at the ground; Cunningham then left. (Tr. 474, 467–468, 476.)

Mullen testified that he felt threatened during the exchange with Cunningham. Cunningham's weapons were loaded, and Mullen did not believe that Cunningham had any work-related reason to be in the training room with his shotgun. Instead, Mullen believed that Cunningham came into the room just to yell at him. With Mullen sitting in the corner of the room, and Cunningham standing over him yelling, Mullen said that he felt as if he had "nowhere to go" and described the situation as "very uncomfortable and very threatening." (Tr. 473–474.)

Regarding the incident, Cunningham testified that he wanted an apology from Mullen because he had learned Mullen was one of the guards who had implicated him in the weapon qualifications complaint. During his testimony, Cunningham refused to say who told him about the complaint and Mullen's involvement, claiming he could not remember. Instead, Cunningham said that he had heard it through the "rumor mill." (Tr. 1057–1058.) Even though he claimed that he could not remember where he learned this information, Cunningham insisted that nobody from Xcel management told him about. Cunningham claimed that the only thing Respondent told him was that he needed to meet with Rake and Manson so they could hear his "side of these so-called rumors and accusations." (Tr. 1060–1061.)

As for the incident itself, Cunningham testified that, after he spoke with Rake and Manson, he was getting off his shift at about 2:00 p.m. and went into the training room where he saw Mullin sitting. According to Cunningham, he went over to Mullen and said to him "very simple [sic], I'd like an apology." (Tr. 1061.) Cunningham claimed that Mullen then went on the offensive, raised his voice, and said that he was not going to give Cunningham an apology. Cunningham again asked for an apology, but Mullen raised his voice once more saying that he was not going to get one. According to Cunningham, he turned around and as he started to walk out of the room, Mullen said, "don't be pointing your weapon at me." (Tr. 1061.) Cunningham testified the whole interaction lasted about 30 seconds. Cunningham denied pointing his shotgun at Mullen or sweeping him with the barrel. Instead, Cunningham said that when he walked into the training room he was holding his shotgun in a "low-ready position," which involves holding the barrel at a 45-degree angle pointing towards the ground. According to Cunningham, he was in the training room because that is where he signs his timecard when he finishes his shift. (Tr. 1061–1062, 1076, 1086)

3. Terry meets with Mullen and Lein

After the incident with Cunningham, Mullen dressed for work but was then summoned into Terry's office. Terry told Mullen that Morgan was on the speaker phone. Morgan asked Mullen if he was one of the three guards who went to see Cdr. Pulley. Mullen replied saying that himself, Salopek, and Lein did, in fact, meet with Cdr. Pulley. Morgan told Mullen that he could possibly be facing disciplinary action and asked whether Mullen wanted a union representative. Mullen said yes, and Morgan ended the conversation. Mullen did not tell Morgan or Terry about the incident with Cunningham that had just occurred. Mullen testified that he did not say anything because he wanted to try and let the matter with Cunningham diffuse. Mullen then left Terry's office and went back to the training room as it was time for him to arm-up and get ready to start his shift. (Tr. 474–476, 764, 781.)

After Lein finished his shift on July 9, he went to Terry's office; Terry was again speaking with Morgan on the speakerphone. Terry told Lein that Morgan wanted to ask him some questions, Lein and Morgan then started talking. Morgan told Lein that he was mad because Lein broke the chain of command by reporting weapons issues to Cdr. Pulley. Morgan brought up the fact that Lein was a retired chief petty officer and asked how Lein would feel if somebody bypassed him in the chain of command. Lein said he always told his sailors that, if they had a problem, he would like the courtesy of knowing what was happening, but they could always speak to someone else in a higher rank instead of him. Lein told Morgan that, because he had already told Powless, who was his direct superior, he did not feel

[19] Transcript pages 406 line 8, and 468 line 3, should read "skell" instead of "scale."

[20] "Skell" is defined as a homeless person or derelict. *Collins Dictionary Online*, https://www.collinsdictionary.com/us/dictionary/english/skell (last visited November 30, 2020). The word is also used as slang, particularly among the New York City police, to mean dirtbag or perp. See *Urban Dictionary*, https://www.urbandictionary.com/define.php?term=SKELL (last visited November 30, 2020). *Lucas v. Tempe Union High Sch. Dist.*, No. CV-17-02302-PHX-JAT, 2019 WL 3083010, at *8, fn. 12 (D. Ariz. 2019) (noting that the "Ninth Circuit periodically uses the website 'Urban Dictionary' to provide additional context for slang terms.").

comfortable qualifying at a gravel pit, he did not believe he jumped the chain of command by going to Cdr. Pulley. (Tr. 725–727.)

During their conversation, Morgan told Lein that the names of the guards listed in the memo could possibly lose their jobs and asked whether Lein had qualified with the M4 rifle. Lein said that he had done so. Morgan then asked if Lein had qualified at a gravel pit. Lein said no, that he qualified at the Bangor range. Morgan then said in a smug tone "so we accommodated you." (Tr. 728) Lein told Morgan that his waiting until the next official range at Bangor to qualify was not an accommodation. Lein told Morgan that he appreciated the job opportunity; he did not know anything about Xcel before joining the company, but a friend who worked for Respondent had nothing but good things about the company. Morgan then thanked Lein for his service in the Navy and the conversation ended. Lein thought that he was being fired, based upon what Terry had told him the previous day, so when he finished talking with Morgan he asked Terry "what's next?" (Tr. 729.) Terry asked if Lein was working the next day, and Lein said yes. Terry then said, "I'll see you on post."[21] (Tr. 728–729, 738–739.)

G. Mullen's Harassment Complaint and Respondent's Investigation

1. Mullen receives a text message from Kevin David

Mullen was not scheduled to work from July 10–July 12; his next scheduled workday was on July 13. On July 10, at about 6:20 p.m., Mullen received a text message from David, who was one of the guards named in the July 9 email to Jones as having his M4 target altered with a large black cross. David's text message to Mullen reads as follows:

> So I'm on your little fucking list, you're a fucking idiot & don't know what you have stepped in. Better call your butt buddy MarkSlander with no proof dumb ass Stupid leading stupider

Mullen viewed David's text messages as a threat. And he immediately thought back to his experience working as a prison guard when a coworker who he had crossed closed the prison cell door on him, crushing his shoulder. (Tr. 223, 480; GC 6; R 32.)

After receiving the text message, Mullen called Salopek, as his name was also mentioned in the text. He also called Manson and Lux. Mullen testified that he called Manson because he wanted a third-party, somebody outside of Xcel, to know about the threat. Manson did not answer so Mullen left him a message. In the voicemail Mullen read David's text message and said that he had been threatened and something needed to be done. (Tr. 480–484; GC 14.)

Regarding his call to Lux, Mullen testified that the two of them played "phone tag" but eventually spoke that night around 8 p.m. Mullen told Lux about David's text message, and Lux replied saying that he was already aware of it. (Tr. 482.) Lux further said that "administration" had advised Lux to tell Mullen to call local law enforcement. Terry testified that the instruction to have Mullen call law enforcement came from him. Terry said that he learned about David's text message from Lux, and Terry told Lux that, if the conduct was not occurring in the workplace, Mullen needed to call local law enforcement if he felt threatened. (Tr. 482, 484, 482, 790, 908–909; GC 14.)

Mullen called 911 after speaking with Lux. About 10 minutes later, a deputy called him from the Kitsap County Sheriff's department. Mullen read David's text message to the deputy, who told Mullen there was not much he could do because it was a veiled threat, as opposed to a direct threat of physical harm. But Mullen received an incident number from the deputy for future reference. (Tr. 485–489, 790–791; GC 14.)

Regarding the text message exchange, David testified he heard rumors that Mullen, Salopek, and a couple others had complained that some of the guards should not be carrying weapons on post because they were not properly qualified and he was implicated in the complaint. Like Cunningham, during his testimony David refused to identify from whom he had heard these rumors, claiming that he could not recall who told him. Despite his lack of memory regarding these rumors, David, who was visibly nervous and evasive while testifying about his text message to Mullen, was adamant that nobody from Xcel management told him that Salopek or Mullen had made the complaint. (Tr. 1036–1038, 1044–1049.)

According to David, he was angry that his name was implicated with the weapons qualification complaint because he had passed his rifle, pistol, and shotgun qualifications on February 21. David believed that Salopek was the one who had initiated the complaint, but because he did not have Salopek's phone number, he sent the text message to Mullen instead. David testified that he did not intend to threaten Mullen and described the incident as "a goofy text message" where he "made no threats to [Mullen] whatsoever." (Tr. 1038.) David said that within minutes after he sent the text to Mullen, he received a phone call from Lux telling him to stop sending Mullen text messages and to not contact him anymore. David testified that he then received calls from two other Lieutenants telling him the same thing. David did not contact Mullen any further. (Tr. 1037–1043; R. 47.)

2. Mullen files a complaint with OSHA, calls out sick and emails Terry

On July 11, Mullen contacted the United States Department of Labor, Occupational Safety and Health Administration (OSHA) and filed a complaint. The Complaint alleged that, after Respondent learned about Mullen's safety complaints regarding weapon qualifications, certain employees threatened him and Respondent called him a "cancer." The threats referred to David's text message and the training room incident with Cunningham.[22] (R 12; Tr. 491–492.)

[21] In his testimony, Terry acknowledged that Lein spoke with Morgan that day in Terry's office but said that he did not really remember what was discussed. (Tr. 891.) He said that he remembered Lein asked for Union representation, "[a]nd I think that was about the end of it." (Tr. 891.) However, it was Mullen who had asked for union representation during his call with Morgan earlier that day and it appears that Terry confused the two. (Tr. 475–476.) I credit Lein's testimony as to what occurred during his conversation with Terry and Morgan on July 9.

[22] Mullen's OSHA complaint was dismissed in July 2019. Mullen appealed the decision, and the dismissal was affirmed in August 2019. (R. 29.)

Mullen's next scheduled workday was July 13. He had not heard back from Lux or anyone at Xcel regarding his complaint about David's text message, so he called Powless and told him that he would not be coming into work until the issue of the threats and harassment against him was addressed. Powless replied, "okay" and the phone call ended. Mullen was also scheduled to work on July 14 and 15. Because he had not heard anything further from Xcel, Mullen sent Terry an email on Saturday morning, July 14. (Tr. 489, 782; JX 7 #1454; R 32.)

In his email, Mullen explained what occurred during the July 9 training room incident with Cunningham. The email states that Cunningham called Mullen and Salopek "pieces of shit" and said they wrote lies about his range qualifications. Mullen wrote that Cunningham's shotgun barrel "swept" his left thigh, while Cunningham stood in front of Mullen yelling. Mullen's email identified a coworker named Norm Simons (Simons) as a witness and said Cunningham was so agitated that it did not appear he was thinking about safely controlling his shotgun.[23] Mullen's email next discussed David's text; Mullen pasted the text message into the email. Mullen ended the email by asking Terry to look into the matter saying both incidents had caused him a great deal of stress, to the point that the has not been able to return to work. (JX. 7 #1454–1455.)

After receiving Mullen's email, Terry called Morgan and also forward the email to him. During their phone call the two discussed how to proceed. Terry testified that Morgan told him to thoroughly investigate the complaint as soon as possible. While David and Mullen were scheduled to work that weekend, Cunningham was not. Terry, who was working from home that weekend, waited until he returned to Indian Island on Monday July 16 to start his investigation. (Tr. 907, 910.) During their phone call, Morgan also recommended that Terry post Xcel's hostile work environment policy in the training room and require everyone to read the policy and sign an acknowledgment that they had done so. (Tr. 910, 919–920, 964–65; R 32; JX 4 #1454.)

While Mullen testified that he believed he was scheduled to work on Monday, July 16, the work schedule shows that he was not scheduled to work on either July 16 or 17. His next scheduled workday was July 18. As for Terry, on Monday July 16 he was back at Indian Island and he took written statements from both Cunningham and Simons. Simons, who gave his written statement at 1:30 p.m., wrote that he was checking the weather on his cell phone when he saw Mullen engaged in some sort of discussion with Cunningham about an apology. Simons further wrote that Cunningham was speaking in a raised and angry voice, and when Simons looked up, he heard Mullen say in a normal but direct tone, that Cunningham was not getting an apology and "don't sweep me with the shotgun." According to Simons, when he looked up Cunningham's shotgun was pointed at the floor and he did not see or hear any communication of a threat by either party. (Tr. 910; R 5.)

Cunningham gave his written statement right after Simons. In his statement, Cunningham stated that he asked Mullen for an apology involving the remarks Mullen made about Cunningham's range qualifications; Mullen would not give him one. Cunningham wrote that he asked for an apology a second time, but Mullen again refused and said that they were done. According to Cunningham's statement, at some point during their conversation, Mullen said that Cunningham was pointing his gun at him. However, Cunningham denied doing so, saying that his gun was pointed at the floor. (R 6.)

On July 16 Respondent posted in the training room its workplace standards of conduct, along with a sign-in sheet for employees to affirm that they had read and understood the policies. Employees were told to read the policies and sign the signature sheet. However, they were not told anything else such as why the policies were being posted. (Tr. 919–920, 1050–1052, 1064.)

3. Mullen emails Terry his resignation

By July 17, a week had passed and Mullen had still not heard anything from Respondent regarding his threat and harassment complaints. Mullen believed that Terry heard Cunningham yelling at him on July 9, and Terry had not replied to Mullen's July 14 email. Therefore, Mullen believed that Xcel was not going to do anything about his complaints. Accordingly, Mullen decided that he needed to resign because he did not think it was safe for him to return to work because of the threats and harassment. So, Mullen drafted the following email which he sent to Terry on Tuesday, July 17:

> I am separating my employment with Xcel protective service (BCSI) effective immediately. The reason is for workplace harassment and threats. I will send my uniforms with a fellow employee. CAC card and region badge will be dropped off at Bangor pass and ID.

Terry testified that after receiving Mullen's email, he called Morgan, who told him not to contact Mullen going forward. Therefore, Terry replied to Mullen by email on July 18 by simply saying that Mullen needed to destroy the corporate credit card information he used for training and to sign a security debriefing. (Tr. 490, 790, 794, 934; JX 4 #1225.)

Terry never spoke with Mullen about his complaints involving the threats from Cunningham and David. When asked why he did not do so, Terry said that it was because Mullen "was on days off." (Tr. 922.) Terry claimed that he was going to interview Mullen when he came back to work but that Mullen resigned. For his part, Mullen testified that, had he known Respondent was investigating his threat allegations involving Cunningham and David, he would not have resigned. (Tr. 791–792, 921–922, 927.)

As for Cunningham and David, Terry decided not to discipline either of them. According to Terry, after reviewing the written statements, he decided that Cunningham had not done anything wrong. Regarding David, Terry said that David was not disciplined because his text message occurred outside of the workplace. Moreover, Terry said he did not view the text as

[23] In January 2019, Mullen asked Simon to write a statement about what occurred to support his OSHA complaint. However, Simon texted Mullen saying that "[a]fter a lot of reflection" he decided not to write a statement as the "only thing that it will show is Tim [Cunningham]'s temper. Which is already well known." (R 48.) In his text, Simon further wrote that he did not see Cunningham "laser" Mullen with the shotgun or hear/see Cunningham threaten Mullen. (Tr. 788–789; R 48.)

threatening. Instead, Terry thought that David was just "venting his frustration" about the allegations in Mullen's complaint to ISO Jones. (Tr. 935.) Also, during his testimony Terry offered his own reason as to why Mullen resigned. Terry believed Mullen actually resigned because he had failed his PRT, and he was scheduled to retake the test towards the end of July. If Mullen had failed again, he would have been fired. (Tr. 934–936.)

H. Rake's Investigation into the Guards' Complaints

1. Rake and Manson review documents and set up interviews

Rake and Manson conducted an investigation into the complaints Salopek, Mullen, and Lein made to Cdr. Pulley, as further set forth in Mullen's July 9 email to Jones, and they issued a report on July 25 with their findings. Despite the fact that virtually everyone who testified at trial referred to the review as an "investigation," Rake was emphatic during his testimony that what he and Manson did is not conduct an "investigation." (Tr. 589.) According to Rake, only the NCIS (Naval Criminal Intelligence Service) or law enforcement can conduct an "investigation," as can an individual directed to do so in writing by the commanding officer. (Tr. 553.) Instead, Rake said that what he and Manson did was conduct a review of a "customer complaint." (Tr. 589.) Rake said that whenever he gets a customer complaint, he partners with the contractor to find out more about the complaint and work through the incident. And, regarding this matter, Rake said that his "original customer complaint" was that Mullen, Lein, and Salopek met with Cdr. Pulley. (Tr. 589.) According to Rake, when he heard the customer complaint, he spoke with Burris and told her that if anybody left their post he would be requesting that they be removed from the contract for violating a general order to stand post until properly relieved. (Tr. 537, 589–590; R 2.)

Rake testified that Cdr. Pulley wanted to pull all the guards off their posts after he spoke with Salopek, Mullen, and Lein and he relayed this information to Terry, telling him how important the situation was and saying they needed to jump on it quickly. Rake went to Indian Island on July 10, and reviewed the training records with Manson, Terry, Powless, and Mitch Vancura (Vancura), another Xcel Lieutenant. Rake said they reviewed the records of the guards who were currently standing post, and then looked at the guards scheduled for the next shift "to get our feet on the ground." (Tr. 538.) Rake reviewed the watch bills and determined that Mullen was working the day he met with Cdr. Pulley; Rake believed Mullen had left his post to speak with Cdr. Pulley without permission from his shift lieutenant, Kristen Kirkpatrick (Kirkpatrick). (Tr. 538–539, 563, 590–591.)

The initial review of documents also showed that Cunningham, Lauritzen and David were not at the Bangor range on May 9, as alleged in the complaint regarding the date that their targets were altered. Salopek testified that the May 9 date was an error, and the incident involving the altered targets actually occurred sometime January or February. According to Salopek, he told this to Manson and Rake when they interviewed him on July 19. As for when his gun qualification shoot occurred in 2018, Cunningham testified that it happened in January. However, Rake's report says that the range qualifications for Cunningham, Lauritzen, and David happened on February 21, but Cunningham did not pass all his tests and shot again on March 9 when he qualified. For his part, Cunningham admitted that he sometimes struggled with his qualifications because of the lighting at the range. And, regarding the time he went shooting with Schryver, Cunningham said it occurred on his own time, as a refresher course because of the problems he was having on the range. While Cunningham claimed that he had already requalified when he went shooting with Schryver, Rake's report states that Cunningham reported that he went shooting in the woods with Schryver to become proficient for his qualification reshoot. Finally, Cunningham testified that he had heard of people qualifying at a gravel pit, but he did not know the exact location and had never been there to shoot. (Tr. 38–39, 905, 1067–1071; R 1, R. 2, p. 2–3, R. 14.)

Along with reviewing documents, Rake testified that he and Manson worked with Terry and Xcel to schedule interviews with various guards. According to Rake, he needed to go through Xcel to schedule these interviews, because he cannot require that a contractor's employees submit to an interview. Rake said that, on all his contracts, he works through the company's "chain of command," so with Xcel there was "a chain of command working to get a hold of each guard." (Tr. 539–541)

Rake and Manson personally interviewed various guards and supervisors, and took written statements from: Lein, Salopek, Schryver, Lauritzen, Coler, Cunningham, David, Kirkpatrick, and Powless. Rake and Manson also conducted phone interviews with Vancura, Terry, Lux, Lein, Coler, and two other guards named David Everson (Everson) and Ben Gentry. They did not interview Schroder, the guard who had a shooting range in his backyard, or another guard named Joab Eades (Eades) noting that they were on leave at the time. And, they never interviewed Mullen. (R 2.)

Regarding Mullen, Rake testified that he tried to schedule appointments with him for an interview three times but was unsuccessful because Mullen had called in sick. However, Rake's report says that Mullen could not be interviewed because he resigned the day before his interview. For his part, Mullen testified that he never heard from either Rake or Manson. Mullen said that he knew the interviews were occurring and assumed someone would reach out to him, but nobody ever did. (Tr. 501–502, 540, 784; R 2.)

2. The interviews with Xcel employees

The interviews with Xcel employees started on July 10. (R. 2.) Rake testified that he had a list of questions he asked each guard. One question was "do you know your chain of command" within Xcel. (Tr. 583.) According to Rake, it was important to ask each guard whether they knew their "chain of command" because he did not normally "have contractors go straight to the CO [Cdr. Pulley] or to a security officer [ISO Jones] without going usually through . . . their company chain of command, or coming to Steve [Manson] and myself, who . . . were out there all the time asking everybody how things were going." (Tr. 585.) When asked if following the "chain of command" was a mandate, or just his preference, Rake said that the Navy Contracting Office follows the contractors' rules and that in all three of the contracts he administers the company/contractor has provided its employees with documents saying "here's who your chain of command is." (Tr. 585.) Respondent's employee handbook says

that the company encourages employees to take their complaints to their immediate leadership team but following such a process is not mandatory. (GC. 2; R 2; R 7, p. 3–4.)

Rake testified that, after each interview, employees were provided with a form and asked to complete a written statement. Nine Xcel employees completed written statements which were attached to the final report. (Tr. 634; R 2.)

a. Employee written statements

Daniel Lein. Lein's written statement is dated July 10. In his statement Lein says that, during his initial M4 rifle qualification he failed by 5 points. Later, Powless told Lein that he and Emily Coler would meet Powless on May 27 at a gravel pit to qualify. Lein asked if the gravel pit shoot was a practice or a qualification, and Powless said that it was to qualify with the M4. But, Powless told him that instead of shooting an actual M4 rifle, Lein would be shooting an AR-15 owned by Armstrong. On the day of the gravel pit shoot, Lein called Powless saying he did not feel comfortable, was tired as he was coming off of a 12-hour shift and would wait until the next scheduled range at Bangor; Powless said that was fine. Out of curiosity Lein again asked Powless if the gravel pit shoot was for a qualification, and Powless said yes. Lein then asked if guards would be paid for their time at the shoot, and Powless said they would not be paid. Lein ended his statement by saying that he qualified with the M4 at Bangor on June 20, 2018 with a score of 157. (R 2, p. 16.).

Emily Coler. Coler's written statement is dated July 10. In her statement Coler wrote that, during her weapon qualifications at Bangor, on or about May 9, she did not pass. She had never previously fired an M4 rifle and received very little training. A few weeks later she was told that she could shoot again, this time at a gravel pit with just herself and one other person who also needed to shoot. The gravel pit shoot was much more successful as Coler received one-on-one time to become familiar with both weapons. Coler wrote that she did not think about the "legality" of the shoot because she had heard from others that it had been done before. Coler spent about 5 hours at the gravel pit and felt much more comfortable shooting. After the shoot, Coler was told that she could now stand post and was excited because it led to the opportunity for more on the job training "OJT." Coler further stated that, at the shooting range on July 9 she qualified on the M4 but did not qualify with the shotgun. Coler ended her statement by writing: "Post: I only stood posts that required the M9. If I was on patrol with someone for example, they had the weapons that they were qualified for, I never had possession of them." (R 2, p. 22.)

Thomas Cunningham. Cunningham's written statement is dated July 11. Cunningham wrote that in January 2018 he qualified at the Bangor range on the M9 pistol and Mossberg M500 shotgun. He remembers 10 other guards at the range that day, including Schryver, David, Salopek, Mullen, and Lauritzen, and that a Lieutenant named John Armstrong was in charge of the range. Cunningham stated that he did not know of anyone falsifying gun records. He further wrote that, in February he qualified at Bangor with the M4 rifle shooting a score of 153. Powless was in charge of the range that day and John Armstrong was his line coach. Cunningham identified two other people who were also shooting in February and said that nobody falsified any gun records. (R 2, p. 21.)

Terrence Lauritzen. In his written statement, dated July 11, Lauritzen wrote that he was being interviewed for statements made against him regarding weapon qualifications on February 21. Lauritzen said that he witnessed no violations of safety at any time on the range, nor has he witnessed any kind of target, document, or forged scoring at any time. Lauritzen ended his statement by saying that he had never qualified shooting anywhere other than at the Bangor range. (R 2, p. 23.)

Jacob Schryver. Schryver's statement is dated July 11. Schryver wrote that, in reference to the statement that he qualified Cunningham at a gravel pit, he never used the words "he's qualified." He and Cunningham did not use an approved course or approved weapons when they shot, as it was a "familiarization," and he was not certified to qualify anyone. Schryver wrote that he could not give the dates and times of the shoot with Cunningham, as it was not documented, and that he had no personal knowledge as to whether Cunningham subsequently qualified after they shot together. Schryver also wrote that, all the complaints he made regarding the range were brought to Powless, as the company's primary range safety officer "RSO." Schryver ended his statement by saying that he was not personally aware of any falsified documents. (R 2, p. 24.)

Mark Salopek. Rake's report contains two written statements from Salopek, both of which were dated July 19. In his first statement Salopek writes that he saw targets being altered on or about January 31, 2018. Salopek further stated that, around June 26–28 (and possibly sooner) Powless told him that Coler and Eades were going to a gravel pit range, but after a complaint was made Eades and Coler had to requalify; Eades told Salopek he had to requalify and that Coler was upset. Salopek stated that he thought he saw Coler standing post armed with a shotgun after the gravel pit range. Salopek also wrote that he saw the Bangor range score sheet for July 7, 2017 and was told by a guard who was present that they did not shoot at Bangor but were at another guard's house, referring to it as "range at Schroder's house." Powless told Salopek that the "range" at Schroder's house was "fun." Salopek also stated that there was a female guard who was pregnant and could not shoot at an indoor range but she continued working nonetheless. Salopek ended his first statement saying that he had never seen anyone leave their post. (R 2, p. 13.)

Salopek's second statement is similar to the first but provides a bit more detail. He confirmed seeing targets being altered on January 31, 2018 at Bangor. And, he wrote that Powles told him about obtaining an AR-15 to use for "range at the gravel pit." After the gravel pit range, Salopek wrote that Coler told him she was glad she could now serve on other posts, and he saw Coler holding a shotgun after the range occurred. After a verbal complaint was made, Lux told Salopek that he called "Everson to determine if it was allowed," referring to a gravel pit range, and was told that it was not.[24] Salopek stated that Coler was told she had to requalify sometime between June 26–28. Salopek wrote

[24] Along with being an acting Lieutenant, Everson was also a firearms instructor. (Tr. 155.)

that he needed to check dates and confirm when the gravel pit range occurred. Salopek next discussed the range on July 7, 2017 where coworkers told him they participated at a range at Schroder's house. Salopek wrote that Armstrong told him he had an AR-15 and a 9mm for use at the range, and that Terry said he was buying ammunition for the range at Schroder's house. Salopek stated that he saw the Bangor range sheet dated July 7, 2017, and a female officer named Owens was listed on the sheet. Salopek further stated that Owens was pregnant, and he believed that she was not allowed to qualify at an indoor range, but nonetheless worked until November or December. Salopek ended this second statement by again saying that he did not know of anyone leaving a post without notifying their supervisor. (R 2, p. 14.)

Kristen Kirkpatrick. Kirkpatrick's statement is dated July 22. Kirkpatrick wrote that she was the shift Lieutenant on July 7, 2018 and at no time did anyone ask her for permission to leave their post, or to enter Building 69 to talk to the commanding officer.[25] Kirkpatrick also wrote that she was unaware of any falsification of government documents by Xcel employees and was not aware of government weapons being used anywhere other than at authorized ranges. (R 2, p. 18.)

Kevin David. In his statement, dated July 22, David stated that he was not aware of any wrongdoing at the range, nor had he witnessed a range at either a gravel pit or at Port Townsend. David wrote that had to re-shoot to qualify on occasion but was unaware of government weapons being used at a gravel pit or open area. He was also unaware of any falsification of government documents. (R. 2, p. 19.)

Gerald Powless. Powless' statement is dated July 23. Powless wrote that the validity of Owens's sustainment shoot during the summer of 2017 was brought to his attention. Powless said that Owens was not allowed to shoot indoors at the time because she was pregnant, and the small arms training center was closed during that period because of lead exposure. Also, the "MILO Range Training System" was inoperative at Indian Island. Therefore, Powless stated that, because Owens could not shoot at either place, she "was familiarized and fired at a private range." Powless wrote that no government weapons or ammunition were used at this private range nor have they ever been outside of the Bangor or Port Townsend ranges. Powless further stated that "to my recollection, Lisa Owens did her sustainment shoot at the Port Townsend range, which we were using during the closure of the Bangor" range. Regarding Coler qualifying at a gravel pit, Powless wrote that this was "a familiarization fire with a personal AR-15 rifle and a personal M500 shotgun, with locally purchased ammunition." Again, Powless stated that no government weapons/ammunition were used and "Coler's shotgun and rifle familiarization that day did not count for qualifications." Powless wrote that Coler "was later brought to the Bangor" range where she qualified with the M4 rifle and M500 shotgun. Finally, regarding the alteration of M4 rifle range targets at the Bangor range, Powless wrote that a couple of guards were having trouble focusing on the target due to the gloomy lighting at the range so he drew a cross on the target with a black marker so the shooters could better focus on the target. To his knowledge, Powless said, he was not violating any regulations by doing so. (R 2, p. 20.)

b. Testimony about employee interviews with Rake and Manson

Four guards testified at trial about their interviews with Rake and Manson. David testified that Rake asked him if he attended a range on May 9, and David replied saying that he did not keep track of the dates. Rake then told him that, according to their records, he was not even there that day. Cunningham testified that he first learned that his name was involved in the "rumors" that some guards had not properly qualified during his interview with Rake and Manson. Cunningham said that, during his interview he learned that the people who were accusing him "of not qualifying were my witnesses at the range in Bangor." (Tr. 1059–1060.) According to Cunningham, he told Rake and Manson that "the inmates are running the asylum," and they "thought it was a laugh." (Tr. 1059–1060, 1068.) Regarding his interview, Lein only said that he met with them on July 10 and provided a statement. (Tr. 690–691, 1043–1044.)

Both Salopek and Rake testified at some length about Salopek's interview. According to Rake, he spoke with Salopek twice and both sessions took quite some time. In the first interview he said that they went through the standard list of questions, including whether Salopek knew who the safety officer was. Rake thought it was important that Xcel's guards had a clear reporting scheme and knew the identity of their safety officer. Rake described Salopek's demeanor during the interview as "arrogant." (Tr. 608.) When asked why he thought Salopek was arrogant, Rake gave a number of reasons. He testified that, on his own accord, Salopek brought up the 2015 armory door incident, saying it had been blown out of proportion and was not a big deal. Rake further said that during their interview Salopek expressed his dislike for Terry, and assumed Terry was the one who had demoted him. Rake testified he told Salopek that Terry was the one who persuaded Rake to talk the Contracting Officer into keeping Salopek on the contract as a guard instead of firing him. Finally, Rake testified that Salopek told them that, when he was a police officer, judges would say Salopek was an expert witness, had proven himself over and over, and whatever Salopek said was the truth; thus whatever Salopek was telling them during the interview should be taken as the truth. (Tr. 607–609, 621–622.)

Rake said that Salopek also raised another incident during their interview, without explanation, involving a 2015 OIG audit of security boats and Salopek said the OIG misunderstood the comments he made during the audit.[26] Rake said he was not even

[25] Apparently, this was in reference to Mullen speaking to Cdr. Pulley while he was still on duty, as Rake testified that he checked with Kirkpatrick and she did not give Mullen permission to speak with Cdr. Pulley. (Tr. 590.) However, Mullen spoke with Cdr. Pulley on July 8, not July 7 which is the date in Kirkpatrick's written statement. (Tr. 160, 329, 462, 679, 734.) (See also R Br., at 16, 56–58, 64.)

[26] Salopek testified that, regarding this incident, the OIG had asked him about the guards' job knowledge, and Salopek said that the guards were not trained in their zones/areas of protection. (Tr. 207–208.)

aware of the incident and had to call the OIG for clarification.[27] Rake also testified that Salopek brought up other topics during his interview that perplexed both himself and Manson. According to Rake, one such topic involved Kirkpatrick, with Salopek claiming she was once a dog groomer, was now a shift Lieutenant, and said that it was unfair women were being treated differently, implying that Kirkpatrick was promoted because she was a woman. Rake said he told Salopek that was he and Manson were the ones who approve shift Lieutenants, with Burris' consent. Rake further said Salopek suggested during his interview that women were problems as security officers, complaining that they are allowed to switch shifts whenever they wanted, and saying that a pregnant woman was allowed to shoot at Port Townsend but should not have been allowed to shoot because of her pregnancy. Regarding the allegation that targets were altered on May 9 for certain individuals, Rake denied that anyone told him that the May 9 date was a mistake, or that anyone gave him a different date for the incident. (Tr. 610–613, 617–618.)

As for his interview with Rake and Manson, Salopek testified that Rake and Manson took a confrontational tone during the interview, with pointed questions; he described the interview as "controlled and directed." (Tr. 177–178.) Salopek said they discussed targets being altered at the range and further said that he told them the May 9 date in the complaint was wrong; Rake replied saying "you're correct." (Tr. 388–389; 381–382.) Salopek testified that he only spoke with them once, and not twice as Rake had said. Salopek denied that the incident involving the 2015 OIG audit was ever discussed. He also denied raising the 2015 armory door incident. Instead, he testified that, at one point during his interview, Manson said to him "you know, we had one incident with you already." (Tr. 427.) Once Salopek realized he was referring to the 2015 armory door incident, Salopek said, "yes, you did. You did have one problem with me." (Tr. 427–429.) Salopek testified that he never said female officers were a problem, he denied complaining about female guards changing shifts, and further denied saying anything about Kirkpatrick being a dog groomer. In fact, Salopek said he was friends with Kirkpatrick, that she was never a dog groomer, and he had recommended her for Lieutenant. (Tr. 421–423, 1106.)

As for the statement attributed to Salopek about being a former police officer, Salopek testified that, what he said during the interview was that he was a police officer for 22 years, testified in court, and had never found a reason to lie. Salopek told Rake and Manson that he would not lie and jeopardize his past and present, so what he was going to tell them during the interview was the truth. (Tr. 424.)

Regarding his two written statements, Salopek said that he drafted the first statement, but was not satisfied with the it. So, he crumpled it up, placed it on the table in front of him, and asked for more paper to draft another one. When he finished the interview, Salopek said he picked up the first draft from the table in order to shred it. According to Salopek, Rake asked for the first statement, saying he did not want it to end up in wrong hands and that he would shred it for him. Three days after his interview, Salopek emailed Manson a four-page, single spaced typewritten statement. The statement contained more of the same type of information that was already set forth in Mullen's July 9 email to ISO Jones but provided further detail. In the email, Salopek wrote that the purpose of the statement was to show a chronological progression of events and give a solid track for follow-up. (Tr. 179–181, 307, 1100, 1104–1105; GC 8.)

I. RAKE'S WRITTEN REPORT

Once the review was completed, Rake drafted his report with Manson's help, and sent it to Burris and Cdr. Pulley.[28] He also sent a copy to an OSHA investigator named Brian Morgan who was investigating Mullen's OSHA complaint.[29] Rake testified that, his normal procedure on a customer complaint would be to only send the report to Burris. Then, after Burris gave him permission, he would also send it to the contractor. But here, because of the nature of the complaint, Rake also sent his report to Cdr. Pulley. And, because OSHA had contacted the Navy Contracting Office, Burris put a "hold" on releasing the report to Xcel; it was not released to Respondent until a later date. Filibeck testified he received the report in December from OSHA. (Tr. 546–548, 554–555, 622–623, 631–632, 1023–1024, 1029–1030.)

Rake's report is dated July 25, 2018 and is titled Memorandum for Contracting Officer, Naval Facilities North West for Indian Island; Commanding Officer Naval Magazine Indian Island. The report is, at times, disjointed. It says that the purpose of the review was to evaluate the July 9 email regarding weapon qualifications at Bangor and to establish if Xcel violated Navy policy and bypassed minimum weapons qualifying requirements. In the report Rake cut and pasted statements from the July 9 email to Jones, titled these statements as "issues" and then proceeded to set forth his findings and recommendations on each issue. There are 12 "issues" total, with the last "issue" having multiple sub-issues relating directly to Salopek. (R 1, R 2; Tr. 542–543.)

Issue 1: The first item deals with the statement in the July 9 email that Mullen, Salopek, Lein, and Schryver were coming forward with safety issues regarding a gravel pit being used for weapon qualifications. The report states that all qualification forms were reviewed for authenticity, that qualification shooting was conducted at either Bangor or Port Townsend, and no guard had produced any documents to show that a Form 3591.1 was falsified or that the shoot did not occur at the proper range. Instead, the report says it was "he said, she said, I heard, no names," and that nobody "could produce any documents to prove the accusations." Also, the report states that Xcel "did hold remedial training to allow personnel extra training to pass

[27] During his testimony regarding this incident, Rake mistakenly referred to Salopek as "Mr. Mullen." (Tr. 610.)

[28] Rake testified that he and Manson spent 400 hours reviewing the allegations in the July 9 complaint. However, it appears that this includes time spent after the report issued, speaking with lawyers, the OIG, and others. (Tr. 543.) Notwithstanding, Rake testified that performing these activities were simply of his job. (Tr. 630.)

[29] Rake testified that he sent the report to Morgan, 3 days after he finished it, because Salopek and Mullen had filed a whistleblower complaint with OSHA. (Tr. 546–547). However, the documentary evidence shows that only Mullen had filed an OSHA complaint at the time the report was issued. (R. 12) The OSHA Case Activity Worksheet shows that Salopek filed his complaint with the agency on November 5, 2018. (R 26.)

qualifications" which did not violate "any contract or instructions." Accordingly, the report recommended no action be taken on this issue.

Issue 2: The second issue the report addressed involved the claim that Cunningham failed his shotgun qualification, was brought to a gravel pit by Schryver who supplied his personal shotgun, that Cunningham was then deemed "qualified," and when it was brought to Terry's attention he said that it was allowed by the Navy. The report states that Cunningham's Form 3591.1 were reviewed, along with ammunition logs, and that Cunningham did a "qualifications reshoot" on March 9, which was "within the time allotted for reshooting." The report further states that Cunningham said he went to an open area with Schryver and practiced with a shotgun on his own time and was never told that the event counted as his official qualification shoot. As for Schryver, the report says Schryver asserted that he had never taken anyone to qualify at any location other than Port Townsend or Bangor, but that he had taken several people out to open areas to provide extra training. Finally, the document says that Terry denied making the comment that this was a qualification shoot, and instead said that it was for remedial training. The report recommended no action be taken, saying that contractors are permitted to take personal weapons to shoot offsite.

Issue 3: Issue three involved the same situation as Issue 2 but focuses on: the claim that Terry gave Schryver ammunition for the shoot; Schryver saying that he was not certified to qualify anyone; and the assertion that the event stood as a qualification. The report noted that "this whole paragraph was denied by . . . Schryver and . . . Terry." It also says that Terry provided ammunition for remedial training only, and Schryver never said to anyone that the shoot counted as a "qualification." The report recommended no action be taken.

Issue 4: This section of the report discusses the allegations that Powless asked Schryver to qualify guards at a gravel pit and Schryver telling Powless that he was not comfortable doing so. The report states that Schryver denied the entire paragraph as worded and says that Schryver was never asked to qualify anyone; instead he was asked to provide remedial training to personnel needing extra time. The report further says that Powless denied ever asking anyone to qualify with a Form 3591.1 at any area other than Bangor or Port Townsend, and that a review of the paperwork, sign in sheets, and ammunition draws, concur with this statement. The report notes that Powless has been the training officer since about 2012, spanning two contracts and numerous inspections, without incident. The report recommends no action be taken.

Issue 5: Issue five involves the claim that, on July 7, 2017 Armstrong told Terry that he had an AR-15 and 9mm, and that Armstrong told Salopek he was bringing the weapons for the range at Schroder's house. In the report, Rake recommends no action be taken, and states: "Not sure what this paragraph means, Officer Mullen resigned the day before his interview, I did not have a chance to ask what this paragraph meant. The entire email reads as though the information was cut and pasted from a larger document. Third person information which cannot be verified. Captain Terry, Officer Armstrong believe he was talking about a time when they went shooting over at Officer Schroder's house."

Issue 6: This issue relates to the claim that, on May 9 Lauritzen and David could not pass their rifle test, Cunningham could not pass both his rifle and shotgun test and his ability to handle weapons was questioned. The report states that Lauritzen, Cunningham, and David were not present at the range on May 9. Instead they shot on February 21, with Lauritzen and David qualifying. Cunningham did not qualify and shot again at Bangor on March 9. The report also says that the line coaches did not notice any problems with Cunningham's ability to handle his weapons. No action was recommended regarding this allegation.

Issue 7: Issue seven involves the claim of using altered targets to qualify Lauritzen, David, and Cunningham; Powless altered targets by superimposing a large black cross on the target, and Vancura put a white piece of paper at the 6 o'clock position so guards could better see the silhouette when shooting. The report finds that the operating manual "does not state anywhere in the document that prevents the use of white dots, black cross marks or altering the target by enhancing the view with markers or dots." The report also states that the Federal Law Enforcement Training Center and Center for Security Forces were contacted, and both use the same practice to assist officers through their qualifications. Finally, the report also says that nobody they interviewed "had actually read the instructions pertaining to altering the targets" except Powless and Terry.[30] The report recommends no action be taken.

Issue 8: Issue eight discusses the allegation that Coler struggled handling her shotgun and rifle, that she failed her rifle and shotgun qualifications, and that Salopek said she should be taken off the range because she handled her shotgun unsafely. The report states that Schryver, who was Coler's line coach on May 9, said that he did not see any unsafe weapons handling, nor did anyone bring this to his attention. The report goes on to say that guards do not always pass their qualifications and that is why they are allowed to retake the shooting course again to qualify. No action was recommended on this claim.

Issue 9: This concerns Cunningham's requalifying with the M4 using altered targets. The report notes that this matter was addressed in Issue 7 and recommends no action be taken.

Issue 10. Issue 10 involves the claim Powless told Lein and Coler that they were going to qualify with weapons at a gravel pit, that the guards would not be paid for the shoot, that Lein was uncomfortable with the plan, did not go, and instead qualified at the next properly scheduled range. The report says that, during his interview, Lein said "he was never told that it was going to

[30] Issue 7 refers to Navy operating exists. See https://www.secnav.avy.mil/doni/opnav.aspx (listing all Department of Navy OPNAV Instructions) (last accessed on November 30, 2020). The correct operating manual is "OPNAV 3591.1F," which is discussed elsewhere in the report. The manual neither discusses the alteration of targets nor has instructions about the issue. The manual does have, as attachments, specific targets, none of which are superimposed with large crosses or white dots. See https://www.secnav.navy.mil/doni/Directives03000%20Naval%20Operations%20and%20Readiness/03-500%20Training%20and%20Readiness%20Services/3591.1F.pdf (last accessed on November 30, 2020).

be a qualification shoot but remedial training to allow more time with a rifle." And, because he was not getting paid, he decided to "take his chances" at the next range. The report also says that "Coler also stated she was never told that going to the 'gravel pit' was to qualify but for remedial training to allow her to qualify." Rake and Manson recommended that no action be taken.

Issue 11. Issue 11 involves the allegation that: at the gravel pit range Coler used her own personal shotgun and an AR-15 supplied by a coworker; after the gravel pit range she was considered qualified on both the rifle and shotgun; Coler was then allowed to work all posts on the base possessing all weapons. The report states that Coler's gun card showed she was only qualified with the M-9 pistol. Notwithstanding, a review of armory records showed that Coler was issued an M500 shotgun by four different shift Lieutenants on the following dates: June 5, June 12, June 19, and June 23. And, she was issued an M4 rifle on June 12. The report says that, upon discussion with the shift Lieutenants, they "discovered the loop holes" that allowed Coler to be issued weapons for which she was not properly qualified, and says they suggested recommendations immediately. The report further states that Manson "checked back thru records and found this was the only incident that allowed a person to be issued weapons." The report notes that, while Coler was issued the weapons in question, she was assigned at a post with a guard who was qualified to use the weapon. The report recommended the following three corrections be taken and says the issues "were resolved during the review:" (1) Nobody "is allowed to stand post until 100% weapons qualifications are completed;" (2) Require a guard's yellow gun card "be placed as a place holder when a weapon is removed to show the weapon was issued;" and (3) "Shared communication from the training officer to the" scheduler "to know who is 100% qualified." The report also states that, when Coler failed the M500 and M4 qualifications, Powless went on a 2-week leave and did not schedule Coler to requalify for the weapons. Instead, the "back up trainer" scheduled Coler at the Bangor Range on July 9, 2018.

Issue 12. Issue 12 involves the final statement in the July 9 email to Jones which states "[w]e feel this practice is unsafe, against Navy policy, and illegal, by falsifying federal documents," and accused Xcel of a cover up. In reply to this statement, the report says that no falsification of any federal documents were found, including Forms 3591.1. And that nobody they "interviewed could provide any documents that GOV records were falsified, only comment was 'that was what I heard.'" Accordingly, the report recommended no action be taken.

The report then goes on to address the issues raised in Salopek's July 22 email, which expounded upon the allegations in the July 9 complaint. At the end of his July 22 email, Salopek wrote that there was an issue regarding the July 7, 2017 range, and recommended Rake and Manson review ammunition records for the ranges scheduled at Bangor. In addressing this claim, the report says the Bangor range was closed on July 7, 2017, "so Officer Owens shot at the Port Townsend Rifle Range to qualify (this is an alternate range approved by the GOV)." [31] (R. 2, p. 9.) The report recommended no action be taken an any of the issues raised in Salopek's July 22 email.

The last section of the report is titled "Comments and Responses" and states that each person interviewed was asked if they knew the proper company chain of command to make complaints. The report says that most guards identified their shift Lieutenant, Terry, or Powless and knew that Morgan had an open-door policy.

Having addressed the issues raised in the July 9 complaint to Jones, which was the objective of his review, Rake went on to state that "[w]hile I could not prove the following I had the feeling Officer Salopek was trying to get back at the company for some incidents that occurred with him since he brought up the following two incidents in our interview without any prodding by us which had nothing to do with the issues at hand, these incidents occurred in 2015." One incident involved the 2015 OIG audit. The report claims Salopek was unable to articulate three protection zones and said that, while he was authorized to fire on a boat as a practical matter he might not do so. The second incident involved Salopek leaving the armory door when he was an acting Lieutenant in 2015.

The report ends with Rake recommending that Salopek be removed from the contract for the following reasons: (1) Despite claiming that he had a high level of integrity and had been called upon by the court as an expert witness, Salopek did not bring facts but third party hearsay, was not able to provide a single document supporting the allegations, "letting the GOV waste time in running around to verify the hearsay comments;" (2) Salopek's disregard for Navy policy regarding his statements during the 2015 OIG audit, his leaving the armory door open in 2015, and the fact he believed these to be minor issues caused by someone else, which led Rake to believe that Salopek could not be trusted to stand post; (3) Salopek's statement that he was well known with judges and any information he provided must be true because of his integrity was the opposite of what the report found, in that his integrity was questioned as he did not have the facts needed by an expert witness in a legal proceeding who would have known the importance of facts as opposed to third party hearsay. Therefore, Rake wrote "I believe [Salopek] is the center to all the third party accusations to meet a hidden agenda of his own." (R 2)

J. Salopek and Lein File a Complaint with the OIG

On August 15, Salopek and Lein filed a complaint with the OIG using a special email address they set up just for this purpose. The complaint was rejected for insufficient information 2 days later. About a week later Salopek re-filed the complaint, and included a 17-page, single spaced, rambling memorandum regarding Respondent's range practices and complaining about Rake and Manson's investigation. Salopek had a telephone interview and met personally with OIG representatives; during these discussions Salopek told them, in part, that he believed the investigation by Rake and Manson may have been biased. (Tr. 185–191, 307–310; GC 9.)

[31] Terry testified that the July 7, 2017 range occurred at Schroder's house, in his backyard; Owens is listed as having qualified on the July 7, 2017 Form 3591.1. (R 42; Tr. 895–898, 967–969.)

Rake testified that, during the OIG inquiry of Salopek's complaint, his personal LinkedIn page came to the OIG's attention. Along with a narrative of his background, Salopek had posted on his LinkedIn page some pictures of Navy Harbor Security Boats (HSBs) that are used to patrol the water surrounding Indian Island. Xcel guards, including Salopek, used to patrol these waters using HSBs until that duty was taken over by the Navy. Salopek had four pictures on his LinkedIn page of the HSBs. Two pictures showed the inside of the boat, with personnel sitting in front of a control panel, and two pictures showed the outside of the boat. According to Rake, the OIG wanted to know how the pictures were taken, since cameras are not allowed on Indian Island absent specific permission. (Tr. 77, 103, 207–208, 436, 596, 643–644; R 13.)

Regarding these pictures, Salopek said that he took them in 2016, and had permission to do so from the commanding officer at the time who told him there was nothing classified on the boats. According to Rake, the OIG asked him to contact the Respondent to have them ask Salopek to remove the pictures. Rake described the pictures as depicting "FOUO" (for official use only) information.[32] Rake reached out to Terry and sent him an email on September 7, with a copy to Morgan, saying that, during a routine social media review, the OIG found that pictures of HSBs were on Salopek's site, with a tag noting that the crew was using an on-board "FLIR" (Forward Looking Infrared), which is a thermal imaging device. Rake's email states that Salopek's LinkedIn page shows the electronic monitoring capabilities of on board HSBs and tells Xcel to ask Salopek to remove the information from his LinkedIn page, or anywhere else they were posted, by September 12. The email further says that, if Salopek "says 'no,' just let me know, do not push or keep asking him. It is OK to tell him that IG is performing inquiries and found this information." (R 13) (Tr. 434, 436, 596.)

Salopek testified that, sometime in September, Powless told him that the OIG wanted the pictures removed, and he immediately complied. At some point Salopek started a marine security services company called "Mjolnir," and similar pictures appeared on the company's website when the website became active on January 1, 2019. There is no evidence that the OIG, or any government security official, had any concerns about the fact Salopek reposted the pictures on his company website in 2019. And, nobody from the OIG's office, or Xcel, has contacted Salopek about the pictures since. (Tr. 313–318, 322–323, 596–597, 1100.)

On September 11, 2018, Salopek received an email from the OIG saying his case was not appropriate for an OIG investigation. However, the email goes on to say that, without divulging any identifying information, the OIG had referred various facts in the complaint to the Navy for their review and response and the OIG would ensure that appropriate leadership was aware of any concerns that may exist. (Tr. 189, 311; GC 9, p. 13.)

Rake testified that he cooperated fully with the OIG during its investigation into Salopek's complaint. Rake said that he sent the OIG his report, all witness statements, and any other documents that he collected for his report. (Tr. 646.) According to Rake, once the OIG "found out my abundance of documentation they, the asked for specific questions and specific documents." (Tr. 646.)

Indeed, on September 17, 2018, the OIG sent an email to Rake's superiors. The email says that a complaint was lodged about Xcel's weapon qualifications, the use of unauthorized firing ranges (gravel pit) for official qualifications, using personal weapons to qualify, falsifying weapon qualifications, and the use of altered targets. The email also says that the complaint alleges Rake and Manson failed to interview important witnesses, and discover pertinent supporting documents, during their inquiry. (R 45, p. 4–5.) Therefore, the OIG asked that Rake's superiors answer five specific questions related to the inquiry: (1) what percentage of Xcel employee weapons-issuance records were reviewed, and for what time period; (2) were all posts properly armed with the required weapons; (3) were any guards issued weapons for which they were not qualified at the time; (4) what specific actions has Xcel taken to resolve the problems identified in Rake's report; and (5) will there be a follow-up to "validate that the fix actions were effective." (R 45, p. 4–5.)

The questions were forwarded to Rake through his chain of command. Rake answered the questions and sent them back up through his supervisors who used Rake's responses to answer the OIG's questions. (Tr. 648–649.) Rake answered the five questions as follows, citing to his July 25 report when necessary: (1) "100% of the staff" were reviewed from September 2017–August 2018, and this was verified again by Mason on September 18; (2) personnel were qualified/armed correctly, with the exception of the findings already set forth in the July 25 report; (3) Coler was issued weapons for which she was not qualified; this occurred because the training officer left on vacation and did not communicate Coler's status to the scheduler; (4) Xcel has "instructed their scheduler and training officer to communicate that no one will stand post with a weapon that is not 100% qualified;" and (5) Xcel was told verbally and then in writing that the company will be assessed on taking corrective measures; the first follow-up occurred on August 30. (R 45.)

In his response to the OIG questions, Rake also stated that everyone who Mullen and Salopek "mentioned to us" as being "mentioned/connected" to the matter was interviewed, and some were interviewed twice. Rake further stated that Salopek was asked "for any documentation of any records that he knew were falsified or dates we could look at and he didn't have anything, other than 'from what I heard,' or words to that effect." Finally, Rake noted that neither Salopek nor anyone else could tell them where the gravel pit was located. (R 45, p. 2–3.)

[32] "FOUO" is not a security classification level, but instead is a Freedom of Information Act (FOIA) designation for unclassified information which the Department of Defense is authorized to withhold from a public FOIA request. Julia P. Eckart, *The Freedom of Information Act–the Historical and Current Status of Walking the Tight Rope Between Public Access to Government Records and Protecting National Security Interests*, 41 SETON HALL LEGIS. J. 241, 255 (2017); see also, Chief of Naval Operations Security Regulations Manual (OPNAV-M) 5510.1 Ch. 4, (August 25, 2017) https://www.secnav.navy.mil/doni/SECNAV%20Manuals1/5510.1%20(OPNAV).PDF. (last November 30, 2020)

K. Salopek's Discharge

1. Filibeck meets with Rake and Burris

In late October 2018, Filibeck met with Rake and Burris at the offices of the Navy Contracting Office located on the Naval submarine base in Bangor, Washington. Rake testified that this meeting occurred on October 25, while Filibeck said it happened on October 26. (Tr. 555–556, 571, 624, 989–995.)

According to Rake, Xcel requested this meeting in order to introduce the company's new management team to the Navy Contracting Office officials including Manson, Rake, and Burris. Filibeck, on the other hand, said that the meeting occurred at Rake's suggestion. Filibeck testified that sometime in mid-October he called the Navy Contracting Office and left a message. Rake returned his call around October 23. During this call Filibeck said he told Rake that he was taking over for Morgan. In turn, Rake told Filibeck that he may want to have a discussion with Burris at his earliest convenience. Filibeck then emailed and spoke with Burris on the telephone, saying that Rake had recommended he come out to meet everyone and discuss some pending issues. (Tr.555, 992–994.)

Present at the Bangor meeting was Rake, Burris, Filibeck, his assistant, and two of Respondent's owners/board members. Both Rake and Filibeck described the purpose of the meeting as a "meet and greet." (Tr. 555, 994.) According to Rake, towards the end of the meeting Filibeck asked whether there were any issues or concerns regarding the contract. (Tr. 555.) At this point, Rake said he looked at Burris, asked if he could tell Xcel about his report, and after she agreed, he told them "we have a safety issue." (Tr. 625.) Rake said he then "briefly went over a lot of the information in the report" including his recommendation to remove Salopek. (Tr. 555–556.) The Xcel officials then asked Rake about the report, the extent of his investigation, if everyone was interviewed, whether there was anything else they needed to know about, or something they could do to help fix things. Rake told them about the research his team conducted, the amount of time spent on the matter, and the extent of their investigation. Rake also told them that Terry had already implemented all of the report's recommendations. Regarding his recommendation to remove Salopek, Rake testified that Burris did not say anything, either for or against his proposal. In fact, Rake testified that Burris did not say more than 10 words during the entire meeting. While he recommended that Salopek be removed from the contract, Rake testified that neither he nor Burris made any recommendation whatsoever as to whether Xcel should terminate Salopek. In fact, Rake said that "it's drilled into use; we cannot . . . fire a contractor." (Tr. 558) (Tr. 555–559, 625–627, 995, 981.)

Regarding what occurred during this meeting, Filibeck testified that, after the initial pleasantries, he told Rake and Burris that Xcel was there to serve and asked what he could do to either perform better on the contract or make their lives easier. According to Filibeck, Rake then asked if he was aware of the issues occurring at Indian Island. Filibeck said that he thought everything was running about as well could be expected. Rake then asked Burris if he could bring everyone up to speed on a few things and Burris nodded her head yes. After Burris agreed, Filibeck testified that Rake first discussed Mullen, saying he had abandoned his post for a couple of hours to go on a "junket" with a couple other guards, and that "they were less than pleased about that." (Tr. 997.) The "junket" was Mullen, Salopek, and Lein going to speak with Cdr. Pulley. According to Filibeck, Rake then said Xcel was having a lot of performance issues, that the Navy had just completed a significant investigation on alleged complaints which, with few exceptions, had no basis in reality, wasted between 400–500 hours of their time, and they did not appreciate it. (Tr. 996–998, 1002–1003)

While Filibeck was not given a copy of the report, he testified that Rake read 85 percent of the report to him during the meeting, and told him that an employee had filed false complaints with no "basis in reality," resulting in an investigation that cost the Navy a lot of time, effort, and money resulting in them "chasing their tails." (Tr. 999.) Filibeck said that Rake detailed the false complaints, saying five guards listed in the complaint were not at the shooting range on the date in question, and that those guards had previously passed their qualifications anyway. Also, Rake said that Coler was qualified on the M9 and the M500 shotgun, but not qualified on the M4 rifle. While she was stationed at a post which required one of the guards carry an M4 rifle, Rake told the Xcel officials that Coler was always stationed at the front post talking to drivers, and the front post only required an M9 pistol. (Tr. 999–1000, 1023–1030.)

Filibeck testified that, during the meeting, Rake said, "[w]e strongly recommended [Salopek's] immediate removal from the contract," because he is dishonest, and cannot be trusted. (Tr. 1002) Filibeck further testified that Rake said he had lost all confidence in Salopek's ability to fulfill his duties at the jobsite, saying "we don't want him, get rid of him." (Tr. 1002.) By the end of the meeting, Filibeck said he knew the Navy Contracting Office had done a thorough job and Rake was serious about wanting Salopek off the contract. That being said, nobody from the Navy ever requested Salopek's removal from the contract in writing, which would have been the standard practice if the Navy wanted him removed. Filibeck, who has worked in government contracting for over 27 years, testified that, when the government directs a contractor to remove an employee from a contract, notification is usually provided in writing. And, although Rake recommended Salopek's removal from the contract, Filibeck acknowledged that neither Rake nor anyone from the Navy ever asked that Salopek be fired. (Tr. 1002) At the end of the meeting Filibeck said that they "discussed remedies" and Filibeck told Rake and Burris that he was going to meet with Salopek, and "would let them know in very short order" how he was going to take care of the matter. (Tr. 1014.) (Tr. 980, 1000–1003, 1029.)

After the meeting ended, Filibeck contacted Terry and Powless to discuss Rake's report. Filibeck said he discussed the report with Terry and Powless because he felt blindsided; he needed to know how this happened and if, in fact, Xcel had training issues he did not know about, or something that the Navy did not uncover. Regarding these discussions, Filibeck testified that Powless was a "fountain of information regarding Salopek." (Tr. 1015.) Despite his discussion with Terry and Powless about training issues, Filibeck claimed that it was not until April or May 2019 that he learned Respondent had actually been using someone's backyard as a shooting range to qualify its guards. (Tr. 1015, 1020.)

2. Filibeck fires Salopek on October 27

On October 27, Salopek and Lein were working the morning shift, assigned to the commercial vehicle inspection (CVIS) post; Powless was the shift supervisor. During the morning briefing, Powless told the guards to make sure their uniforms were in order and shoes shined as some company "bigwigs" were coming. (Tr. 196, 699.) After the briefing, Salopek and Lein went to their post. (Tr. 195–197, 699–700.)

Respondent informed the Union that Salopek was going to be fired, so Union business agent Scott Harger (Harger) called Salopek that morning and told him the news before it happened. Salopek testified that, during this call, Harger told him both he and Lein would be fired. At some point Powless and Vancura drove to the CVIS post and relieved Salopek of his duties. (Tr. 198.) Vancura assumed Salopek's position while Powless and Salopek drove back to the Xcel offices in Building 848. When they arrived, Powless told Salopek that he needed to take his weapon. Salopek surrendered his pistol and the two went into the Lieutenant's office. (Tr. 198–199, 699, 812–813.)

After speaking with his union representative, Salopek was then taken to the training room. Present was Filibeck and one of Xcel's owners/Board members; Salopek did not know either individual. According to Salopek, after everyone introduced themselves Filibeck said that Salopek could either resign or he would be fired. Salopek refused to resign and asked why he was being terminated. Salopek testified that Filibeck told him he was being fired for dishonesty, violation of the chain of command, and lack of candor to a supervisor. However, in a written statement drafted on October 28, Salopek wrote that Filibeck told him he was being fired for dishonesty, affecting the morale of the workplace, and "something regarding candor with supervisors." (R. 52.) This written statement comported with an affidavit Salopek's provided to the NLRB during the underlying investigation; neither document mentions a violation of the chain of command. (Tr. 202, 270–271, 338–339, 351–352, 357; R 52.)

Salopek testified that he asked Filibeck during this meeting for the specific charges against him; Filibeck said there were a litany of items and he would send them to Salopek. Filibeck then told Salopek he needed to sign various paperwork in Terry's office and turn in his Common Access Card ("CAC card") and badge.[33] Salopek complied. When Salopek went to Terry's office, Terry told him that there was nothing in his employee file except the vault incident in 1995 and that "this is all Rake." (Tr. 355) Salopek said Terry then told him that the Xcel officials met with Rake and afterwards called Terry saying Salopek and possibly Lein were going to be fired. Regarding this phone call, Terry testified that he received a call from Filibeck on October 26. Filibeck told Terry that he had just finished meeting with the Navy regarding Salopek, and they "basically wanted him gone" because Salopek was the person responsible for the months-long investigation over weapon qualifications. (Tr. 945.) As for his conversation with Salopek on October 27, Terry said he told Salopek that this was out of Xcel's hands and was what the Navy had requested. (Tr. 203, 344, 353–358, 946; R 52.)

Regarding his meeting with Salopek on October 27, Filibeck testified he told Salopek that he had just met with the Navy, and while Salopek had worked for Xcel for some time, the Navy directed him to remove Salopek from the contract. Filibeck said he told Salopek the reasons for his removal were dishonesty, falsifying reports, and lack of candor during the Navy investigation which resulted in hundreds of hours of investigative time, causing the Navy to "chase[ ] their tail." (Tr. 1016.) According to Filibeck, he then told Salopek that he had not done Xcel any favors and asked if he wanted to resign. Salopek would not resign, so Filibeck told Salopek that he was terminated effective immediately. (Tr. 1015–1016.)

Salopek never received anything in writing from Xcel explaining why he was terminated, or the charges that were levied against him. On October 30, an automatically generated email was issued stating that Salopek's CAC card had been revoked. According to Rake, this is standard practice; once Xcel notifies Rake that someone is no longer employed by the company, the former employee's CAC card is revoked since that person is no longer working on the contract. (Tr. 203–204, 359, 571–573; GC 10–11; (JX 5 #1678.)

3. Respondent's stated reasons for firing Salopek

After Salopek was fired, Terry completed a company "change of status" form which states that Salopek was fired on October 27 and was not eligible for rehire. The form further says that Salopek was terminated for "chain of command violation and dishonesty." (JX 5 #1285.) Filibeck instructed Terry to write down these two specific reasons for Salopek's discharge on the form. (Tr. 947–949.)

Filibeck denied using the term "chain of command" during his October 27 meeting with Salopek, but admitted that this was one of his concerns. (Tr. 1016) Also, when asked if a guard was prohibited from going to anyone at the United States Navy about employee complaints, Filibeck testified that "[i]t is definitely a violation of the rules and regulations for sure." (Tr. 1017.) However, there is no evidence that any such "rules or regulations" exist, and nothing in Respondent's employee handbook precludes a guard from contacting anyone at the Navy directly, either civilian employees or military personnel, about their complaints. (GC 2.)

According to Filibeck, as a contractor Xcel follows the military's chain of command whenever an issue arises. Thus, when an issue is brought to the company's attention, Xcel takes the matter to Manson, Rake, or Burris. Then, if Xcel does not believe the issue is receiving the attention it deserves from the Navy's Contracting Office, Xcel can turn the matter over to the OIG which would conduct its own independent investigation. Only if the OIG finds merit to the matter, would a commanding officer, like Cdr. Pulley, become involved as the OIG would go through the military chain of command with its findings. Filibeck testified, "[w]e don't jump that." (Tr. 1016.) Thus, Filibeck said, "we just don't get the option to . . . leave our post and . . . barge into the commanding officer's offices. It reflects very badly on the employees and on the company as a whole." (Tr.

[33] A CAC card is an identification card containing biometric information issued to government employees, members of the military, and contractors. It allows them access to the base. (Tr. 209–210, 573–579.)

1022.) Filibeck further said that when someone does not operate inside of the confines of the military's rigid structure, the result is what occurred with Xcel involving the complaint lodged by Mullen, Salopek, and Lein, "[t]hey will tell somebody something that turned out to be completely unfounded allegations for the most part, there's a knee jerk reaction to problems." (Tr. 1017.) (Tr. 1016–1017, 102.)

When asked how Salopek was dishonest, Filibeck referred to the guards that were alleged to have falsified training records and failed their qualifications. According to Filibeck, he told Salopek that he was dishonest because the allegations that several guards falsified training records and failed their qualifications were false. Regarding Salopek's dishonesty, Filibeck further said that, if an employee on a federal contract makes an allegation it better be correct because there are repercussions. And, Filibeck said that Salopek should have brought the complaints through the appropriate military chain of command so Xcel could have reported the problem appropriately to the government. As for Salopek's alleged lack of candor, Filibeck testified that, according to Rake, Salopek was not forthcoming with them, in that Rake and Manson had to go back looking for things. Filibeck said that he had an opportunity to review the training records at Indian Island before he "clipped" Salopek, and that as per the Navy investigation, Salopek's allegations were completely false.[34] (Tr. 1018–1019.) In fact, Filibeck said that Salopek's allegations were "not even close, and he got us in a lot of trouble with the Navy for filing those false allegations." (Tr. 1019.) (Tr. 1018–1022.)

Filibeck testified that he believed Rake had conducted a very thorough investigation involving extremely serious allegations. And he was facing a situation where Rake, who Filibeck described as "basically our direct boss" was recommending Salopek's immediate removal from the contract, and Burris was not saying anything. (Tr. 1004.) Filibeck said that the Navy has the right, under the contract, to request anybody be removed; Filibeck wanted to keep the contract at Indian Island and "keep the customer happy." (Tr. 1004.) Therefore, Filibeck decided to remove Salopek from the contract. As for why Salopek was discharged, as opposed to being transferred to another Xcel contract, Filibeck testified that the allegations against Salopek were very serious, and Xcel's next closest contract was with the United States Army Corps of Engineers at a series of dams on the lower Columbia River which was "10,080 miles away." (Tr. 41, 981, 1005.) Also, Filibeck said that there were a couple of issues with transferring Salopek to another contract. The first issue was "if this guy is going to do this kind of activity here, he's going to do it there." (Tr. 1005.) (Tr. 1003–1007.)

Also, Filibeck said that, at the time of his testimony, he believed there was currently "an active investigation regarding those classified photos that are still up" on Salopek's website, referring to the photographs Salopek took of the HSB console. (Tr. 1005–1006.) Therefore, because Salopek posted classified photographs on his own personal website for another company, Filibeck said that he "could never employ him." (Tr. 1006.) However, no evidence was introduced that there was, in fact, any such current investigation into Salopek's pictures. Finally, Filibeck claimed that Salopek would not be able to receive a CAC card if he had been transferred to another one of Xcel's contracts. However, Filibeck later admitted that the reason Salopek's CAC card was cancelled was because Xcel had fired him for cause, and if Salopek had been transferred to another Xcel contract, as opposed to being fired for cause, there would not have been any problems with Salopek's CAC card. Rake confirmed the Navy's ability to transfer CAC card authorizations from one contract to another, when the employee is "not in trouble," and said that the Navy Contracting Office "do[es] that a lot." (Tr. 575–576.) (Tr. 1005–1006.)

4. Lein's conversation with Powless on October 27

Lein testified that October 27 was a strange day. That morning, he was pulled off the CVIS post to wash a vehicle, which was not a typical assignment for a guard standing post. Then, instead of resuming his post, Powless had him load boxes of old files into a van with two other guards and drive them to a building for storage. Moving boxes of paperwork was also not part of Lein's normal duties. He eventually returned to the CVIS post sometime around noon. At some point that day, Salopek told Lein about the conversation he had with Harger. Lein then witnessed Powless and Vancura relieve Salopek of his duties, and he saw Salopek leave with Powless. Based upon what had been occurring that day, Lein assumed he was going to be fired as well. (Tr. 700–705.)

When Lein finished his post, he went to Building 848 and turned in his weapon. Someone at the armory told Lein that Powless wanted to speak with him, so Lein walked over to Powless who was standing nearby. Powless invited Lein into Terry's office. At this point Lein testified that he was upset. He asked Powless "am I fired," and further told Powless that he was not going to sit there and have a conversation if he was being fired. (Tr. 706.) Powless replied saying "they were going to fire you" but decided that, since it was Lein's first time "jumping the chain of command," he would get a second chance. (Tr. 706–707.) Powless then told Lein that the two of them had not talked since July, when the violations were reported to Cdr. Pully. Powless told Lein that he was "ticked off" at Lein for not letting Powless know that he was doing something wrong. Lein testified that could not believe what Powless was saying, as he had been expecting an apology from Powless; the two spoke briefly and Lein left. Lein was never disciplined. (704–708, 743–744.)

L. Lein's Issue Involving Guard Mount/Arm-up Pay

Article 12 of the parties' CBA states that guards are to receive an extra 30 minutes of paid time for each shift they work; this is referred to in the contract as "guard mount pay." (JX 15–16.) The document says nothing about whether this extra time is to be pro-rated depending upon the length of the shift. In practice, the extra 30 minutes is broken down into two 15-minute increments. At the start of a shift guards are given 15 minutes to arm-up, receive briefings, and get to their post, and they get 15 minutes at the end of a shift to get back to Building 848, pass on briefings, and arm-down. A standard shift for a guard is

[34] Filibeck referred to his firing Salopek as having "clipped" him. (Tr. 1018–1019.)

therefore 8.50 hours. (Tr. 708–710, 950–951; JX 15–16.)

Terry testified that, depending upon their weapons and guard assignments, it only takes about 5 minutes to complete the entire arm-up/arm-down process; it is "a very fast process." (Tr. 958.) And, he said that traditionally, if a guard has armed-down before the full 15 minutes allotted, Respondent allows them to go home early. (Tr. 952.)

Sometime around Christmas 2018, Lein volunteered to work a 4-hour shift. Lein went to work, and at the start of his shift put down 4.50 hours on his timesheet to account for his 4-hour shift and the extra half hour for guard mount pay. When Lein finished his shift, he checked his timesheet and someone had whited-out the 4.50 hours and replaced it with 4.25 hours. Lein approached the part-time Lieutenant on duty and asked why his timesheet had been changed. The Lieutenant told Lein that he was working a 4-hour shift and therefore only entitled to an extra 15 minutes for guard mount. Lein disagreed, and the Lieutenant told him to bring it up with Terry if he had a problem. (Tr. 709–712, 740.)

The next morning Lein testified that he went to Terry's office to get clarification on the matter. He told Terry what had happened and also said that he did not appreciate the Lieutenant changing his timesheet; instead the Lieutenant should have first discussed the matter with Lein. Terry told him to put down 4.50 hours. Lein felt that Terry was just appeasing him and wanting to get Lein out of his office. Nevertheless, Lein was paid for 4.50 hours. (Tr. 713, 740–742.)

In about early to mid-January 2019, Lein was assigned to work 4-hour shift and had another issue regarding guard mount time. He arrived to work at 1:30 a.m. along with another guard for a 2–6 a.m. shift. The two guards went to the armory at 1:45 a.m. where Lieutenant Lux was on duty. Lux refused to let them arm-up until 2 a.m. Lein told to Lux that the CBA provided 30 minutes for guard mount and explained his discussion with Terry a few weeks earlier. However, Lux would not allow them to arm-up until 2 a.m. This resulted in Lein and his coworker being late to relieve the other guards on post. (Tr. 714–716, 743; R 46.)

The next day, Lein testified that he was assigned to work the dayshift and he went to the training room for the shift-briefing. However, there were only a couple people present. Eventually Powless arrived and said that the briefing would occur in the Lieutenant's office. Lein testified that, when he walked into the Lieutenant's office everyone was there, including half of the night-shift guards and the night-shift Lieutenant. According to Lein, it was unusual to have other shifts present during the day-shift briefing; once he walked into the office he knew something was wrong as everyone was looking at him. After they entered, Powless told the group that somebody had complained about the arm-up time and Terry had directed that nobody would be going home early anymore. (Tr. 717–718, 742; R 46.)

Lein was mad, so after the meeting he followed Powless to the armory and told him "if you're going to put this crap out at guard mount" at least have the whole story and the facts before "you put me out there like that. Because everybody knew they were talking about me." (Tr. 719.) Lein testified that Powless "got pissed off," turned his back to Lein and then turned around and said, "oh, are you going to write me up?" Lein believed that Powless was referring to the complaint that Lein, Salopek, and Mullen made to Cdr. Pulley and thought Powless was still mad at Lein for making the complaint. (Tr. 720.)

After speaking with Powless, Lein armed-up and walked to his duty van along with Everson who was his partner for the day. When they arrived at their van, an Xcel Lieutenant named Paul Wilson was standing there and told Everson "hey, you need to get this guy straightened out" in reference to Lein; there was no reply and Lein went to his duty post with Everson. (Tr. 721.) Lein testified that throughout the day Everson and another guard kept telling him that he: needed to apologize to Terry; was messing up the Company's spreadsheet; was the only one that had complained; was not a team player; and ruined everyone's life because the guards could no longer go home early. Lein replied by telling his coworkers that he did not care about the Company's spreadsheet, they needed to read the CBA, and that Respondent was obligated to pay him what the contract dictated. (Tr. 721–722; R 46.)

Terry was working that day, and he had to drive past Lein's post to enter the base. When Terry drove to the guard shack Lein testified that he walked up to Terry's car and told him what Powless had said at the guard mount briefing that morning; Lein was angry. Lein told Terry that the guards had been verbally assaulting him in the guard shack because of what Powless said at the briefing and that he should not have to come to work and be harassed because he asked for clarification about guard mount pay. According to Lein, Terry said that the guards should be mad at him and not Lein; Terry then drove off. (Tr. 722–723, 742.)

Before his shift ended that day, Lein needed to go to Building 848 to reset his email. According to Lein, he sat at a computer next to Powless to fix his email and told Powless that the guards had been harassing him all day. Lein testified that, at one point, Powless told him that if he had any issues or concerns maybe next time he should bring them up to his peers. Right before the shift ended, Powless told Lein that he had communicated with Terry and the guards were no longer prohibited from leaving early after they finished arming down. (Tr. 742.)

The issue involving guard mount pay was not the first time Lein brought a problem regarding his pay to Terry's attention. In September 2018, Lein complained to Terry about the amount of pay he received during his first 2 weeks of employment with Respondent, which he referred to as his "in-hire" period; this consisted primarily of time spent training and with weapon qualifications. According to Lein, he was only paid $11 per hour during this time, and he had $38 taken out for union dues. Lein said he discussed the matter with his coworkers, and with the Harger, and learned that the minimum wage at the time was $11.50 per hour. Also, one of his coworkers said that he had been paid his regular salary of about $27 per hour during his in-hire period. Harger also told Lein that too much money had been deducted for union dues during his first 2 weeks. Harger then emailed Terry on September 26 asking for a copy of Lein's dues authorization card. Lein said that a few days later he was summoned to Terry's office. According to Lein, Terry told him that, if he had any pay issues, he needed to speak to Terry about it and not the Union. Lein replied saying that he had the right to speak with the Union. During this meeting Lein said he also told Terry that the minimum wage was $11.50 per hour, and that every guard hired after January 1 should be reimbursed an extra $40.

(Tr. 695–699, 826; GC 17.)

Terry acknowledged that Lein came to him with a question about guard mount pay involving a 4-hour shift but could not remember when it occurred. He first guessed that it happened in November 2018 and then said that he thought it happened when Lein was still in his probationary period. Terry testified that, during their conversation he told Lein that he would be paid a full half-hour. Respondent's counsel asked Terry whether, during this conversation, he told Lein to only come to him about issues like pay as opposed to going to the Union. Terry said that he did not recall any such conversation but did remember telling Lein that if he has any issues with his pay, uniforms, or whatever, to please let him know so Terry could see if he could solve the problem. (Tr. 955–956.)

III. ANALYSIS OF THE 8(A)(1) AND (3) ALLEGATIONS

A. Mullen, Salopek and Lein Engaged in Protected Concerted Activities

The protections afforded under Section 7 of the Act extend "to employee efforts to improve their terms and conditions of employment or otherwise improve their lot as employees through channels outside of the immediate employee-employer relationship." *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)). This includes the right of employees to take their complaints to their employer's clients or customers. *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990) (citing *Greenwood Trucking, Inc.*, 283 NLRB 789 (1987)); *Paragon Systems, Inc.*, 362 NLRB 1561, 1564, 1576 (2015) (contract security guard who delivered strike notice to Army Colonel at client agency was engaged in union activity protected by Sec. 7 of the Act); *M.V.M., Inc.*, 352 NLRB 1165, 1172–1175 (2008) (letter from Federal courthouse security guards who worked for private contractor, sent to the United States Marshals Service, complaining about working conditions constituted protected concerted activity for mutual aid and protection).[35] And, employees engage in concerted activity protected by Section 7 when they complain about issues involving safety, training, and equipment used in the workplace. *G4S Regulated Security Solutions*, 359 NLRB 947, 951 (2013), affd. 362 NLRB 1072 (2015), enfd. mem. 670 Fed.Appx. 697 (11th Cir. 2016) (security guards were engaged in protected concerted activity by complaining about, among other things, having lanyards on their weapons and wearing vests); *North West Rural Electric Cooperative*, 366 NLRB No. 132, slip op. at 1 fn. 1, 14 (2018) (employee was engaged in concerted activity for mutual aid and protection by posting comments about safety and the lack of safety training on Facebook forum regardless of whether coworkers agreed with his comments or if the comments on safety practices and accident prevention actually had merit); *Mitchell Manuals, Inc.*, 280 NLRB 230, 231 (1986) (employee letter sent to chairman of employer's parent corporation addressing employee concerns about wages, education, and training, was concerted activity for mutual aid and protection); *Dreis & Krump Manufacturing*, 221 NLRB 309, 310, 314 (1975), enfd. 544 F.2d 320 (7th Cir. 1976) (protesting the quality of supervision as it relates to training and safety falls within the scope of the mutual aid or protection clause).

Here, Mullen, Salopek, and Lein were concerned about safety issues surrounding Respondent's practice of organizing and conducting weapon qualifications at unauthorized locations, using non-government weapons with non-government ammunition. They were also concerned about the propriety of Respondent's Lieutenants altering targets to assist guards who were having trouble qualifying. By taking these concerns to Cdr. Pulley and ISO Jones, the three guards were engaged in concerted activity for mutual aid and protection. *Valley Hospital Medical Center*, 351 NLRB at 1252; *Kinder-Care Learning Centers*, 299 NLRB at 1172. However, this does not end the inquiry, as "[o]therwise protected communications with third parties may be so disloyal, reckless, or maliciously untrue as to lose the Act's protections." *Valley Hospital Medical Center*, 351 NLRB at 1252.

"Statements have been found to be unprotected as disloyal where they are made 'at a critical time in the initiation of the Company's' business and where they constitute 'a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income.'" Id. (quoting *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464,472 (1953). However, the "Board is careful . . . to distinguish between disparagement of an employer's product and the airing of what may be highly sensitive issues." Id. (internal quotation omitted). For employee criticism to be considered so disloyal to lose the Act's protection there must be evidence of a "malicious motive." Id.

Statements that are "maliciously untrue, i.e., if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity," are also unprotected. Id. That being said, "the mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue." Id. When "an employee relays in good faith what he or she has been told by another employee, reasonably believing the report to be true, the fact that the report may have been inaccurate does not remove the relayed remark from the protection of the Act." Id. (citing *KBO, Inc.*, 315 NLRB 570, 571 (1994), enfd. mem. 96 F.3d 1448 (6th Cir. 1996)).

Here, the complaints made to Cdr. Pulley and ISO Jones related directly to the guards' working conditions and nothing in those complaints were disloyal or disparaging so as to lose the protection of the Act. There is no evidence the statements were made "at a critical time in the initiation of" Xcel's business. *Jefferson Standard*, 346 U.S. at 472. Indeed, Xcel had been the contractor at Indian Island for 20 years. And, although the statements were critical of Respondent's weapons training/qualification practices, they were not made "in a manner reasonably calculated to harm the [Respondent's] reputation and reduce its income." Id. In context, it is clear that the three guards did not intend to "disparage or harm Respondent" but wanted "to pressure Respondent to" change its weapons qualification practices

[35] *M.V.M., Inc.*, 352 NLRB 1165, 1172–1175 (2008), is not binding precedent, as it is a two-member Board decision. It is cited for its persuasive value only.

to comport with Navy regulations, thereby improving safety by ensuring that all guards were properly qualified to use the weapons and ammunition they are required to carry while patrolling at Indian Island. See *Valley Hospital Medical Center*, 351 NLRB at 1253 (citing *Mount Desert Island Hospital*, 259 NLRB 589, 593 (1981), enfd. in relevant part 695 F.2d 634 (1st. Cir. 1982.)

Also, there is no evidence that the statements made in the complaints to Cdr. Pulley and ISO Jones were maliciously false. Instead, the evidence shows that the core issues raised in complaints were, in fact, true. Both Coler and Lein failed their initial weapon qualifications in early May and were told they would have the chance to shoot again at a gravel pit to qualify. Coler stated in her written statement to Rake that she shot at the gravel pit range, did not think about the "legality" of the qualification because she had heard it had been done before, and was then told that she could now stand post. (R 2 p. 22.) After her gravel pit qualification Mullen saw Coler standing post with an M4 rifle and Rake's report confirmed that she was issued an M500 shotgun or M4 rifle on multiple occasions before she passed her subsequent qualification test at the Bangor range on July 9. Lein's written statement to Rake discusses how Powless had arranged for him to qualify at the same gravel pit as Coler, and that Powless told him that he would be qualifying with an AR-15 provided by another guard instead of using an M4 rifle. (R 2, p. 16.) Lein's testimony also confirms that Respondent considered Coler's gravel pit range an official qualification shoot, as Powless told him the shoot was for qualifying and that Coler passed her rifle test shooting a score of 141. Indeed, Terry admitted that, until the Navy's Contracting Office started investigating the complaints lodged by the three guards, Respondent had a longstanding practice of using unauthorized locations to qualify guards, including the backyard of a someone's house, or anywhere else they could find, and they used non-government issued weapons for these qualifications. Terry further admitted that this practice had been going on for years, and it was only when Respondent got its "hand slapped" as part of the investigation that Xcel stopped this practice. (Tr. 963, 978.)

Also, the evidence shows that at least one weapons qualification Form 3591.1 contained false information. The Form 3591.1 signed by Powless for the July 7, 2017 qualification states that it occurred at the Bangor range. However, the qualification shoot actually occurred in Schroder's backyard. (R. 42; Tr. 895–898, 967–969.) Indeed, according to Rake's report the Bangor range was closed on July 7, 2017. (R 2, p. 9.) Also, regarding the complaint that Respondent was using altered targets, Powless admitted doing so. Powless' written statement admits to altering targets with a large cross because a couple guards were having trouble focusing on the targets do to the "gloomy lighting" at the range. (R 2 p. 20.) Cunningham admitted that he sometimes struggled with weapon qualifications because of the poor lighting.[36] (Tr. 1071.) While Rake claimed that the practice of altering targets was not prohibited, it does not take away from the legitimacy of the concern expressed by Mullen, Salopek, and Lein. Guards on post could hardly expect criminals, terrorists, or other wrongdoers to be walking around outlined with a large black cross to help their coworkers focus on the potential threat. And, nobody claims that a guard's ability to shoot accurately in all types of weather conditions and lighting is not a vital job duty.

While Mullen's email to Jones, and Salopek's email to Morgan, states that the incident with the altered targets occurred in May, which is incorrect, I credit Salopek's testimony that he told Rake that the date was a mistake. Indeed, in his second written statement to Rake, Salopek stated that he saw targets altered at the Bangor range on or about January 31. (R 2, 14.) Moreover, the mere fact that any statement in the complaints were "false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue." *Valley Hospital Medical Center*, 351 NLRB at 1253. Ultimately, Respondent bears the burden of proof to show that an employee's statements are maliciously untrue. *Three D, LLC*, 361 NLRB 308, 312 (2014), enfd. 629 Fed.Appx. 33 (2d. Cir. 2015). And here, Respondent has not even shown that the primary allegations in the complaints were false, let alone that they were made with malicious intent. Accordingly, the complaints made by Mullen, Salopek, and Lein did not lose the protection of the Act.

Similarly, I find that Mullen did not lose the protection of the Act when he accompanied Salopek and Lein to Cdr. Pulley's office while he was on duty. At various times during their testimony, Rake and Filibeck claimed that Mullen improperly left his post when he went to speak with Cdr. Pulley, with Filibeck saying that Rake called Mullen's actions a "junket." (Tr. 589–590, 996–997.) And, Rake testified that, had Mullen not resigned, he was going to recommend Mullen be removed from the contract for abandoning his post. (592–593) However, the evidence shows that Mullen did not abandon his post. Instead, Mullen was within his patrolling area of South Patrol at all times that day, as Cdr. Pulley's office is located within South Patrol. Also, Mullen did not miss any of his required security checks that day, nor is there any evidence that Mullen had abandoned his radio and pistol when he met with Cdr. Pulley. Given the fact that guards are allowed to take breaks whenever they want, without calling in for relief, and that guards on South Patrol spend a lot of their day "just killing time" because of the minimum number of security checks to be performed, it can hardly be said that Mullen abandoned his post when he spoke with Cdr. Pulley. This is especially true considering the fact that it was not uncommon for guards on South Patrol to spend 30 minutes at the end of their shift each day washing their work truck. Meeting with the base commander involving an important security issue is surely more important that washing a work truck or parking somewhere "killing time." Accordingly, I find that Mullen did not abandon his post, and his actions that day did not lose the protection of the Act.

B. Mullen's Resignation/Constructive Discharge

The General Counsel alleges that Xcel constructively discharged Mullen, arguing that Respondent imposed intolerable

[36] Notwithstanding Cunningham's claim that he passed all his qualifications in January, Rake's report found that was not the case as he had to reshoot his qualifications on March 9. (R 2, p. 2.)

working conditions upon him in retaliation for his protected concerted activities, and should have reasonably foreseen that, if Mullen did not receive assurances that the threatening behavior against him would be addressed and stopped, he would quit. (GC Br., at 36–38.) "Two elements must be proven to establish a 'traditional' constructive discharge: 'First, the burden imposed on the employee must cause, or be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union [or protected] activities.'"[37] *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1170 (2004) (quoting *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976)); see also *American Licorice Co.*, 299 NLRB 145, 148 (1990) (whether employer specifically intended that the employee quit is not dispositive, as a constructive discharge can occur in circumstances where "the employer should have reasonably foreseen that its action would have that result."). The test as to whether working conditions were so difficult or unpleasant so as to force an employee to resign is an "objective one." *Chartwells*, 222 NLRB at 1069; *Quanta*, 355 NLRB 1312, 1314 fn. 4 (2010); see also, *Aliotta v. Bair*, 614 F.3d 556, 566 (D.C. Cir. 2010) ("The test for constructive discharge is an objective one: whether a reasonable person in the employee's position would have felt compelled to resign under the circumstances."). If the General Counsel proves a prima facie case of constructive discharge, the burden shifts to the employer to show that it had a legitimate, nondiscriminatory reason for its actions. *Grand Canyon Mining Co.*, 318 NLRB 748, 760 (1995).

Regarding Mullen, I believe that, given the circumstances, the evidence supports a finding that a reasonable person would view the text message from David as threatening. The message calls Mullen a "fucking idiot," calls Salopek Mullen's "butt buddy" and says that Mullen "don't know what you have stepped in." (GC 6.) Regarding the incident with Cunningham in the training room, although I generally did not view Cunningham to be a credible witness, I find that the evidence does not show that Cunningham actually "swept" Mullen with his shotgun, or purposely pointed the gun at him. Instead, the evidence shows that, during the altercation, Mullen was sitting down and Cunningham was standing over him holding his shotgun at a 45-degree angle, pointing towards the ground. Because Mullen was sitting down, and Cunningham was standing up, it is easy to understand why Mullen would think that Cunningham's shotgun was pointed towards him, when in reality it was pointed at an angle towards the ground. That being said, the credited evidence shows that Cunningham was mad when he confronted Mullen. He was yelling at Mullen, calling him a "fucking rat" and "fucking skell," while demanding an apology. Indeed, Simon, who was present when the incident occurred, said that a written statement from him would only show Cunningham's temper, which was already well known. Given these circumstances, I find that, although Cunningham was not purposely pointing his shotgun at Mullen, it was not unreasonable for Mullen to view the interaction as threatening.

Accordingly, I find that Mullen reasonably viewed both incidents as threatening, and therefore his reporting them to Respondent and asking that they be addressed before returning to work was rational. However, I do not believe the evidence supports a finding that Respondent's actions/inactions imposed a situation that was so difficult or unpleasant that it forced Mullen to resign, or that Respondent should have foreseen Mullen would have resigned because Xcel did not immediately inform him of the company's investigation into his allegations.

Regarding the text message from David, after Mullen reported it, Respondent immediately addressed the issue. Shortly after he sent the text message, David received calls from three different Xcel Lieutenants telling him to stop texting Mullen and cease all contact with him. While Respondent never informed Mullen that David was directed to stop contacting him, David complied with the directive and there is no evidence that Mullen heard from David again. In these circumstances, where David ceased all contact with Mullen once the incident was reported to Respondent, I do not believe that a reasonable employee would have found conditions so difficult or unpleasant so as to be forced to resign. Cf. *Hockman v. Westward Communications, LLC*, 407 F.3d 317, 332 (5th Cir. 2004) (prompt remedial action was fatal to Title VII constructive discharge claim); *Young v. Temple University Hospital*, 359 Fed.Appx. 304, 309 (3d Cir. 2009) (same).

As for the incident with Cunningham on July 9, Mullen did not report the altercation to anyone until July 14. Mullen had an opportunity to tell both Terry and Morgan about the situation with Cunningham shortly after the incident occurred, when he was called into Terry's office on July 9 to speak with Morgan on the telephone but chose not to say anything. He also had the opportunity to tell Powless about the incident on July 13 when he called to say that he was not coming into work. However, instead of specifically telling Powless about what occurred with Cunningham, Mullen only said that he would not be coming into work "until these situations" or "these threats, and harassment" was addressed. (Tr. 489, 782.) Powless told Mullen "okay." (Tr. 489.) And, despite the fact Mullen was scheduled to work on July 13, 14, and 15, Respondent never demanded, or even asked, that Mullen return to work. (R 32.) He was allowed to stay home without repercussions. While Terry waited 2 days before starting his investigation, he received Mullen's email over the weekend while he was working from home. When he returned to Indian Island on Monday July 16, he immediately took statements from Cunningham and Simons and on the same day Respondent also posted its workplace standards of conduct in the training room, requiring every guard sign a document affirming that they had read and understood the policies. And, Mullen resigned on July 17, even though he was not scheduled to work until the next day. (R 32.)

Like the issue with David's text message, I do not believe the General Counsel has established a prima facie case that Terry's inaction for 2 days before he started investigating the Cunningham incident, or his failure to inform Mullen of the investigation, created working conditions so difficult or unpleasant that Mullen

[37] A constructive discharge can also occur where the evidence shows that the employee faced a "Hobson's Choice" between continued employment and abandoning his or her statutory rights. *Sara Lee Bakery Group, Inc. v. NLRB*, 296 F.3d 292, 300 (4th Cir. 2002). Here, neither the General Counsel nor the Union advance a "Hobson's Choice" argument regarding Mullen, nor does the evidence support such a claim.

was forced to resign. First, I find it significant that that Mullen himself waited 5 days before he even reported the incident to Respondent, although he had at least two opportunities to do so. And when he did report the incident, he waited until the weekend. Under these circumstances, where Terry was working from home, I do not believe that it was unreasonable for him to have waited until he returned to Indian Island on July 16 to begin his investigation and post Respondent's workplace guidelines. As for the fact that Mullen did not hear anything back from Terry, generally courts allow an employer sufficient time to remedy the intolerable working conditions. *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752, 754 (11th Cir. 1996) ("A constructive discharge will generally not be found if the employer is not given sufficient time to remedy the situation."). Had Respondent directed Mullen to return to work immediately, or risk discipline, the situation may have been different. See *Boumehdi v. Plastag Holdings*, LLC, 489 F.3d 781, 790 (7th Cir. 2007) (Court noting that "[i]f continued employment would compromise an employee's personal safety . . . we do not expect an employee to remain on the job while the employer tries to remedy the problem."). However, after Mullen told Powless that he would not return to work until the threats and harassment were addressed, he was allowed to stay home, without threat of discipline or discharge. Under these circumstances, where Terry was actively investigating Mullen's complaint against Cunningham, and Respondent was not requiring Mullen to return to work while it was sorting through the various allegations, I do not believe the evidence warrants a finding that Mullen's working conditions were so difficult or unpleasant that a reasonable employee would have been forced to resign. Accordingly, I recommend that this allegation be dismissed.

. *Respondent violated Section* 8(a)(1) *of the Act by Discharging Salopek*

1. Res gestae

The credited evidence shows that Filibeck fired Salopek for violating the chain of command and for dishonesty. These are the two reasons Filibeck told Terry to put on Respondent's internal termination document. *Paragon Systems, Inc.*, 362 NLRB at 1566 (Board finds no merit in employer's claim that it lawfully disciplined employee for parking violation and talking to coworkers as these reasons were not listed in disciplinary form or notice). While Filibeck denied using the term "chain of command" in his conversation with Salopek, he admitted that Salopek's violating the chain of command was a concern for Respondent. Also, Powless, who had met with Filibeck and Terry to discuss Salopek and Rake's report, told Lein that Xcel was going to fire him as well, but decided against it since it was the first time Lein had jumped the chain of command. Under these circumstances, there is no doubt that Salopek's jumping the chain of command, by joining his coworkers to meet with Cdr. Pulley and complaining to ISO Jones, was a motivating reason for Salopek's discharge. As for how Salopek was dishonest, Filibeck said that Salopek's allegation that several guards falsified training records and failed their weapon qualifications was false. Both of these allegations were contained in the complaints lodged by Salopek to Morgan and in the email Mullen sent to Jones. In short, both reasons stated by Respondent for Salopek's termination, as documented in his change of status form, were part and parcel of Salopek's protected concerted activities.

"Where a case turns on the alleged misconduct that is part of the res gestae of activity protected by Section 7 of the Act, the proper inquiry is whether the employee lost the Act's protections in the course of that activity." *ADT, LLC.*, 369 NLRB No. 23, slip op. at 8 (2020) (citing *Desert Cab, Inc.*, 367 NLRB No. 87, slip op. at 1 fn. 1 (2019)). I believe that this is the proper standard through which to analyze Salopek's discharge.

As set forth above, Salopek did not lose the Act's protections in the course of his protected concerted activity. Mullen, Salopek, and Lein had a protected right to take their complaints about working conditions directly to Cdr. Pulley and ISO Jones. *Paragon Systems, Inc.*, 362 NLRB at 1564, 1576; *Valley Hospital Medical Center*, 351 NLRB at 1252. While Xcel may have preferred that the three guards used another forum to publicize their concerted complaints, like going to the OIG instead of Cdr. Pulley or Jones, "an 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 channel. *Valley Hospital Medical Center*, 351 NLRB at 1254 (citing *Kinder-Care Learning Centers*, 299 NLRB at 1171–1172); see also *M.V.M., Inc.*, 352 NLRB at 1175. And, while Filibeck claimed that Mullen, and by extension Salopek, violated rules and regulations by going to the United States Navy about employee complaints, there is no evidence that any such regulations exist.[38] (Tr. 1017.) Moreover, even if they did exist, "so long as protected concerted activity is not unlawful, violent, in breach of contract, or disloyal, employees engaged in such activity generally do not lose the protection of the Act simply because their activity contravenes an employer's rule or policies." *Valley Hospital Medical Center*, 351 NLRB at 1254 (citing *Communication Workers Local 9509*, 303 NLRB 264, 272 (1991)). Because neither Salopek, Mullen, nor Lein lost the protection of the Act when they engaged in protected concerted activities, Respondent violated Section 8(a)(1) of the Act when it terminated Salopek for alleged misconduct that was part of the res gestae of his protected concerted activities. *ADT, LLC.*, 369 NLRB No. 23, slip op. at 9 (2020).

2. *Wright Line*

The same conclusion is warranted even when applying the burden shifting framework set forth in *Wright Line. Wright Line*, 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); see also, *NLRB v. Main St. Terrace Care Center*, 218 F.3d 531, 540–541 (6th Cir. 2000) (applying *Wright Line* to 8(a)(1) allegations involving employee concerted activity). Under this framework, the General Counsel must prove by a preponderance of the evidence that employee protected activity was a motivating factor for the employer's actions. To support such a showing, the elements of

[38] Nor is there credible evidence that Respondent was required to follow some specific military chain of command that prohibited the three guards from speaking with Cdr. Pulley, who seemed to welcome their complaints.

protected activity, knowledge of that activity, and animus on the part of the employer are required. *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009); see also *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 8 (2019) (noting that evidence of animus must be sufficient to establish a causal relationship between the employee's protected activity and the employer's action against the employee). If the General Counsel makes this initial showing, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. *Consolidated Bus Transit*, 350 NLRB at 1066; see also *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1550 (10th Cir. 1996) (by shifting the burden the employer's justification becomes an affirmative defense). An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Rhino Northwest, LLC*, 369 NLRB No. 25, slip op. at 3 (2020) (internal quotations and citations omitted). Where an employer's explanation is "pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon." *Limestone Apparel Corp.,* 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). Also, where the "proffered non-discriminatory motivational explanation is false even in the absence of direct motivation the trier of fact may infer unlawful motivation." *Roadway Express*, 327 NLRB 25, 26 (1998).

Here, the first two elements are easily proven. Salopek was engaged in protected concerted activity and Respondent, including Filibeck, knew about this activity. The evidence also supports a finding of animus on behalf or Respondent generally and Filibeck in particular. Filibeck's testimony clearly showed that he looked upon the actions of the three guards, in taking their complaints to Cdr. Pulley and then to ISO Jones, with disfavor and believed it was done in violation of the chain of command. This is sufficient to establish animus that can be considered in determining the motive for Salopek's discharge. Cf. *Crossroads Furniture*, 301 NLRB 520, 520 fn. 1 (1991) (remarks made by store manager showing Respondent looked with disfavor on employees perceived to be actively involved in the exercise of protected concerted activity establishes animus that the Board can consider in determining the motive for employee's discharge). Further animus is shown by Filibeck's fictional explanation regarding one of the reasons why Salopek could not be transferred to another Xcel contract. Filibeck testified that one of the reasons Salopek could not be transferred was because Respondent's next closest contract was 10,080 miles away, with the Army Corps of Engineers on a series of dams on the lower Columbia River. (Tr. 981, 1005.) The dams in question were the Bonneville, Dales, and John Day dams which were located on the border with Washington and Oregon. (Tr. 41, 981) See also *National Wildlife Federation v. National Marine Fisheries Service*, 422 F.3d 782, 788 fn. 1 (9th Cir. 2005). These dams are between 245 and 330 miles away from Indian Island–not 10,080 miles away as Filibeck testified.[39] I find that Filibeck's wildly exaggerated claim that Salopek could not be transferred because these dams were located 10,080 miles away is further evidence of animus. *Grane Healthcare Co.*, 357 NLRB 1412, 1433 (2011), enfd. 712 F.3d 145 (3d Cir. 2013) (employer's fabricated explanation for the decision not to hire employee supports the inference of antiunion animus). Finally, there were multiple statements by Respondent's officials that further establish the company's animus against the fact that the three guards engaged in protected concerted activity by complaining directly to Cdr. Pulley and ISO Jones including: Powless telling Lein that Respondent was going to fire him for "jumping the chain of command" but since it was his first time he would get a second chance; Morgan saying that Lein was easy to get rid of because he was on probation and that Salopek and Mullen are a cancer; Morgan asking Mullen if he met with Cdr. Pulley and saying that Mullen could possibly face disciplinary action; Terry asking Lein whether he met with Cdr. Pully, inquiring who accompanied him to the meeting, and saying that Lein made a big mistake and was going to be pulled off post and off the contract; and Morgan telling Lein that he was mad because he broke the chain of command.

Accordingly, having presented a prima facie case that Salopek's discharge was discriminatorily motivated, the burden shifts to Respondent to show, by a preponderance of the evidence, that it would have discharged Salopek notwithstanding his protected concerted activities. Respondent has not done so.

When asked why Salopek was not transferred to another contract, instead of being fired, Filibeck specifically testified that he did not want to transfer Salopek because "if this guy is going to do this kind of activity here, he's going to do it there." (Tr. 1005.) It was clear Filibeck did not want to employ someone who, like Salopek, might violate the chain of command and go directly to the head of a client agency with concerted complaints about working conditions. Filibeck next said that Salopek could not get a CAC card because he was removed for cause and that he believed there was a current ongoing investigation into "classified photos" that were on Salopek's website. However, further inquiry shows these excuses are pretext. Filibeck admitted that, if he had transferred Salopek, instead of firing him, there would have been no issue with his CAC card, and this was confirmed by Rake. And, no evidence was presented of any ongoing investigation into any of the photographs on Salopek's company website. Indeed, the photographs, which both Rake and Filibeck said were designated "FOUO" (for official use only), are not classified. Instead, FOUO is simply a Freedom of Information Act designation specifically used for unclassified material.[40] Also,

[39] I take judicial/administrative notice of the locations of these dams and the associated mileage calculations. See *United States v. Perea-Rey*, 680 F.3d 1179, 1182 (9th Cir. 2012) (Court takes judicial notice of Google map and satellite images); *Pahls v. Thomas*, 718 F.3d 1210, 1216 fn. 1 (10th Cir. 2013) (same); Fed.R.Evid. 201(b).

[40] OPNAVINST 3432.1A, which applies only to Navy personnel and contractors, prohibits the posting of FOUO information on public websites. However, Salopek immediately removed the pictures when it was brought to his attention in September 2018 and he did not repost the pictures until 2019, after his discharge. Because he had been terminated and was no longer working on a Navy contract in 2019, he was not covered by OPNAVINST 3432.1A. See https://www.secnav.navy.mil

Respondent cannot rely upon statements Salopek made to the Navy Contracting Office, which Filibeck designated as showing dishonesty or lack of candor to support its termination decision. As discussed above, Salopek's statements did not lose the protection of the Act. Moreover, misconduct discovered during an investigation undertaken because of an employee's protected concerted activity cannot make the resulting discharge lawful. *Kidde, Inc.*, 294 NLRB 840, 840 fn. 3 (1989). Such is the case here, as Rake testified that the original customer complaint, which prompted his investigation, was the fact that Mullen, Salopek, and Lein met with Cdr. Pulley. (Tr. 589.)

Finally, Respondent cannot rely upon Rake's recommendation to remove Salopek from the contract to escape liability. The General Counsel does not allege Salopek's removal from the contract to be a violation. Instead, it is Salopek's termination that is alleged to be unlawful. Rake was resolute that the Navy cannot ask that a contractor discharge a specific employee, and everyone agrees that nobody from the Navy ever asked Xcel to discharge Salopek. Moreover, "[i]t is well settled that an employer violates the Act when it follows the direction of another employer with whom it has business dealings to discharge its employees because of their [protected concerted] activities." *Paragon Systems, Inc.*, 362 NLRB 1561, 1565 fn. 14 (2015). "The fact that the direction comes from a Government actor does not alter [the] analysis." Id.

Here, it is clear that Rake was motivated by animus against the fact that Mullen, Salopek, and Lein complained directly to Cdr. Pulley and Jones, instead of coming first to Rake or Manson, when he recommended that Salopek be removed from the contract. This was evident by the fact that Rake asked every guard he interviewed whether they knew their chain of command. It was further evident by his statement that the guards' speaking directly with Cdr. Pulley was not normal since he and Manson were at Indian Island "all the time." (Tr. 585.) By going to Cdr. Pulley with their complaints about weapon qualifications, Rake and the entire Navy Contracting Office was caught in an embarrassing situation. I credit Terry's testimony that both Rake and Manson knew these unauthorized weapon qualifications were occurring, and that Rake/Manson had approved of them for years. Had the three guards complained to Rake or Manson directly, they could have handled the situation quietly and not be exposed.

It was clear that Cdr. Pulley did not know about the unauthorized range practices, nor did he approve of them. Instead, Cdr. Pulley wanted all of Respondent's guards removed from their posts until Xcel could prove that they were properly qualified with their weapons. I find it telling that, nowhere in Rake's report or in his responses to his superiors regarding the OIG inquiry, does he acknowledge that the complaints lodged by Salopek, Mullen, and Lein, about unauthorized weapon qualifications were true. Instead, Rake downplayed the accusations, and used Mullen and Salopek as scapegoats, claiming that Mullen abandoned his post and that Salopek was at "the center to all the third part [sic] accusations to meet a hidden agenda of his own." (R 2, p. 11.) Rake's statement about Salopek is evidence that Rake harbored animus against his involvement in the concerted complaints. *Paragon Systems, Inc.*, 362 NLRB at 1565 (statement in report from contracting officers' representative accusing contract guards who delivered strike notice to Army Colonel of "having their own agenda" and "handling their own personal grievances," was evidence of animus).

Further evidence of Rake's animus is shown by the mischaracterizations in his report, and in his email to his superiors, which were specifically contradicted by the written statements of the various guards and by the trial evidence. For example, in his report, Rake states that Coler was improperly issued weapons for which she was not qualified because of "loop holes" due to a lack of communication. Similarly, the report says Coler was never told that "going to the 'gravel pit' was to qualify" but that instead it was for remedial training. However, in her written statement, Coler stated that after her gravel pit range she was told that she was now able to stand post. And the evidence shows that after the gravel pit range Coler was treated as if she had qualified. The report also says that, after Coler failed her rifle and shotgun qualifications Powless went on leave for two weeks and therefore did not reschedule her to qualify. However, the evidence shows that Coler failed her initial qualifications on May 9 and shot at the gravel pit range with Powless on May 27. Also, the evidence shows that Powless was not on leave during this period, as the report claims, as he had multiple conversations with Lein at work about requalifying.

Rake's report also states that Lein was never told that going to the gravel pit range would be a qualification shoot, but that he was instead told it was for remedial training. But, Lein's written statement to Rake specifically states that that Powless told him that the gravel pit range was for qualifications. His written statement was bolstered by his credible trial testimony where Lein said that Powless told him that the gravel pit range was for a qualification, and that Coler qualified with a score of 141.

In Salopek's written statement he stated that the range at Schroder's house occurred on July 7, 2017, and that he saw a "Bangor range sheet" for that date. (R 2, p. 15.) However, in his report, Rake said that none of the guards interviewed could provide any facts or documents showing falsified qualification forms. And in his answers to the OIG questions, which he sent to his superiors, Rake stated that, when Salopek was asked for any dates he and Manson could look at regarding falsified records, "he didn't have anything." While Salopek did not have access to the actual qualification forms, his written statement provided Rake and Manson with the exact date to look at for falsified records–July 7, 2017. And, neither in his report nor in his answer to the OIG questions does Rake mention the fact that, on July 7, 2017, a qualification shoot occurred at Schroder's house and that the official Form 3591.1 falsely states that it occurred at Bangor. Indeed, neither Schroder nor Mullen were even interviewed, notwithstanding the fact that in his answers to the OIG questions Rake specifically stated that everyone Mullen and Salopek mentioned were interviewed.

/doni/Directives/03000%20Naval%20Operations%20and%20Readiness/03-400%20Nuclear,%20Biological%20and%20Chemical%20Program%20Support/3432.1A.pdf (last accessed on November 30, 2020).

Additionally, at trial Rake testified that no qualifications occurred at any "gravel pit range" but instead Respondent's guards went to "an open field" or to an "individual's house who has a range on his house" to practice. (Tr. 564.) Rake knew, as was confirmed by Terry, that Respondent had been using unauthorized ranges to qualify its employees for years, but he refused to acknowledge this during his testimony. All of this leads me to the inescapable conclusion that Rake harbored animus against the fact that the three guards went directly do Cdr. Pulley and to ISO Jones, and he sought to have both Mullen and Salopek removed from the contract and used as scapegoats to obscure the fact that the Navy's Contracting Office knew of, and had been condoning for years, Respondent's practice of using unauthorized ranges and personal weapons for their qualifications. Cf. *Grane Healthcare Co.*, 357 NLRB 1412, 1433 (2011), enfd. 712 F.3d 145 (3d Cir. 2013) (employer's fabricated explanation for the decision not to hire employee supports the inference of anti-union animus); *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 574 fn. 117 (2003) (supervisor's fabricated testimony supports a finding that he evaluated employee with animus against the union and its supporters in mind); *Andujar v. Nortel Networks, Inc.*, 400 F.Supp.2d 306, 331 (D. Mass. 2005) (in employment discrimination case, if a jury believes testimony that management officials fabricated events in response to claims of discrimination, it may infer discriminatory animus). Also, I credit Terry's testimony that he received a call from Filibeck on October 26 and that Filibeck said he had just finished meeting with the Navy and they wanted Salopek "gone" because he was the person responsible for the months-long investigation over weapon qualifications. (Tr. 945.) This shows both Rake's animus, and the fact that Filibeck knew Rake wanted Salopek "gone" because he was involved in the concerted complaints which resulted in the Navy's investigation.

Finally, I do not credit Filibeck's testimony that he did not learn that Respondent had been using unauthorized ranges, including someone's backyard, to qualify guards until April or May 2019. Generally, I did not find Filibeck to credible as he seemed conceited during his testimony, particularly while testifying about Salopek, and was flippant about Salopek's discharge. "The demeanor of a witness may satisfy the tribunal, not only that the witnesses' testimony is not true, but that the truth is the opposite of his story." *Gissel Packing Co.*, 157 NLRB 1065, 1066–1067 (1966) (internal quotation omitted). Such is the case here regarding Filibeck's knowledge of Respondent's weapons qualification practices. After he met with Rake and Burris, Filibeck discussed Rake's report with Terry and Powless, wanting to know what had happened and whether Xcel in fact had training issues he did not know about or that the Navy did not uncover. It strains credulity to think that, during his meeting with Terry and Powless, the two individuals responsible for the unauthorized ranges, they did not inform Filibeck of what was occurring. This is especially true since Terry believed that the Navy had, in the past, authorized these practices. I therefore find that Filibeck learned about these practices during his meeting with Terry and Powless, before he fired Salopek.

In short, Xcel was not privileged to fire Salopek based upon Rake's recommendation that he be removed from the contract. The Navy was not authorized to fire Salopek, and did not recommend that he be terminated. Moreover, the recommendation that Salopek be removed from the contract was based upon Rake's animus against his concerted activities, and Filibeck knew this. *Paragon Systems, Inc.*, 362 NLRB at 1565 ("an employer's interest in maintaining a contract is not a legitimate business reason where, as here, a contractor requires the employer to discriminate against employees on the basis of their Section 7 activity."). Accordingly, by terminating Salopek's employment, Respondent violated Section 8(a)(1) of the Act.

D. Guard Mount Pay

Paragraph 8 of the Complaint alleges that, in December 2018 and January 2019 Lein concertedly complained about guard mount pay, which is mandated by the CBA, and Respondent violated Section 8(a)(1) and (3) of the Act when Powless announced that, because someone had complained about guard mount pay, nobody would be allowed to go home early. The CBA between the Union and Xcel contains a provision providing for 30 minutes of paid time each shift to allow guards to arm-up at the beginning of the day, and arm-down at the end of the day. In practice, this extra time was broken down to 15 minutes at the start of the shift and 15 minutes at the end of the shift. The credited evidence shows that, it usually does not take guards the full 15 minutes to arm-down at the end of a shift, and historically Respondent has allowed guards to leave early if when they finished arming down.

In December 2018 Lein volunteered to work a 4-hour shift and put down 4.5 hours on his timesheet to account for the extra half-hour allowed for in the CBA. When the shift Lieutenant changed his timesheet to 4.25 hours, Lein complained to Terry and was paid 4.5 hours for the shift. Lein had the same issue occur in mid-January 2019 when Lieutenant Lux prohibited Lein and another guard from "arming up" until their shift started, notwithstanding the fact the CBA provided for a full 30 minutes. Lein told Lux about the CBA provision and his earlier discussion with Terry involving this same issue. Notwithstanding, Lux would not let the guards arm-up until the start of their shift.

The next day, Lein was assigned to work the day shift. Instead of having their shift briefing in the training room as usual, Powless brought Lein into the Lieutenant's office where the other guards had congregated, including half of the night-shift. Powless told the guards that somebody had complained about the arm-up time and therefore Terry directed that nobody would be allowed to go home early anymore. Later that day, right before Lein's shift ended, Powless told Lein that he had spoken with Terry and that guards were no longer prohibited from leaving early after they finished arming down.

The General Counsel asserts that, because Lein was invoking a contractual right, he was engaged in union activity and Xcel's prohibition against leaving early violated Section 8(a)(1) and (3) of the Act because it was based on animus against Lein's invoking the contract. Had the General Counsel presented evidence that Lein, or any other guard, did not leave early before the prohibition was revoked, then a violation may have occurred. However, no such evidence was presented. The record contains no evidence that any guard had finished arming down, but was prohibited from going home early, before Respondent reinstated its established practice. Indeed, Lein's own testimony shows that

the prohibition was revoked before the day shift ended. Under these circumstances, where there is no evidence that any employee was adversely affected, I recommend the 8(a)(3) allegation be dismissed.[41] See *Simmons Co.*, 314 NLRB 717, 725 (1994) ("There is no evidence of any adverse action taken by the employer . . . and thus no prima facie case."); *Choctaw Maid Farms*, *Inc.*, 308 NLRB 521, 528 (1992) (no violation where the record evidence does not show that anyone was adversely affected by remark made by human resources director). However, I find that Powless' statement to employees that they would no longer be allowed to go home early because somebody had complained about guard mount pay was coercive and a violation of Section 8(a)(1) of the Act. *Shamrock Foods Co.*,369 NLRB No. 5, slip. op. 1 fn. 2, 14 (2020) (manager's statement that employee could no longer leave early because union flyers were distributed constituted a violation of Section 8(a)(1) of the Act).

IV. ANALYSIS OF THE INFORMATION REQUEST ALLEGATIONS

1. Facts

The Complaint alleges that, between October 2018 and May 2019 the Union made four separate information requests, seeking over 21 different items of information, that Respondent either did not provide, or failed to provide in a timely manner. The evidence shows that on October 30, 2018, the Union filed a grievance over Salopek's discharge along with a request for information supporting the grievance. On January 21, 2019, the Union emailed another information request to Respondent. A third information request was emailed to Respondent on February 28, 2019, and a fourth and final information request was emailed to Xcel on May 8, 2019. (JX 1, JX 2, JX 6, JX 11, JX 12.)

Regarding the specific unfair labor practice allegations, regarding the October 30 information request, Complaint paragraphs 9(a) and 9(f)–9(h) allege that Respondent either did not provide, or failed to provide for a period of 3 months, the following information regarding Salopek: "(i) His personnel file; (ii) A copy of the rule(s), procedure, policy, or requirement that he was accused of violating; (iii) Any document(s) signed by him during the investigation and processing of his discharge; (iv) Copy of any document(s) given him by Respondent relating to his discharge; (v) Any written or taped witness statement(s), including copies of any email communications, related to his discharge; (vi) The written investigation or other record (including but not limited to video evidence) made by or provided to Respondent relating to his discharge from any source, including but not limited to United States government employees and/or representatives; (vii) Any list of witnesses compiled for his discharge; (viii) Record of any prior disciplinary warnings or notifications given to him; and (ix) Anything else especially relevant to his discharge, including communications between Respondent, its managers, employees, and/or U.S. government employees, agencies, and/or contractors regarding his discharge." (GC. 1(bbb).) The General Counsel asserts that the information requested in subparagraphs ii, iii, iv, v, vii, and ix were never provided, and that Respondent delayed providing the information sought in subparagraphs i, vi, and viii for 3 months. (GC. 1(bbb).)

As for the information request made on January 21, 2019, Complaint paragraph 9(b) alleges that Respondent failed to provide the following information requested by the Union relating to Salopek: "(i) Any and all documents, including witness statements and/or investigatory reports supporting Respondents stated reason for terminating Salopek's employment: chain of command violation and dishonesty; (ii) Any and all documents, including without limitation, post orders and company policies, defining chain of command violations; (iii) From 2009 to present, any and all documents relating to discipline imposed against employees other than Salopek for alleged dishonesty and/or chain of command violations and/or weapons mishandling allegations, including without limitation an incident in or around 2013 where Cody Owens allegedly handled a shotgun in an unsafe manner; and (iv) Any and all documents relating to any request by the Government client to Respondent to remove Salopek from the contract and/or a revocation of his clearance/site access." Paragraph 9(c) of the Complaint alleges that, since about February 28, 2019, Respondent failed to provide Respondent with the following information: "Whether, at any time prior to Salopek's discharge in October 2018, the Government client required Xcel to remove Salopek from the contract and/or revoked his clearance or site access." (GC 1(bbb))

Finally, Complaint paragraph 9(d) alleges that, since May 8, 2019, Respondent has not provided the Union with the following information it requested: (i) "All documents relating to Respondents assertion in its Amended Answer to the Consolidated Complaint and Notice of Hearing that 'Employee Salopek had his security clearance revoked by the Navy, and hence was not, and is not qualified to work at XCEL or for rehire'; (ii) The date and reason(s) stated by the Navy for the alleged revocation in the item above; (iii) The names of Navy personnel having allegedly revoked Salopek's security clearance; (iv) Whether, since Salopek's complaints to the Navy in about July 2018, Respondent has changed its procedures for qualifying officers on range, including without limitation whether the Navy permits Respondent to alter targets with black X's to permit officers to more easily qualify; (v) Whether, from June 2018 to present, Respondent permits its employees to man a rifle post where they lack a valid rifle range qualification; (vi) Any and all documents from Navy personnel Rake and Manson to Respondent from July 2018 to present regarding range qualifications procedures, including

[41] As for the allegation in complaint par. 6, the credited evidence shows that in late September 2018 Lein was summoned to Terry's office. Terry asked why Lein did not first come to him, before contacting the Union with his pay issues, so Terry could try to solve the problem. Lein replied saying he had the right to speak with his Union representative. Under these circumstances, where Respondent and the Union had a longstanding bargaining relationship, I find that Terry's statement does not constitute a violation. Accordingly, I recommend that complaint par. 6 be dismissed. Compare *Frank Mashuda Co.*, 221 NLRB 233, 234 fn. 5 (1975) (no violation where unionized employer expressed its desire that employees bring their complaints to the employer first before going to the union), with *Campbell "66" Express, Inc.*, 238 NLRB 953, 962 (1978), enf. denied on other grounds 609 F.2d 312 (7th Cir. 1979) (violation where employee was threatened with discharge unless he withdrew his grievance and manager admonished him "if you got any more problems you come to me. Don't go to the Union.").

without limitation, any documents stating that where an officer lacks a range qualification for a given firearm, the officer is not permitted to work posts that require use of the firearm for which the officer lacks the qualification; (vii) All documents relating to complaints made in or around March 2019 by Officers Kitchen and Coler to Commanding Officer Pulley concerning investigations against Lt. Commander McCright regarding his alleged stalking and other misconduct toward former supervisees; (viii) Whether Officers Kitchen and Coler made the complaints in the paragraph 9(d)(vii) above to Respondent before making them to the Navy; (ix) Whether Officers Kitchen and/or Coler were disciplined for their complaints in paragraphs 9(d)(vii) and/or (viii) above; and (x) Supporting documents, if any, for paragraph 9(d)(ix)."

2. Analysis

The majority of the information request allegations can be dispensed with in short order, as they were made either after the charges were filed in this matter, or after the initial unfair labor practice complaint had issued. It is well established that the Board's procedures do not include pretrial discovery and therefore the Board will generally not find an information request violation when the information sought relates to a pending charge alleging unlawful discrimination. *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 543–544 (2003); *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 315 NLRB 882, 882 (1994). The original charge alleging that Salopek was illegally discharged because of his protected concerted activities was filed on December 12, 2018. (GC 1(a).) And it is clear that the information sought by the Union in their January 21, 2019 and February 28, 2019 information requests relate directly to the unfair labor practice charge regarding Salopek's discharge which was still pending at the time. And, the Union's May 8, 2019 information request was made after the initial unfair labor practice complaint had issued alleging Salopek's discharge violated the Act. Indeed, in the May 8, 2019 request the Union asks for documents that would further support the unfair labor practice complaint allegations, or that dealt with Respondent's potential defenses to the allegations. Because the Board does not allow pretrial discovery, I recommend that the allegations contained in paragraphs 9(b), 9(c), and 9(d) of the Complaint be dismissed.

The duty to collectively bargain under Section 8(a)(5) of the Act includes the obligation to supply a union with information that will enable it to perform its duties as the employees' collective-bargaining representative. *Teachers College, Columbia University*, 365 NLRB No. 86, slip op. at 4 (2007), enfd. 902 F.3d 296, 302 (DC Cir. 2018.) This includes information the union needs to process grievances. Id. Regarding the Union's October 30, 2018 request, the information sought was presumptively relevant as it involved information related to the processing of the grievance involving Salopek's discharge and sought the type of information that the Board generally requires an employer to provide. *Fleming Companies*, 332 NLRB 1086, 1086 (2000) (personnel file of discharged employee and work rules); *Public Service Co. of New Mexico*, 364 NLRB 1017, 1019 (2016) (employer's memorandum and notes recommending discipline); *HTH Corp.*, 361 NLRB 709, 755 (2014) (prior disciplinary actions); *Stephens Media, LLC*, 356 NLRB 661, 683–684 (2011) (copies of policies employee allegedly violated); *Teamsters Local 89*, 365 NLRB No. 115, slip op. at 11 fn. 11 (2017) (statements); *NTN Bower Corp.*, 356 NLRB 1072, 1139 (2011) (video/audio tapes). Finally, all of the information the Union requested should have been readily available to the Respondent. See, *McCarthy Construction Co.*, 355 NLRB 50, 50 fn. 2 (2010), affd. 355 NLRB 365 (2010) (Violation for 3-month delay in providing union with relevant information as the documents sought should have been readily available to the Company). Accordingly, by failing to provide the Union with the information sought in its October 30, 2018 information request, or delaying in providing that information for a period of 3 months, I find that Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Union, Security, Police, and Fire Professionals of America, Local 5 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All federal contract security officers employed by the Respondent at the Indian Island Naval Magazine in the State of Washington. Excluding all other employees, employed in any capacity such as Area Managers, Captains, Lieutenants, office or clerical employees, and professional employees as defined in the National Labor Relations Act.

4. By telling employees they will no longer be allowed to go home early because someone complained about guard mount pay Respondent has violated Section 8(a)(1) of the Act.

5. By discriminating against Mark Salopek because he engaged in protected concerted activities Respondent has violated Section 8(a)(1) of the Act.

6. By failing and refusing to provide the Union with the information it requested, that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of its employees, Respondent has been engaged in unfair labor practices within the meaning of Section 8(a)(5) and 8(a)(1) of the Act.

7. By unreasonably delaying, for a period of three months, in providing the Union with the information it requested, that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of its employees, Respondent has been engaged in unfair labor practices within the meaning of Section 8(a)(5) and 8(a)(1) of the Act.

8. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. Specifically, having found that Respondent violated Section 8(a)(1) of the Act by discharging Mark Salopek, I shall order Respondent to reinstate him and make him whole for any loss of earnings and other benefits suffered as a result of

the discrimination against him. If Respondent no longer employs security guards at Indian Island, then it shall offer Salopek reinstatement to a substantially similar position at one of Respondent's next closest locations/jobsites.

Respondent shall compensate Mark Salopek for any adverse tax consequences of receiving a lump–sum backpay award in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014). Respondent shall also compensate him for his search–for–work and interim employment expenses regardless of whether those expenses exceed interim earnings. *King Soopers, Inc.,* 364 NLRB 1153 (2016). Backpay, search–for–work, and interim employment expenses, shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB 1324 (2016), Respondent shall file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration. Additionally, Respondent is ordered to preserve and provide, at a reasonable place designated by the Board or its agents, all payroll records and other relevant 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 the Order, in accordance with *Ferguson Electric Co.*, 335 NLRB 142 (2001).

The Respondent shall be required to expunge from its files any references to the unlawful discharge issued to Mark Salopek, and notify him and the Regional Director of Region 19, in writing, that this has been done and that this unlawful employment action will not be used against him in any way. The Respondent shall also post the attached notice in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010) and *Durham School Services*, 360 NLRB 694 (2014). If Respondent is unable to post the attached notice because it no longer employs security guards at Indian Island, Respondent is also ordered to mail the Notice to all current and former employees who were employed at Indian Island at any time between October 27, 2018 and September 30, 2019. Finally, Respondent is ordered to provide the Union with the relevant information it requested, as outlined herein, that is necessary to the Union's performance of its duties and responsibilities as the exclusive collective-bargaining representative of Respondent's employees.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[42]

ORDER

Respondent Xcel Protective Services, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with reprisals because they engaged in activities protected by the Act.

(b) Discharging employees because they engaged in protected, concerted activities.

(c) Refusing to bargain collectively with the Union by refusing or delaying to provide it with requested information that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of Respondent's 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) Promptly provide the Union with all the relevant information it requested relating to Mark Salopek's discharge, including but not limited to: a copy of the rules, procedures, policies, or requirements that he was accused of violating; any documents signed by him during the investigation and processing of his discharge; a copy of any documents given him by Respondent relating to his discharge; any written or taped witness statements, including copies of any email communications, related to his discharge; any list of witnesses compiled for his discharge; records of any prior disciplinary warnings or notifications given to him; and anything else especially relevant to his discharge, including communications between Respondent, its managers, employees, and/or U.S. government employees, agencies, and/or contractors regarding his discharge.

(b) Within 14 days from the date of the Board's Order, offer Mark Salopek full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. If Respondent no longer employs security guards at Indian Island, then it shall offer Salopek reinstatement to a substantially similar position at one of Respondent's next closest locations/job sites.

(c) Make Mark Salopek whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(d) Compensate Mark Salopek for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Mark Salopek, and within 3 days thereafter, notify him in writing that this has been done and that the unlawful employment action will not be used against him in any way.

(f) 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 electronic copies of such records if stored in electronic form, necessary to analyze the amount of back pay due under the

[42] 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.

terms of the Board's Order.

(g) Within 14 days after service by the Region, post at its facility at Indian Island, Washington facility copies of the attached notice marked "Appendix." 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.[43] In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business, closed the facility involved in this proceeding, or no longer employs security guards at Indian Island, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at Indian Island at any time between October 27, 2018 and September 30, 2019.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 19 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 with this order.

Dated, Washington, D.C. December 7, 2020

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 a representative 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 tell you that you can no longer leave work early because an employee complained that we were not providing you with a benefit guaranteed by the collective-bargaining agreement.

WE WILL NOT discharge or otherwise discriminate against you because you have engaged in protected concerted activities, by complaining with your coworkers about your working conditions, including weapon qualifications, and speaking with third parties about these issues.

WE WILL NOT refuse to bargain collectively with the International Union, Security, Police, and Fire Professionals of America, Local 5 ("Union"), by refusing or delaying to provide it with requested information that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of our employees.

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

WE WILL promptly provide the Union with all the relevant information it requested relating to Mark Salopek's discharge.

WE WILL, within 14 days from the date of the Board's Order, offer Mark Salopek full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. If we no longer employ security guards at Indian Island, then WE WILL offer Mark Salopek reinstatement to a substantially similar position at one of our next closest locations/job sites.

WE WILL make Mark Salopek whole for any loss of earnings and other benefits resulting from the discrimination against him, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Mark Salopek for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and we will file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharge issued to Mark Salopek, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that this unlawful employment action will not be used against him in any way.

XCEL PROTECTIVE SERVICES, INC.

[43] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means, and to the reading of the notice to employees. 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."