Security Walls, Inc. *and* International Union, Security Police and Fire Professionals of America (SPFPA). Case 16–CA–152423

June 15, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On January 21, 2016, Administrative Law Judge Arthur J. Amchan issued the attached decision finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its disciplinary policy when it discharged three security guards and by failing to bargain with the Charging Party Union over those discharges. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief. The General Counsel and the Charging Party also filed cross-exceptions and supporting briefs.

The National Labor Relations 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, and conclusions, to modify the recommended remedy, and to adopt the recommended Order as modified and set forth in full below.[1]

I. BACKGROUND

The Respondent is a security contractor that began providing guard services to the Internal Revenue Service (IRS) facility in Austin, Texas, on March 1, 2014. The Respondent succeeded an employer that was party to a collective-bargaining agreement with International Union, Security Police and Fire Professionals of America (SPFPA or Union) for a unit of guards. The Respondent did not adopt that collective-bargaining agreement, but pursuant to its obligation to recognize and bargain with the Union over the guard unit, it commenced collective bargaining negotiations in August 2014.[2]

When the Respondent began providing security services at the Austin IRS facility on March 1, 2014, it posted a "Performance Work Statement" (PWS), which was a component of its agreement with the IRS at the facility. The lengthy PWS includes the following "STANDARDS OF CONDUCT":

> 6.4.1 GENERAL The Contractor shall be responsible for maintaining satisfactory standards of employee competency, conduct, appearance, and integrity, and shall be responsible for taking such disciplinary action with respect to his employees as may be necessary.
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> 6.4.2 The Government may request the Contractor to immediately remove any employee from any or all locations where the contractor has contracts with the IRS should it be determined that the employee has been disqualified for either employment suitability, performance suitability, or security reasons, or who is found to be unfit for performing security duties during his/her tour of duty. The Contractor must comply with these requests in a timely manner. For clarification, a determination of unfitness may be made from, but not be limited to, incidents involving the most immediately identifiable delinquencies or violations of the Standards of Conduct.
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> 6.4.3 Each Contract employee is expected to adhere to standards of behavior that reflect credit on himself, his employer, and the Federal Government. The CO and COR[3] have the authority to cause the retraining (at the Contractor's expense), suspension, or removal of any Contract employee from the contract who does not meet and adhere to the Standards of Conduct as required in this contract.
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> 6.4.4 The Contractor is also responsible for ensuring that their employees conform to acceptable standards of conduct. The following actions, behaviors, or conditions are cause for immediate removal from performing on the contract:

[1] In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. In accordance with our decision in *King Soopers*, 364 NLRB No. 93 (2016), we shall also order the Respondent to compensate discriminatees Jason Schneider, John Klabunde, and Christopher Marinez for their search for work and interim employment expenses as an offset against interim earnings regardless whether those expenses exceed interim earnings. We shall modify the judge's recommended Order and substitute a new notice to reflect these remedial changes and to conform to the violations found.

We reject the General Counsel and Charging Party's argument on cross-exceptions that the Board should amend the judge's remedy to extend the backpay period for security guards Schneider, Klabunde, and Marinez regardless of whether the Respondent is able to return them to their prior positions or substantially equivalent positions. The parties can present evidence during the compliance stage of this proceeding regarding the Respondent's ability to reinstate the discharged employees and its corresponding backpay obligation.

[2] The Respondent and the Union reached tentative agreement in August 2014 on some issues (including grievance and arbitration, discipline, and discharge), but only agreed to implement procedures for same-day sick leave. The parties ultimately executed a collective-bargaining agreement effective September 1, 2015.

[3] The PWS defines "CO" as "Contracting Officer" and "COR" as "Contracting Officer's Representative."

The PWS then sets forth a long list of employee offenses, including the following:

> Section 6.4.4.21: Neglecting duties by sleeping while on duty, failing to devote full-time and attention to assigned duties…or any other act that constitutes neglect of duties…

Subsequently, on April 25, 2014, the Respondent unilaterally adopted a "Disciplinary Action/Policy Statement."[4] The policy, signed by Scott Carpenter, the Respondent's project manager for the IRS contract, and Juanita Walls, the Respondent's chief manager, specifically states that: "This policy statement is the official policy of "Security Walls" and supersedes all other policies concerning this subject." The Disciplinary Action/Policy Statement sets forth a detailed progressive disciplinary system which lists specific violations and the corresponding disciplinary actions. Several of these violations, such as refusal to assist or cooperate in investigations, result in immediate termination. Other violations, such as violation of security regulations, or violation of written rules, result in verbal counseling. If a violation of written rules results in a breach of security, the policy provides that it "counts as a third or fourth offense based on previous offenses." Under the progressive disciplinary system, a third offense calls for a 2-day suspension and a fourth offense calls for termination. This policy had been in effect for more than 1 year when the three discharges at issue in this case occurred. None of the discharged guards had prior offenses.

On April 15, 2015, security guard Jason Schneider reported to the facility's visitor center to relieve fellow guard and union president, John Klabunde, who was scheduled to take a break. When the two guards momentarily focused their attention on correcting an error in the logbook, a woman walked into the facility undetected. The next day, the Respondent suspended Klabunde and Schneider. A similar breach occurred on April 22, when a woman and child walked into the facility while security guard Christopher Marinez was adjusting his chair to obtain a clear view of the areas he was responsible for guarding. The Respondent suspended Marinez later that day.

On April 19, Klabunde, in his capacity as union president, emailed Site Supervisor Frederico Salazar, stating that, "As Local Union President, I have some issues I needed [sic] to address regarding my and Officer Schneider's suspension." Klabunde then requested information about his discipline, including the following information:

> 1) Why were myself and Officer Schneider not given anything in writing regarding the policy him and I violated to constitute a suspension?
>
> 2) Why were we not given the exact duration of the suspension?
>
> 3) What exact company policy did we violate?
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> 4) In addition, I have a clean record with zero write-ups, and to my knowledge, Officer Schneider does as well. So why did this result in a suspension?
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> 5) At first it was stated to Officer Schneider and myself, that our suspension would be 2 days. However, yesterday Watch Commander Zumpano had told me that it may last longer. There are no items in the company policy that have suspension durations lasting longer than 2 days. So why is it we're being informed that our suspension might last longer than 2 days?

On April 23, the Union filed a grievance concerning all three suspensions, arguing that the Respondent failed to adhere to its disciplinary policy. The grievance requested reinstatement of the three guards and went on to state, "The Union and the Company must work sincerely and wholeheartedly to the end, that the provisions of Security Walls Disciplinary Action/Policy Statement be applied and interpreted fairly, conscientiously, without discrimination, and to the best interest of efficient security operations of the client."

Also on April 23, the Respondent's project manager Carpenter, and IRS Contracting Officer Representative (COR) John Sears, exchanged a series of emails. At the time of the discipline, Sears was the IRS representative charged with monitoring the Respondent's performance of its contract.[5] In the emails, Sears did not demand that the Respondent discharge the three guards. Instead, after reviewing video footage of the officers' conduct, Sears stated that "officers working that post must be able to multi-task and recognize what's going on around them" and that he hoped that the Respondent "can address this so that the guards are paying greater attention to details so we don't miss these types of incidents."

On April 28, the Respondent's site supervisor Salazar met with Schneider, Klabunde, and Marinez and told them that they were terminated. The next day, the Respondent's corporate counsel, Ed Holt, sent the Union a letter entitled "Response to Grievance regarding Officer Marinez" stating that the actions of the three guards fell

[4] The Respondent's adoption of this statement is not alleged as a violation of the Act.

[5] In his testimony, Carpenter identified Sears as the COR multiple times without contradiction and explained, "His job involves reporting to the Contracting Officer on our performance, on our adherence to the Performance Work Statement, and on our management and oversight of this contract." There is no reference to any other IRS contact point regarding discipline.

outside the purview of the Respondent's discipline policy and were governed by the PWS. The letter then stated that the three guards would remain on suspension pending a final decision by Chief Manager Walls, which Holt expected would be received in 3 days. The letter concluded: "This is not an offer to bargain. Nor is it an offer to invoke the grievance procedure contained in the agreements tentatively agreed to in August 2014." On May 1, Holt sent an email to Chief Steward Orlando Marquez, stating that Salazar did not have the authority to terminate the guards, that the guards were not terminated at that time, and that the Respondent would notify the Union when Chief Manager Walls made her final decision. The record does not show that Walls ever issued such a decision.

On May 3, Marquez emailed Holt demanding reinstatement and make-whole relief for the three guards and informed Holt that the Union would file a charge with the Board if the Respondent did not meet its demands. The Respondent did not respond to the Union's demand, nor did it notify the Union of a final decision by Walls. On May 14, 2015, the Union filed an unfair labor practice charge.

II. DISCUSSION

The judge found that the Respondent unilaterally and unlawfully changed its disciplinary policy when it discharged the guards and that it unlawfully refused to bargain with the guards' Union following their discharges. The judge rejected the Respondent's argument that the PWS mandated the discharges, obviating any statutory duty to bargain. The judge found that the progressive disciplinary system memorialized in the Respondent's Disciplinary Action/Policy Statement, which by its terms supersedes the PWS, did not make the discharges a mandatory as opposed to a discretionary penalty. The judge further found that even the PWS did not mandate the discharges; rather, it vested the IRS COR with the authority to demand discharges or lesser penalties for PWS violations and that IRS COR Sears did not demand that the Respondent discharge the guards. The judge also noted that the Respondent admitted in its answer to the complaint that it exercised discretion in discharging the guards. Finally, the judge found that the post-discipline correspondence between representatives of the Union and the Respondent was sufficient to invoke Respondent's bargaining obligation concerning the discharges.

A. Unilateral Changes

We agree with the judge that the Respondent unilaterally changed its progressive disciplinary policy, set forth in its April 2014 Disciplinary Action/Policy Statement, when it treated the discharge of the three guards as a mandatory penalty. As the judge found, neither the April 2014 Disciplinary Action/Policy Statement, nor the PWS that was superseded by the April 2014 policy, mandated that the Respondent discharge the guards and that the Respondent unilaterally departed from its stated policies in treating the discharges as mandatory.

The PWS, posted in March 2014, directs the Respondent to maintain disciplinary standards and provides that the IRS may request the removal, retraining, or suspension of any employee for failing to maintain proper standards of conduct. Thus, under the PWS the IRS CO or the COR had the authority to order the Respondent to discharge employees for violations of the PWS. At the time of the discharges, Sears was the COR, and the record shows that Sears not only had the ability to order contractors to discharge employees, he exercised that ability at least once in the past.[6] However, in addressing his concerns with the Respondent about the guards' misconduct here, Sears did not instruct the Respondent to discharge them. Nor did he inform the Respondent that its contract with the IRS was in jeopardy because of the guards' infractions.[7] Thus, even under the PWS, the Respondent was not required to discharge the guards. This finding is also consistent with the Respondent's admission in its answer to the complaint that discharging the guards was within its discretion.

Moreover, almost 2 months after the Respondent posted the PWS, it established its April 2014 Disciplinary Action/Policy Statement which, by its express terms, supersedes all prior disciplinary policies. That Disciplinary Action/Policy Statement lists, with great specificity, offenses that serve as grounds for immediate discharge. For all other offenses, it establishes a progressive system. Security breaches, such as the ones at issue, are *not* listed as gross misconduct requiring immediate dismissal. Instead, they are listed under the Respondent's progressive disciplinary system as warranting a 2-day suspension for a first offense or—*if* the employee has prior offenses—discharge. None of the discharged guards had a prior

[6] By specifically quoting Sec. 1.6.33 of the PWS, ("NOTE: The CO will make all determinations regarding the removal of any employee . . . ."), our colleague implies that the COR may not have the ultimate authority to make discharge decisions. However, our colleague concedes that two other provisions of the PWS "appear to give the COR the authority" to order discharges. Further, the record shows that Sears was the Respondent's IRS contact point on matters involving the PWS. Nothing in the hearing testimony, exhibits, or even the Respondent's motion to reopen the record identifies a CO or other higher-ranking individual charged with enforcing the Respondent's contract with the IRS. Moreover, the Respondent has not argued that Sears was not its agent or was acting outside the scope of his authority.

[7] The PWS provides that the contractor (i.e., the Respondent) can be immediately removed from performance of the contract for one of the listed infractions, including its employees' neglect of duty.

offense. Thus, by discharging Schneider, Klabunde, and Marinez, the Respondent departed from this policy. We therefore agree with the judge that the Respondent violated Section 8(a)(5) of the Act when it unilaterally changed its established disciplinary policy by discharging the three guards.[8]

B. Refusal to Bargain

We agree with the judge's finding that the Respondent unlawfully refused to bargain with the Union following the discharge of the three guards. The Respondent, in its exceptions, argues that it satisfied its bargaining obligation because during the course of its negotiations for a collective-bargaining agreement, it had bargained with the Union over discipline and grievance procedures and had tentative agreements in place on these matters that were identical to that of its predecessor. The Respondent argues that because these provisions had been collectively bargained, it had no further obligation to bargain over the discharges. However, it is well-established that tentative agreements made during collective-bargaining negotiations are not binding upon the parties until a final collective-bargaining agreement is reached. *Taylor Warehouse Corp.*, 314 NLRB 516, 517 (1994) ("Under Board law, tentative agreements made during the course of contract negotiations are not final and binding."), enfd. 98 F.3d 892 (6th Cir. 1996). Further, it is undisputed that the Respondent never bargained with the Union over the discharge of the three guards specifically. And notwithstanding the Respondent's claim that it agreed to the same grievance procedures as its predecessor, it refused to follow those procedures.[9]

Our dissenting colleague—in contrast to the Respondent—argues that we must reverse the judge because the Union did not adequately request bargaining over the discharges. As this argument is raised for the first time by our colleague in dissent, it is not properly before the Board. See *UPS Supply Chain Solutions, Inc.*, 364 NLRB No. 8, slip op. at 2 (2016) (Board Member's dissenting argument not made by excepting party is not procedurally before the Board). Even if we were to consider it, we would find it lacking in merit.

The Board has never required a union to employ some combination of magic words to express a request to bargain. Rather, a request for bargaining "need take no special form, so long as there is a clear communication of meaning." *Armour & Co.*, 280 NLRB 824, 828 (1986), quoting *Scobell Chemical Co. v. NLRB*, 267 F.2d 922, 925 (2d Cir. 1959). The Board has found that a union's request that an employer rescind a unilateral action, coupled with a threat to file an unfair labor practice if the employer does not do so, is sufficient to express a request to bargain. See *Indian River Memorial Hospital*, 340 NLRB 467, 468–469 (2003). Additionally, it is clear from the Union's request for relevant information that it was seeking to bargain over the nature of the disciplines being imposed. See *Richmond Division of* Pak-Well, 206 NLRB 260, 261 (1973), citing *Rod-Ric Corp.,* 171 NLRB 922, (1968), enfd. 428 F.2d 948 (5th Cir. 1970); cert. denied 401 U.S. 937 (1971).[10] Finally, any doubt that an employer may have as to whether a union has made a bargaining request is resolved when a union files an unfair labor practice charge. *Trucking Water Air Corp.*, 276 NLRB 1401, 1407 (1985).[11]

[8] Our dissenting colleague argues that the Respondent's Disciplinary Action/Policy Statement did not supersede the PWS, notwithstanding the clear statement in the Respondent's policy that it supersedes all prior disciplinary policies. As a non-personal services contract between the Respondent and the IRS, the PWS reflects the agreement between the Respondent and the IRS, but not necessarily between the Respondent and its own employees. Rather, the PWS expressly delegates to the Respondent the role of setting and enforcing a disciplinary policy consistent with its listed parameters. There is no dispute that the Respondent's Disciplinary Action/Policy Statement serves that function; in fact, it may well be that the policy represents the Respondent's attempt to conform its disciplinary policy to the PWS guidelines. Further, neither the Disciplinary Action/Policy Statement nor the collective-bargaining agreement ultimately entered into with the Union even mentions the PWS. Consequently, we look to the disciplinary policy that actually governed the Respondent and its employees.

[9] On April 28, in response to the Union's grievance and correspondence seeking to address the suspensions with the Respondent, the Respondent sent a letter to the Union stating that the guards would remain on suspension pending a final decision by Respondent's chief manager, expected in 3 days, and that it was not offering "to invoke the grievance procedure contained in the agreement tentatively agreed to in August 2014."

[10] See also *Carina Bay Resort*, 356 NLRB 273, 274, fn. 6 (2010), enfd. 451 Fed. Appx. 143 (3rd Cir. 2011); *Biewer Wisconsin Sawmill*, 306 NLRB 732, 732 fn. 4 (1992). We note that while the parties were not in an initial bargaining posture, as in the cases above, they were in the process of bargaining for a first contract with the Respondent as a successor. As such, the Union's questioning the Respondent on its actions and policies pertaining to the guards' disciplines, sought not only to learn the basis for these disciplines but also information as to how the Respondent was administering its recently-announced disciplinary policy. There is no doubt that the Respondent understood this; its primary argument on exceptions is that it satisfied its bargaining obligation over the disciplines through contract bargaining.

[11] See also *Sewanee Coal Operators Assn*., 167 NLRB 172, 172 fn. 3 (1967); *Roberts Electric Co*., *Inc.,* 227 NLRB 1312, 1319 (1977). As our colleague acknowledges, in *Sewanee*, the Board found that the filing of a charge amounted to "a renewal of the Union's request to bargain [and] it constituted a clear and unmistakable notice to the Respondent that the Union intended to exercise the rights flowing from its certification and, as such, was tantamount to an explicit request to bargain." The Board concluded that the Respondent's refusal to bargain following the charge constituted "another refusal to bargain." Our dissenting colleague reads *Sewanee* and *Trucking Water Air*, supra, as requiring an initial request to bargain which is later "renewed" by an unfair labor charge. But he fails to take into account the Union's com-

In this case, all the above considerations took place. The Union first sought information as to the grounds for the suspensions (later discharges). In so doing, the Union's communications were the initial steps in an attempted back-and-forth communication with the Respondent over the discharges and the Respondent's application of its rules. Specifically, following his suspension, Klabunde, in his capacity as the Union's Local president, sent the Respondent an email stating that, "As Local Union President *I have some issues I needed to address* regarding my and Officer Schneider's suspension." Klabunde then listed five questions requesting details about the suspensions, asking whether there was a written policy underlying the suspensions, and seeking clarification as to the duration of the suspensions. Thus, Klabunde, in his capacity as formal representative and leader of the Union, sought to discuss with the Respondent the suspensions that became discharges and the basis of this discipline.

The Union then protested the discharges through its grievance in which Klabunde renewed his request for information, emphasizing that the parties *needed to work together* to ensure that the Respondent's Disciplinary Action/Policy Statement was applied and interpreted fairly and in the best interest of efficient security operations. In response, the Respondent cited the PWS as the governing policy and stated that "This is not an offer to bargain. Nor is it an offer to invoke the grievance procedure contained in the agreements tentatively agreed to in August 2014." At this point, then, the Respondent effectively closed any avenue of communication and refused to provide the Union with the basis for the discharges. Indeed, the Respondent would not even concede that the guards had, in fact, been discharged.

The Union again contacted the Respondent demanding reinstatement of the guards and other relief. It was only at this point that the Union stated its intention to file charges with the Board if the Respondent did not address its demands. During this time, the Respondent continued to stonewall the Union's requests by stating that no discharges occurred—even after the employees themselves were told that they were discharged.

Under these circumstances, we find that the Union adequately communicated its desire to bargain with the Respondent over the discharges.[12] Further, any doubt that the Respondent may have had over whether the Union sought to bargain should have been dispelled when the Union filed the instant charges with the Board.[13] We therefore agree with the judge that the Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union over the discharge of the three guards.[14]

Our dissenting colleague further argues for a reversal of the judge's refusal to bargain finding on yet another ground that was never raised by the Respondent, either to the judge or to the Board. The dissent contends that the judge's finding violated the Respondent's due process rights because the General Counsel's complaint did not allege a "post-discharge" failure to bargain. As with our colleague's previous argument—raised solely by him and not the Respondent—this argument is not properly before the Board. See *UPS Supply Chain Solutions, Inc.*, 364 NLRB No. 8, slip op. at 2. However, even if it were before us, it is similarly without merit.

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munications seeking to address with the Respondent the disciplines and the Respondent's disciplinary policy. He also ignores the Respondent's continued refusal to bargain even when presented with incontrovertible evidence of the Union's desire—in the form of a Sec. 8(a)(5) refusal to bargain charge—to do so.

[12] Thus, the cases cited by our colleague are distinguishable. See, e.g., *The Emporium*, 221 NLRB 1211, 1214 (1975) (union attended bargaining session over proposed closure of certain facilities but refused to make proposals or request information); *Associated Milk Producers*, 300 NLRB 561, 563–564 (1990) (employer offered to discuss planned discontinuation of pension fund contributions with the union before implementation, but the union failed to communicate with the employer in any manner until after the change was implemented, and the union had already filed charges with the Board).

Further, we are not persuaded by our colleague's attempt to distinguish the cases cited above as involving "some reference to a dialogue" that, our colleague contends, is absent here. As set forth above, the Union clearly attempted to engage in a dialogue over the discharges through the information requests (prefaced by Klabunde's statement, "I have some issues I needed to address"), as well as through the Union's grievance, which by its very nature contemplates a dialogue between the Respondent and the Union. The fact of the matter is that the Respondent shut down all attempts at communication by the Union before it could engage in any meaningful dialogue over the discharges.

[13] See *Sewanee Coal Operators*, discussed supra.

[14] Contrary to our colleague, we do not find that the Sixth Circuit Court of Appeals' decision in *Ohio Edison Co. v. NLRB,* 847 F.3d 806 (6th Cir. 2017), compels a different result. The court in *Ohio Edison* emphasized that in determining whether a union requested bargaining, it is essential to examine the "substance of a request, not the form" and consider "all the circumstances." Id. at 810. The circumstances here present an even stronger case for finding that the Respondent was aware that the Union sought to bargain over the discharges. For example, in *Ohio Edison* the employer unilaterally changed a minor reward program that the parties had never bargained over and was not included in the parties' collective-bargaining agreement. The court explained that the Union's expression of disapproval over the change and empty threat—which it failed to follow through on for 6 weeks—to come to the employer's headquarters to confront the employer's CEO (who had no control over labor relations) were insufficient to convey the union's desire to bargain over the unbargained reward program. By contrast, as set forth above, the Union here engaged in much more than a solitary oral protest, or as our colleague would suggest, "issue[] a list of demands"; it sought information, filed a grievance, repeatedly sought to determine the basis for the discharges, advised the Respondent of its desire to work with the Respondent to ensure that its disciplinary policy was fairly applied, threatened to file Board charges due to the Respondent's inadequate responses, and ultimately filed a charge with the Board.

Contrary to our colleague's repeated references to "*pre-discharge*" and "*post-discharge*" bargaining, the complaint makes no such distinction. Rather, the complaint broadly alleges that the Respondent unlawfully suspended and terminated the three guards "without prior notice to and without affording the Union an opportunity to bargain . . . ." Given the facts here, where the Respondent suspended the employees and gave conflicting statements as to whether they were discharged, the complaint's broad allegation is entirely appropriate. Further, even under our colleague's restrictive reading of this allegation to encompass only pre-decisional bargaining, a post-discharge violation would nonetheless be closely connected to the allegation, and the parties fully litigated the issue. Accordingly, we would not find that the Respondent was deprived of due process, even were that argument properly before us.[15]

Under well-settled Board precedent, the Board may find a violation and provide a remedy for a violation of the Act in the absence of a specific complaint violation if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Pergament United Sales, Inc., v. NLRB,* 920 F.2d 130, 135 (2d Cir. 1990), enfg. 296 NLRB 333 (1989). The essential inquiry as to whether a matter has been fully litigated "rests in part on 'whether the respondent would have altered the conduct of its case at the hearing, had the specific allegation been made.'" *Piggly Wiggly Midwest, LLC,* 357 NLRB 2344, 2345 (2012) (quoting *Pergament,* supra at 335).

We find that both prongs of *Pergament* are satisfied here. First, it is clear that the post-discharge failure to bargain is closely related to the pre-discharge failure. Both the pre- and post-discharge failures to bargain allegations arise out of the same set of interactions between the Respondent and the Union. In particular, because the Respondent never definitively informed the Union that the guards were, in fact, discharged, it is difficult to draw the line as to when a pre-discharge bargaining obligation ended and a post-discharge bargaining obligation began. Indeed, even as late as May 3, the Respondent maintained that Site Supervisor Salazar did not have authority to terminate the guards and that the Union would be advised when a decision had been made; however, no such decision was ever communicated to the Union or the three guards, nor were discharge documents ever entered into evidence.

Further, the Respondent does not contend that it would have proffered additional evidence or legal argument had the complaint been worded differently. Indeed, at the hearing the parties elicited testimony and exhibits detailing *all* of the communications between the Respondent and the Union as well as any events that occurred between the April 2015 suspensions and the filing of the charge in this case. Moreover, the Respondent's legal arguments both before the judge and in its motion for reconsideration do not distinguish between pre- and post-discharge bargaining. Rather, the Respondent argues that it never had a bargaining obligation because the discharges were not discretionary and even if it did, the Respondent satisfied its obligation through contractual bargaining. As such, we find no indication that the Respondent would have altered its legal or factual presentation had the complaint contained a specifically worded post-discharge allegation. We therefore reject our colleague's contention that the Respondent was deprived of due process by the judge's finding that the Respondent unlawfully refused to engage in post-discharge bargaining.

C. The Respondent's Motion to Reopen the Record

On March 16, 2016—nearly 2 months after the judge issued his decision—the Respondent moved to reopen the record to introduce evidence regarding events that occurred after the close of the hearing. On March 27, 2016, the Respondent filed a supplement to the motion, including an affidavit from Chief Manager Walls stating that, following the Respondent's offer of reinstatement to the guards, IRS Senior Contract Specialist Bernadette Briggs emailed Walls on March 9, 2016, that the IRS would not permit the guards to perform services under the contract. In its motion, as supplemented, the Respondent argues that this information precludes a finding that the 2015 discharges were discretionary and obviates any bargaining obligation it may have had over the discharges. Based on this evidence, the Respondent requests that the Board allow it to withdraw the admission in its answer that its discharges of security guards Schneider, Klabunde, and Marinez were discretionary. We deny the Respondent's motion.

The Respondent's motion makes no showing that the evidence the Respondent seeks to introduce would require a different result, as required under Section 102.48(d)(1) of the Board's Rules and Regulations.[16]

[15] Contrary to our colleague, our recent decision in *Security Walls, LLC*, 365 NLRB No. 52 (2017), is not at odds with our findings here. In that default judgment case, the parties stipulated to facts surrounding the Respondent's alleged failure to engage in pre-discharge bargaining. Under those circumstances, the Board was constrained by the stipulation to consider solely that allegation.

[16] Sec. 102.48(d)(1) of the Board's Rules and Regulations provides, in pertinent part:

Moreover, Respondent has not met the Board's requirement of showing that the evidence existed at the time of the hearing, much less that it acted with diligence in uncovering the evidence. See *Fitel/Lucent Technologies, Inc.*, 326 NLRB 46, 46 fn. 1 (1998). At the time of the discharges, IRS COR Sears did not demand the discharge of the three guards. Nor did the Respondent argue during the proceeding before the judge that any other IRS representative demanded the discharge of the guards. Thus, the Respondent seeks to introduce evidence of events that occurred after the violations alleged in this case—evidence, which, by definition, is not "newly discovered" or "previously unavailable" under the Board's rules. See *Harry Asato Painting, Inc.,* 2015 WL 5734974 (2015); *Allis-Chalmers Corp.*, 286 NLRB 219, 219 fn. 1 (1987) (denying motion for reconsideration to accept evidence of events that occurred after the hearing closed).[17] That a different IRS representative assertedly determined—some 10 months after the discharges and after the judge had found that the Respondent acted unlawfully—that the guards' offenses prevented reinstatement would not affect the finding here that the Respondent exercised discretion in discharging the guards,[18] nor would it otherwise excuse Respondent's obligation to bargain over the discharges.[19]

> A party to a proceeding before the Board may, because of extraordinary circumstances, move for . . . reopening of the record after the Board decision or order. . . . A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

[17] Our colleague would broaden the scope of the Sec. 102.48(d)(1) of the Board's rules to include posthearing events under the definition of "evidence which has become available only since the close of the hearing." We decline to do so. As stated above, Board precedent is clear: evidence pertaining to events that occurred after the close of the hearing is not considered by the Board in a motion to reopen the record.

[18] Our colleague argues, somewhat paradoxically, that the Respondent should not be held to its admission that the discharges were discretionary because at the time, extant Board precedent (namely *Fresno Bee*, 337 NLRB 1161 (2002)), held that discipline imposed under a preexisting policy does not constitute a unilateral change even if the discipline was discretionary. However, we perceive no reason why a party should be relieved of its admission to *a factual matter.* That the Respondent exercised discretion in discharging the three guards should not change based on the General Counsel's theory of a violation. As set forth in detail above, we find that neither the PWS nor the Respondent's Disciplinary Action/Policy Statement mandated these discharges. As such, the Respondent's admission is consistent with, but not an indispensable part of, the evidence underlying this finding.

[19] Indeed, in Manager Walls' affidavit, she asserts her speculative belief "that if Ms. Briggs or the COR were aware of circumstances surrounding the three officers in April 2015, they would have taken the same position as when they became aware of the incidents recently" (i.e., nearly a year after the discharges and nearly 2 months after the judge's decision). But the record evidence shows that Sears, as the COR, *was* aware of the incidents in April 2015, and did not demand that the guards be discharged. In any event, Walls' speculation does not demonstrate that the IRS was unaware of the discharges in 2015 or that it would have acted differently than it actually did; Briggs' email, in turn, does not purport to address either point.

Our dissenting colleague argues that we should allow the Respondent to introduce evidence showing that Sears had no authority to demand the removal of the guards and that he failed to report the incident to an IRS representative with such authority. We disagree. The Respondent's representatives, particularly Carpenter, testified without contradiction that COR Sears was the contact point for the IRS on matters related to the PWS. Further, as noted above, the record shows that Sears advised the Respondent and its predecessor on personnel matters and had directed the discharge of at least one employee in the past. The Respondent does not explain why it could not have pursued the issue of Sears' authority during the hearing. In any event, even if the IRS were shown to have *subsequently* disagreed with Sears' conduct, this would not alter the Respondent's duty to bargain with the Union at the time of the discharges.

ORDER

The National Labor Relations Board orders that the Respondent, Security Walls, LLC, Austin, Texas, its officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act.

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with the International Union, Security, Police and Fire Professionals of America (SPFPA) as the exclusive collective-bargaining representative of all full-time and regular part-time security officers employed by the Respondent at the International Revenue Service Center and affiliated buildings in Austin, County of Travis, Texas.

(b) 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) Rescind the unilateral change to its progressive discipline policy.

(b) Offer unit employees Jason Schneider, John Klabunde, and Christopher Marinez full reinstatement to their former positions, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Jason Schneider, John Klabunde, and Christopher Marinez whole for any loss of earnings and other benefits suffered as a result of the unlawful discipline, in the manner set forth in the remedy section of the judge's decision, as modified herein.

(d) Compensate Jason Schneider, John Klabunde, and Christopher Marinez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 16 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 this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify Jason Schneider, John Klabunde, and Christopher Marinez in writing that this has been done and that the discharges will not be used against them in any way.

(f) Within 14 days from the date of this Order, notify the Internal Revenue Service of this Decision and Order.

(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, post at its Austin, Texas facilities, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 16, 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. In addition to physical posting of paper notices, the 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 2015.

[20] 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."

(i) Within 21 days after service by the Region, file with the Regional Director for Region 16 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. June 15, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting.

This case is a little bit complicated. It involves three discharges by the Respondent, Security Walls, of three armed security guards who were supposed to prevent unauthorized persons from entering a secure facility pursuant to Respondent's contract with a government agency, the Internal Revenue Service (IRS), which maintained an office there. The Board's administrative law judge ruled that the three discharges violated the National Labor Relations Act (NLRA or Act). Consistent with the judge's ruling, the Respondent started the process of reinstating the three security guards. However, after the Respondent had commenced that process, the Respondent's client—the IRS—invoked its right to require the removal of the three security guards, who were discharged because they permitted unauthorized persons to get past them and enter the secure facility. It is uncontroverted that the IRS had the right to direct the Respondent to remove the three security guards. Nonetheless, my colleagues deny the Respondent's motion to reopen the record and to amend its answer (which contained an admission that the discharge of the three guards had been discretionary). I dissent because, in my view, the Board should grant Respondent's motion to reopen the record and to amend its answer. I also believe the judge erroneously found that the security guards' discharges were unlawful.

DISCUSSION

As noted above, this case involves the discharge of three armed security guards who neglected one of their primary duties when they permitted unauthorized persons to gain entry to a secure federal facility that housed an office of the IRS. On April 15, 2015, security guards Jason Schneider and John Klabunde failed to notice an

unauthorized person entering the facility. (At the time, Schneider and Klabunde were correcting an administrative error in a logbook.) On April 22, 2015, two other unauthorized persons walked into the facility undetected by security guard Christopher Marinez (who was preoccupied with adjusting the height of his chair). The Respondent suspended and then discharged the three guards in accordance with Section 6.4.4 of the Performance Work Statement (PWS), a contract that spells out what the "contractor" (here, the Respondent) is required to do by the "Government" (in this context, the IRS). Section 6.4.4 of the PWS states that "[t]he contractor is . . . responsible for ensuring that their employees conform to acceptable standards of conduct." Section 6.4.4 lists a number of "actions, behavior or conditions" that constitute "cause for immediate removal from performing on the contract." Among the infractions that constitute "cause for immediate removal" is "failing to devote full time and attention to assigned duties." See PWS Section 6.4.4.21; see also Section 1.6.32.4.22 (Respondent's Exhibit 1, pp. 27, 57).

The judge rejected the Respondent's argument that Section 6.4.4 in the PWS mandated the discharges. In doing so, the judge relied on the absence of evidence that the IRS actually demanded that the three officers be removed from the contract as well as an admission—in the Respondent's answer to the complaint—that the discharges were discretionary.[1] The judge then found that the applicable disciplinary standards were those set forth in the Respondent's progressive discipline policy[2] and that the discharges deviated from that policy, which did not list allowing unauthorized persons to enter the facility among infractions warranting immediate termination. Consequently, the judge found that the Respondent implemented an unlawful unilateral change to its progressive discipline policy when it discharged the three employees, in violation of Section 8(a)(5) of the Act.[3] My colleagues agree with the judge's finding and rationale.

The complaint alleged that the Respondent additionally violated Section 8(a)(5) of the Act by discharging the three security guards without giving the Union *pre-discharge* notice and opportunity to bargain over the discharge decisions. The judge dismissed that allegation but found, sua sponte, an additional, unalleged violation of Section 8(a)(5): that the Respondent failed to engage in *post-discharge* bargaining concerning the discharge decisions. In this regard, on May 3, 2015, the Union emailed the Respondent demanding that it reinstate the employees immediately and make them whole and threatening to file unfair labor practice charges if the Respondent failed to accede to its demand. The judge found that this email was not "a formal demand for bargaining," but he held it was "sufficient to invoke Respondent's obligations to bargain." Again, my colleagues agree.

The judge issued his decision on January 21, 2016, in which he ordered the Respondent to reinstate the discharged officers. The Respondent did so, and the three officers commenced refresher training and firearms qualification on February 29, 2016.

On March 16, 2016, the Respondent filed with the Board exceptions and a supporting brief. On the same day, the Respondent also filed a motion to reopen the record and remand the case to the judge, together with a sworn affidavit from its chief manager, Juanita Walls, and an email from IRS Senior Contract Specialist Bernadette Briggs. In the affidavit, Walls averred that on March 9, 2016, she received an email from Senior Contract Specialist Briggs, which stated that Marinez, Schneider, and Klabunde "will not be permitted to perform services under this contract, effective immediately." Briggs ordered the removal of Marinez, Schneider and Klabunde based on Section 6.4.4 in the PWS, the same provision relied upon by the Respondent in defense of the discharges—namely, "failing to devote full time and attention to assigned duties." The affidavit also expressed Walls' belief that Briggs would have taken the same position at the time of the discharges had she been aware of the relevant circumstances at that time.[4] The

[1] The Respondent moves to withdraw this answer. For the reasons set forth below, I would grant the Respondent's motion.

[2] The judge found that the PWS was superseded by the progressive discipline policy on the basis that the progressive discipline policy postdated the PWS and states that it "supersedes all other policies concerning this subject." The judge also noted that the Respondent's contention that the PWS mandated the discharges was "somewhat inconsistent" with its admission that it exercised discretion in discharging the three guards.

[3] In *NLRB v. Katz*, 369 U.S. 736, 747 (1962), the Supreme Court held that unilateral changes in employment terms—i.e., changes made without giving the union reasonable notice and the opportunity for bargaining—violate Sec. 8(a)(5).

[4] At the time of the discharges, IRS representative John Sears was the Contracting Officer's Representative (COR); Sears was aware of the officers' misconduct; and although Sears deemed the misconduct a dischargeable offense, he did not demand that the officers be removed from performing on the Respondent's contract with the IRS. Two sections in the PWS appear to give the COR authority to issue such a removal demand. PWS Sec. 6.4.3 provides that the COR and the Contracting Officer (CO) "have the authority to cause the . . . removal of any Contract employee from the contract who does not meet and adhere to the Standards of Conduct as required in this contract," and PWS Sec. 1.6.33 similarly provides that "[t]he CO and/or COR may require . . . dismissal of any Contract employee deemed careless, incompetent, insubordinate, unsuitable, or otherwise objectionable during the performance of duties associated with the Contract." However, immediately following Sec. 1.6.33, the PWS adds the following: "**NOTE:** The CO will make all determinations regarding the removal of any employ-

Respondent contends that the record should be reopened to receive this additional evidence because the evidence would establish that (i) the Respondent had no choice but to discharge the three security guards, obviating any duty to bargain regarding the discharges; and (ii) reinstatement and an award of backpay are inappropriate remedies. On March 27, 2016, the Respondent filed a supplement to its March 16 motion, requesting the Board's permission to amend its answer and deny the allegation that the discharges of the three security guards were discretionary. My colleagues deny the Respondent's motion to reopen the record as well as its supplement to that motion.

I respectfully dissent from my colleagues' decision in three respects.

1. *The Respondent's Motion to Amend its Answer and to Reopen the Record.* I would permit the Respondent to amend its answer in order to deny the allegation that the discharge decision was discretionary, and I would grant the Respondent's motion to reopen the record and for a remand to the judge to allow him to receive the proffered evidence and reconsider, in light of that evidence, whether the discharges were mandated by the PWS and therefore not subject to bargaining.

I believe that the circumstances of this case make it unfair for the judge and my colleagues to hold the Respondent to its admission, in its answer to the complaint, that the decision to discharge the security officers was discretionary. The complaint alleged one and only one unfair labor practice: that the Respondent had violated Section 8(a)(5) by discharging the security officers "without prior notice to the Union and without affording the Union an opportunity to bargain." At the time the complaint issued (September 29, 2015), extant Board precedent held that where an employer discharges an employee pursuant to a preexisting policy, the employer has no duty to give the union notice and opportunity to bargain in advance of the discharge decision *even if*, in making that decision, the employer exercises discretion in applying the policy.[5] Accordingly, when it answered the complaint, the Respondent had every reason to believe that it was immaterial whether it admitted or denied exercising discretion when it decided to discharge the security officers. Subsequently, the judge relied in part on the Respondent's admission to find that the Respondent unilaterally changed its progressive discipline policy when it discharged the security officers—an unfair labor practice not alleged in the complaint[6]—and my colleagues also rely on the admission. In these circumstances, I believe fairness requires that the Board permit the Respondent to withdraw its admission and deny the allegation that the discharge decision was discretionary.

Turning to the motion to reopen the record, I disagree with my colleagues' finding, in reliance on Section 102.48(d)(1) of the Board's Rules and Regulations, that admitting the proffered evidence would have no impact on the outcome of this case. If admitted, evidence that Senior Contract Specialist Briggs has demanded that the officers be removed pursuant to PWS Section 6.4.4 for "failing to devote full time and attention to assigned duties" would support the Respondent's steadfastly held position that the officers' dereliction of duty compelled their discharge under PWS Section 6.4.4. This evidence, together with the withdrawal of the Respondent's answer as discussed above, might well cause the judge to reconsider his finding that the discharge decisions were discretionary. See *J. P. Stevens & Company, Inc.*, 246 NLRB 1164, 1165 (1979) (granting motions to reopen the record to accept evidence concerning employer's surveillance of union supporters because the evidence, if credited, "might cause the Administrative Law Judge to reconsider" allegations the judge had dismissed).[7] Moreover,

ee from any or all locations where the contractor has contracts with the IRS." Consistent with PWS Sec. 1.6.33, the Respondent's IRS project manager, Scott Carpenter, testified that COR Sears' "job involves reporting to the Contracting Officer . . . on [the Respondent's] adherence to the PWS."

[5] See *Fresno Bee*, 337 NLRB 1161 (2002). In *Fresno Bee*, the Board dismissed a similar 8(a)(5) allegation, reasoning that when an employer does not change a preexisting disciplinary policy but merely applies it in imposing discipline, the imposition of that discipline does not constitute a unilateral change, notwithstanding that the employer exercises discretion in applying the policy. Id. at 1186–1187. The Board subsequently overruled *Fresno Bee* in *Alan Ritchey, Inc.*, 359 NLRB 396, 402 (2012). However, *Alan Ritchey* was decided by a three-member panel, two members of which were serving recess appointments the Supreme Court subsequently invalidated in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). The Court's decision in *Noel Canning* nullified the Board's decision in *Alan Ritchey*, which had the effect of reinstating *Fresno Bee* as controlling precedent. Thus, when it answered the complaint in the instant case, the Respondent reasonably believed that the judge was compelled to dismiss the complaint *regardless* whether the Respondent exercised discretion when discharging the security officers (and the Respondent's posthearing brief to the judge relied heavily on *Fresno Bee*). A Board majority subsequently reinstated the holding of *Alan Ritchey* in *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016), but *Total Security Management* issued on August 26, 2016—*after* the complaint issued in the instant case (September 29, 2015), and also after the hearing (December 10, 2015), and the issuance of the judge's decision (January 21, 2016). Moreover, the Board's decision in *Total Security Management* applies prospectively only and therefore does not apply in this case. 364 NLRB No. 106, slip op. at 11–12. (I dissented from the majority's decision in *Total Security Management*, see id., slip op. at 17–41, and I adhere to my dissent.)

[6] The General Counsel amended the complaint at the hearing to add this allegation.

[7] I disagree with my colleagues that the Respondent's motion to reopen the record must be denied on the basis that the evidence it seeks to introduce did not exist at the time of the hearing. Under Sec.

the Respondent represents that on remand, it would introduce evidence that accounts for the belatedness of Briggs' demand—namely, that no IRS official with final authority to demand the officers' removal from the contract was aware of their dereliction of duty at the time they were discharged on April 24, 2015.[8] Consistent with the mandate of Section 102.21 of the Board's Rules and Regulations that "[t]he rules and regulations . . . shall be liberally construed to effectuate the purposes and provisions of the Act," I believe it would effectuate the purposes of the Act to allow the Respondent to adduce the proffered evidence, which was unavailable at the time of the hearing and which might have a substantial impact on the result of this proceeding.

2. *The Unilateral Change Allegation.* I disagree with the judge's finding that the Respondent's discharge of Marinez, Schneider, and Klabunde in reliance on Section 6.4.4 of the PWS constituted an unlawful unilateral change in the Respondent's progressive discipline policy. The PWS requires the Respondent to "ensure that [its] employees conform to acceptable standards of conduct" (Sections 1.6.32.4 & 6.4.4), and the failure of Marinez, Schneider, and Klabunde "to devote full time and attention to assigned duties" constitutes "cause for [their] immediate removal from performing on the contract" under the PWS (Sections 1.6.32.4 & 1.6.32.4.22; Sections 6.4.4 & 6.4.4.21). In my view, the judge erroneously found that PWS Section 6.4.4 was superseded by the Respondent's progressive discipline policy, which contained no comparable language. As the judge found, the progressive discipline policy stated that it superseded "all other *policies* concerning this subject" (emphasis added). However, this language could not supersede Section 6.4.4 in the PWS because the PWS was not a "policy" promulgated by the Respondent. Rather, as stated in the PWS, it was "a non-personal services *contract*" (emphasis added), entered into between the IRS and the Respondent, which governed the entire arrangement making the Respondent responsible for providing "armed security guard services" at the secure government facility, and which made "failing to devote full time and attention to assigned duties" grounds for removing a security officer.[9] In short, the record fails to support the judge's finding that the contract between the IRS and the Respondent (including Section 6.4.4) was superseded by the Respondent's progressive discipline policy. This renders erroneous the judge's conclusion that the Respondent's application of PWS Section 6.4.4 constituted an unlawful unilateral change in the Respondent's progressive discipline policy.

3. *The Post-Discharge Refusal-to-Bargain Allegation.* For two reasons, I believe my colleagues err in affirming the judge's finding that the Respondent violated Section 8(a)(5) by refusing to bargain with the Union *after* it discharged the security officers.

First, the judge's finding violates the Respondent's due process rights. "'To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case.'"[10] Typically, appropriate notice is furnished by the allegations set forth in the complaint.[11] The Board will also consider any representations made by the General Counsel on a timely ba-

102.48(d)(1) of the Board's Rules and Regulations, one of the grounds for granting a motion to reopen the record is that the evidence sought to be introduced "has become available only since the close of the hearing," and this may include evidence regarding posthearing events.

Sec. 10(c) of the Act states: "No order of the Board shall require the reinstatement of any individual as an employee . . . or the payment to him of any backpay, if such individual was suspended or discharged for cause." As the judge recognized, PWS Sec. 6.4.4 provides that "failing to devote full time and attention to assigned duties" constitutes "cause for immediate removal," and the evidence proffered by the Respondent indicates that the responsible IRS official—Senior Contract Specialist Briggs—has required the Respondent to remove Marinez, Schneider and Klabunde based on this provision. Therefore, apart from the potential relevance of this evidence to the question of liability, this evidence would establish that Marinez, Schneider and Klabunde were discharged "for cause." Therefore, Sec. 10(c) of the Act would preclude the Board from ordering backpay and reinstatement.

[8] In an email sent on April 23, 2015, COR Sears acknowledged that the officers' dereliction of duty constituted a dischargeable offense, and Sears further stated: "If individual guards do not have the character and self-discipline to work at a federal installation and comply with the responsibilities associated, then they will need to be removed." R. Exh. 9. Sears did not, however, demand the officers be removed from performing work on the contract. The Respondent seeks to introduce evidence, on remand, that Sears was not a final decision-maker regarding contract employees' suitability to perform work on the contract, and that Sears failed to report the officers' misconduct to his superiors, including Briggs. Such evidence is clearly material to this case, and the Respondent should be given an opportunity to introduce it. Moreover, the PWS does not, on its face, contradict the Respondent's contention that Sears was not a final decision-maker in this regard. Although PWS Sec. 1.6.33 and 6.4.3 appear to grant the COR authority to require an officer's removal, language immediately following Sec. 1.6.33 appears to reserve that authority solely to the CO. In addition, IRS project manager Carpenter testified that Sears' "job involves reporting to the Contracting Officer . . . on [the Respondent's] adherence to the PWS." In these circumstances, it is particularly appropriate that the Respondent have an opportunity to introduce evidence regarding the scope and limits of COR Sears' authority.

[9] See PWS Sec. 1.0: "*GENERAL:* This is a non-personal services contract to provide armed security guard services."

[10] *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004) (quoting *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992)); see also *KenMor Electric Co., Inc.,* 355 NLRB 1024, 1029 (2010) ("Due process requires that a respondent have notice of the allegations against it so that it may present an appropriate defense."), enf. denied sub nom. *Independent Electrical Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543 (5th Cir. 2013).

[11] *KenMor Electric*, supra.

sis during the course of litigation concerning the theory of the alleged violation.[12] However, the mere "presence of evidence in the record to support a charge unstated in a complaint or any amendment thereto does not mean the party against whom the charge is made had notice that the issue was being litigated."[13]

The requirements of procedural due process were not satisfied here. The complaint alleges that the Respondent discharged the three guards "without *prior* notice to the Union and without affording the Union an opportunity to bargain" (emphasis added). In other words, the complaint alleged a failure to engage in *pre-discharge* bargaining.[14] The General Counsel could have also alleged, in the alternative, that the Respondent failed to engage in *post-discharge* bargaining. The complaint does not so allege, and at no time during the hearing or in its posthearing brief to the judge did the General Counsel advance this alternative theory of violation. Moreover, at no time did the General Counsel amend the complaint to add such an allegation, and this fact is the more telling in that the General Counsel *did* amend the complaint to add a different allegation: that the Respondent unilaterally changed its progressive discipline policy in violation of Section 8(a)(5). The absence of a complaint allegation—or of full litigation of an issue closely connected to the subject matter of the complaint[15]—infringes on a respondent's due process rights under any circumstances; but given that the General Counsel did amend the complaint to add *one* unfair labor practice allegation, the Respondent was all the more entitled to assume that it was not at risk of being found liable for having committed an *unalleged* unfair labor practice. This denial of due process in itself warrants reversal of the judge's finding.

Moreover, even if the merits of the judge's finding are reached, I believe the record contradicts the judge's finding that the Respondent unlawfully refused to engage in post-discharge bargaining upon request regarding the discharges of Marinez, Schneider and Klabunde.[16] As

[12] See *Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 180, slip op. at 4 (2015); *Iron Workers Local 118 (Pittsburgh Des Moines Steel)*, 257 NLRB 564, 565–566 (1981), enfd. 720 F.2d 1031 (9th Cir. 1983).

[13] *Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983); see also *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 547 (7th Cir. 1987) ("[T]he simple presentation of evidence important to a . . . claim does not satisfy the requirement that any claim at variance from the complaint be 'fully and fairly litigated' in order for the Board to decide the issue without transgressing . . . due process rights."); *Cioffe v. Morris*, 676 F.2d 539, 542 (11th Cir. 1982) ("[T]he introduction of evidence relevant to an issue already in the case may not be used to show consent to trial of a new issue absent a clear indication that the party who introduced the evidence was attempting to raise a new issue" (internal quotations omitted).).

[14] In another case involving the Respondent, my colleagues and I found identical complaint language alleged a failure to engage in predischarge bargaining, and we dismissed the allegation on the basis that *Alan Ritchey*, supra, had been nullified by the Supreme Court's decision in *Noel Canning*, supra, and the Board's decision in *Total Security Management*, supra, applies prospectively only. See *Security Walls, LLC*, 365 NLRB No. 52 (2017); see also supra fn. 6. In case there was any room to doubt the theory of the complaint, the General Counsel's attorney removed all doubt in his opening statement at the hearing. Counsel stated:

> Your Honor, this case is about Respondent's failure to bargain over the suspension and subsequent termination of three employees, Chris Marinez, Jason Schneider, and John Klabunde.
>
> . . . . . .
>
> **Under the principles of *Alan Ritchey*, such actions were unlawful and it is the position of the General Counsel that *Alan Ritchey* was soundly reason[ed] and should be adopted.**

(Tr. 8–9) (emphasis added). Similarly, in his posthearing brief to the judge, the General Counsel's attorney urged the judge to adopt the rationale of *Alan Ritchey* to find that the Respondent violated Sec. 8(a)(5) by failing to bargain prior to the suspensions and discharges. (GC's posthearing brief at 12–14.)

[15] *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). A purported failure to engage in *post*-discharge bargaining is not closely connected to an alleged failure to engage in *pre*-discharge bargaining. But even if they were closely connected, the issue of post-discharge bargaining was not fully and fairly litigated at the hearing. Citing *Piggly Wiggly Midwest, LLC*, 357 NLRB 2344 (2012), my colleagues say that the post-discharge-bargaining issue was fully litigated on the basis that the Respondent purportedly would not have proffered additional evidence had the complaint been worded differently. But in the same case, the Board emphasized that "[i]t is the opportunity to present *argument* under the new theory of violation, which must be supplied." Id. at 2345 (emphasis added; alterations in original; internal quotations omitted); see also *Champion International Corp.*, 339 NLRB 672, 673 (2003) ("It is axiomatic that a respondent cannot fully and fairly litigate a matter unless it knows what the accusation is."); *Buonadonna Shoprite, LLC*, 356 NLRB 857, 858 (2011) ("Although a judge may in appropriate circumstances find a violation not alleged in a complaint, the judge should not decide an issue that the judge alone has injected into the hearing, especially where . . . the parties were never advised to litigate the issue.") (internal quotation omitted). Because the judge found an unalleged failure to engage in post-discharge bargaining sua sponte, the Respondent never had an opportunity to present argument to the judge under this new theory of violation.

[16] As I recognized in my partial dissenting opinion in *Total Security Management*, supra, 364 NLRB No. 106, slip op. at 18 (Member Miscimarra, concurring in part and dissenting in part), employers have an obligation under Sec. 8(a)(5) to engage in bargaining upon request regarding disciplinary standards and procedures. See also *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (regarding mandatory subjects, the employer and union, upon request, have an "obligation . . . to bargain with each other in good faith," although "neither party is legally obligated to yield"); *Fresno Bee*, supra, 337 NLRB at 1187 ("Respondent has an obligation to bargain with the Union, upon request, concerning the discharges, discipline, or reinstatement of its employees."), overruled on other grounds by *Total Security Management*, supra.

Because the record contradicts the judge's finding that the Union here requested bargaining regarding the discharges of Marinez, Schneider and Klabunde, I do not reach or pass on the extent to which Respondent was required to engage in post-discharge bargaining had it been requested by the Union.

noted previously, the judge found that the May 3, 2015 email from Chief Union Steward Orlando Marquez to the Respondent's corporate counsel, Ed Holt, "may not constitute a formal demand for bargaining," but the judge nonetheless found that it was "sufficient to invoke Respondent's obligations to bargain," and my colleagues also find that the Union requested bargaining. I believe this finding is contrary to existing law. In the May 3 email, as described by the judge, Union representative Marquez demanded "reinstatement and a make-whole remedy for the 3 officers" and "stated that if Security Walls did not respond to this demand, the Union would file unfair labor practice charges with the Board." See also GC Ex. 4 (same). Conspicuously absent from the May 3 email was *any* request to engage in bargaining regarding the discharges, nor did the Union request bargaining in any of its other communications with the Respondent related to the discharges.[17] Existing Board law makes it clear that a Union's objections, protests, and threats to file a Board charge are *not* sufficient under Section 8(a)(5) to constitute a request for bargaining.[18]

[17] My colleagues find that the Union "adequately communicated its desire to bargain," but they point to no communication in which the Union requested bargaining, and the record contains none. Rather, the record shows the following. On April 19, 2015, the Union requested information regarding the suspensions. On April 23, the Union filed a grievance concerning the suspensions, in which it demanded that the officers be reinstated *immediately* with backpay (emphasis in Union's grievance). To state the obvious, since bargaining takes time, a demand for the officers' immediate reinstatement cannot be reasonably construed as a request to bargain. On April 29, the Respondent answered the grievance, attaching by way of detailed explanation, the investigative reports completed by the Respondent's IRS project manager, Scott Carpenter. The Union followed up by email dated May 1, and the Respondent answered that same day. On May 3, the Union responded with a series of demands—including, once again, that the officers be reinstated and made whole "immediately"—but in neither this response, its prior communications, nor subsequently did the Union ever request bargaining.

My colleagues say that the Respondent "effectively closed any avenue of communication" by stating in its April 29 answer to the grievance that "[t]his is not an offer to bargain." This does not change the fact that the Union never requested bargaining. It was the Union's duty to request bargaining, not the Respondent's to offer to bargain in the absence of a Union request. Moreover, the Union apparently did not regard the Respondent's April 29 answer as closing off communication, since the Union responded on May 3—still without requesting bargaining.

My colleagues cite *Richmond, Division of Pak-Well*, 206 NLRB 260 (1973), and several other cases for the proposition that a union's request for information is effectively a request to bargain. Those cases are clearly distinguishable. Each was a test-of-certification case, i.e., a case in which the employer violated Sec. 8(a)(5) by refusing to bargain with a newly certified union in order to appeal the Board's decision in the underlying representation case to a court of appeals. In that context, the Board has deemed a request for information self-evidently relevant to negotiations for an initial collective-bargaining agreement as a request to bargain, even if bargaining was not explicitly requested in so many words. See *Richmond, Division of Pak-Well*, 206 NLRB at 261 (finding that union requested bargaining when it sent employer a letter stating: "Prior to meeting with you for the purpose of negotiating an agreement, the Union is requesting the following information: A list of all employees[,] [s]eniority dates . . . [r]ate of pay . . . [l]ist of all classifications. . . . As soon as we receive this information and have a chance to digest it, I will contact you for the purpose of beginning negotiations.") (alterations in original). Here, in contrast, nothing in the Union's communications with the Respondent indicated a desire to bargain. To the contrary, in both its April 23 grievance and its May 3 email, the Union demanded that the three officers be reinstated *immediately*. As noted above, this was a demand that could not reasonably be understood as a request to bargain.

[18] *Trucking Water Air Corp.*, 276 NLRB 1401 (1985); *Sewanee Coal Operators Assn.*, 167 NLRB 172 (1967); and *Roberts Electric Co.*, 227 NLRB 1312 (1977), upon which my colleagues rely, are not to the contrary. In *Trucking Water Air*, the union president (Schueler) called the employer's president (Pace) after hearing that the company, whose employees the union formerly represented, was back in business. Schueler testified, "I asked Mr. Pace that I wanted to sit down with him and I wanted to talk about the situation. . . . I said I'd like to sit down with you right now and he said no." 276 NLRB at 1406. The judge found that "Schueler's request that Pace 'sit down' with him to discuss 'the situation' [met] the criteria" for a request to bargain. Id. at 1407. The judge then added the following dicta: "Were there any further doubt of the meaning of Schueler's statement to Pace, this doubt was eliminated shortly thereafter when the Union filed the unfair labor practice charges which led to the instant complaint." Id. Similarly, in *Sewanee Coal Operators Assn.*, supra, the union sent a letter to the respondents stating that it "desire[d] to meet at a mutually agreed time and place to negotiate a contract," 167 NLRB at 176, and the Board found that the subsequent filing of refusal-to-bargain charges was a "renewal" of the union's request to bargain, id. at 172 fn. 3. Again, in *Roberts Electric*, supra, a newly certified union sent letters to the respondents requesting bargaining, and the judge found that the union's subsequent filing of charges renewed the bargaining request. 227 NLRB at 1319. Thus, in all of these cases, the union requested bargaining prior to and separate from the subsequent filing of unfair labor practice charges; and while the Board found that charge filing may *renew* a bargaining request previously made, nothing in these cases suggests that the filing of a charge may substitute for a bargaining request that had never been made. Nevertheless, my colleagues apparently view these cases as authority for the proposition that an unfair labor practice charge effectively converts a prior union demand for reinstatement and backpay into a request for bargaining. This reading goes far beyond these cases and directly contradicts the Board's long-held position that filing a charge does *not* make up for a union's failure to clearly indicate a desire to bargain. The Board had never cited *Trucking Water Air* for this proposition until a panel majority, over my dissent, did so in *Ohio Edison Co.*, 362 NLRB No. 88, slip op. at 13 (2015). The Court of Appeals for the Sixth Circuit rejected the Board majority's decision in *Ohio Edison*. See *The Ohio Edison Company v. NLRB*, 847 F.3d 806 (6th Cir. 2017).

My colleagues say that the facts here present a stronger case for finding that the Union demanded bargaining than those the Sixth Circuit found insufficient to constitute a bargaining demand in *Ohio Edison*. To the contrary, the facts of the instant case put it even further away from the line separating objections, protests, and threats from requests to bargain than those at issue in *Ohio Edison*. There, Union President Marshman responded to news that the employer planned to make changes to an employee rewards program by telling the employer's director of labor relations, Eileen McNamara, that he would "have to come to" the employer's corporate headquarters, and he added that he would also have to "file a Board charge." *Ohio Edison Co.*, 362

See, e.g., *Associated Milk Producers*, *Inc.,* 300 NLRB 561, 564 (1990) ("It was incumbent on the Union to request bargaining—not merely to protest or file an unfair labor practice charge."); *Clarkwood Corp.*, 233 NLRB 1172, 1172 (1977) (employer's actions did not violate Section 8(a)(5) where union officials "contacted [r]espondent and protested its contemplated actions" but did not "request [r]espondent to bargain"); *The Emporium*, 221 NLRB 1211, 1214 (1975) (employer did not fail to bargain over subcontracting where the union asked the employer not to contract out, complained that the contractor refused to recognize the union, asked whether the respondent would "do something about this" and "took the position that . . . [r]espondent had violated its bargaining agreement," but where the union "never tested [r]espondent's willingness to satisfy its bargaining obligation"); *Medicenter, Mid-South Hospital*, 221 NLRB 670, 679 (1975) (employer did not unlawfully fail to bargain over polygraph testing where the union "showed no inclination to do anything but object" and failed to request bargaining); *American Buslines, Inc.*, 164 NLRB 1055, 1055–1056 (1967) (no unlawful refusal to bargain about promotions that resulted in elimination of the bargaining unit where the union, upon receiving notice of the employer's plans, "failed to prosecute its right to engage in . . . discussion but contented itself by protesting the contemplated promotions . . . and by subsequently filing a refusal-to-bargain charge"). See generally *Ohio Edison Co.*, supra, 362 NLRB No. 88, slip op. at 4–6 (Member Miscimarra, concurring in part and dissenting in part).[19] Moreover, in my view, the Board should not encourage years of litigation over an alleged refusal to engage in bargaining, when the charging party, instead of requesting bargaining, merely threatened the other side with Board litigation.[20]

The Act imposes an obligation on parties to bargain regarding mandatory subjects upon request, *without* resorting to Board litigation, and it improperly inverts this process for the Board to order bargaining—after potentially years of litigation—that was never requested in the first place. If we were to find violations in these circumstances, it would substantially deviate from the Board's role as a referee charged with overseeing the process of collective bargaining that the parties themselves are required to initiate. See *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107–108 (1970) ("It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strength of the parties."). Since the record fails to establish that the Union requested bargaining over the discharges of the three security officers, I believe the Respondent cannot reasonably be found to have violated Section 8(a)(5) by failing to engage in post-discharge bargaining with the Union over the discharges.

For the foregoing reasons, I respectfully dissent.

NLRB No. 88, slip op. at 3 (Member Miscimarra, concurring in part and dissenting in part). McNamara then emailed her supervisor that Marshman was "not happy," and she added that she "was sure that he's serious about the charge and coming to" headquarters. Id., slip op. at 4 fn. 5. The majority in *Ohio Edison* found that Marshman had requested bargaining, based in part on McNamara's testimony that she understood Marshman was serious about coming to headquarters, which the majority interpreted as indicating that Marshman wanted "to *discuss* the matter with the [r]espondent's CEO." Id., slip op. at 1 (emphasis added). However, McNamara testified that she took Marshman to mean that "he wanted to *complain*" to the employer's CEO about the change. Id., slip op. at 4–5 fn. 5 (Member Miscimarra, concurring in part and dissenting in part) (emphasis in *Ohio Edison*). But although Marshman never requested bargaining, he did at least signal a desire to meet the employer's CEO face to face. Here, in contrast, union agent Marquez issued a list of demands, and the only meeting he proposed was one between the Union and "representatives of the National Labor Relations Board . . . to discuss charges if Security Walls again fails to meet the Local's immediate demands." GC Exh. 4. This is even further removed from a request to bargain than Marshman's statements in *Ohio Edison*.

[19] My colleagues cite two cases in support of the judge's finding that Marquez's May 3, 2015 email was "sufficient to invoke Respondent's obligations to bargain." In each of those cases, however, the union's response included some reference to dialogue, discussion, bargaining, or an exchange of ideas. Thus, in *Armour & Co.*, 280 NLRB 824 (1986), the Board found a request to bargain where, in response to a proposed change, the union stated that it "would like the opportunity to *discuss* with your company your position." Id. at 828 (emphasis in original). In *Indian River Memorial Hospital*, *Inc.,* 340 NLRB 467 (2003), the employer notified the union of a change in the work schedule, and the union's business agent responded that a schedule change was "a mandatory subject of bargaining." In response, the employer stated, "We are willing to bargain collectively over those items covering wages, hours, and working conditions," but "changing schedules . . . is a management right." Id. at 467. Thus, both the union's statement and the employer's response referenced bargaining, and the Board found a clear request to bargain. Id. at 468–469. Here, unlike these cases relied upon by my colleagues, Marquez's email was totally devoid of any reference to discussion or bargaining.

[20] My colleagues also say the arguments presented in this section are not properly before the Board on the basis that the Respondent did not advance them. Within the limits of due process—requiring that respondents have "a clear statement of the theory on which the agency will proceed with the case," *Lamar Advertising of Hartford*, 343 NLRB at 265—I believe that the Board should apply the applicable law to the facts of each case, regardless of whether the parties have done so. See *Kamen v. Kemper Financial Services*, *Inc.,* 500 U.S. 90, 99 (1991) (stating that "the court 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").

Dated, Washington, D.C. June 15, 2017

Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to bargain in good faith with the International Union, Security, Police and Fire Professionals of America (SPFPA) about disciplinary matters.

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 rescind the unilateral change to our progressive discipline policy.

WE WILL, within 14 days from the date of this Order, offer Jason Schneider, John Klabunde and Christopher Marinez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jason Schneider, John Klabunde and Christopher Marinez whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Jason Schneider, John Klabunde and Christopher Marinez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 16 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 for each employee.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Jason Schneider, John Klabunde and Christopher Marinez, and WE WILL, within 3 days thereafter, notify Jason Schneider, John Klabunde and Christopher Marinez in writing that this has been done and that the discharges and suspension will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, notify the Internal Revenue Service of this Order.

SECURITY WALLS, INC.

The Board's decision can be found at www.nlrb.gov/case/16–CA–0152423 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.

Jonathan Elifson, Esq., for the General Counsel.
Milton D. Jones Esq. (Morrow, Georgia), for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Austin, Texas, on December 10, 2015. The International Union, Security, Police and Fire Professionals of America filed the charge on May 14, 2015. The General Counsel issued the complaint on September 29, 2015.

Respondent, Security Walls, LLC, employs the security guards at an Internal Revenue Service facility in Austin, Texas under contract. On March 1, 2014, Respondent succeeded another contractor, which had a collective-bargaining agreement with the Union. Security Walls declined to adopt its predecessor's collective-bargaining agreement.

On September 1, 2015, a collective-bargaining agreement between Respondent and the Union went into effect. However, in April 2015, several months earlier, Respondent suspended and discharged 3 security guards who were members of the bargaining unit without giving the Union prior notice or offering it an opportunity to bargain over the discharges. The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) in doing so. The General Counsel relies in part on the

rationale in *Alan Ritchey,* 359 NLRB 396 (2012), a decision invalided by the Supreme Court due to the composition of the Board at the time.

In the alternative, the General Counsel alleges that Respondent violated Section 8(a)(5) and (1) by unilaterally disregarding its generally progressive discipline policy.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited liability company based in Tennessee, provides security and private investigation services. One of its places of business is the IRS facility in Austin, Texas. During the calendar year ending August 31, 2015, Respondent performed services valued in excess of $50,000 outside of Texas. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent replaced the predecessor contractor at the IRS facility on March 1, 2014. It declined to adopt its predecessor's collective-bargaining agreement with the Union. Contract negotiations took place on August 6, 2014, and a number of articles were tentatively agreed upon. One of those tentative agreements concerned a grievance and arbitration procedure (Art. XIV). Another tentative agreement concerned discharge and discipline. However, a complete collective-bargaining agreement did not become effective until September 1, 2015. There is no evidence that the parties agreed to an interim grievance procedure between August 2014, and September 2015.

The Incident of April 15, 2015

On April 15, 2015, security guard Jason Schneider relieved guard John Klabunde for a break at about 2 p.m. at Klabunde's post by the visitor center for the facility (designated post B-1). Both the relieving guard and the relieved guard must sign in and out of a log book. Apparently Klabunde made an error in signing out. While he and Schneider were attempting to correct the error, a woman, who was not authorized to enter the facility, walked between the exit arm for cars leaving the facility and a fence, and entered the facility without being detected by either Schneider or Klabunde.

The next day Respondent suspended both guards.

The Incident of April 22, 2015

On April 22, 2015, guard Christopher Marinez, who normally worked at night, worked the day shift. At about 2 p.m. Respondent moved Marinez to the B-1 post by the Visitor's Center. Marinez decided that his chair was too low to afford him a clear view of the area for which he was responsible. While Marinez adjusted his chair, a woman and a child, who were not authorized to enter the facility, walked by his post undetected. Respondent suspended Marinez the same day.

Despite the fact that there was no contractual grievance procedure in place, the Union's Chief Steward, Orlando Marquez filed a grievance on April 23, demanding reinstatement and backpay for all three guards.

April 28, 2015 Meeting

On April 28, Schneider, Klabunde and Marinez were summoned to a meeting with Site Supervisor Frederico Salazar. Salazar handed the three guards some documents and told the three that they had been terminated. Scott Carpenter, Respondent's project manager for the IRS contract, had investigated the two incidents and prepared a report recommending the termination of the three guards. Carpenter's report is most likely the paperwork given the guards since there is no other documentation in this record pertaining to the terminations. Carpenter did not attend the April 28 meeting. Chief Union Steward Orlando Marquez was present at this meeting. There was no negotiation about the discipline imposed.

Facts pertaining to the alleged unilateral change

On April 25, 2014, a year before the suspensions in this case, Respondent adopted, unilaterally it appears, a disciplinary policy which applied to all Security Walls personnel on contract TIRMS-14-C-0001. This is the contract that applies to the guards working at the Austin IRS facility (GC Exh. 3; R. Exh. 8). This discipline policy states on its face that it supersedes all other policies concerning discipline.

This policy provides generally for a progressive discipline system. However, it specifies a number of violations for which a guard may be terminated immediately upon a first offense. These violations are: refusal to cooperate in an investigation, sleeping on duty, sexual activities on the job, falsification, unlawful concealment, removal, mutilation, destruction of any official document or record or concealment of material facts by willful omission from official documents, records or statements.

The incidents for which guards Schneider, Klabunde and Marinez were fired, fit into none of categories for which a guard could be fired immediately upon a first offense. In a category entitled "violation of written rules, regulations or policy," a violation resulting in a breach of security could result in a 2-day suspension, or termination based on previous offenses. There is no evidence that Schneider, Klabunde or Marinez had any offenses prior to April 2015. Thus applying Respondent's disciplinary policy in effect in April 2015, they could not have been terminated.

The Performance Work Statement

Respondent, however, contends that it was entitled to terminate Schneider, Klabunde and Marinez pursuant to the Performance Work Statement (PWS), Exh. R-1, which spells out its obligations to the IRS. Security Walls contends this document takes precedence over its disciplinary policy. However, the PWS was posted at the IRS facility on March 1, 2014; thus the disciplinary policy on its face supersedes it with regard to discipline. Respondent cites to the following sections of the PWS:

> Section 6.4.4 (page 58): The contractor is also responsible for ensuring that their employees conform to acceptable standards

of conduct. The following actions, behavior or conditions are cause for immediate removal from performing on the contract.

Section 6.4.4.2: Violations of Federal Management Regulations, Subpart C, *Conduct on Federal Property* (41 CFR 102-74) (see Section J, Exhibit 7).
Section 6.4.4.21: Neglecting duties by sleeping while on duty, failing to devote full-time and attention to assigned duties…or any other act that constitutes neglect of duties…

Failure to abide by the Performance Work Statement, can under some circumstances, result in Security Walls losing its contract with the IRS.

Email exchange between IRS and Security Walls

IRS' representative monitoring Respondent's performance on this contract was John Sears. When he learned of the second security breach within a week of the Visitor's Center post by Marinez, Sears exchanged emails with Scott Carpenter, Security Walls' project manager.

From: Sears John D.
Sent: Thursday, April 23, 2015 9:04 AM
To: Scott Carpenter
Subject: FW: Unauthorized Access
Good Morning Scott:

De-ja-vu. Hopefully this one will not get all the way to the campus director. None the less, it was another security breach but luckily control center was on top of it. I will review available footage this morning on this and let you know what we see. Fred had indicated that you would be in town tomorrow?

It was brought to my attention yesterday that moral (sic) has taken a hit because of the Schneider and Klabunde suspensions. Ultimately, I hope that SW will adopt an effective system of discipline for these types of violations and deter them from happening. But guards who commit a serious offenses (sic) like carelessly permitting a security breach or falsifying daily log reports to reflect patrols that were not being done, must understand that those are fireable offense and warrant more than a slap-on-the wrist "verbal counseling" or "written counseling." First offense or not!

Each month when I sign off on payment for services, I own that responsibility and everything that goes with it. I cannot accept substandard services and those associated with this contract need to understand that. If individual guards do not have the character and self-discipline to work at a federal installation and comply with the responsibilities associated, then they will need to be removed.

Hopefully we can make some significant progress when you come out here tomorrow. Unfortunately, some of them have just developed bad habits that are getting them into trouble.

From: Sears John D
Sent: Thursday, April 23, 2015 11:15 AM

To: Scott Carpenter
Subject: RE: Unauthorized Access

Scott, I just looked at footage from all available views.
Like the previous incident last week, it was a matter of the breach occurring when he turned his back momentarily to apparently adjust his chair. It was not a matter of careless behavior, but officers working that post must be able to multitask and recognize what's going on around them.

Again, I hope SW can address this so that guards are paying greater attention to details so we don't miss these types of incidents.

From: Scott Carpenter
Sent: Thursday, April 23, 2015 6:47 PM
To: Sears John D
Subject: RE: Unauthorized Access

Thank you, John.

While I am concerned with morale, I am much more concerned with having officers who can perform the very basic duty they have, protection of the facility. These are, as you know, very serious violations on the standards of conduct and post a huge risk to the facility and all personnel on site. I will be there in the morning to review video of both incidents and finalize our internal investigation. Unfortunately, these officers neglected their most primary duty and we are very fortunate that we did not have an angry, armed person gain access.

I look forward to meeting with you tomorrow morning.

Scott

From: Sears John D
Sent: Friday, April 24, 2015 8:17 AM
To: Scott Carpenter
From: RE: Unauthorized Access

I agree Scott. Look forward to seeing you today.

John

While it appears that Sears could have demanded that the three guards be removed from the contract, there is no evidence that he did so.

On April 28, Site Supervisor Salazar summoned the three guards to a meeting and told them that they were terminated. On April 29, 2015, the day after Respondent terminated Schneider, Klabunde, and Marinez, Ed Holt, Corporate Counsel at Security Walls sent the Union a letter titled "Response to Grievance regarding Officer Marinez," (Exh. R-11).

Holt discussed the investigative report of Project Manager Scott Carpenter. Then he stated that Carpenter's recommendation did not state a final action or outcome. However, Site Supervisor Salazar had given the three officers papers signed by Scott Carpenter on the previous day (possibly Carpenter's April 24 investigative report) and told them that they were fired (Tr. 101–102). There are no other termination documents in this record or any evidence that the termination decision was made later than April 28.

Holt went on to say:

As identified in Mr. Carpenter's recommendation, the alleged violations of Officers Marinez, Klabunde and Schneider all under the specifications of the PWS [Performance Work Statement], and are outside the conduct defined in Security Walls internal Disciplinary Action/Policy Statement as cited

> as the basis for the grievance. As such, the appropriate disciplinary action is neither specified in, nor controlled by company policy.
>
> As any disciplinary action in this case is based upon the provisions of the PWS, Officer Marinez has not been unjustly discriminated against, nor have his rights been "grossly violated" as alleged in the grievance.
>
> Based on the foregoing, Officers Marinez, Klabunde, and Schneider shall remain on suspension pending a final decision by Chief Manager Walls as to whether either of the officers has committed a violation of the Standards of Conduct set out in the PWS
>
> Security Walls awaits a response in three calendar days.

This is not an offer to bargain. Nor is it an offer to invoke the grievance procedure contained in the agreements tentatively agreed to in August 2014.

Chief Union Steward Orlando Marquez emailed Holt on May 3, demanding reinstatement and a make-whole remedy for the three officers. Marquez stated that if Security Walls did not respond to this demand, the Union would file unfair labor practice charges with the Board. Corporate Counsel Holt responded to the Union by stating that Site Supervisor Salazar did not have the authority to terminate the officers on April 28. However, there are no termination documents in this record apart from those given to the officers by Salazar on that date. Security Walls did not otherwise respond to the May 3 email and the Union filed the initial charge in this matter on May 14.

Analysis

Respondent violated Section 8(a)(5) and (1) by failing to bargain about the discharges of the 3 guards after the fact

I decline the General Counsel's invitation to apply the rationale of the *Alan Richey* decision until the Board adopts that rationale; I am bound by existing precedent. Moreover, even if the Board were to reaffirm its holding in *Alan Ritchey*, it must decide whether it will apply that rationale only prospectively, as it did in the 2012 decision or retrospectively.[1]

However, even under existing Board precedent, Respondent violated the Act. An employer has an obligation to bargain with the Union, upon request, concerning disciplinary matters, even if it has no obligation to notify and bargain to impasse with the Union before imposing discipline, *The Fresno Bee,* 337 NLRB 1161, 1186–1187 (2002); *Ryder Distribution Resources, Inc.,* 302 NLRB 76, 90 (1991). This is certainly true when, as in this case, its existing disciplinary policy did not require termination, *Sygma Network Corp.,* 317 NLRB 411, 417 (1995). An employer's disciplinary system constitutes a term of employment that is a mandatory subject of bargaining, *Toledo Blade Co.,* 343 NLRB 385, 387 (2004). The Union filed a grievance of April 23, to which Respondent replied on April 29, R. Exh. 11. The Union replied to Respondent's letter on May 3 demanding the reinstatement of Schneider, Klabunde, and Marinez.

While there was an exchange of emails between Respondent's Counsel Holt and Chief Steward Marquez after May 3, Holt did not offer to bargain over the discharges or address the issues raised in Marquez's May 3 email. While the May 3 email may not constitute a formal demand for bargaining, it is sufficient to invoke Respondent's obligations to bargain. Thus, Respondent refused to bargain after imposing discipline and thus did not live up to its obligations under existing caselaw. On this basis alone, I find that Respondent violated Section 8(a)(5) and (1).

Respondent, in its answer admitted that it exercised discretion in terminating the three guards, but at the same time appears to be arguing that the discharges were made pursuant to an established policy in the Performance Work Statement that mandated their discharges. To the contrary, I find that Respondent terminated these employees pursuant to a policy that had not existed prior to April 2015, and therefore violated Section 8(a)(5), *Great Western Produce, Inc.,* 299 NLRB 1004, 1005 (1990), revd. on other grounds in *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007).

Respondent violated the Act in unilaterally changing its discipline and discharge policy

Respondent's contention that it terminated the three guards pursuant to a valid established policy, i.e., the Performance Work Statement, is somewhat inconsistent with its admission that it exercised discretion in doing so. Respondent violated Section 8(a)(5) and (1) by unilaterally changing its discipline policy by terminating three employees for a first offense not contemplated by its existing progressive discipline policy.[2]

It is clear Respondent did not have any policy that mandated the termination of a security guard on the first occasion that a security breach occurred on his or her watch until April 2015. Thus, this in fact was a unilateral change. The Performance Work Statement does not mandate such discipline. It leaves it up to the IRS contracting officer to decide whether to demand the removal of an employee from the contract. It also allows the contracting officer to require retraining, suspension or dismissal of any contract employee deemed carless in the performance of his duties. Since neither John Sears, nor any other IRS official, demanded the removal of the three officers from the contract, or their termination, Respondent acting on its own, unilaterally determined that the three officers' conduct merited termination in violation of Section 8(a)(5).

What is also clear is that the three guards would not have been discharged if Respondent applied the progressive discipline policy it adopted in April 2014. Respondent, at page 9 of its brief, argues that this policy pertains only to ordinary misconduct, not gross misconduct. This is simply incorrect. By specifically mentioning offenses which are grounds for termination on a first offense, the policy clearly deals with "gross misconduct."

One quandary is that Respondent's unilateral adoption of the

[1] For the same reason I will not address the General Counsel's contention that Respondent is obligated to pay for discriminatees' expenses while searching for work.

[2] The General Counsel's reliance on instances in which guards were not disciplined for prior security breaches is misplaced. In none of those instances was the breach undetected by the guard in question, as was the case with Schneider, Klabunde, and Marinez.

progressive discipline policy may also have been a violation of Section 8(a)(5). However, I do not see that as an impediment in finding a violation for another unilateral change. The progressive discipline policy was adopted on April 25, 2014. Respondent had bargaining obligations with regard to this Union beginning on March 1, 2014, and appears to have neglected these obligations in promulgating this policy.

On the other hand, the progressive discipline policy states on its face that it supersedes all other policies concerning discipline. Thus, by its terms the progressive discipline policy supersedes the Performance Work Statement, which was posted at the IRS facility in Austin on March 1, 2014, with regard to disciplinary matters. Moreover, regardless of whether or not Security Walls could disregard its progressive disciplinary policy, it did not have a policy mandating the termination of its guards for a first offense similar to those of Schneider, Klabunde and Marinez prior to April 2015. IRS' representative Sears was even unwilling to characterize their behavior as "careless" in his April 23 email to Scott Carpenter.

The Union did not waive its bargaining rights by not pursuing the grievance procedure set forth in the tentative agreements of August 2014

Normally in collectively bargaining negotiations, tentative agreements are not immediately binding on the parties, unless they specifically agree that is the case. Otherwise, they become operative only when a final collective-bargaining agreement is reached, *Stroehmann Bakeries, Inc.,* 289 NLRB 1523, 1524 (1988). Thus, the parties' tentative agreement in August 2014, regarding a grievance and arbitration process did not become operative until September 1, 2015, months after the discharges at issue in this case. Thus, contrary to Respondent's contentions, the tentative agreements of August 2014, have no bearing on this case. There was no grievance procedure in place for the Union to pursue. Moreover, Counsel Holt's letter of April 29, 2015, presented the Union with a fait accompli. It indicated that Respondent had no intention of rescinding or reducing the discharges of the three guards under any circumstances.

CONCLUSIONS OF LAW

Respondent violated Section 8(a)(5) and (1) of the Act in refusing and/or failing to bargain with the Union over the discharges of Security Guards Schneider, Klabunde, and Marinez.

Respondent violated Section 8(a)(5) and (1) of the Act in unilaterally changing its discipline policy in discharging Security Guards Schneider, Klabunde, and Marinez for a first time security breach.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, by unilaterally changing its progressive discipline policy in violation of Section 8(a)(5) and (1) of the Act, Respondent shall rescind this unilateral change and restore the status quo ante until such time as the parties are able to resolve the discharges through the collective-bargaining process.

Respondent is also ordered to reinstate officers Schneider, Klabunde, and Marinez to their former positions, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. Further Respondent is order to make these employees whole for any loss of earnings and other benefits suffered as a result of Respondent's unlawful conduct, with interest, *Heartland Human Services,* 360 NLRB No. 101 (2014).

Backpay 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).

Respondent shall reimburse the discriminatees in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits the discriminatees' backpay to the proper quarters on their Social Security earnings records.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Security Walls, LLC, Austin, Texas, its officers, agents, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with the International Union, Security, Police and Fire Professionals of America (SPFPA) as the exclusive collective-bargaining representative of all full-time and regular part-time security officers employed by the company at the Internal Revenue Service Center and affiliated buildings in Austin, County of Travis, Texas.

(b) 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) Rescind the application of its new discipline and discharge rule through the date of the parties' collective-bargaining agreement that went into effect of September 1, 2015.

(b) Offer unit employees Jason Schneider, John Klabunde, and Christopher Marinez full reinstatement to their former positions, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Jason Schneider, John Klabunde, and Christopher Marinez whole for any loss of earnings and other benefits suffered as a result of the unlawful discipline, in the manner set forth in the remedy section of the decision.

(d) Compensate Jason Schneider, John Klabunde, and Chris-

[3] 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.

topher Marinez for any adverse tax consequences of receiving their backpay in one lump sum, and file a report with the Social Security Administration allocating the employees' backpay awards to the appropriate calendar quarters for each employee.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify Jason Schneider, John Klabunde, and Christopher Marinez in writing that this has been done and that the discharges will not be used against them 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 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.

(g) Within 14 days after service by the Region, post at its Austin, Texas. Facilities, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 16, 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. In addition to physical posting of paper notices, the 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 2015.

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

Dated, Washington, D.C., January 21, 2016.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to bargain in good faith with the International Union, Security, Police and Fire Professionals of America (SPFPA) about disciplinary matters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Jason Schneider, John Klabunde, and Christopher Marinez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jason Schneider, John Klabunde, and Christopher Marinez whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges Jason Schneider, John Klabunde, and Christopher Marinez.

WE WILL, within 3 days thereafter, notify Jason Schneider, John Klabunde, and Christopher Marinez in writing that this has been done and that the discharges and suspension will not be used against them in any way.

SECURITY WALLS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16–CA–152423 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

[4] 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."