

**Security U.S.A. and Dave Gutierrez and Javier Echevarria.** Cases 32-CA-14873 and 32-CA-15016

May 10, 1999

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On April 29, 1997, Administrative Law Judge David G. Heilbrun issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed a brief in opposition to the General Counsel's exceptions and the General Counsel filed a reply brief.

On January 20, 1998, a three-member panel of the Board remanded this proceeding to Deputy Chief Administrative Law Judge William Schmidt for designation of an administrative law judge for the limited purpose of determining whether the Respondent's failure to transfer Charging Party Echevarria from the position of security officer to the position of police officer violated Section 8(a)(1) of the National Labor Relations Act. On March 12, 1998, Administrative Law Judge Mary Miller Cracraft issued the attached supplemental decision. The General Counsel filed limited exceptions and a supporting brief. The Respondent filed a brief in opposition to the General Counsel's limited exceptions.<sup>1</sup>

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

The National Labor Relations Board has considered the initial decision, the supplemental decision, and the record in light of all of the exceptions and briefs and has decided to affirm the judges' rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order set forth in the Supplemental Decision.<sup>3</sup>

We adopt, as noted above, Judge Heilbrun's conclusion that the Respondent did not violate Section 8(a)(1) by terminating security officer Echevarria on September 7, 1995.<sup>4</sup> This issue turns on employer motivation. The test to be used is set forth in *Wright Line*.<sup>5</sup> Under *Wright*

*Line*, the General Counsel is required to make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the "same action would have taken place even in the absence of the protected conduct."

I. FACTS

To briefly place this issue in context, we note that security officer Echevarria had anticipated being promoted to a law enforcement position. On April 25, 1995, as a result of not receiving the promotion, Echevarria told one of the Respondent's supervisors, Captain Pope, that he would not continue working as a security officer. When Pope asked if this was an ultimatum, Echevarria answered that he was giving a list of his priorities and that he would choose working as a police officer at the Respondent as his first priority. However, he stated that he would choose working as a police officer at Evergreen Valley College, his other part-time employment, over working as a security officer for Respondent. Echevarria added that he would work in security at the Respondent if he had no other work and needed the money. Echevarria ceased being scheduled for work on or about April 25. As discussed more fully in Judge Heilbrun's decision, the Respondent did not attempt to schedule Echevarria to work again until August. After Echevarria's appearance at the August 1 unemployment hearing on the behalf of former employee Gutierrez, the Respondent again began offering work assignments to Echevarria. The Respondent also began keeping a log of these offers. After Echevarria declined a number of Respondent's August offers of work and further announced his intention to take off the entire month of September as personal vacation, Respondent on September 7 discharged Echevarria.

II. ANALYSIS

We assume arguendo that the General Counsel presented sufficient evidence to support an inference that a reason for Echevarria's discharge was his protected concerted activity (i.e., his participation in Gutierrez' unemployment hearing). However, we find that Respondent met its burden of demonstrating that the termination would have taken place even in the absence of such activity. Thus, the Respondent established that it terminated Echevarria because his unavailability for work in August and September was causing difficulties for Respondent. These difficulties included maintaining a full complement for security coverage and incurring excessive overtime costs.

Our dissenting colleague concludes that the Respondent has not met its *Wright Line* burden. She concludes that Respondent's offers of work to Echevarria were part of Respondent's effort to establish a basis to rid itself of Echevarria. We disagree. The Respondent had a need to

<sup>1</sup> The Respondent filed no exceptions to the finding that its failure to transfer Echevarria violated Sec. 8(a)(1).

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

<sup>3</sup> The General Counsel moved to amend the complaint to allege that the Respondent's failure to offer Echevarria part-time work from mid-May 1995 through the summer of 1995 violated Sec. 8(a)(1). The motion is denied as untimely. The General Counsel did not raise this issue until it filed its brief in support of exceptions to the original judge's decision.

<sup>4</sup> All dates here are in 1995 unless otherwise stated.

<sup>5</sup> 251 NLRB 1083 (1989), enf. 662 F.2d 899 (1st Cir. 1982), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 393-403 (1983).

fill a position, and it made offers to Echevarria to fill it. Contrary to our colleague, we do not find that Respondent's offers were other than bona fide offers of work. The Respondent had a legitimate interest in, and was privileged to ascertain, whether Echevarria was truly interested in continuing to work for Respondent.

As our dissenting colleague notes, Respondent's offers of work began shortly after Echevarria's appearance at former employee Gutierrez' unemployment hearing. The Respondent also began keeping a log of these offers. However, this does not establish that the Respondent's work offers were part of any scheme to get rid of Echevarria.

The Respondent offered Echevarria several security officer assignments in August. Echevarria turned down every assignment offered to him. We recognize that most of these offers of assignments were on short notice. However, as Personnel Specialist Smith explained to Echevarria, the short notices were due to the fact that security officers were being terminated or were resigning, and thus Smith could not give more notice to Echevarria. Further, Echevarria was unavailable for security assignments even when the offer of an assignment was not on short notice.

The log shows that Smith called August 23 and offered Echevarria employment for the day shift on August 28, 29, and 30. Echevarria turned down all of those assignments. Also on August 23, Smith offered Echevarria employment on the "grave" shift for September 3, 10, and 17. The log shows that Echevarria was "unable to work." Smith testified that he did not recall that Echevarria gave him any reason why he could not work on those dates. Thus, not all of the offers that Echevarria received were on short notice. The August 23 offer of work for September 3 was given with 11 days' notice and the offers of August 23 for work on September 10 and 17 exceeded Echevarria's request for 2 weeks' notice.

Echevarria admitted that during one of the phone conversations with Smith he asked whether the assignment was as a security officer or a law enforcement officer. Learning that it was as a security officer, Echevarria replied that he was working at Evergreen. Thus, it was the nature of the job being offered, not the length of advance notice, that was of concern to Echevarria. Finally, when Smith called Echevarria on September 1, with offers of assignments for September 3, 4, and 5, Echevarria stated that he was taking vacation during the entire month of September.

The September vacation was the last straw for the Respondent. Echevarria had turned down every assignment offered for a month. These assignments had been for various shifts and with various amounts of notice. The Respondent had explained to him why some of these offers were on short notice. Then, he abruptly told the Respondent on September 1—after an offer of several

assignments had been made—that not only would he not accept any of those assignments, but that he would not be available for the entire month because he was taking vacation. At that juncture, the Respondent had every reason to conclude that Echevarria was unlikely to accept any security assignment. Ultimately, Judge Heilbrun found credible Smith's testimony that Respondent, at times material, was having problems maintaining a full complement of staff at Moffett Field. Judge Heilbrun further found "understandable" and credible Project Manager Copeland's testimony that he decided to terminate Echevarria because his unavailability for work was contributing to Respondent's difficulties in maintaining a full complement for security coverage and in incurring excessive overtime costs.<sup>6</sup>

Thus, we agree with Judge Heilbrun's conclusion that the Respondent did not violate Section 8(a)(1) by terminating Echevarria. We find that Echevarria would have been terminated even in the absence of his protected concerted activity because he refused to accept legitimate security officer assignments.<sup>7</sup>

#### ORDER

The National Labor Relations Board adopts the recommended Order of Administrative Law Judge Cracraft as set forth in the supplemental decision and orders that the Respondent, Security U.S.A., Mountain View, California, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

MEMBER FOX, dissenting in part.

Contrary to the judge and my colleagues, I would find that the Respondent's termination of Javier Echevarria violated Section 8(a)(1) of the Act, on the grounds that the evidence shows that it was motivated by Echevarria's protected activity of assisting fellow employee Gutierrez at the hearing in which Gutierrez, opposed by the Respondent, sought unemployment compensation.

The judge implicitly credited testimony that the Respondent's agent, Richard Min said (in the judge's paraphrase) that "Echevarria's role was like stabbing him in the back, because it betrayed their agreement not to have meddling in work-related affairs of others." The judge also found that it was only after Echevarria appeared at the August 1 unemployment compensation hearing that

<sup>6</sup> Judge Heilbrun also found that Copeland did not know of Echevarria's long, post-April absence until late summer 1995.

<sup>7</sup> We recognize that Judge Cracraft concluded that the Respondent had earlier unlawfully denied Echevarria's request to be transferred from the position of security officer to a position as law enforcement officer. As noted, there are no exceptions to that conclusion. However, the General Counsel does not argue that Echevarria's refusals to take security officer assignments were justified by reason of the antecedent unlawful failure to transfer Echevarria to a position as law enforcement officer.

We also note, as did Judge Cracraft, that the General Counsel, on brief, abandoned the theory that Echevarria was constructively discharged on April 25, 1995, due to the Respondent's unlawful failure to transfer him to a law enforcement position.

the Respondent began offering Echevarria work and keeping a log of Echevarria's responses. The log-keeping was begun, the judge found, "because Echevarria had just drawn attention to himself by leading off the [unemployment compensation] proceeding on Gutierrez' claim." There is no evidence that the Respondent kept similar logs of its offers to other employees.

Recorded in the log were a series of short notice offers of work to Echevarria, which Echevarria declined. As Echevarria explained, without contradiction, he needed 2 weeks' advance notice in order to schedule other part-time work, and had so informed the Respondent. Contrary to the judge's statement that these "notification procedures" were "much the same as those used over [Echevarria's] first eight months as a part-time employee," the testimony of the Respondent's own witness was that assignment schedules were normally made out several weeks in advance, and only last minute vacancies (such as those occurring when employees called in sick) were filled on short notice. Thus, Echevarria's failure to accept assignments during August, which was relied on for his termination, was a product of the Respondent's own actions in calling Echevarria frequently with offers of employment on short notice. The Respondent offered no business reasons why it would suddenly start making such offers to him in August, after making no offers to him in the immediately preceding months.

On the basis of the foregoing evidence, I would find that the General Counsel established that the Respondent was determined to fire Echevarria in retaliation for his acting in concert with fellow employees over employment disputes, and that it employed the frequent offer of short-term jobs and careful logging of his responses turning down the offers to accomplish this. On the basis of the same evidence, I would find that the Respondent failed to show that it would have terminated Echevarria absent his protected activities.

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*Michael J. Reiser, Esq. (Rankin, Sproat & Pollack)*, of Oakland, California, for the Respondent.

*William Sokol, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld)*, of Oakland, California, for the Charging Party (or Parties).

## DECISION

### STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was tried in Oakland, California, on April 16 and 17, 1996. The charges were filed by David K. Gutierrez and Javier Echevarria on July 25, 1995, and October 3, 1995, respectively, and a consolidated complaint was issued February 29, 1996. The primary issues are whether Security U.S.A. (the Respondent), caused the constructive termination of an employee by failing and refusing to transfer him to a preferred job position, or, alternatively, later involuntarily terminated that same person, in either event in violation of Section 8(a)(1) of the National Labor Relations Act.

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

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent, a California corporation, with an office and place of business at the Moffett Field - NASA Ames Research Center, Mountain View, California, engages in providing security and law enforcement services at this facility valued annually in excess of \$50,000 directly to the United States Government. On these admitted facts I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Further, I find that the Respondent's described operations exert a substantial impact on the national defense. See *Southfork Systems*, 313 NLRB 274 (1993).

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. Summary

The Respondent assumed security responsibility at Moffett Field in May 1994, and related law enforcement responsibility in July 1994, under a Federal Service Contract Act award, as the U. S. Navy phased out its prior functions at that facility. The Respondent's central office in Oakland, California, established a senior company representative at the site to manage operational, budget, and employment matters. Subordinate administrators, security personnel, law enforcement officers, and supportive persons were promptly hired as a full scope of all contracted responsibilities was reached during the summer of 1994. Eventually a total complement of about 100 personnel became employed.

Uniformed security officers and differently uniformed law enforcement officers were both subject to a security clearance by the Defense Investigative Service, and their hire was also conditioned on the results, when ultimately available, of a psychological examination. Additionally both categories of personnel were subject to the Respondent's own background investigation done in particular reference to former employers; an investigation less detailed for security officers than for law enforcement officers. Persons of the latter classification were typically checked by face-to-face interview of references and former employers. Another employment requirement for both security officers and law enforcement officers was, and remains, the completion of a Federal Arrest Authority (FAA) course, as administered locally over several days by Kennedy Space Center (KSC), Florida instructors of NASA. The necessary carrying of firearms by such personnel while in the performance of official duties made such course completion a mandatory requirement.

The case, as consolidated, originates in a collaboration between the Charging Parties while preparing an incident report that involved the confrontation and forceful subdual of a youthful male citizen at the Moffett Field premises. This collaboration is asserted to be a motivating reason why in April 1995 the Respondent ultimately and unlawfully declined to convert the employment of the Charging Party Echevarria from a security officer to the preferred and higher paid position of law enforcement officer. While the conversion did not occur, Echevarria remained in the part-time, on-call status into which he had been originally hired during the summer of 1994. However he did not actively work on his job during the entire late spring and summer 1995. The Respondent eventually then terminated him in early September 1995 for becoming unac-

ceptably unavailable even for part-time, on-call work as a security officer.

The General Counsel contends that by the Respondent not advancing or “promoting” Echevarria to be a police officer, it unlawfully caused his constructive discharge from the undesired capacity of security officer. Further, the General Counsel contends that the true motivating reason for Echevarria’s eventual formal involuntary termination was because he had represented Charging Party Gutierrez about a month earlier, when the latter pressed a formal claim for unemployment compensation benefits. The consolidated complaint also alleges that by an acknowledging verbalism of its agent in mid-1995, plus unlawful interrogations of certain employees, the Respondent committed independent violations of Section 8(a)(1) of the Act. The Respondent denies the commission of any unfair labor practices.<sup>1</sup>

### *B. Principal Issues*

#### 1. Alternative theory no. 1 (constructive discharge)

Did the Respondent decline to “promote” Echevarria from a security officer position to a law enforcement (police) officer position in April, and by such conduct unlawfully cause his constructive discharge?

#### 2. Alternative theory no. 2 (termination)

Did Respondent unlawfully terminate the employment of Echevarria in September; the unlawfulness being, as also with the earlier constructive discharge, because he had engaged in protected concerted activities?

### *C. Persons Involved*

Dave Gutierrez was employed by Respondent as a law enforcement officer in excess of 6 months, until his termination by written notice dated March 14 having short retroactive effect. His subsequent unfair labor practice charge as Case 32–CA–14873 relative to this termination was partially dismissed as to the chief 8(a)(3) allegation, but two independent violations of Section 8(a)(1) were found by the Regional Office to have merit and eventually incorporated into the consolidated complaint.

Echevarria was hired by the Respondent in August 1994 with a background that included some higher education, criminal justice training, a specified police academy certificate, and experience gained from various jobs as (1) a police officer at Santa Clara County Transit Authority (SCCTA), City of San Juan Bautista, and school districts, (2) a security guard at Eastridge mall and elsewhere, (3) a security instructor/counselor and director, and (4) a law office investigator.

Project Manager J. B. (Bob) Copeland is the Respondent’s senior site representative. He commands five branches that exist to fulfill the Respondent’s Moffett Field contract with NASA. Copeland originally briefly headed one of these, the Facility Security & Law Enforcement (FSLE) branch, as his first Moffett Field assignment.

Richard C. Min has been the chief of police, or head of the FSLE branch, since approximately May 1994. His prior experience in security and law enforcement work includes 10 years in property and security administration at Eastridge Mall, and 14 years in the Santa Clara County Sheriff’s Office. Min has been personally acquainted with Echevarria from the years

when each were employed at Eastridge, and from later continuing encounters in security contexts at the shopping center.

The chain of command under Min has quasi-military characteristics typical of a uniformed security and police organization. Captains James L. Hildebrand, James Pope, and Robert A. Grant are chiefs of investigation, operations and administration, respectively. Pope supervises four lieutenants who serve as shift “watch commanders” for round-the-clock security and law enforcement coverage under the Respondent’s obligations at Moffett Field.

These lieutenants are John Vargas, Sid Johnson, Richard Elliott, and William Horn. All persons of the captain and lieutenant rank are admitted supervisors of the Respondent within the meaning of Section 2(11) of the Act, and for that reason its agents within the meaning of Section 2(13).

For case purposes Vargas has unusual significance among these persons. He is a former colleague of Echevarria at SCCTA, where they were each officials of a professional organization for police. Prior to this time of approximately 1989–1990 when both Vargas and Echevarria were with the same employer, they had a further acquaintanceship from the years Vargas was first at SCCTA and Echevarria at Eastridge. This combination of public transit and a shopping mall provided interaction between security personnel of the two organizations.

### *D. Evidence*

#### 1. Constructive discharge issue

Vargas had been hired as a lieutenant in April 1994. Soon after this he relayed information to Min that Echevarria was interested in working at the Respondent. Min seemed receptive to this, and contemporaneously Echevarria telephoned him to solicit work there. This led to a long personal discussion at an outside loading dock of the site between Min and Echevarria around early July 1994.

During this conversation Echevarria volunteered that a former supervisor at SCCTA, named Gene Simmons, might not express a favorable reference toward him because of intervening as president of the professional association there. Echevarria testified that Min then said he did not want the applicant to start, or participate in, a union at Moffett Field or bring any “Cesar Chavez bull shit” to the facility. Moffett Field is within the Santa Clara County boundaries. Min denied having any recollection of making such statements. Echevarria testified further that Min termed him overqualified for the part-time security officer position, which was then the only one open. However, Min assured Echevarria that he could likely advance to the more professionally responsible law enforcement officer position when one came up. Min denied making this promise.

Echevarria’s active employment began with a familiarizing 1 day “ride-along” around the Moffett Field premises. He then immediately began the FAA course in early August 1994. However, early in the span of it he was forced to miss at least 1-full day because of a personal emergency. At the end Echevarria was denied a course completion certificate because he had missed part of it. The consequence thereafter for whenever he was scheduled to work was to post him only to building 227. This was an internal location and the only security station at Moffett Field where the officer need not be armed. Echevarria finished out 1994 in this manner, and on a subject to be revisited in the recitation of facts was commended in writing for providing extra assistance to a private contractor’s official also stationed at building 227 named Mark Warzyniak. The

<sup>1</sup> All dates and named months hereafter are in 1995, unless otherwise indicated.

letter of commendation was forwarded to Echevarria as a congratulatory memorandum from Lt. Johnson dated December 15, 1994.

After settling into what became a continuing, 7-month long post assignment to building 227, Echevarria's manner of learning his scheduled days of work was usually twofold. It could be arranged by telephone, either as a call made to him in notification of when needed, or as information when he himself telephoned in to inquire. Echevarria testified that a further way was when he actually appeared at Respondent's briefing room to check the FSLE work schedule.

*a. January 1995 incident*

On January 24, 1995, apparently in the afternoon, Gutierrez stopped a youth as he walked outbound from the facility's main gate. The confrontation escalated from anger to a physical altercation, during which Gutierrez placed a choke-hold on the young man who was then thrown down and handcuffed. Elliott, the incoming night-shift lieutenant, was given a verbal description of events, and arrangements followed from this for Gutierrez to prepare an incident report with assistance from Echevarria. At 6 a.m. the following morning Gutierrez presented his completed written report to Elliott. After reading it Elliott spoke of problems, such as attempted legal justification for "the stop and detention" and omission of specifics on the subdual. Gutierrez nevertheless submitted it for higher review as written.

Gutierrez testified that his incident report was done on a standard police form. He termed the assistance received from Echevarria as quite common, with an experienced officer being able to contribute toward quality and professionalism of the report. For Echevarria's part he had mainly advised on a specific vehicle code section in California law applicable to pedestrians, plus that Gutierrez should accurately and in chronological order insert the important facts in this undertaking.

*b. Aftermath of January 1995 incident*

Hildebrand testified that he began an internal affairs investigation of the January 24 incident the following day. It was initially prompted by an immediate telephone complaint from the young male's mother, which advanced that possible excessive force or improper conduct was present in the acts of Gutierrez. However verbal reports from other officers at the scene, coupled with the reservations initially held by Elliott, caused preparation of the incident report itself to become an issue during this internal affairs investigation. Eventually on March 9 Hildebrand produced a 35-page investigation report, one that contained the conclusions causing the Respondent to terminate Gutierrez from employment.

Such collateral issue about Gutierrez' incident report itself drew Echevarria into the internal affairs investigation. Part of this investigation report is a summary of interviews with Echevarria by Hildebrand on February 2 and 3, done personally and by telephone, respectively. In the first of these, the manner of locating certain penal and vehicle code sections for apparent applicability to Gutierrez' incident report was discussed. Hildebrand recorded Echevarria saying that he would not condone or participate in any falsification of a police report. In the later telephone interview Hildebrand questioned Echevarria about an audio recording of the incident, a prospect along with other circumstances about which Echevarria had no knowledge until well subsequent to the episode. Hildebrand documented his final belief as being that Echevarria's explanation of events

flowing from the January 24 incident seemed "truthful and credible."

Echevarria recalled this phase of things as involving three separate contacts with Hildebrand. In the early stages Echevarria parried Hildebrand's probing questions, and by his answers tended to exonerate Gutierrez. Later Hildebrand intimated that Echevarria knew Gutierrez had a recording of the incident, and he should concede this if it was true or else it was going "to affect" him. However in a final conversation with Hildebrand after Gutierrez' discharge, this captain congratulated Echevarria on his integrity and conduct during the internal affairs investigation after which the two of them socialized.

*c. Other background evidence*

Echevarria testified to a three-way conversation that ensued in July 1994 when he and Min walked to Vargas' desk after the verbal hire as a part-time security officer with promised later advancement. According to Echevarria, Min delegated hiring details to Vargas for follow through, and then said to both of them that he had solicited an assurance from Echevarria that he would not start a union at this workplace.

Vargas testified to certain discussion between himself and Min about the time Echevarria was being hired in July 1994. In the first of these, Min stated he would hire Echevarria as a part-time security officer and move him up to law enforcement officer with the next opening. However, Min also mentioned at the time to Vargas that Echevarria would not be able to do "any of this union stuff out there." Min was not questioned directly about any of this testimony from Vargas.

During the final few months of 1994 Echevarria spoke frequently to Min, Pope, Vargas, other lieutenants, and police officers about stagnating in the security officer position. He was especially aggravated because of a belief that another person had been hired after him as a security officer, but with time to take and complete the FAA course in August 1994. This individual was believed to have been then promoted to a law enforcement officer, thus filling a job anticipated by Echevarria. His dilemma was also compounded by uncertainty and delays in the scheduling of another FAA course as the new year of 1995 approached.

In continuing persistence as seeker to become a police officer with the Respondent, Echevarria testified to conversing again on January 6 with Min. This led to Min's assurance that Grant would see to ordering of the distinctively dark blue uniforms worn by law enforcement personnel. Echevarria, corroborated by Gutierrez, also testified that this assurance led to an episode with both present, where Grant instructed Personnel Specialist Darin Smith to initiate an anticipatory order. Both witnesses also recalled Smith querying whether this should be only for the shirt or the entire uniform as ostensibly meant by Grant fulfilling Min's directive. On a separate occasion shortly after this, Gutierrez overheard Grant's end of a telephone conversation in which this lieutenant inquired if Echevarria's uniform had arrived. Min, Grant and Smith all deny that any steps toward obtaining "dark blues" for Echevarria had been either discussed or attempted.

In a side development during Hildebrand's 6-week long internal affairs investigation of Gutierrez, it became known that the Respondent intended to hire for a position titled "investigator." Echevarria testified that Hildebrand offered to recommend him for this position, and he was later told by Pope of his selection. However filling of the position was abruptly canceled in February, leading Echevarria to inquire of Min about

what was happening. Min's response was assertedly that Echevarria had "pissed some people off at Moffett Field police department." Min had no recollection of making such a statement.

Echevarria's continuing assignment to building 227 in early 1995 resulted in one notable incident. As known from sketchily presented facts, Echevarria had angered Warzyniak in late March, in consequence of which Warzyniak prohibited Echevarria, as he had the power to do, from continuing to work at that location. Now down to no locations where an unarmed Echevarria could be legitimately assigned, he was for several weeks, as Min termed it, hidden in "the back 40" until a resolution could be reached.

#### *d. April 1995 developments and aftermath*

That resolution was soon presented when the next, long-awaited FAA course was scheduled for April. Echevarria took the course (or only the portion he had missed in August 1994) as given on or about April 15, and passed the FAA course test. In the process of doing so he learned that three newly hired law enforcement officers were among the test-takers, one of them a part-time person. When next soon scheduled to work after passing the FAA course, Echevarria appeared and initially asked Vargas about a police uniform. Vargas inquired about this of Pope, and relayed Pope's answer to Echevarria that he was still to work as a security officer although now an armed one. He did so on April 24 as his next to the last day of active employment ever with the Respondent.

The following day Echevarria's assignment was made at the firing range for weapon qualification. After doing so, and while still in an upset mood from Respondent's ongoing failure and refusal to convert him to a police officer, Echevarria testified to speaking successively with Pope (via Vargas) and Min about the situation. Pope's response was unchanged from the day before, while Echevarria recalled that during discussion with Min, the chief explained how his role in assisting Gutierrez affected the job situation. Min's claimed elaboration about this was that it "angered the administration at Moffett," and "it was going to be a while before [he] got the law enforcement position." Min was not questioned about any such conversation on April 25.

After this brief and unsatisfactory session with Min, Echevarria again angrily sought out Pope to protest the Respondent's apparent retaliation against him, and to tell Pope that he would not continue working as a security guard because his original job intention was to be a Moffett Field police officer. Pope asked if this was an ultimatum, which Echevarria answered by saying that he was giving his "list of my priorities" as among "the other part-time employments that I have." Echevarria then referred to Evergreen Valley College (EVC) in San Jose, his continuous part-time employer since August 1, 1994. He told Pope that if EVC offered to make him as a full-time police officer, he would take that over any disappointing continuation as a security officer with the Respondent. Echevarria said he would choose working as a police officer at EVC over a security officer for the Respondent even though both jobs paid the same. Echevarria added that he would be reconciled to keep working merely in security at Moffett Field only if no other work was available and he needed the money. Pope assertedly simply replied "okay" to all this. Pope's own version of the conversation was of remarks by Echevarria "something in the effect" of not wanting to remain as a security

officer, and if he could not become a police officer for Respondent he "probably wouldn't continue there."

Echevarria testified that immediately after this point in time he got permission from the Respondent to attend the Gavilan College (Gilroy, California) program in instructional development, and the Gavilan College program in background investigation. He recalled initially asking the Respondent to pay the cost of this training, plus any missed wages while taking the course. The Respondent declined both requests. Echevarria termed his situation for the period around the end of April into mid-May as that he "had to pay for the course myself and take time off in order to attend these courses." Echevarria was awarded certificates of course completion from Gavilan College on May 5 and May 11, respectively. His summarizing testimony about this approximately 2 week-span was, "I got approved for the time off."

Following this he resumed an interest in active part-time work by telephoning and personal visits to Moffett Field. His usual contact there was a watch commander or scheduler Smith. Echevarria soon realized that the entry "TBD" was regularly appearing after his name on the schedules, and upon inquiry to Elliott was told this meant "to be determined." He testified to making a specifically remembered call to Smith in June, and being told to be patient about when an assignment would materialize. The summer unfolded, however, without any further work assignment from the Respondent.

Echevarria also testified to a conversation with Min in July, arising because of his request to borrow a radar gun for proficiency practice during his police job at EVC. Min declined the request, and Echevarria followed up with a typical question about whether a law enforcement officer position was materializing at Respondent. Min said there were no such vacancies, but he also inquired why Echevarria had not been to work. That question "completely floored" Echevarria, because in his view this was the case because the Respondent had not called him to work for over 2 months by then.

#### *e. Contentions*

The General Counsel contends that Echevarria engaged in activity that was both protected and concerted when he aided Gutierrez in preparing the January 24 incident report. The basis of this contention is that Gutierrez was, from the outset, vulnerable to corrective or punitive action by his employer because of his own actions during the incident, and his report concerning it would also, therefore, affect his own terms and conditions of employment. From this, coupled with evidence of Min's original admonition to Echevarria and the Respondent's stern appraisal of Gutierrez sufficient to cause it to discharge him, the General Counsel argues that the Respondent never forgave Echevarria for helping Gutierrez and continued punishing him as well. This basic contention addressing alternative theory no. 1 concedes that while Echevarria might have verbally quit from a willingness to accept security officer assignments after April 25, this was truly a reflection of his mounting frustration over promotional promises broken and unlawful verbalisms spoken directly against his lawful conduct and persistent pressing for occupational advancement to highly prized police work. On this reasoning the General Counsel contends that the Respondent could reasonably foresee that Echevarria would quit in frustration, but reality of the situation is its own creation of his

constructive discharge from the part-time security officer position.<sup>2</sup>

The Respondent contends first that Echevarria's limited role in preparation of the Gutierrez incident report was akin to a daily work routine and not, as a matter of law, protected concerted activity under the Act. Further, the Respondent argues that by function, organizational structure and necessary qualifications, a security officer is not potentially promotable to police officer, in addition to the fact that Echevarria had never formally applied in writing for the position of law enforcement officer. Here Respondent points out that his original job application was to the non-existent title of "federal police officer." The Respondent also contends that had any concealed motivation to ease Echevarria out of its work force existed, ample opportunity had long been present from his inability to be armed while on duty and circumstances of the Warznyiak complaint. Finally, the Respondent points to the fact that Echevarria had formally never resigned from his position as security officer, thus negating any basis from which to find a constructive discharge from employment.

*f. Credibility*

I have little assurance that Gutierrez was a reliable witness from observation of him. He was peculiarly careless about the chronology of his own unemployment compensation proceedings. He also presented with rigid and seemingly programmed assertions, such that I discredit his only significant testimony to the effect that the Respondent had set in motion the ordering of a police uniform for Echevarria.

Vargas was plainly aligned in friendship with Echevarria, in ways that outweighed his supervisory status with the Respondent. I believe he attempted to be truthful, but that in given instances he simply supported Echevarria as a personal choice between competing interests. I only specifically discredit Vargas where he, too, testified that Min, Grant, and Smith were singly and collectively intending to have police "dark blues" waiting for Echevarria's use.

Echevarria is, of course, the central and key witness in the proceeding. I have definite reservations about major portions of his testimony. On pure demeanor grounds he was excessively effusive, and too often appeared to grope for convenient responses. His version of why and how a police job was so obsessively desired did little to create much confidence in Echevarria's ability to avoid faulty thinking. For example, he claimed the person eventually identified as David Moranz had usurped the law enforcement job otherwise hopefully available (his "window of opportunity") to him in 1994. Yet for the entire balance of that year it is known, and he surely did know, that by not successfully passing the August 1994 FAA course he could not be armed at Moffett Field and thus not a police officer there. This creates much doubt about his grasp of basic reality, as when he incessantly hounded many people among whom he worked ("almost everybody in the department . . . a lot of people") about the subject. Echevarria also cast his belief in assuredly soon achieving a law enforcement position in terms of promises that he "not to worry", a testimonial phrase shown like an incantation nine times in the transcript. It is also troubling that Echevarria limited a response about speaking to

management on April 25 to Pope alone, but after an off the record recess when his attention was again called to that point he suddenly added Min as a person spoken with and even attributed a remark to him that tended to show retaliatory motive. This larding of testimony with perceptions, characterizations, faintly-concealed obsessiveness, and occasional seeming convenience in replying to a question causes me to doubt the fullness of his veracity. I do, however, credit particular portions of Echevarria's testimony, most prominently as to damaging remarks uttered by Min other than on April 25 itself.

As to the Respondent's witnesses, most are dealt with as specific credibility evaluations in my discussion that follows. I make comment here only as to Min, Grant, and Smith. Min was the least impressive witness of the case, a person whose demeanor while testifying seemed more dreamlike or theatrical than having a serious intent at recalling the truth. His several denials of uttering cautionary or threatening remarks toward Echevarria about activism were totally unconvincing. I discredit Min in large part, and except only where noted otherwise. Conversely, Grant displayed a sincere-seeming and earnest demeanor that persuades me to credit him as to the important collateral question of whether Respondent anticipatorily ordered a police uniform for Echevarria. This same sense of witness truthfulness applies to Smith, who also credibly denied any knowledge of a police uniform requisition being authorized for Echevarria. However, I believe Smith was less than candid in claiming to have attempted telephone contact to Echevarria for work assignments during the early summer months of 1995. This shall be treated in more detail during separate discussion of Echevarria's final termination, which the General Counsel has labeled alternative theory no. 2.

*g. Discussion*

I am first satisfied that Echevarria's assistance in preparation of Gutierrez' incident report during the early morning hours of January 25 was protected concerted conduct under the Act. It is known that Elliott, the incoming night watch commander for evening January 24 into morning January 25, was both alarmed and skeptical as to Gutierrez' actions in the altercation. As later described in a memorandum dated February 9 to Hildebrand, Elliott intimated that his first verbal advice from Gutierrez himself displayed intolerant stereotyping of the person confronted and overaggressiveness in his physically forceful response. During the 4 hours overtime that Elliott assigned to Gutierrez, continuing him from his afternoon shift into 6 a.m. on January 25, the incident report was created with assistance from Echevarria.

As then turned in to Elliott at 6 a.m., it appeared to this lieutenant that a strained description of the incident had emerged, complete with supposedly mitigating references to California statutes, including (1) Penal Code section 69 concerning obstruction or resistance toward "executive" (including police) officers in performance of their duties, (2) Vehicle Code section 3300 as to a pedestrian's obligations of care when walking along a roadway, and (3) Government Code section 21956 titled "Public Safety Officers Procedural Bill of Rights." Gutierrez had already had his probation extended twice because of overly aggressive conduct while at work, and Elliott's abiding sense of things was that Gutierrez was willing to slant his report as submitted after several hours spent with Echevarria composing it. I do not, therefore, consider their joint effort to be a routine matter, but instead that it could be (and was) influential in whether Gutierrez might face disciplinary action. This

<sup>2</sup> The General Counsel's unopposed posttrial motion to amend the dates of the Respondent's alleged (1) refusal to transfer Echevarria to a police officer position, and (2) subsequent termination of his employment as a security officer to April 10 and 25, respectively, is granted.

circumstance persuades me that the Act's requirement of protected concerted activities relating to terms and conditions of employment, either actual or potential, has been met. See *Mediplex of Wethersfield*, 320 NLRB 510, 512-513 (1995); *Cleanpower, Inc.*, 316 NLRB 496, 497-498 (1995).

The Board's basic case authority for constructive discharge issues is *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976). In that case two elements are defined as what must be proven relative to such an issue. These are:

First, the burdens imposed on the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities. *Id.* at 1069.

These elements continue to be the test, as exemplified in *Lively Electric, Inc.*, 316 NLRB 471 (1995), where the "so difficult or unpleasant" factor was re-emphasized, and that a forced resignation had occurred because of an employee's "union or other protected activities." (Emphasis added.)

The Board requires analysis of employer motivation in discharge cases under its doctrine in *Wright Line*<sup>3</sup> This requirement includes constructive discharge, although the *Wright Line* doctrine applies there only to the second Crystal Princeton element. *Davis Electric Wallingford Corp.*, 318 NLRB 375 (1995). *Wright Line* calls for the General Counsel to generate a prima facie case sufficient to support inferring that an employee's protected conduct was a motivating factor toward the discharge. Should this showing be made the burden of proof shifts to an employer to demonstrate that the same adverse action would have taken place even absent the protected conduct involved.

This case presents an unusual situation in that Echevarria did not resign from, quit or abandon his security officer position during April in any realistic sense. Neither did Respondent prohibit him from so working, remove him as a counted part-time employee, or announce that he was through at Moffett Field. Instead a limbo-like status resulted from the Echevarria-Pope conversation on April 25, with the supervisory captain of operations uncertain of the employee's intentions, and Echevarria openly voicing a mixed message of not planning to continue on assignment as a security officer, but hedging this with the qualification that he might do so if personal financial pressures forced it.

The very allegation of the Respondent having caused a constructive discharge is actually undercut by Echevarria's desire to undertake, as he did to completion, the Gavilan College courses of early May. However he had become a seasoned and regular part-time security officer by spring 1995, so regardless of how perplexing his remarks to Pope might have been, I believe the onus of testing Echevarria's intentions fell on Respondent. Some specific duty assignment should have been offered him before the end of May to clarify the situation. Smith backslid from his unassured testimony of having made scheduling-type telephone calls to Echevarria before the end of May, and I find that it was not done. I do note the parties' stipulation that Vargas telephoned by Echevarria on "several instances . . . from May through August" to report about any scheduled work. However Vargas was not the scheduler for part-timers, and there is no certainty that he communicated meaningfully with

Smith about Echevarria's employment status around the time such calls began. Therefore the interruption to Echevarria's utilization 2 or 3 days in most weeks for a continuous 8-month period was more at the Respondent's behest rather than the employee.

The element of "difficult or unpleasant" conditions being imposed on a person is simply not present in this branch of the consolidated case. What I see instead is that Echevarria had elevated his expectations to a level that fueled an overblown dismay about not being changed to a police officer position. I discount several superficialities that have been erected about the situation by all parties. The first of these is the Respondent's contention that Echevarria did not title his application, nor any written reapplication, properly. The phrase "federal police officer" that was on his original job application in 1994 is notice enough of what Echevarria sought, and coupled with a nagging drumfire of dissatisfaction left the Respondent amply informed about his occupational aspirations. Raising this technicality does not serve the Respondent well, when it is noted how its own application for employment form asks those submitting one to confirm their capabilities for duties of an "attached" job description. Echevarria's employment application in evidence here has no such attachment, and although it was admitted as one of the General Counsel's exhibits the Respondent thereafter made no effort to supply the missing item. Secondly, Respondent's claim that Echevarria was not even qualified for police work is unconvincing. By experience, training and police academy completion he was adequately grounded for such an occupation by normal standards. Related to this is Copeland's testimony that his psychological evaluation was disqualifying. I reject this unsupported claim, considering it an afterthought injected only for purposes of this litigation and not worthy of evidentiary weight.

For the General Counsel's part I find no significance from Echevarria being denied FAA completion after missing only one portion of the course<sup>4</sup> The course was entirely managed by NASA personnel from KSC, and I do not accept the implication that Respondent should have somehow wrung an exception for Echevarria from these independent authorities. I disregard this feature of the case, even though it is shown that on a localized matter of contractual liberality the employer was once able to obtain a special waiver from NASA. This excused formal police academy graduation for Johnson, based on his 30 years in military security being considered the equivalent. Secondly, the General Counsel raised the implication of the Respondent's notable satisfaction with Echevarria's work as of December 1994, but did so with a vagueness that failed to connect with issues at hand. This was the commendation in terms of his relationship with independent contractor Warzyniak at building 227 where they each worked. The letter of commendation referred to gratitude for Echevarria's "extra effort . . . and other assistance" provided at that post, however this was a written expression of the otherwise unidentified Tim Gafney and not Warzyniak himself.

There was a special context to Echevarria's original hire that illuminated some events throughout this entire consolidated case. Foremost in this context is the Echevarria-Vargas relationship. It was expressly termed one of friends, and they had

<sup>3</sup> 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

<sup>4</sup> The FAA course overall was 88 hours of instruction, presumably meaning 11 full days for attendance, with a "non-legal portion" of 5 days where Echevarria's short absence occurred.

known each other for over 10 years. When working together at SCCTA both were principal officers of the professional police organization there.<sup>5</sup> This bond was more personal than official during their time of mutual employment with the Respondent. For example, it was Vargas who Echevarria kept advised of emergency circumstances when he missed the day of August 1994 FAA training.

When Echevarria eventually completed this training the following April, he happily confided in Vargas of his expectation in finally becoming a police officer. Vargas had also nominated Echevarria when Pope asked him for investigator position prospects, telling Pope that he endorsed his friend's background and intelligence.

A long acquaintanceship had also existed between Min and Echevarria. This manifested during the employment interview of early July 1994 between these two, which itself was prompted through the suggestion of Vargas. The episode was oddly relaxed for an employment interview, lasting as it did perhaps 2 hours while at an outdoor loading dock. Echevarria volunteered matters about his background, including an off-duty escapade in 1991 while employed as a police officer for the city of San Juan Bautista.<sup>6</sup> Min was unconcerned about the old incident associated with San Juan Bautista, and equally dismissive of what SCCTA official Simmons might think. For Min's part he claimed to be fond of Echevarria at the time from their past outstanding relationship, and welcomed his becoming an applicant.

With this narrowing of attention to salient facts, and considering interpersonal context, an insufficient basis exists for me to conclude that Echevarria faced conditions so difficult or unpleasant that he was forced to discontinue working from April onward. His principal state of mind toward the security officer job with Respondent was one of resentment. It is true that various assurances of advancement to higher paying police work had been voiced to him. However long before these unfulfilled assurances became a complete exasperation, Echevarria had become unrealistically agitated over being continued only as a security officer. The fact was that Moranz had been hired for a full-time police officer position in summer 1994. For Echevarria to testify that months afterward he was still complaining to most everybody in the department so they could "comfort me," shows that the root cause of his anger was largely self-induced.

The specific events of 1995 do little to affect my outlook. Evidence concerning his assistance to Gutierrez in preparation of the incident report is inconclusive. During Respondent's internal affairs investigation of the matter, Hildebrand attempted to bully Echevarria into conceding that he had helped conceal a tape recording of the altercation. A subsequent revelation showed that Echevarria had only belatedly discovered existence of such a tape, and Hildebrand's concluding written assessment on the subject was to characterize Echevarria as "truthful and credible."

Comparably I see no significance to the little that is known about Respondent's recruitment for an investigator in late winter 1995. This job is a type of police officer, and requires being armed while on duty. All that involved Echevarria was a few

loosely-voiced soothings about his consideration, which was intrinsically at odds with his lack of FAA certification. I realize that Echevarria testified to canceling out from other scheduled part-time work on the day he believed he might start as an investigator, however the premise for his expectation was not authoritative. Here Pope credibly denied making the claimed prediction that Echevarria would become an investigator within 3 days, and more notably Hildebrand credibly contradicted his claim that a personal certification to carry a concealed weapon was sufficient for him to come onto NASA jurisdiction while so armed. I find that the Respondent's agents were less than forthright with Echevarria on this matter, but attach no significance to the actual selection of Franz Kinkhorst for the added investigator job in terms of the pertinent constructive discharge issue.

Another view of the case is that in early 1995 Echevarria was not really bedeviled by Respondent, but in truth had a situation of considerable convenience. First in this regard is that he was, and had been since about August 1, 1994, comfortably also employed as a part-time police officer at EVC. This permitted not only that income, but the flexibility to play off one job against the other in terms of how to most beneficially achieve an earnings pattern. Associated to this was the advantage of Echevarria slotting in further professional training, as with the (1) radar operator course, (2) half day of chemical agent/O.C. spray instruction, and (3) spring semester college course for field training officer, done in January, February and March, 1995, respectively.

It is also plain that had the Respondent harbored any abiding intention to torment Echevarria out of his work with them, no better opportunity was presented than the late March Warzyniak incident. Whatever it was that precluded him from further work at building 227, this closed out the last post at which Echevarria could be legitimately assigned. The overall distribution of physical protection at the facility was one of armed law enforcement officers, at post, on patrol, and doing special assignments, augmented by an array of armed security officers akin, by Echevarria's own description, to nonskilled, private security officers. The requirement of near-universal use of armed personnel was subject to waiver at NASA's "special dispensation," and Vargas testified that at times the Respondent used an unarmed officer even at the main gate. Echevarria, too, recalled occasionally working the main gate for the first several weeks of his employment, until a complaint was made about his being there unarmed. He also testified that the place to which he was relocated after building 227 could not be used was the undescribed gate 17. The implication here is that the Respondent hedged on his assignment, perhaps because by then the April FAA test was near. In any event as a matter of employment dynamics, no better opportunity existed for the Respondent to release Echevarria completely even before the new FAA course had it wanted to.

This also brings into question the matter of hiring, firing and related authority within the FSLE branch. While Echevarria attributes the appearance of hiring authority, or some significant role in the process, to Min and lesser so to Vargas, the more persuasive evidence shows otherwise. All these individuals, as well as the captains on occasion, did talk about their authority in employment matters. However each of them, other than Vargas when describing the fluid "selection board" concept, denied having such authority. To the contrary Copeland credibly testified that it was his exclusively, and his words are

<sup>5</sup> This organization, termed "the union" in Echevarria's testimony, was the Santa Clara County Peace Officers Association. It does not engage in collective bargaining.

<sup>6</sup> This community is approximately 50 miles south from Moffett Field.

backed up by his letter dated July 20, 1994, offering the employment Echevarria soon accepted and commenced.

The countervailing evidence, and the General Counsel's chief medium to support the constructive discharge theory, is Min's hostile seeming words. I credit Echevarria's testimony that Min termed those in charge as pissed off because Echevarria helped Gutierrez, and that in a remark separated by over a month this had angered the administration of his employer. However coarse these words, they were spoken familiarly and with a ring of idle thought expressed casually to a long-known acquaintance. A comparable fact situation was present in the Board's recently decided *System One Corp.*, 322 NLRB 732 (1996). In that case a supervisor's friendly warning on the subject of unions was found not to have "played a part" in the subsequent discharge. I cannot infer that Min's verbalisms represented any operative action to discourage Echevarria from continuing to accept work, if and when offered, as a security officer.

What I see instead is Echevarria's financially-grounded aggravation, compounded by his strong sense of occupational esteem, that did not, as phrased in an analogous Board case, become "so unbearable that [the employee] was illegally forced to resign." See *Algreco Sportswear Co.*, 271 NLRB 499, 500-501 (1984); *Appalachian Machine & Rebuild Co.*, 317 NLRB 1343, 1349 (1995). I conclude from this that the first branch of Crystal Princeton is not present. My discussion also constitutes a *Wright Line* analysis, by holding first that the General Counsel has failed to mount a prima facie case of constructive discharge, and secondly that even if so viewed the Respondent would have followed its same course of disregarding Echevarria's ambiguous status well into summer 1995 even had he not undertaken the protected concerted aiding of Gutierrez. I shall thus propose to dismiss the General Counsel's alternative theory no. 1.

## 2. Termination issue

### a. Gutierrez' unemployment compensation proceeding

After Gutierrez' discharge in March he initiated an unemployment compensation proceeding with the California Department of Employment Development (EDD). The Respondent resisted granting of such benefits, and an original hearing on the claim in late June was rescheduled to August 1. On this date Gutierrez, Vargas, and Echevarria assembled at the unemployment insurance appeals board as supporters of the claim, while the Respondent was represented by Human Resource Manager Suzanne M. Rollinson and Business Operations Branch Manager Tara Accola. When the hearing opened before that administrative law judge, Gutierrez asked permission to be represented by Echevarria. This was granted and the hearing commenced until a point when Respondent asked to recess in order to obtain necessary rebutting witnesses. This resulted in a further postponement until August 29. Gutierrez then accepted legal advice not to press the small dollar claim involved, and he notified Echevarria it would not be necessary to appear again. The EDD hearing on August 29 was in the nature of a default proceeding, and after testimony on that date by only Min and Hildebrand the unemployment benefits claim of Gutierrez was denied.

### b. August and September events

Through the summer months of 1995 Echevarria had periodically made inconclusive telephone calls to the watch com-

manders about scheduling, and occasionally went to the facility in order that personnel could "still see my face." Then beginning immediately after August 1 he began receiving phone calls from both Smith and Min. These early August calls from Smith were work assignments, which Echevarria could not accept because of lateness receiving the message or conflict with scheduled work at EVC. The two calls he got from Min were of an increasingly insistent tone that Echevarria contact Smith for assignments.

Soon after Min's second call, Smith and Echevarria conversed again by telephone concerning a couple of shifts that needed to be filled. This time Echevarria asked for 2 weeks advance notice of available work with Respondent, in order that he could effectively schedule his other part-time job at EVC. His final call from Smith, occurring on September 1, was again a short notice offer of work assignments. This time Echevarria repeated his need for 2 weeks advance notice, as well as stating his intention to take the entire month of September off as a vacation from any work.

In early August Min had instructed Smith to start keeping a log of his contacts to Echevarria about working. Smith logged five such calls for the month of August, and the call on September 1 offering a comprehensive set of four assignments early that month. Smith's recorded remark about a response to this offer stated how Echevarria had advised he could not work at all during September because of a need to rest. Smith and Min then advised Copeland of the extended time Echevarria had not worked for Respondent, coupled with his projected unavailability for all of September. Min provided an acceptable recollection that Copeland did not even know of Echevarria's long post-April absence until late summer 1995. Copeland considered this revelation, and decided to terminate Echevarria because his unavailability contributed to excessive overtime costs in the FSLE branch. Min carried out this decision with a letter to Echevarria dated September 7 notifying him of immediate termination.

### c. Discussion

On this issue the nature of Echevarria's involvement being considered protected and concerted under the Act is more evident. The law is clear that an employee's testimony, and by implication representation, in aid of another's claim for unemployment compensation is protected by Section 7 of the Act. *S & R Sundries*, 272 NLRB 1352, 1357 (1984); *American Transfer*, 288 NLRB 1425, 1427 (1988); *Telex Communications*, 294 NLRB 1136, 1140 (1989).

The issue of Echevarria's final termination warrants close scrutiny, for if Respondent's dealings with his post-April status suffered from inaction, this was more than compensated for by drastic action in September. The evidence from which an inference of unlawful employer motivation might be found originates in Min's harsh remarks during the hiring interview in July 1994. Min apparently sensed some inclination on Echevarria's part to marshal collective strength for work-related problems of his colleagues. This was the conceded and anticipatory explanation given by Echevarria about his occasional role at SCCTA, and the view Simmons might have had toward it. Although saying he was unconcerned by that factor in the past, Min did directly warn Echevarria against involvement with any union if employed at Moffett Field. He also invoked the name of Cesar Chavez to symbolize exactly what he meant by such a directive.

In any pure sense that was the last the subject of a union affects this case. The balance of the supervisory staff showed no particular hostility to labor organizations, and in fact some of them had affiliations in the past. The Peace Officers Research Association of California (PORAC) organization has been introduced into the case as a part of contemporary happenings in August. That professional organization is readily known at the facility, and its publications have even infiltrated into the workplace without concern. The subject of PORAC, therefore, seems to have no bearing on any evaluation of Echevarria as union-leaning, or to inspire resentment against him by his employer.

This leaves then as a basis to infer unlawful motivation for Echevarria's termination only the fact that he took time in mid-summer 1995 to appear with Gutierrez on August 1 at the EDD hearing. His appearance was clearly adverse to Respondent's interests, however only mildly so and predictably without harm other than as a nuisance factor when Gutierrez forsook his claim late that month. The General Counsel presented testimony from Vargas that Min had stated Echevarria's role was like stabbing him in the back, because it betrayed their agreement not to have meddling in work related affairs of others (e.g., "step[ping] forward on officers' behalves. . ."). Min did not deny making such an utterance.

However, Echevarria's own credibility is weakened as it concerns fundamental facts touching this issue. In a particularly rambling course of his cross-examination, he described the belief he had formed after listening to a tape recording of Hildebrand's testimony from the unemployment compensation hearing. He characterized this as Hildebrand telling that administrative law judge "that Gutierrez and I had *conspired to lie* in his report." (Emphasis added.) However the word "conspired", or some variation, does not appear in an unofficial transcript of Hildebrand's EDD testimony. The passage apparently influencing Echevarria's opinion merely read, ". . . they [Gutierrez and Echevarria] tried to make a good situation out of a bad situation." The nature of this overstatement seriously reduces integrity of Echevarria's testimony in general.

The inferential basis for the General Counsel's alternative theory no. 2 that remains is thus little more than the timing of Smith's log, and the intrinsic validity of Copeland's reasons for effecting a termination. I consider the start of Smith's log more than a coincidence, and find that it was done because Echevarria had just drawn attention to himself by leading off the EDD proceeding on Gutierrez' claim. However this does little to advance the General Counsel's theory, for more significantly August was a period when the Respondent gave ample opportunity for Echevarria to again work if he chose. It did so by notification procedures much the same as those used over his first 8 months as a part-time employee. Notably, Echevarria testified that in a late August call he asked Smith what capacity was intended as between security officer and law enforcement. When Smith told him it was security officer, Echevarria's declination was couched only in terms of previously-made scheduling for work at EVC. This gives rise to uncertainty whether Echevarria was still limiting himself to acceptance only of police officer work with the Respondent, particularly when he stressed the need for lengthy advance notice but without reaffirming the priorities he had much earlier explained to Pope.

I believe the most meaningful evidence as to Echevarria's long period of absence from the Respondent is contained in the records of his work history at EVC from early May through late

August 1995. These records of dates, hours, and earnings show Echevarria was occupied on a nearly full-time basis at EVC throughout that summer. He was, by then, also working occasionally at Systems for Public Safety, leaving him truly disengaged from Respondent. While these facts may not have been known to Respondent as those months passed, Echevarria's notification projecting the entire month of September as a personal vacation left little reason for Respondent to officially retain him.

Another recently decided case provides useful contrast to the circumstances here. *Fairlane Town Center*, 321 NLRB 105 (1996), involved events affecting employees of a security force adjunct to corporate management and operation of a large shopping center. An organization named Police Officers Association of Michigan undertook a typical union representation campaign among the approximately two dozen security officers employed at the large mall. The Board adopted a holding that supervisors viewed one discharged guard as "pro-union" because of his "critical role" in the campaign, which motivated management to "rid itself of the sole union organizer on the security guard staff" when the opportunity to do so was presented. A succinct application of *Wright Line* was made in terms of probative evidence. By such standard the Board held that employer unlawfully dealt with the terminated security guard in "treating his refusal to continue working full time as a voluntary quit." 321 NLRB at 109.

With the absence of union activities engaged in by, or suspected of, Echevarria, the faint significance of his presence to open Gutierrez' EDD proceedings, and an understandable, albeit generalized, explanation by Copeland of why he chose not to keep this part-timer, I am also here not persuaded that the General Counsel has adequately proven a prima facie case.

I so conclude after taking into account meritorious allegations of independent 8(a)(1) violations, as discussed below, which I do not see as related to the termination. Should this view not be adopted in terms of making an analysis as to the first branch of *Wright Line* doctrine, I am also satisfied that the increasing difficulty in maintaining a full complement for FSLE branch coverage at Moffett Field, as Smith credibly testified was the problem, meant Respondent would have taken the same action against Echevarria even in the absence of his protected concerted activities.

### 3. Other alleged violations

The consolidated complaint alleges that while awaiting start of the unemployment compensation appeal hearing on August 1, Vargas reaffirmed to Gutierrez and Echevarria that he had heard Min admonish Echevarria not to engage in any union activities as an employee of Respondent. I have found that this was a statement made by Min in July 1994, and although remote in time a year later believe, on balance, that Gutierrez and particularly Echevarria should have been insulated from the reminder that it was once spoken by this branch chief. The personal friendship that Vargas had with Echevarria, and his seeming willingness to support Gutierrez, do not offset the fact that as a statutory supervisor his remarks are attributable to the Respondent. I thus agree that sufficient support is present for this happening to be found as the violation alleged, and that a remedy is warranted.

On August 3 Pope instructed his lieutenants to carry out a written poll among FSLE personnel. Its purpose was to ascertain whether in the past any were contacted by Gutierrez in reference to joining PORAC. Rollinson had actually initiated

such a poll, claimedly because the investigating Board agent so requested. Of 29 listed personnel, 25 made a reply to the question.

The General Counsel hinges the 8(a)(1) allegation in this regard on *Johnnie's Poultry Co.*, 146 NLRB 770 (1964). That case, among its other holdings, addressed the matter of an employer conducting employee interviews to ascertain facts for preparing a defense in the event complaint issued on charges being investigated. The doctrine is reasonably applicable when polling of employees is achieved by a written method, as with questionnaire format found violative in *Forrest City Grocery Co.*, 306 NLRB 723, 729-730 (1992).

The Respondent's explanation of how this all came about is readily rejected. Aside from Rollinson being in an occupation that should have dictated skepticism about the supposed request, it went forward even though Copeland did so basically under protest and thinking it was not right. The attempt to foist blame for creating this poll on a Board agent is a highly dubious explanation, which I find to be intrinsically implausible. Cf. *Adair Standish Corp.*, 290 NLRB 317, 330-331 (1988). Here Respondent awkwardly and deliberately contravened all the safeguards attaching to such action as set forth and long applied from *Johnnie's Poultry*. These are:

[T]he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis . . . .  
146 NLRB at 775.

These factors frame an outer limit for "permissible inquiry" of employees on the point involved. Here the poll was abrupt, mandatory-seeming, and without any accompanying statement of purpose. I thus also find sufficient support present to show merit in this discrete allegation of the consolidated complaint. See *Astro Printing Services*, 300 NLRB 1028, 1035-1036 (1990).

#### CONCLUSIONS OF LAW

1. By its unlawful conduct described below, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By verbally acknowledging that it had conditioned the employment of a person on his agreement to refrain from engaging in union activities the Respondent violated Section 8(a)(1) of the Act.

3. By interrogating employees with a written poll of whether they had been contacted with reference to joining an association of police officers Respondent violated Section 8(a)(1) of the Act.

4. The Respondent has not otherwise violated the Act as alleged in the consolidated complaint.

#### REMEDY

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

Specifically, a recommended remedy of conventional notice posting shall be made, to inform employees of the Respondent's obligation to avoid intrusion on their rights under Section 7 of the Act. By this requirement, the dual purpose public interest of (1) advising employees that the Board has protected their rights, and (2) preventing or deterring future violations,

will be clearly served. *NLRB v. Hiney Printing Co.*, 733 F.2d 1170, 1171 (6th Cir. 1984).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

#### ORDER

The Respondent, Security U.S.A., Mountain View, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Verbally acknowledging that it had conditioned the employment of a person on his agreement to refrain from engaging in union activities.

(b) Interrogating employees with a written poll of whether they had been contacted with reference to joining an association of police officers.

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

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

(a) Within 14 days after service by the Region, post at its facility in Mountain View, California, copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

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

#### 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize  
To form, join, or assist any union

<sup>7</sup> 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.

<sup>8</sup> 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."

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT verbally acknowledge that we had conditioned the employment of Javier Echevarria on his agreement to refrain from engaging in union activities.

WE WILL NOT interrogate employees with a written poll of whether they had been contacted by David Gutierrez with reference to joining the Peace Officers Research Association of California (PORAC).

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.

#### SECURITY U.S.A.

*Sharon Chabon, Esq.*, for the General Counsel.

*Michael J. Reiser, Esq. (Rankin, Sproat & Pollack)*, of Oakland, California, for the Respondent.

*William Sokol, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld)*, of Oakland, California, for the Charging Parties.

#### SUPPLEMENTAL DECISION

##### STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. On April 29, 1997, Administrative Law Judge David G. Heilbrun issued a decision in this case finding inter alia that the Respondent's refusal to transfer Javier Echevarria from the position of part-time security officer to the higher position of law enforcement officer on April 10, 1995,<sup>1</sup> did not result in the constructive discharge of Echevarria on April 25. Judge Heilbrun further found that the subsequent termination of Echevarria on September 7 was not unlawful. By Order of January 20, 1998, a three-member panel of the Board remanded the proceeding to Associate Chief Administrative Law Judge William L. Schmidt for designation of an administrative law judge to resolve the issue of whether the Respondent's refusal to transfer Echevarria on April 10 was unlawful.<sup>2</sup> The Order remanding specifically requires that the designated administrative law judge utilize the framework set forth in *Wright Line*<sup>3</sup> in making this determination and further requires that factual findings, conclusions of law, and a recommended Order be set forth in the Supplemental Decision. By order of February 4, 1998, Associate Chief Administrative Law Judge William L. Schmidt designated me to consider the case on remand.

All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions before Judge Heilbrun. On the entire record<sup>4</sup> and after consider-

ing the briefs filed by counsel for the General Counsel and for the Respondent,<sup>5</sup> I make the following

#### FINDINGS OF FACT

In May 1994, the Respondent assumed security responsibilities at Moffett Field - NASA Ames Research Center, located in Mountain View, California. It employed uniformed security officers and uniformed law enforcement officers. Both classes of officers were required to complete a Federal Arrest Authority (FAA) course in order to carry fire arms in the course of their duties. Echevarria began working for the Respondent as a security officer in August 1994. He had been previously cautioned by Chief of Police Min that he was not to engage in any union activities as an employee of the Respondent.<sup>6</sup> Min told Lieutenant Vargas that he would move Echevarria to law enforcement with the next opening. Min also explained to Vargas that Echevarria would not be able to do any unionizing at the Respondent's facility.

Due to a personal emergency, Echevarria failed to complete the FAA course when it was given in August 1994. Accordingly, he was assigned to work at building 227, the only unarmed security guard work available for the Respondent, and was ineligible to work as a law enforcement officer until he completed the course. Moreover, in late March 1995, a NASA independent contractor barred Echevarria from his continuing assignment at building 227 because of a dispute between the two. Respondent continued Echevarria's employment by keeping Echevarria hidden, "in the back 40."

On January 24, security officer Gutierrez encountered a young man at the facility's main gate. A physical altercation ensued in which Gutierrez placed a choke hold on the young man, threw him down and handcuffed him. Night-shift Lieutenant Elliott instructed Gutierrez to prepare an incident report. Gutierrez received assistance from fellow security officer Echevarria. Judge Heilbrun specifically found, "Echevarria's assistance in preparation of Gutierrez' incident report during the early morning hours of January 25 was protected concerted conduct under the Act." (JD(SF)-33-97 at 10:26-28). Upon reading the incident report, Elliott expressed concern about the legal justification for stopping and detaining the youth.

Security officer Gutierrez' actions were subsequently fully investigated. Echevarria was questioned extensively during the course of the 6-week investigation. As Judge Heilbrun found, "[Captain] Hildebrand attempted to bully Echevarria into conceding that he had helped conceal a tape of the altercation [between Gutierrez and the youth]." (JD(SF)-33-97 at 13:29-31). However, Hildebrand subsequently discovered that Echevarria had only belatedly discovered the existence of such a tape and Respondent concluded that Echevarria was truthful and credible, according to captain Hildebrand, the investigating officer,

<sup>5</sup> On remand, the parties submitted their briefs to Judge Heilbrun and their briefs on exception to the Board.

<sup>6</sup> During a preemployment conversation in July 1994, Echevarria told Min that a former supervisor might not express a favorable reference because Echevarria had intervened as president of the professional association at that place of employment. Min responded that he did not want Echevarria to start or participate in a union at Moffett Field or bring any "Cesar Chavez bull shit" to the facility. Judge Heilbrun specifically credited Echevarria's testimony regarding this conversation and discredited Min's denial of uttering cautionary or threatening remarks to Echevarria about union activism. (JD(SF)-33-97 at 10:7-9 and 10:13-1015.)

<sup>1</sup> All dates are in 1995 unless otherwise referenced.

<sup>2</sup> At the time of the remand, Judge Heilbrun had retired.

<sup>3</sup> 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

<sup>4</sup> In making findings of fact, I have relied exclusively on the credibility determinations of Judge Heilbrun.

or, as Echevarria recalled, was congratulated for his integrity. Gutierrez was discharged on March 14.

In February, during the course of the Gutierrez investigation, Echevarria believed that he was recommended for the position of investigator. Echevarria learned that the position was canceled and asked Chief of Police Min about the situation. Min responded that Echevarria had, “pissed some people off at Moffett Field police department.” Min cautioned Echevarria that he would have to gain favor there before he would receive the investigation position. Judge Heilbrun specifically credited Echevarria’s testimony that Min “termed those in charge as pissed off because Echevarria helped Gutierrez, and that in a remark separated by over a month, this had angered the administration of his employer.” (JD(SF)–33–97 at 14:39–41.)

Echevarria spoke frequently to Min, Pope, Vargas, and others about his desire to be transferred to law enforcement officer. He received, “various assurances of advancement to higher paying police work.” (JD(SF)–33–97 at 13:19–20.) On April 10, Respondent hired four full-time and one part-time law enforcement officers. On April 15, Echevarria and several of the newly hired officers took the FAA course. Echevarria successfully completed the FAA test, thus qualifying to carry a fire arm as part of his duties for Respondent. On his next workday, April 24, Echevarria, who understood that the FAA requirement was the last step to his becoming a law enforcement officer, requested his police uniform when he reported for duty. He was told that he would continue to work as a security officer.<sup>7</sup>

In *Wright Line*, 251 NLRB 1083 (1980), enf.d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983), the Board articulated the allocation and order of proof in cases involving 8(a)(1) or (3) violations which turn on employer motivation as follows: First, the General Counsel must make a prima facie showing sufficient to support an inference that protected activity was a motivating factor in the employer’s decision. Upon making such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected activity.

In *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), the Board stated that it had traditionally described the General Counsel’s burden as that of establishing a prima facie case. Noting, however, that in *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1340 fn. 8 (1995), the court suggested that the General Counsel’s burden might be more appropriately described as a burden of persuasion, the Board concluded that the change did not represent a substantive change in *Wright Line* and restated that test as follows: “the General Counsel [must first] persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.”

I find that the General Counsel has presented sufficient evidence to support an inference that Echevarria’s protected con-

certed conduct was a motivating factor in Respondent’s failure to transfer Echevarria from the position of security officer to the position of law enforcement officer. I rely specifically on Judge Heilbrun’s finding that Echevarria engaged in protected concerted activity in assisting Gutierrez in preparation of the incident report<sup>8</sup> and his further finding that the report as submitted was influential in determining whether Gutierrez was disciplined. Further, I find that not only did the Respondent have knowledge of the actions of Echevarria but it had earlier voiced animosity toward Echevarria with regard to union activities and acknowledged that there was animosity toward Echevarria because of his assistance to Gutierrez.

The Respondent asserts that by function, organizational structure and necessary qualifications, a security officer cannot be transferred to police officer. I do not find this argument persuasive as the Respondent’s chief of police, Min, told lieutenant Vargas that Echevarria would be transferred at the first available opening.<sup>9</sup> Moreover, the Respondent argues that Echevarria was not qualified for the law enforcement position. In agreement with Judge Heilbrun, I find that Echevarria’s training, experience, and completion of police academy adequately qualified him for the position. In addition, the Respondent notes that Echevarria never filed a formal application for the position of police officer. I agree with Judge Heilbrun’s dismissal of this argument: The Respondent was on notice that Echevarria wanted promotion to the law enforcement position and there is no evidence that he was ever instructed to submit a second employment application. Echevarria applied originally for the position of federal police officer; Echevarria expressed, “a nagging drumfire of dissatisfaction”<sup>10</sup> regarding failure to attain the law enforcement position.

Finally, Respondent notes that it certainly had ample opportunity to dismiss Echevarria when the dispute arose at building 227 in late March and there was absolutely no other unarmed security guard or law enforcement officer position available. However, rather than dismiss Echevarria at that point, Respondent hid him in “the back 40,” as Min described it. Although failure to discharge Echevarria in late March evidences some leniency toward Echevarria, it does not counter the failure to transfer it appears that Min was willing to allow Echevarria to continue working as a security officer as long as he remained out of sight. However, the evidence also clearly indicates that Min understood that the administration at Moffett Field was

<sup>8</sup> The Respondent contended that Echevarria’s limited role in assisting Gutierrez was part of his daily work and not protected concerted activity. Judge Heilbrun found that Echevarria’s assistance to Gutierrez was concerted activity regarding Gutierrez’ employment and, thus, protected under the Act. See, e.g., *Chromalloy American Corp.*, 263 NLRB 244 (1982) (relying in part on *Illinois Bell Telephone Co.*, 251 NLRB 932 (1980), and holding that a request for assistance regarding a potential disciplinary action from a fellow employee is grounded in Sec. 7); *Yellow Freight Systems.*, 297 NLRB 322, 326 (1989) (assisting another employee in filing sexual harassment charge is protected concerted activity).

<sup>9</sup> As Judge Heilbrun found, Min did not have actual authority to hire or fire. This was exclusively the province of Project Manager Copeland. However, Min effectively recommended hiring of Echevarria and, according to Copeland, he acceded to Min’s assessment of Echevarria on several occasions when he had misgivings about Echevarria. In any event, Min’s statements adequately demonstrate that Echevarria was not transferred due to the animosity toward Echevarria’s assistance of Gutierrez.

<sup>10</sup> JD(SF)–33–97 at 12:9.

<sup>7</sup> According to Echevarria, he spoke with Min on April 25. Min told Echevarria that Echevarria’s role in assisting Gutierrez affected Echevarria’s job situation. Min further stated that it was going to be awhile before Echevarria got the law enforcement position because Echevarria had angered the administration at Moffett Field, the location at which Respondent provided security. Judge Heilbrun specifically discredited this portion of Echevarria’s testimony.

angry at Echevarria for his assistance of Gutierrez; i.e., for his protected, concerted activity. Given the assurances made to Echevarria regarding transfer to the law enforcement position and Echevarria's successful completion of the FAA requirement, the fact that he could have been fired in late March, prior to his FAA certification, is of little relevance. I conclude, therefore, that the Respondent would not have taken the same action (failure to transfer) in the absence of Echevarria's protected, concerted activity.

#### CONCLUSION OF LAW

By failing to transfer Javier Echevarria from the position of security guard to the position of law enforcement officer on April 10, 1995, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, in light of Judge Heilbrun's finding that the Respondent did not violate the Act in terminating Echevarria's employment in September.<sup>11</sup> The Respondent must make Echevarria whole for any loss of earnings and other benefits, computed on a quarterly basis from April 10, 1995, the date of failure to transfer him, until September 7, 1995, the date of his termination, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended<sup>12</sup>

#### ORDER<sup>13</sup>

The Respondent, Security U.S.A., Mountain View, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Verbally acknowledging that it had conditioned the employment of a person on his agreement to refrain from engaging in union activities.

(b) Interrogating employees with a written poll of whether they had been contacted with reference to joining an association of police officers.

(c) Failing to transfer Javier Echevarria from the position of security guard to the position of law enforcement officer because of his protected, concerted activity.

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

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

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

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Mountain View, California, copies of the attached notice marked "Appendix."<sup>14</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by 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 10, 1995.

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

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

<sup>11</sup> The General Counsel has abandoned its theory that Echevarria was constructively discharged. See G.C. Br. in Support of Exceptions at 6 and the General Counsel's reply to Respondent's opposition at 2-3, fn. 3.

<sup>12</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusion, 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.

<sup>13</sup> This recommended Order incorporates the Order set forth in Judge Heilbrun's decision as well as the further violation found herein. The appendix which follows similarly incorporates Judge Heilbrun's appendix.

<sup>14</sup> 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."