

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

VANCE UNIFORMED PROTECTION  
SERVICES, INC.

Employer

and

Case No. 5-RC-15728

INTERNATIONAL UNION, SECURITY,  
POLICE AND FIRE PROFESSIONALS OF  
AMERICA (SPFPA)

Petitioner Union

Stan P. Simpson, Esq., of  
Washington, D.C., for the Regional Director.  
John R. Ates, Esq. (Winston & Strawn), of  
Washington, D.C., for the Employer.  
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Heinen & Brooks), of Detroit, Michigan, for  
the Petitioner Union.

RECOMMENDED DECISION ON OBJECTIONS

ROBERT A. GIANNASI, Administrative Law Judge: Pursuant to a July 14, 2004, Report on Objections and Notice of Hearing, I heard evidence in this matter on August 4 and 5, 2004, in Washington, D. C.

The case arises from the Union's objections to a June 23, 2004, election in an appropriate unit of the Employer's security employees at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The employees rejected the Union by a vote of 17-14, with 2 challenged ballots that did not affect the results. The Union's objections alleged that the Employer threatened to retaliate against employees for supporting the Union (Objections 2 and 7); made an extraordinary benefit payment before the election (Objection 5); discriminatorily prohibited off-duty employees from remaining in a public area on the day of the election (Objection 8); and asked employees to report union harassment to management officials (Objection 9). After considering the objections, as well as supporting statements during an investigation, the Regional Director found sufficient factual issues to warrant a hearing.

Based on the testimony at the hearing, my assessment of the credibility of the



5 directed employees to report “harassment” by union supporters to management officials. The facts are as follows. On May 24, 2004, the Employer distributed to all Thurgood Marshall employees a 5-page document setting forth its policy against union representation and offering reasons why employees should not support a union. The document was either mailed to employees or given to each individual employee at work (Tr. 117-118). It was also placed in notebooks that are kept at each employee’s workstation. These are known as “Post notebooks.” Tr. 119. On the first page of the document (Exhibit A to Board Exh. 1(e)), the following appears:

10 You should know that you do not have to let union agents into your homes. You do not have to accept their literature. You do not have to go to their meetings.

15 And, if you believe you are being harassed while you are on the job, by a union agent or anyone else, please report it to your supervisor or a member of management so that we can put a stop to it.

20 It was conceded that no employees at the Thurgood Marshall site complained about union “harassment.” Tr. 147.<sup>1</sup>

25 Statements like the one set forth above have been found coercive and indeed violative of Section 8(a)(1) of the Act. That is because broad language asking that employees report so-called union harassment is so “vague” as to invite employees to inform on their fellow workers who engage in union activity and thus infringes on lawful attempts by prounion employees to solicit the support of their fellow employees. See

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30 <sup>1</sup> Human Resources Director Steransky testified that she drafted the document set forth above, which was described as being sent by Director of Operations Wilkens, Regional Director Semyone and Obie Moore, who was identified as “SR VP VUPS.” Steransky testified about her motivation in writing the document, why she sent it and what she meant by the language used (Tr. 144-147, 171-184). None of this is, of course, relevant. *NLRB v. Aluminum Casting & Engineering, Co.*, 230 F.3d 286, 294 (7<sup>th</sup> Cir. 2000). The question to be decided is whether the language used, as an objective matter, had a reasonable tendency to coerce employees and thus interfere with a free election. See *Pacific Beach Hotel*, 342 NLRB No. 30 (2004) (Slip op. 2-3). Nevertheless, I found Steransky’s testimony on these matters wholly unreliable. Her attempts to show that the harassment language in the antiunion document applied to EEO concerns or was addressed to unionization efforts elsewhere in the Employer’s operations, and not to Thurgood Marshall, were evasive, exaggerated, vaguely based and contrary to obvious facts. Although she referred to other union campaigns at the Employer, one, in Minnesota, had concluded without the filing of a petition, and others, allegedly in the Washington area, were described in general and unspecific terms. Her references to union harassment in the Minnesota campaign were vague and unpersuasive. Steransky also admitted that she issued other directives, at about the same time, that were specifically addressed to EEO concerns, including harassment. Moreover, the document with the harassment language at issue dealt wholly with efforts to combat a union and said nothing about EEO or other harassment. And the only active union campaign was at the Thurgood Marshall site. Indeed, the document specifically mentioned the Thurgood Marshall site, and only that site, after stating that the Employer was “absolutely opposed to the presence of a union here.”

*Automotive Plastic Technologies, Inc.*, 313 NLRB 462 (1993); *Liberty House Nursing Homes*, 245 NLRB 1194, 1197 (1979); and *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998). See also *NLRB v. Aluminum Casting & Engineering Co.*, 230 F.3d 286, 294 (7<sup>th</sup> Cir. 2000). As the Board recently stated in *Ryder Truck Rental, Inc.*, 341 NLRB No. 109 (2004) (Slip op. 1):

It is well settled that the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited. To that end, an employer's invitation to employees to report instances of "harassment" by employees engaged in union activity is violative of Section 8(a)(1). Here, in response to nothing more than a vague claim of "harassment" in connection with an employee's solicitation, Woehlke directed employees to document in writing the specifics of that employee's union activity. Clearly, employees who learned of this directive, and of the circumstances upon which it was given, could reasonably believe that the Respondent was seeking written documentation of its employees' lawful Section 7 activity.  
[Internal citations omitted.]

This is an even stronger case of coercion than *Ryder Truck* because, here, there is no evidence at all of complaints of union "harassment" at the Thurgood Marshall site. Indeed, here, the statement was official management policy, set forth in an antiunion campaign document disseminated to all employees, whereas *Ryder Truck* involved only one statement by a low level supervisor, who simply responded to the complaints three employees had made to him. Moreover, this case falls squarely within the classic situation described by Chairman Battista in his dissent as supporting a violation. For example, here, the Employer took the initiative in inviting reports of harassment "sua sponte." It did not issue a "narrowly tailored response to an unsolicited complaint of harassment," and there was no attempt to minimize the possibility that employees would construe the statement as pertaining to lawful Section 7 conduct. Slip op. at 2-3.

The context of the language asking that harassment by union agents and others be reported to management, and, indeed the entire document, made it clear that the Employer was focused on union activity.<sup>2</sup> Accordingly, the Employer's attempt (Br. 17-18) to parse the language, contending that it was addressed to harassment in general or to people other than union agents, fails to legitimize it. See my assessment of Steransky's testimony to this effect at note 1, supra. Whatever the Employer called the

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<sup>2</sup> Language draws meaning from its context, especially in union campaigns. As Judge Learned Hand advised over a half century ago:

Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part.

*NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2<sup>nd</sup> Cir. 1941).

activity that was to be reported, the language used was vague enough and broad enough to cover lawful union solicitation by employees. And that is its problem. See *Liberty House Nursing Homes*, supra, 245 NLRB at 1197; and *NLRB v. Aluminum Casting & Engineering*, supra, 230 F.3d at 294. Thus, the plain meaning of the language used, as an objective matter, broadly infringed on protected activity. See, in addition to the cases cited above, *Pacific Beach Hotel*, 342 NLRB No. 30 (2004) (Slip op p. 2-3) (Broad no-solicitation rule was unlawful because it prohibited both protected and unprotected activity and thus interfered with free election).<sup>3</sup>

The Employer's harassment reporting language was coercive because it had the tendency to impede employees from lawfully discussing their pronunion views with fellow employees for fear that their efforts would be reported to management, which would then "put a stop" to those efforts. The antiunion document that contained the offensive language remained operative, and, indeed, presumably remained in the Post notebooks at each workstation, up to the date of the election. Since the language clearly reflected the policy of top management and was widely disseminated, in a very close election—two different votes would have changed the outcome, I find that the statement interfered with a free election. Accordingly, I sustain Objection 9. See *Cedar-Sinai Medical Center*, supra, 342 NLRB No. 58, where threats to 2 employees in a very large unit were found to have interfered with an election, even though the margin was 68 votes, because "at least" 34 employees might have heard about the threats, and their votes might have tipped the election.

#### The Retroactive H & W Payments

Objection 5 involves the circumstances surrounding the payment of retroactive health and welfare (H & W) benefits during the period prior to the election. Shortly after the Employer took over operations at the Thurgood Marshall site, it negotiated an increase in the amount allotted to employees, under federal contract law, for health and welfare payments. In October of 2003, the Employer requested approval from the Federal Government and the prime contractor to raise the H & W payment for employees to \$2.36 per hour. The necessary approval was obtained in early March of 2004 and the Employer immediately implemented the increase by reflecting it in the

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<sup>3</sup> *First Student, Inc.*, 341 NLRB No. 19 (2004), cited by the Employer (Br. 17), is clearly distinguishable. In *First Student*, the Board found lawful employer language stating "[I]f anyone confronts you and tries to force you or intimidate you to support the union, please inform me immediately." The Board viewed such language as a "request to report threatening conduct," which is lawful because threatening conduct in support of union solicitation is unprotected. Slip op. at 2 and fn 4. The language in this case is nothing like that in *First Student*. It asks for reports on "harassment;" it is not limited to reporting threatening conduct. In this respect, the Employer's reliance (Br. 17) on Steransky's discredited testimony as to her intent in drafting the language is unavailing. See note 1, supra, and *NLRB v. Aluminum Casting*, supra, 230 F.3d at 294. Nor, contrary to the Employer's brief (Br. 17), was other language in the 5-page antiunion document—Vance "respects [employees'] right to consider unionization"—sufficient to neutralize the objectionable language. Such a statement does not tell employees that they are not to report lawful union solicitation, which is what it would take to effectively neutralize the objectionable language.

5 paychecks of each employee. That increase, however, applied to future hours worked; it did not deal with the retroactive H & W payments that were due employees for working from October 2003 through February of 2004. The Employer sent an invoice for the retroactive payments in late March of 2004, and actually received a check for the payments—in the amount of about \$11,000—on about May 5 or 6, 2004. That amount was due to all people who worked at Thurgood Marshall from October through February, whether they were still employed or not, or whether they were employees or supervisors. In order to calculate what was due to each individual entitled to a retroactive payment, the Employer had to compute the hours worked by each individual during the period involved (Tr. 75-77, 85-86).

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As early as December 2003 (Tr. 22), well before the Union began its organizing campaign and before the election petition was filed, both management and employees knew that an increase in H & W payments was on the way. Indeed, after the prospective increase showed up in their paychecks in March, the employees anticipated the payment of retroactive benefits. Employees and supervisors questioned management officials about the payment; they were told that it was coming, as indeed it was, after the appropriate approvals were secured and necessary processing was completed. When the Employer received its check for the payments, it undertook to make the required individual payments. It appears that the first payroll date on which the payments reasonably could be made was June 18, 2004. That would have meant that the individual payments—which amounted (depending, of course, on hours worked) to about \$170 per employee—would have come in the employees' regular paychecks, normally sent to the employees' home or deposited directly in the employees' bank account. The Employer, however, decided to cut individual paychecks for the payments. Except for payroll errors, the Employer had never before cut separate paychecks and distributed them manually (Tr. 169-170). It also decided to distribute them at a campaign meeting, at which management officials spoke against union representation. Both supervisors and employees attended that meeting, which was held on June 11, 2004, and they were given their checks at that time. Regional Director Semyone distributed the checks, mentioned that they were the retroactive payments previously authorized and promised, and apologized for the delay in making the payments (Tr. 22-24, 79, 84-85, 89-100, 160-166, 168-170).<sup>4</sup>

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As indicated above, the retroactive payments were in the works and expected well before the Union filed its election petition. This was not a new benefit; it was a preexisting benefit whose distribution fell within the critical period. Since the Employer received its check in early May 2004, it is hard to see how any timely distribution could not have fallen within the critical period. Even a distribution through normal payroll would have put the money in the employees' hands on June 18, some 7 days later than the actual manual distribution, but still before the election. In these circumstances, I do not believe that the Employer was required to wait until after the

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50 <sup>4</sup> Semyone testified that the meeting was held on June 15; Steransky testified that it was held on June 11. Although the difference is not significant for the purpose of deciding the issue, I accept Steransky's version on this point because she seemed more confident of the date than Semyone.

election to distribute the individual payments; indeed, in that case, the Employer might well have been faulted for waiting so long. Thus, particularly because the payments had been authorized and promised before the onset of the Union and some delay in calculating the individual payments was necessary and reasonable, I cannot fault the Employer for distributing the payments within the critical period. See *American Sunroof Corp.*, 248 NLRB 748 (1980).

On the other hand, manipulating the announcement or payment of a previously approved benefit so as to influence an election is objectionable. See *H-P Stores, Inc.*, 197 NLRB 361, 362 (1972) (Employer withheld its announcement for 13 days before making it 4 days before the election). What concerns me is that, here, the Employer apparently went out of its way to cut individual checks and distribute them at an antiunion campaign meeting. The implication might well have been that only the Employer could give benefits and thus the employees should reciprocate by voting against the Union. I suspect that, despite testimony to the contrary, which I did not believe, the Employer wanted to use the payment of this benefit as an edge in its campaign.<sup>5</sup> At the very least, the objective circumstances suggested that this would be its effect. In *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), the Supreme Court upheld the illegality of “conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect.” *Id.* at 409. As the Court stated: “The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.” *Ibid.* In that case, the employer told employees, in the middle of an election campaign, that it was the source of employee benefits, listed many past benefits and announced several new ones, some of which had been promised earlier. 375 U. S. at 407.

I am nevertheless reluctant to find, in this case, that the distribution of the individual benefit checks at an antiunion campaign meeting had a tendency to interfere with a free election. The checks did not reflect payment for new benefits. The employees knew the payments were coming and they also knew that the payments

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<sup>5</sup> Semyone and Steransky testified about the steps taken by management between the delivery of the gross retroactive payment to the Employer in May and the distribution of the individual checks in June. Semyone testified generally about some software problems that delayed the individual payments and caused them to be made by cutting checks manually (Tr. 78-79). Steransky did not testify about software problems; she testified simply that she wanted to get the checks out as soon as possible after the necessary processing was completed on June 9 (Tr. 160, 168). No one from the Employer’s payroll department testified and no documentary evidence was submitted to support Semyone’s testimony about software problems. Both Semyone and Steransky denied that the payment method was calculated to impact on the election. I reject their denials. I thought both Semyone, whose testimony about software problems seemed unduly exaggerated, and Steransky, whom I discredited on another issue, tailored their testimony to diminish any relationship between the circumstances of the individual distributions and the Employer’s campaign against union representation. Accordingly, I do not find their self-serving testimony on this issue reliable.

5 were decided upon before the Union came on the scene. The payments would have  
been made whether or not the Union had filed an election petition and they would have  
been made prior to the election even if they were made through the normal payroll  
distribution. Although the checks were distributed during an antiunion meeting, they  
10 were distributed to employees and supervisors alike. The convenience of such a  
distribution while all recipients were present seems reasonable in the circumstances of  
this case. And there is no evidence that, when the checks were distributed,  
management representatives mentioned any specific relationship between the  
15 distribution of the individual checks and the union campaign or how the employees  
should vote. In these circumstances, the payment was roughly equivalent to the  
situation in which an employer issues split paychecks to employees, one indicating  
how much would be paid in union dues. The Board does not ordinarily intervene in  
such cases, although the split paycheck technique is an obvious campaign tactic,  
20 unless the employer changes the method of paying employees within 24 hours of a  
Board election. See *Kalin Construction Co.*, 321 NLRB 649, 652 (1996).

25 Here, the checks were distributed some 12 days before the election. Unlike in *H-  
P Stores*, supra, where the announcement was inexplicably withheld until 4 days  
before the election, here, the distribution was accelerated. Thus, it did not fall  
immediately before the election, and the impact of the payment was arguably  
minimized, at least in terms of timing. Although it is a close call, I believe the method  
the Employer used to issue employees their previously promised and authorized  
retroactive H & W payments did not have the tendency to interfere with free choice in  
the election. I shall therefore overrule Objection 5.

#### The Threats

30 Two objections (2 and 7) deal with alleged threats that, if the Union came in, the  
employees would lose their jobs. The Union offered the testimony of employee Amon  
Meyers on this issue. He testified that, sometime in June, about one or two weeks  
prior to the election, he was on break in the cafeteria with two other employees,  
35 officers Butler and Perry, when Sergeant Carter, an admitted supervisor, approached  
them (Tr. 24-26). Carter told them that, if the employees got together with  
management to air their grievances, perhaps a union would be unnecessary. In the  
course of the discussion, Carter said that, if the Union came in, the employees would  
be "out." Tr. 25. This testimony was uncontradicted since Carter did not testify,  
40 although he was still employed by the Employer at the time of the hearing. I credit  
Meyers' testimony on what Carter said because he impressed me as a candid and  
reliable witness, who was still employed when he testified against his employer's  
interests. As shown below, Project Manager Kelly and Human Resources Director  
Steransky investigated whether Carter made such a statement, speaking with Carter  
45 and several employees. But I do not rely on their hearsay accounts of what Carter  
allegedly told employees for the truth of Carter's statement. In addition to its hearsay  
quality, this testimony did not show that the investigators spoke with Meyers or the  
other two employees who were with Meyers at the time Carter made the statement to  
50 them.

The above or a similar statement made by Carter, perhaps to other employees,

5 was widely disseminated among the employees and came to the attention of  
management officials late in the day, on Friday, June 18, 2004, just five days before  
the election. Kelly testified that the alleged statement reported to her was that, if the  
officers voted the Union in, they would be fired (Tr. 121). During their investigation of  
Carter's remarks, Kelly and Steransky spoke with Carter. They also spoke to some  
employees, although, as indicated above, no one spoke to Meyers or the two  
employees who were with him when Carter made the statement to them. As a result of  
10 the investigation, and because of pre-existing management issues, the Employer  
transferred Carter to another of the Employer's facilities that same day and demoted  
him from his supervisory position. He returned to Thurgood Marshall as a rank-and-file  
security officer about a month after the election and shortly before the hearing in this  
case.

15 On Monday, June 21, just two days before the election, the Employer held its last  
campaign meeting with employees, urging them not to vote for the Union. In the  
course of that meeting, Kelly addressed the alleged threat by Sergeant Carter, without  
mentioning him by name. She told the employees that when the Employer heard that  
20 "some of you may have been told that if you supported the union Vance would fire you,  
it "immediately took corrective action." She continued by saying that the Employer  
"respects the decision you make – whether it (sic) for or against the union. We will not  
interfere with the exercise of your rights under the National Labor Relations Act. You  
should know that we will not fire or otherwise take any adverse action against  
25 someone because they supported the union. Whether a union comes in or not is your  
choice, and we respect that. [B]ecause Vance is a company that wants to do the right  
thing, we have dealt with the individual who allegedly was involved." <sup>6</sup>

30 I find that Carter made an unlawful threat, which was disseminated throughout  
the unit. In these circumstances and unless effectively repudiated, the threat was  
sufficient to overturn the election. The question is whether the Employer effectively  
repudiated the threat before the election. Under applicable law, for a repudiation to be  
effective in neutralizing a threat, it must be "timely, unambiguous, specific in nature to  
35 the coercive conduct, free from other proscribed conduct, and adequately published to  
the employees involved. Additionally, it must set forth assurances to the employees  
that no interference with their Section 7 rights will occur in the future, and . . . there  
must in fact be no unlawful conduct by the employer after publication of the  
repudiation." *Action Mining, Inc.*, 318 NLRB 652, 654 (1995), citing *Passavant*  
40 *Memorial Area Hospital*, 237 NLRB 138 (1978) and similar cases. Such a disavowal is

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6 The above is based on a scripted statement prepared for delivery by Kelly and introduced  
into evidence as Employer Exh. 2 through Steransky, who testified that she was present when  
45 Kelly delivered the remarks. Steransky said that Kelly read from the script and did not deviate  
from it (Tr. 154-158). In contrast, Kelly did not refer to the script when she was testifying and  
did not testify that she read from a script. Although Kelly's testimony was partly in response to  
leading questions, she did testify that, during her remarks, she said substantially what was set  
forth in the scripted speech (Tr. 126-127). Indeed, employee Meyers basically confirmed Kelly's  
50 testimony and what was in the scripted speech (Tr. 26, 56-58). In these circumstances, I  
believe that Kelly essentially made the points set forth in the scripted speech.

sufficient not only to remedy unfair labor practices, but also to restore the laboratory conditions for a valid election. *Ibid.*

5 The Employer commendably investigated the matter promptly and decided to  
remove the supervisor who made the threat immediately upon learning that the threat  
was being discussed among employees. The Employer also also made efforts to  
disavow the threat shortly after it learned that it was being disseminated, and it did so  
10 in meetings with all employees. The employees were clearly and unambiguously told  
that they would not be penalized if they decided to vote for union representation.  
Contrary to the Union's contention (Br. 21-22), the disavowal was not rendered  
ineffective simply because it did not recite the specific threat or refer to Carter himself  
by name. The employees knew that Carter was gone and the Employer's description  
15 of the threat—that some employees may have been told that if they supported the  
Union they would be fired—was certainly specific enough so that the employees knew  
what the Employer was talking about. Moreover, it disavowed the essence of the  
threat. It stated, "we will not fire or otherwise take any adverse action against  
someone because they supported the union."

20 The one significant aspect of an effective disavowal or remedy that is not present  
in this case is the lack of further unfair labor practices. See *Action Mining*, supra, 318  
NLRB at 654. As shown above, the Employer kept in operation, and in the Post  
notebook of each employee, an unlawfully broad anti-harassment policy, in effect,  
25 asking employees to report union activities to management. Nothing in the disavowal  
remarks of June 21 dealt with the unlawfully broad union "harassment" language. That  
language was in effect both prior to and after June 21, and until the June 23 election.  
In these circumstances, and under applicable law, the Employer's disavowal of June  
21 did not effectively remedy or repudiate the Carter threat. I also note a troubling  
30 statement made by Kelly in her scripted speech attempting to repudiate the Carter  
threat. Before discussing the Carter threat and attempting to repudiate it, she  
reviewed statements made at previous employer campaign meetings and gave  
reasons why the employees should reject the Union. She said, "[w]e've learned about  
the real possibility of strikes and that employees can lose their job in a strike."  
35 Employer Ex. 2. Such language is unlawful because it goes beyond simply informing  
employees that they can be permanently replaced during a strike. Employees retain  
their employee status even during an economic strike and must be recalled once the  
permanent replacements leave. Thus, broad statements, without explanation, that  
40 employees can "lose their jobs as a consequence of a strike" are unlawful and violative  
of Section 8(a)(1) of the Act. See *Baddour, Inc.*, 303 NLRB 275 (1991); and *Mediplex  
of Danbury*, 314 NLRB 470, 471 (1994). Although such language was not specifically  
alleged as objectionable and I do not independently consider such language itself as  
45 requiring that the election be overturned, it deserves consideration in determining  
whether the Employer's June 21 disavowal was effective, particularly where, as here,  
there is no dispute that the language was used in the same speech that is alleged to  
have repudiated another threat. It would be unseemly to accept a disavowal where  
another threat was made in the very disavowal speech itself. Accordingly, I find that  
50 the Carter threat lingered and remained unremedied as an incident—a well-known  
incident—that had the tendency to interfere with the election. I shall therefore sustain  
Objections 2 and 7.

## Expulsion of Off-Duty Employee

5           Objection 8 relates to an incident that took place on the day of the election during  
which employee Meyers was told to leave the building. At the time, Meyers was off  
duty and in civilian clothes. He had been talking in a work area to an employee who  
was on duty. The facts are as follows. Meyers, who works the 6 am to 1 pm shift, had  
10 voted earlier in the day and went off duty at about 1:15 pm. He changed out of his  
uniform and into his civilian clothes in the break room at the north end of the building's  
main floor. He left the break room and went to the cafeteria in the basement to buy a  
drink and get some money from the ATM machine nearby. He then came up the  
15 elevator at the south end of the main floor and stopped by Post 7 where an on-duty  
security guard, Michelle Anthony, was stationed. Meyers engaged her in a short  
conversation, including a discussion about how the election was going (Tr. 28). At  
some point, he exchanged eye contact with Regional Director Semyone, who was  
20 standing in the public atrium that separates the south and north ends of the building  
and was visible through glass doors separating the public and private areas. When he  
noticed Semyone, Meyers left Post 7, walked through the glass doors into the atrium,  
past Semyone, and headed back to the break room. Although Meyers suspected that  
he was going to be asked to leave, neither Semyone nor Meyers said anything when  
they passed each other. Meyers proceeded to the break room to retrieve some  
25 personal items and was getting ready to leave the building. At about 1:45 pm,  
Lieutenant Tonya Wilson, who had been alerted to the situation by Semyone, told  
Meyers that he needed to leave the building. After a short exchange with Wilson,  
Meyers left. Meyers was not issued a warning or disciplined in any way for this  
incident (Tr. 27-30, 41-51, 79-81, 103-104).

30           Both Wilson and Semyone testified that there was a rule that off-duty employees  
could not remain in the building talking to on-duty employees after the completion of  
their shifts and that the rule was regularly enforced (Tr. 81-82, 108-110). Kelly  
35 confirmed the rule, stating that it originated from the main contractor, CES. She also  
confirmed that she had had occasion to direct her supervisors to enforce the rule (Tr.  
119-120). Although Meyers conceded the existence of such a rule, he testified it was  
"seldom enforced." Tr. 29. His testimony on the point was not, however, as reliable as  
that of Wilson, Kelly and Semyone, who are responsible for enforcing the rule.  
40 Meyers' testimony in this respect was general and non-specific. He said that he often  
stayed after hours, but he was unclear as to whether this was in the public or non-  
public areas of the building (Tr. 29). And he did not testify that supervisors knowingly  
let him remain in the building on these occasions. Significantly, he knew enough about  
45 the rule and its enforcement to testify that he did not "make it a practice" to linger on  
after the end of his shift (Tr. 29). No other evidence was submitted on the issue. Nor  
is there any evidence that the rule was enforced, in whole or in part, because of  
Meyers' role as a union supporter, even though Semyone conceded that he knew that  
Meyers was a union supporter. In accordance with the weight of the mutually  
50 corroborative testimony of three different management witnesses on this issue, none of  
which was effectively disturbed on cross-examination or shown to be unreliable, I find  
that the rule that was enforced against Meyers on June 23 was uniformly and non-  
discriminatorily enforced.

5 The Employer's enforcement of the rule prohibiting off-duty employees being on  
 the premises and talking to on-duty employees against Meyers did not interfere with  
 the election. Contrary to the thrust of Objection 8, Meyers was not in the atrium, a  
 public area, when he was seen talking to on-duty employee Anthony. He was in a  
 private, work area. Moreover, Meyers had already voted, and, by the time he was told  
 10 to leave the premises, even the second voting session was almost completed.  
 Contrary to the Union's suggestion (Br. 23), there is no evidence that Anthony had not  
 voted at the time she and Meyers were talking. Indeed, there is no evidence that any  
 other employees who had not already voted, or any employees, for that matter, even  
 knew about Meyers' expulsion on the day of the election. Nor is there any evidence  
 that Semyone knew what Meyers and Anthony were talking about when he observed  
 15 them; it is highly unlikely that he was in a position to overhear their conversation since  
 he was in the atrium separated from them by glass doors. Thus, the Union's  
 contention (Br.23)—that other employees would view the ejection of Meyers as a  
 suggestion that "they would be singled out or disciplined for supporting the union"—is  
 completely without merit. The rule itself was a valid and reasonable one, and Meyers  
 20 violated it. Meyers knew he was not permitted to linger on after his shift and talk to on-  
 duty employees. When he saw Semyone observing him, he knew he had to leave.  
 There is no credible evidence that the rule was not uniformly enforced, and, indeed,  
 Meyers suffered no consequences for violating the rule, except that he was asked to  
 leave. In these circumstances, I will overrule Objection 8.

#### 25 Conclusion

30 Because I have sustained Objection 9 and Objections 2 and 7, the election must  
 be overturned. The case is remanded to the Regional Director for Region 5 to hold a  
 new election at a time and under circumstances he thinks appropriate. The notice for  
 the new election shall include a statement of the reason for the second election. See  
*Fieldcrest Cannon, Inc.*, 327 NLRB 109, 110 (1998).<sup>7</sup>

35 Dated, Washington, D.C., August 27, 2004.

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 45 \_\_\_\_\_  
 Robert A. Giannasi  
 Administrative Law Judge

45 \_\_\_\_\_  
 50 <sup>7</sup> Pursuant to Section 102.69 of the Board's Rules and Regulations, any party may, within  
 fourteen (14) days from the date of this recommended decision, file with the Board in  
 Washington, D.C., an original and eight (8) copies of exceptions thereto. Immediately upon the  
 filing of such exceptions, the party filing them shall serve a copy on the other parties and shall  
 file a copy with the Regional Director of Region 5. If no timely exceptions are filed, the Board  
 will adopt the recommendations set forth herein.