

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

Dallas, Texas

SECURITY CONSULTANTS GROUP, INC.

Employer

and

Case 16-RC-10961

**UNITED GOVERNMENT SECURITY OFFICERS
OF AMERICA, INTERNATIONAL UNION**

Petitioner

and

**INTERNATIONAL UNION, SECURITY, POLICE AND
FIRE PROFESSIONALS OF AMERICA (SPFPA) AND ITS
LOCAL UNION NO. 48**

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board delegated its authority in this proceeding to the undersigned. Upon the entire record, in which the Petitioner filed a brief, the undersigned makes the following findings and conclusions.¹

¹ The Intervenor did not file a brief based on the Intervenor's position described below concerning the subpoena and petition to revoke. The Intervenor did, however, timely submit a letter generally setting forth its position in this matter.

I. SUMMARY

United Government Security Officers of America, International Union (UGSOA or Petitioner) seeks to represent a unit composed of all security officers employed by the Employer for security services in Dallas, Texas and surrounding areas. International Union, Security, Police and Fire Professionals of America (SPFPA or Intervenor), and its Local Union No. 48 asserts that Petitioner is ineligible to represent the petitioned-for unit under Section 9(b)(3) of the Act because it has an affiliation with Service Employees International Union, a non-guard union.

The parties have stipulated that Petitioner and Intervenor are labor organizations within the meaning of Section 2(5) of the Act and that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. At hearing, the parties stipulated there is no contract bar to this proceeding and that the following unit is an appropriate unit within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time security guards, employed by the Company under a Government Security Services contract for the Federal Buildings in Dallas, Texas and surrounding areas which include the following counties: Dallas County, Ellis County, Collin County, Navarro County, Lamar County, Hunt County, Tarrant County and Grayson County.

Excluded: All office clerical employees, professional employees, managers, and supervisors as defined by the National Labor Relations Act, as well as any temporarily assigned employees or substitute employees also defined in the Act.

Based upon the record as a whole and careful review of the Petitioner's brief, I find that the Intervenor failed to carry its burden to show that Petitioner is barred from being certified as the representative of the above-referenced employees pursuant to Section 9(b)(3) of the Act and will direct an election in the petitioned-for unit.

II. PROCEDURAL ISSUES

Both during and after the hearing in this matter, the parties have disputed several matters related to a subpoena issued by the Intervenor and a responsive petition to revoke submitted by the Petitioner. After continued correspondence between the parties subsequent to the adjournment of the hearing, the Hearing Officer obtained a copy of one document from UGSOA for *in camera* review. After conducting an *in camera* inspection, the Hearing Officer determined that the document in question would not be entered into the record and the hearing was closed. As discussed in greater detail below, the Intervenor has continued to object to the Hearing Officer's rulings.

I hereby reaffirm the Hearing Officer's rulings. To lend context to this discussion, I will discuss the Board's Rules and Regulations covering subpoenas in representation case hearings, the history of the parties' dispute regarding the Intervenor's subpoena and the Hearing Officer's rulings. In doing so, I note that Regional Directors and hearing officers have the authority to quash subpoenas in representation case hearings. Section 102.66(c) of the Board's Rules and Regulations states, in relevant part:

. . . The Regional Director or the hearing officer, as the case may be, shall revoke the subpoena, if in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Regional Director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. . . .

The day before the scheduled hearing, the Intervenor served a subpoena upon Petitioner requesting production of the following documents for the period since January 1, 2010: “[A]ll

records constituting or referring to any agreement between the UGSOA and any labor organization that includes non-guards as members, including but not limited to the Service Employees International Union” and “all records reflecting any money or services received by the UGSOA from any labor organization that includes non-guards as members, including but not limited to the Service Employees International Union.”

Petitioner filed a petition to revoke the subpoena, arguing that the subpoena sought documents unrelated to the questions in the case and that the subpoena was untimely and burdensome. (Intervenor Exh. 2) Petitioner argued that the subpoena was merely a “fishing expedition” and did not seek relevant evidence. The petition to revoke included a statement that the Intervenor was likely seeking documents regarding a dispute and litigation between a local union of the Petitioner and a SEIU local. Regarding the timeliness of the subpoena, Petitioner noted that the hearing was first scheduled for July 26, but postponed until July 28. The subpoena was served upon Petitioner on July 27, the day before the rescheduled hearing.

At hearing, the Intervenor presented its sole witness--its attorney, who testified regarding another individual’s conversation on the issue at hand. This conversation is discussed more fully below. The parties then discussed their subpoena issues. After hearing the parties’ positions, the Hearing Officer partially granted Petitioner’s petition to revoke and quashed the subpoena paragraph referencing “any money and services.” The Hearing Officer also partially denied the petition to revoke and ordered the production of evidence of any litigation in which the Petitioner lost representation rights to employees now represented by the Service Employees International Union (SEIU). Petitioner refused to comply. The Hearing Officer then adjourned the hearing. By letter dated July 30, 2010, the Intervenor requested that the Region seek enforcement of the

subpoena. On August 2, 2010, Petitioner requested the Hearing Officer conduct an *in camera* review of documents ordered to be produced.

By letter dated August 3, 2010, the Intervenor argued against an *in camera* review, asserting that the documents were relevant to determine Petitioner's ability to represent guards. It further argued that the documents should not be kept secret as this situation could present a case of first impression for the Board. It also argued that the documents could reveal the identity of additional witnesses. It claimed entitlement to an open review of the documents. Further, it asserted that it had a sworn affidavit from a former Petitioner president that discussed the lawsuit in question between Petitioner and SEIU.²

By order dated August 6, 2010, the Hearing Officer granted Petitioner's request to review the document *in camera*. By letter dated August 9, 2010, the Intervenor requested an appeal of the Order for *in camera* review. In this letter, the Intervenor stated its concern again that the Hearing Officer could not put the document in the proper context. It additionally provided Petitioner's 2009 LM-2 form and Petitioner's letter disclaiming interest in the unit that was the subject of the lawsuit.³ It stated that, for the two previous years, Petitioner had been losing members and money. It also argued again for a case of first impression and that the *in camera* review is "not utilized otherwise in American jurisprudence." Petitioner also acknowledged that the Petitioner's agreement would likely have "self-serving language that it does not create an affiliation," but that this was nevertheless a matter for the Board to decide.

² The Intervenor never offered this sworn affidavit or the witness to the Hearing Officer or the Regional Director either in support of its contention that the documents were relevant or to demonstrate its contention that the Petitioner was not an appropriate §9(b)(3) representative.

³ I note that Intervenor did not offer this information into the record during the hearing. The LM-2 form is widely available to the public and could have been presented at that time.

The Hearing Officer conducted an *in camera* inspection of the material under subpoena, and after this review, issued an order by letter dated August 12, 2010, which quashed the subpoena in its entirety, denied admission of the material into the record and closed the record.

After the close of the hearing, the Intervenor, through its counsel, by letter dated August 17, 2010, requested copies of all correspondence or other documents received from Petitioner, including, but not limited to, all recordings or notes of *ex parte* communications between the Region and Petitioner's attorney in order to assist it in preparing its appeal of the Hearing Officer's ruling concerning the subpoena. By another letter dated August 17, 2010, Intervenor's counsel requested that all actions and documents related to the subpoena and petition to revoke be made part of the record in this case.

Finally, by letter dated August 18, 2010, the Intervenor requested permission to appeal the decision of the Hearing Officer to grant the motion to quash the subpoena and close the record. Therein, the Intervenor also requests that I direct that the hearing remain open and that a hearing date be scheduled for the presentation of evidence.

I affirm the Hearing Officer's rulings concerning the subpoena, the *in camera* review of the requested documents and the rejection of the subpoenaed document as evidence. I also deny the Intervenor's August 9, 2010, request for permission to appeal the Hearing Officer's ruling concerning the Petitioner's motion for an *in camera* review and the Intervenor's August 18, 2010, request for permission to appeal the Hearing Officer's ruling concerning the closing of the record and the petition to revoke.

As noted in *Marion Hospital for the Aged and Inform, Inc.*, 333 NLRB 1084 (2001), a party seeking to obtain documents pursuant to a subpoena in a representation case must show that he is in substantial need of the materials in preparation of his case and that the party is

unable without undue hardship to obtain the substantial equivalent of the materials by other means. Here, the Intervenor, which claims that Petitioner is controlled by a non-guard union, presented only its counsel as a witness, and counsel presented only hearsay evidence of such knowledge. Intervenor's subsequent correspondence demonstrates that it apparently has some information in its possession about a lawsuit between Petitioner and SEIU and its purported effects, but failed to present such at the hearing.

Nonetheless, giving the Intervenor the benefit of the doubt, the Hearing Officer requested production of one document from Petitioner. The Hearing Officer then appropriately determined that an *in camera* review was necessary upon Petitioner's request.

Despite the Intervenor's argument that such review is not utilized in this manner in American jurisprudence, an *in camera* review of documents is regularly used in judicial venues. Under Board policies and procedures, a Hearing Officer has the authority to conduct such a review. The Board's *Guide for Hearing Officers in NLRB Representation and Section 10(k) Proceedings* provides for *in camera* review when such review "allows the hearing officer to inspect the documents privately . . . to determine whether the material is relevant, privileged or not producible for other reasons." *Id.* at 14. In addition, the Board has approved *in camera* inspection in various circumstances including the review of allegedly fraudulent authorization cards⁴, documents to determine whether attorney-client privilege exists⁵, and union minutes⁶.

As noted above, I affirm the Hearing Officer's ruling concerning the rejection of the subpoenaed document. In so affirming, I find, as discussed in greater detail below, that the Intervenor has failed to establish the document in question is relevant as it does not reveal evidence of direct affiliation or definitive evidence of indirect affiliation. Additionally, although

⁴ *Crystal Art Gallery*, 323 NLRB 258, fn. 3 (1997).

⁵ *Brinks, Inc.*, 281 NLRB 468, 470 (1986).

⁶ *Lodi Memorial Hospital Ass'n*, 249 NLRB 786 (1980).

confidentiality was not explicitly argued, the documents sought in the instant case involved a prior court proceeding and presumed settlement of such proceeding. As such, the litigants and the public have some interest in protecting the confidentiality of such settlement. See *Hasbrouck v. BankAmerica Housing Services*, 187 F.R.D. 453 (N.D.N.Y. 1999).

Pursuant to the Intervenor's request, I now make part of the record of this matter the following records, which will be received in evidence as Board's Exhibits 3(a) through 3(j): July 30, 2010, request by Intervenor that Region seek enforcement of subpoena (Bd. Exh. 3(a)); August 2, 2010, request by Petitioner that Hearing Officer conduct an *in camera* review of documents ordered to be produced (Bd. Exh. 3(b)); August 3, 2010, position statement from Intervenor in opposition to *in camera* review (Bd. Exh. 3(c)); August 6, 2010, Order Granting Petitioner's Motion for an *In Camera* Review (Bd. Exh. 3(d)); August 9, 2010, letter from Intervenor requesting appeal of the order for *in camera* review (Bd. Exh. 3(e)); August 12, 2010, letter from Hearing Officer quashing subpoena and closing record (Bd. Exh. 3(f)); August 17, 2010, letter from Intervenor requesting that the Region make part of the record all documents related to the subpoena dispute in this matter (Bd. Exh. 3(g)); August 17, 2010, letter from Intervenor requesting copies of all correspondence or other documents received from Petitioner, including, but not limited to, all recordings or notes of *ex parte* communications between the Region and Petitioner's attorney (Bd. Exh. 3(h)); August 18, 2010, request from Intervenor for permission to appeal the Hearing Officer's decision to grant the petition to revoke the subpoena and close the record (Bd. Exh. 3(i)); and August 19, 2010, letter from Intervenor regarding its August 17, 2010 request for correspondence and documents (Bd. Exh. 3(j)). These documents will be forwarded to the court reporter as a supplement to the record.

I am refusing to provide copies of any internal communications between the Region and the parties in this case because such production would violate Section 102.118 of the Rules and Regulations of the National Labor Relations Board, which prohibits the production of any documents without the written consent of the General Counsel and also seeks documents that are work product. Notwithstanding this ruling, I note that *ex parte* communications between a hearing officer and the respective parties in a pre-election representation hearing are not inappropriate and are, in fact, to be expected.

III. ANALYSIS

The Intervenor contends that Petitioner is either directly or indirectly affiliated with the SEIU and therefore may not represent guards pursuant to Section 9(b)(3) of the Act. To support this claim, the Intervenor's attorney presented hearsay testimony that Intervenor's president received a phone call from SEIU requesting that it withdraw its petition in Case 5-RC-16477 because SEIU represented the security officers and was given the unit by the UGSOA, the Petitioner in the instant case. After this phone call, the Intervenor withdrew its petition in Case 5-RC-16477. The Intervenor also alleged that an agreement between Petitioner and SEIU resulted in the Petitioner's disclaimer of interest, but presents no evidence to support this claim. As previously noted, the Intervenor, by letter in support of its need to receive the documents it sought by the subpoena in this matter, claims to have in its possession a sworn affidavit concerning a settlement between Petitioner and SEIU. The Intervenor did not attempt to present such affidavit at the hearing in this matter or after the close of the hearing. The following analysis will reveal that Petitioner is not barred from acting as the exclusive bargaining representative of a guard unit, such as the petitioned-for unit.

A. Section 9(b)(3) of the Act

Section 9(b)(3) of the Act mandates that the Board not certify a labor organization as a bargaining unit representative of guards if the organization “admits to membership, or is affiliated directly or indirectly with an organization, which admits to membership, employees other than guards.” See *A.D.T. Co.*, 112 NLRB 80 (1955) and *Wackenhut Corp.*, 169 NLRB 398 (1968) (Board will dismiss representation petitions filed by labor organizations that admit employees other than guards into membership).

B. Direct Affiliation

The Intervenor failed to present any evidence showing a direct affiliation between Petitioner and the SEIU. Even if the hearsay evidence is fully credited, it falls short of establishing any direct affiliation between the two unions and no evidence was adduced which showed that the Petitioner has any non-guard members. Because the evidence fails to establish that Petitioner is directly affiliated with the SEIU, I must examine whether any indirect affiliation exists between Petitioner and the SEIU.

C. Indirect Affiliation

An indirect affiliation exists when a non-guard union participates in guard affairs to such an extent and duration that the guard union loses the freedom to formulate its own policies. *Lee Adjustment Center*. 325 NLRB 375 (1998); *Magnavox Co.*, 97 NLRB 1111 (1952). Even giving full credit to the hearsay evidence, it falls short of establishing indirect affiliation. Even if that relationship existed, such affiliation was brief and no evidence has been presented that such affiliation continues to the present. The Board has historically “refused to find indirect affiliation where, on the record, it appeared that the assistance and advice once received by the

guard union from the non-guard union had, in fact, terminated.” *International Harvester Co.*, 145 NLRB 1747, 1749 (1964); *Federal Services, Inc.*, 115 NLRB 1729, 1731 (1956).

Here, the record evidence does not show definitive evidence of any indirect affiliation. As the Board recognized in *Lee Adjustment Center*, 325 NLRB at 376: “[A]ny less stringent standard [than definitive evidence] would seriously undermine the rights of guards to be represented by a union and of guard unions to represent guards.” See also *Children’s Hospital of Michigan*, 317 NLRB 580, 581 (1995).

For the reasons outlined above, I find that Petitioner is not barred by Section 9(b)(3) of the Act from being certified as the representative of the employees in the petitioned-for unit and I shall direct an election accordingly.

IV. CONCLUSION

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer’s rulings made at the hearing and in his post-hearing Orders are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.⁷
3. The labor organizations involved claim to represent certain employees of the Employer.

⁷ The parties stipulated, and I find, that the Employer is a Tennessee corporation with places of business located in Dallas, Texas and surrounding areas where it is engaged in the business of providing security guard services at buildings and properties owned and leased by the Federal Government throughout the United States. During the past 12 months, a representative period, the Employer provided services valued in excess of \$50,000 to the United States Government in various locations outside the State of Texas.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time security guards, employed by the Company under a Government Security Services contract for the Federal Buildings in Dallas, Texas and surrounding areas which include the following counties: Dallas County, Ellis County, Collin County, Navarro County, Lamar County, Hunt County, Tarrant County and Grayson County.

Excluded: All office clerical employees, professional employees, managers, and supervisors as defined by the National Labor Relations Act, as well as any temporarily assigned employees or substitute employees also defined in the Act.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the Unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period,

employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **United Government Security Officers of America, International Union or International Union, Security, Police and Fire Professional of America (SPFPA), and Its Local Union Number 48.**

A. List of Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list for the unit, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in Region 16, 819 Taylor Street, Room 8A24, Fort Worth, Texas, on or before **August 27, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review

affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (817) 978-2928. Since the list will be made available to all parties to the election, please furnish a total of **three** copies, unless the list is submitted by facsimile, in which case no copies need to be submitted. If you have any questions, please contact Region 16.

B. Notice Posting Obligation

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

C. E-FILING

The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents, which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board website at www.nlr.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-file your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

D. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on **September 3, 2010**. The request may **not** be filed by facsimile.

Dated at Fort Worth, Texas this 20th day of August, 2010.

/s/ Martha Kinard

Martha Kinard, Regional Director,
National Labor Relations Board
Region 16
Federal Office Building
819 Taylor Street, Room 8A24
Fort Worth, Texas 76102-6178

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CASE 16-RC-10961

DATE OF MAILING August 20, 2010

AFFIDAVIT OF SERVICE OF DECISION AND DIRECTION OF ELECTION

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by postpaid regular mail upon the following persons, addressed to them at the following addresses:

Brad Odum
Labor Relations Manager
Security Consultants Group, Inc.
102 Mitchell Road, Suite 100
Oakland Ridge, TN 37830

Michael L. Burke, DHS Director
United Government Security Officers of
America, International Union
8620 Wolff Court, Suite 210
Westminster, CO 80031

Robert B. Kapitan, Attorney
Kapitan Law
600 E. Granger Rd., Suite 200
Brooklyn Heights, OH 44131

Subscribed and sworn to before me on
August 20, 2010

DESIGNATED AGENT

/s/ Timothy Watson

NATIONAL LABOR RELATIONS BOARD