**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**SECURITY CONSULTANTS GROUP, INC.**

Employer,

Case No. 16-RC-10961

and

**UNITED GOVERNMENT SECURITY OFFICERS OF AMERICAL INTERNATIONAL UNION**

Petitioner,

and

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

Intervenor.

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**PETITIONER UGSOA'S BRIEF IN OPPOSITION TO THE INTERVENOR, SPFPA'S, REQUEST FOR REVIEW**

Petitioner, United Government Security Officers of America, International Union (UGSOA), herby submits its Brief in Opposition to the SPFPA's Request for Review. As set forth below, the SPFPA's Request should be denied as it is without merit and otherwise unsupported by the record in this matter.

## I. Introduction

This case was commenced after the UGSOA sought to represent a unit of security officers employed by Security Consultant's Group, Inc. in Dallas, Texas and surrounding areas. (Decision, at pg. 2) The SPFPA asserts that the UGSOA has an affiliation with the Service Employees International Union (SEIU), a non-guard union, and is therefore ineligible to represent the petitioned-for unit under Section 9(b)(3) of the Act. *Id.*

## II. The SPFPA Has Failed To Show Sufficient Cause To Reopen The Record And/Or Introduce New Evidence.

Rule 102.65(e)(1) provides, in relevant part, that:

> A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record...No motion ...to reopen the record will be entertained by the Board or by any Regional Director with respect to any matter which could have been but was not raised pursuant to any other section of these rules. … Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the Regional Director or the Board believes should have been taken at the hearing will be taken at any further hearing.

That Rule also requires that the requesting party state the additional evidence sought to be adduced, why the evidence was not presented previously and what result it would require if adduced and credited. However, the SPFPA failed to address these criteria in its request and instead merely contends that the new evidence supports its assertion that the UGSOA is in violation of 9(b)(3), a proposition based on nothing more than mere conjecture.

The SPFPA'S argument for review centers around two main issues. (See Intervenor SPFPA'S Request for Review ("Request")) The first issue involves a Subpoena that SPFPA served on the UGSOA the day before the hearing. (Decision and Direction of Election issued by Regional Director Kinard on August 20 (Decision), at pg. 3-4; Request, at pg. 2). Secondly, the SPFPA asserts that it was not permitted "to submit additional evidence." (Request, pg. 12).

### A. The Subpoena And Related Events.

The hearing in this matter was originally scheduled for July 26, 2010, but postponed until July 28. (Decision, at pg. 4) The SPFPA served the Subpoena at issue on the UGSOA on July 27, requesting "All 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 [SEIU]" 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 [SEIU]." (Decision, at pg. 3-4) The UGSOA filed a Petition to Revoke the subpoena, and subsequent procedural events led to an *in camera* review conducted by the hearing officer of a confidential document provided to the Region by the UGSOA for that purpose. (Decision at pg. 4-6). After review of the confidential document, the Hearing Officer revoked the SPFPA's subpoena in its entirety, denied admission of the material into the record and closed the record. (Decision, pg. 6)

Upon review of the Hearing Officer's decision, the Regional Director cited provision for such *in camera* review in the Board's *Guide for Hearing Officers in NLRB Representation and Section 10(k) Proceedings* which "allows the hearing officer to inspect the documents privately … to determine whether the material is relevant, privileged or not producible for other reasons." (Decision, at pg. 7, quoting *Guide* at pg. 14) As the Regional Director further notes, Board precedent has continually upheld the legitimacy of the *in camera* review process. (Decision at pg.7) Intriguingly, the SPFPA has not cited any Board case law in support of their continued assertion that "the method Petitioner demanded and the Region accepted in this case is improper." (See Request at pg. 10). One would surmise that this is due to the fact that Board precedent is clearly contra to the SPFPA's position on this matter. (See for example *Crystal Art Gallery*, 323 NLRB 258, fn.3 (1997) asserting *in camera* inspections of [the documents at issue] are frequently conducted by hearing officers in lieu of admitting them into evidence; *Brinks, Inc.*, 281 NLRB 468, 470 (1986) holding that the hearing officer should have conducted an in camera inspection of documents to determine whether any of them were subject to … privilege; and *Lodi Memorial Hospital Ass'n*, 249

NLRB 786, fn.4 (1980) finding that only unprivileged documents should have been made available to the opposing party.) Therefore, the SPFPA'S repeated characterization of the *in camera* review conducted by the Hearing Officer in this case as an illegitimate, secretive procedure is entirely absurd and unfounded.[1]

Additionally, the Regional Director cited *Marion Hospital for the Aged and Inform, Inc.*, 333 NLRB 1084 (2001), noting that Board precedent requires "a party seeking to obtain documents pursuant to a subpoena … must show that he is in *substantial need* of the materials in preparation of his case…" (Decision, at pg. 6-7) (emphasis added). The SPFPA has shown no such "substantial need," but merely continues to make blanket assertions that the subpoenaed documents are relevant. (See Request at pg. 5-10) Such assertions are based upon nothing more than their own hypothetical analysis of circumstantial events. *Id*. Therefore, it would have been proper to revoke the Subpoena even before the *in camera* review. However, the Hearing Officer conducted the review "giving the Intervernor the benefit of the doubt.", and thereafter revoked the subpoena rejecting as valid the argument asserted both then and now by the SPFPA. (Decision at pg. 7)

> Rule 102.66(c) states that a Regional Director or Hearing Officer
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> *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.

[1] Court's have also traditionally recognized the legitimacy of this private review process as well. See for example: *In Re: GRAND JURY SUBPOENA, 190 F.3d 375 (CA. 5, 1999)* wherein the 5th Circuit addressed the *in camera* review process and reversed a trial court judge's decision to disclose to the requesting party documents submitted to the court for *in camera* review by the producing party.

(emphasis added). It is therefore clear that the Hearing Officer was acting in accordance with this Board directive, which clearly gives him the authority to revoke subpoenas and make determinations regarding the probative value of requested documents.

Therefore, despite the SPFPA's insistence that the subpoenaed documents prove an impermissible affiliation between the UGSOA and the SEIU, the Hearing Officer properly rejected that proposition after reviewing the confidential document. Moreover, the Hearing Officer reviewed the evidence and ruled on this matter in accordance with both the Board's rules and precedent as it pertains to the admission of probative evidence and what constitutes a valid 9(b)(3) affiliation issue. The Regional Director subsequently affirmed the procedure used by and the findings of the Hearing Officer. Accordingly, further review of this matter would be unproductive and a waste of time and resources.

**B. The Submission of Additional Evidence.**

Despite the extraordinary circumstances Rule 102.65(e)(1) requires be present to justify reopening a record in order to submit new evidence, the SPFPA nonetheless argues that the submission of additional evidence should be permitted here. (Request at pg. 12) The SPFPA did attempt to present new evidence in its August 9th letter to the Hearing Officer in the form of an LM-2; however, the Regional Director noted in response, "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" (Decision at fn.3) Aside from the "evidence" presented in the August 9th letter, the SPFPA has not identified, with the exception of one witness, what further evidence it wished to submit. (See Request at pg. 12). Rule 102.65(e)(1) requires not only such identification of evidence, but also what result it would require if adduced and credited. The SPFPA merely

posits, "no one from the Region questioned me as to what additional evidence I had." (Request, at pg. 12) As the Regional Director correctly notes however, the SPFPA had previously made assertions with regard to its possession of evidence despite continued failure to produce the same. For instance, the SPFPA "asserted that it had a sworn affidavit from a former Petitioner president that discussed the lawsuit in question between Petitioner and SEIU." However, as the Regional Director notes, "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." (Decision at fn.2)

The SPFPA does mention their intent to introduce one witness. (Request at pg. 12). However, it remains neglectful of fulfilling the requirements set forth in Rule 102.65(e)(1) as the SPFPA does not name this witness, much less set forth "what result it would require if adduced and credited." (See Rule 102.65(e)(1)) Nor does the SPFPA explain why it made no mention of such testimony prior to the Region's DDE which was made over three weeks after the SPFPA states that the witness resigned from the UGSOA and allegedly had knowledge of what his testimony would be. (See Request at pg. 12)

As the SPFPA has failed to comport with the requirements set forth in Rule 102.65(e)(1), the Region must refuse to reopen the record in this matter.

## III. The Hearing Officer And Regional Director Followed Board Precedent When Conducting Their Proceedings And Issuing Their Decision.

The Board has held that the non-certifiability of a guard union must be shown by **definitive evidence**, as any less stringent standard would seriously undermine the rights of guards to be represented by a union, and of guard unions to represent guards. See, e.g.,

*Children's Hospital of Michigan*, 317 NLRB 580, 581 1995), enfd. sub nom. *Henry Ford Health System v. NLRB*, 105 F.3d 1139 (6th Cir. 1997)(emphasis added).

The Regional Director discussed the weak evidence that SPFPA set forth at the hearing in support of their assertion that the UGSOA is precluded by 9(b)(3) from representing the petitioned-for guard unit. Far from "definitive evidence", the SPFPA presented one witness – its own attorney, who presented only hearsay testimony regarding a telephone conversation between SPFPA's president and the SEIU, during which the SEIU requested the SPFPA withdraw its petition for a unit of employees Washington, DC, which it did, because the UGSOA had disclaimed interest in the unit.[2] (See Decision at pg. 4, 7, 9) Despite assertions of additional evidence, namely an affidavit concerning a settlement between the UGSOA and the SEIU, "the Intervenor did not attempt to present such affidavit at the hearing in this mater or after the close of the hearing." (Decision at pg. 9) The Regional Director concluded that even if the hearsay evidence is given full credit, it fails to establish a direct or indirect affiliation.[3]

Furthermore and importantly, the Regional Director found that "even if that relationship existed, such affiliation was brief and no evidence has been presented that such affiliation continues to the present." (Decision at pg. 10) The Regional Director correctly adhered to Board precedent that no affiliation will be found "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." (Decision at 10-11, quoting *International*

[2] One trusts that the irony of the admissions of SPFPA's counsel is not lost upon the Board in light of the assertions being made by the SPFPA in this matter.

[3] It should also be noted that all of the information related to the UGSOA's litigation with the SEIU was available to and known by the SPFPA well in advance of the hearing so the arguments it now asserts on the basis of the same could have been made at the hearing.

*Havester Co.,* 145 NLRB 1747, 1749 (1964); *Federal Services, Inc.,* 115 NLRB 1729, 1731 (1956))

Therefore, the record in this case clearly supports the Regional Director's finding of no affiliation, direct or indirect. The SPFPA was required to show such affiliation by "definitive evidence," which the Hearing Officer and the Regional Director correctly concluded the SPFPA failed to do.

## IV. The SPFPA'S Efforts In This Case Appear To Be Nothing More Than An Attempt To Use The Board In Its Campaign Efforts Against the UGSOA.

Ultimately, the UGSOA trusts that this Region sees the SPFPA's efforts for what they truly are which is nothing more than an effort to use the Board's processes to obtain information and/or documents from the UGSOA that it perceives to be damaging to the UGSOA so it can use the same to further its smear/raiding campaign against the UGSOA. Ultimately, it is not the advancement or protection of Section 9(b)(3) that the SPFPA seeks in this endeavor, but rather the elimination of the UGSOA as a competitor in the representation of security officers - an objective that has become an all consuming obsession for the SPFPA at the detriment of its own membership and the employees in this instance who are being deprived of their right to select a representative of their own choosing.[4]

The SPFPA's fascination with the UGSOA's 9(b)(3) status is a well-documented predilection. In 2003 the SPFPA, in Region 28, attempted to disqualify the UGSOA from representing guards in Arizona on the basis of an anti-raid agreement between the UGSOA and the SEIU. Region 28 rejected that endeavor. (See 28-RC-6141) Recently, the SPFPA

[4] See for example the smear website www.eyeonugsoa.org for a sampling of this effort and a reiteration of much of the same assertions made in the SPFPA's Request for Review.

attempted the same 9(b)(3) argument in Region 15 and failed. (See 15-RC-8720) Additionally, the UGSOA would note that not only are the SPFPA's efforts all consuming but also disingenuous since it received a settlement payment in the amount of $170,000.00 from the SEIU as reported in its 2006 LM report. Certainly this sheds light on the feigned concern the SPFPA notes in its Request regarding the UGSOA's resolution of its litigation with the SEIU and reveals what it is really attempting to use these proceedings to accomplish.

## III. Conclusion

The SPFPA's effort in requesting review in this instance should be seen for what it is which is nothing more than a part of its on going raid and smear campaign against the UGSOA which it is now attempting to have the NLRB advance. The Board should reject this endeavor and affirm the Region's decision which was correct in regards to both the use of the long recognized *in camera* review process and in determining that the UGSOA was not affiliated with the SEIU. For the reasons states herein, Petitioner respectfully requests that Request for Review be denied.

Respectfully submitted,

**JOHN A. TUCKER CO., L.P.A.**

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**CERTIFICATE OF SERVICE**

I hereby certify that, on September 21, 2010 I have caused a copy of the foregoing to be served by e-mail and/or fax on:

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*/s/ John A. Tucker*
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