

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

GOLDEN FARM BROOKLYN, INC. d/b/a GOLDEN FARM GROCERY)	
)	
Employer)	
and)	Case No. 29-RC-77022
)	
)	
LOCAL 338, RETAIL WHOLESALE, AND DEPARTMENT STORE UNION, UNITED FOOD AND COMMERCIAL WORKERS)	
)	
Petitioner)	
)	

**REPORT ON CHALLENGES AND OBJECTIONS
AND NOTICE OF HEARING**

On March 21, 2012,¹ Local 338, Retail, Wholesale and Department Store Union, United Food and Commercial Workers (“the Petitioner”) filed a petition² in this matter seeking to represent certain employees employed by Golden Farm Brooklyn, Inc., d/b/a Golden Farm Grocery (“the Employer”). Pursuant to a Stipulated Election Agreement signed by the Petitioner and the Employer, and approved by the undersigned on March 21, an election by secret ballot was conducted on May 2 among the employees in the following unit:

All full-time and regular part-time employees, including cashiers, clerks, stock persons, drivers, and general merchandise handlers of groceries, meat, fish, and produce employed by the Employer at its facility located at 329 Church Avenue, Brooklyn, New York, but excluding all managers, buyers, office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

¹ All dates hereinafter are in 2012 unless otherwise indicated.

² On March 7, the Petitioner filed an earlier petition for the same unit, which was withdrawn on March 21.

The Corrected Tally of Ballots made available to the parties pursuant to the Board's Rules and Regulations, showed the following results:

Approximate number of eligible voters	27
Number of void ballots	1
Number of ballots cast for the Petitioner	13
Number of votes cast against participating labor organizations	8
Number of valid votes counted	21
Number of challenged ballots	5
Number of valid votes counted plus challenged ballots	26

Challenges are sufficient in number to affect the results of the election.

The Petitioner challenged the ballots of Young Chung Chun, Jose Cuautle, and Sharon Kim on the ground that they are supervisors within the meaning of Section 2(11) of the Act. The Petitioner also challenged the ballot of Kim on the ground that she is a former owner of the Employer and enjoys certain benefits due to her status as a former owner. The Petitioner challenged the ballot of Seung Seup Lee on the ground that this individual is not employed by the Employer. The Board Agent conducting the election challenged the vote of Maria Gomez because her name did not appear on the Excelsior³ list.

The Petitioner and the Employer filed timely objections to conduct affecting the results of the election. The Petitioner and the Employer's objections are attached hereto as Exhibit A and Exhibit B, respectively.

Pursuant to Section 102.69 of the Board's Rules and Regulations, the undersigned caused an independent investigation to be conducted concerning the above-mentioned objections and challenges, during which the parties were afforded full opportunity to submit evidence bearing on the issues. The investigation revealed the following:

³ Excelsior Underwear, 156 NLRB 1236 (1966).

I. The Challenges

With regard to the ballot of Maria Gomez, her name did not appear on the Excelsior list provided by the Employer prior to the election. The parties have agreed that this was an error, and that Gomez is eligible to vote in the election. Accordingly, I direct that the ballot of Maria Gomez be opened and counted.

The Petitioner challenged the ballots of Young Chung Chun and Jose Cuautle on the ground that they are supervisors within the meaning of Section 2(11) of the Act. In support of these challenges, the Petitioner states that named employees will testify that each of these individuals possess unspecified indicia of supervisory status under Section 2(11) of the Act. The Employer states that Chun was formerly a supervisor within the meaning of Section 2(11) of the Act, but was demoted when ownership of the store changed, which occurred on November 1, 2011, and has not acted as a supervisor since that time. According to the Employer, Cuautle has never been a supervisor within the meaning of Section 2(11) of the Act. In view of the conflicting positions and facts asserted by the parties regarding the eligibility of Chun and Cuautle, I find that the challenges to their ballot raise material and substantial issues of fact and credibility that would be best resolved by a hearing. Accordingly, I direct that a hearing be held regarding the challenges to the ballots of Chun and Cuautle.

The Petitioner challenged the ballot of Sharon Kim on the grounds that she is a supervisor within the meaning of Section 2(11) of the Act and that she is a former owner of the Employer who enjoys certain benefits due to her status as a former owner. In its offer of proof, the Petitioner states that named employees will testify that Kim exercises supervisory authority and also receives special treatment and benefits which other employees do not receive because she is a former owner of the Employer. According to the Employer, Kim is the spouse of a

manager, not an owner. The Employer maintains that she does not exercise supervisory authority.

The Board has found that relatives of management may be excluded from a bargaining unit because their interests may be “sufficiently distinguished from those of other employees.” NLRB v. Action Automotive, Inc., 469 U.S. 490, 494 (1985) (in which the Supreme Court affirmed a Board decision excluding the mother of three brothers who owned and managed the employer’s operation, as well as the wife of one of the owners from a bargaining unit). The Board does not automatically exclude a family member merely because he or she is related to management, but employs an expanded community of interest inquiry to determine whether the family member enjoys special status as a result of the family relationship. See International Metal Products Co., 107 NLRB 65 (1953) (finding that family members are not automatically excluded); NLRB v. Action Automotive, supra at 495. To this end, the Board considers factors such as the extent of family involvement in ownership and management of the company, whether the employee lives with the owner or manager or is dependent upon the owner or manager, whether the employee has greater access to owners or managers than other employees, and whether the employee receives special job-related benefits, such as higher wages or better working conditions. See NLRB v. Action Automotive, supra at 495; R & D Trucking, Inc., 327 NLRB 531, 533 (1999); Parisoff Drive-In Market, Inc., 201 NLRB 813 (1973).

In view of the conflicting positions and facts asserted by the parties regarding the eligibility of Kim with regard to her alleged supervisory status as well as her status as the spouse of a manager, I find that the challenge to her ballot raises material and substantial issues of fact and credibility that would be best resolved by a hearing. Accordingly, I direct that a hearing be held regarding the challenge to the ballot of Kim.

The Petitioner also challenged the ballot of Seung Seup Lee on the ground that this individual is not employed by the Employer. In support of this challenge, the Petitioner states that named employees will testify that Lee is not employed by the Employer. The Petitioner further states that it will present payroll evidence regarding Lee's status. The Employer contends that this individual has been on the Employer's payroll long before the election, and was on the Employer's payroll at the time of the election. In view of the conflicting positions and facts asserted by the parties regarding the eligibility of Lee, I find that the challenge to his ballot raises material and substantial issues of fact and credibility that would be best resolved by a hearing. Accordingly, I direct that a hearing be held regarding the challenge to the ballot of Lee.

II. The Objections

A. The Petitioner's Objections

1. Request to Withdraw

The Petitioner has requested permission to withdraw its second objection. The Employer does not object to the Petitioner's request. I approve the withdrawal of the Petitioner's second objection.

2. Objection No. 1

In its first objection, the Petitioner alleges that on May 2, shortly before the polls opened, the Employer interrogated employees, polled employees regarding how they were going to vote, and campaigned in a manner that coerced and restrained employees in the exercise of their Section 7 rights. The Employer maintains that this objection lacks merit.

In support of this objection, the Petitioner states that named employees will testify that Joe Mieluchowski, a labor relations consultant employed by the Employer, approached them shortly before the polls opened on the day of the election and interrogated them about how they

were going to vote. The employees will further testify that Mieluchowski tried to pressure them into voting against the Petitioner. The Petitioner provides no specific evidence regarding Mieluchowski's attempt to pressure employees.

The foregoing conduct of alleged interrogation, if true and attributable to the Employer, could have affected the outcome of the election and would, therefore, warrant setting aside the election.⁴ In view of the conflicting positions and facts asserted by the parties regarding the alleged interrogation before the polls opened, I find that the Petitioner's first objection raises material and substantial issues of fact that would be best resolved by a hearing. Accordingly, I direct that a hearing be held regarding the allegation that the Employer interrogated employees contained in the Petitioner's first objection.

With regard to the Petitioner's allegation that Mieluchowski attempted to pressure employees into voting for the Employer, the Petitioner has not presented specific evidence regarding this allegation. In order to support objections adequately, a party must do more than "rely on its bare allegations." Lange and Perkins LLC d/b/a The Daily Grind, 337 NLRB 655, 656 (2002); see also Allen Tyler & Son, Inc., 234 NLRB 212, 212 (1978) ("In the absence of any probative evidence, [the Board] shall not require or insist that the Regional Director conduct a further investigation simply on the basis of a 'suspicious set of circumstances'"), Audubon Cabinet Company, 119 NLRB 349, 350 (1957) ("Objections, to merit investigation by a Regional Director, must be reasonably specific in alleging facts which prima facie would warrant setting aside an election."). In the present case, the Petitioner asserts merely that the Employer "tried to pressure" employees into voting for the Employer. This conclusory statement does not present probative evidence of objectionable conduct. Indeed, an employer may lawfully attempt to persuade employees to vote against union representation in an election. Accordingly, I

recommend overruling that portion of the Employer's first objection which alleges that the Employer tried to pressure employees into voting for the Employer.

B. The Employer's Objections

In its first objection, the Employer alleges that during the critical period prior to the election, representatives of the Petitioner approached three employees, distributed authorization cards, and offered them financial rewards in exchange for supporting the Petitioner. In its second objection, the Employer maintains that these alleged offers of financial reward destroyed the laboratory conditions for the election. The Petitioner asserts that these objections are without merit.

The Employer provided affidavits from three employees. One employee testified that Lucas Sanchez approached him/her on an unspecified date in March.⁵ This employee stated that Sanchez gave him/her a card with his name and number on it, but the employee did not keep the card. According to this employee, Sanchez offered him/her money to support the Petitioner. Sanchez did not specify an amount, but told the employee that the money was ready. This employee testified that s/he told Sanchez that s/he wanted to think about it, but never spoke to Sanchez or anyone else about such an offer again.

The other two employees testified that they were together when Sanchez approached them in April, sometime within the critical period. Sanchez was accompanied by a woman identified as "Kelly." According to both employees, Sanchez offered each of them \$2000 in exchange for supporting the Petitioner. One of these employees told Sanchez that s/he did not

⁴ See Unimasco, Inc., 196 NLRB 400 (1972) (setting aside an election following unlawful questioning of employees about their union support).

⁵ The critical period commenced on March 7. Thus, it is not clear that this conduct occurred within the critical period. The objecting party has the burden to prove that the objectionable conduct occurred within the critical period. See In re Accubuilt, Inc., 340 NLRB 1337, 1338 (2003).

want the money. One employee testified that s/he believed both Sanchez and Kelly were representatives of the Petitioner, but s/he did not know for sure. Sanchez gave one of these employees a flyer from NY Communities for Change, a community group. The flyer is attached hereto as Exhibit C. Sanchez's telephone number and e-mail address are on the bottom of the flyer. The flyer does not mention the Petitioner. None of the Employer's witnesses report that Sanchez or Kelly gave any of them a Union authorization card or any literature or documents from the Union.

The Petitioner states that Sanchez is not a representative of the Petitioner, but rather works for NY Communities for Change.

Discussion

The Employer's evidence shows that within the critical period, Sanchez and Kelly approached two or three employees and Sanchez offered them money in exchange for supporting the Union. The Employer submitted no evidence that Sanchez was an agent of the Petitioner or that the Petitioner is affiliated with NY Communities for Change. The employees who testified did not aver that Sanchez gave them authorization cards for the Petitioner or identify himself as an agent of the Petitioner in any way. Indeed, one employee testified that Sanchez gave him/her a business card. Although one of the employees stated that s/he thought Sanchez was an organizer for the Petitioner, s/he admitted that s/he was not sure. The Employer has not offered sufficient proof to establish that Sanchez is an agent of the Petitioner. Rather, the evidence demonstrates that Sanchez is an employee of NY Communities for Change, a community organization. Sanchez distributed to employees a NY Communities for Change flyer, listing his contact information, including a NY Communities for Change e-mail address. The Employer's offer of proof is entirely insufficient with regard to its allegation that Sanchez or NY Communities for Change is an agent of the Petitioner.

Absent evidence that Sanchez is an agent of the Petitioner, his conduct must be analyzed as that of a third party. Third-party conduct may serve as a basis on which to set aside an election, but only if that conduct is “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” Westwood Horizons Hotel, 270 NLRB 802, 803 (1984); see also Phoenix Mechanical, 303 NLRB 888 (1991). The Board requires this high standard because, in general, statements made by third parties are less likely to affect the outcome of an election and because parties cannot control the conduct of third parties. See Cal-West Periodicals, 330 NLRB 599, 600 (2000); Phoenix Mechanical, 303 NLRB at 888. The Board will not set aside an election where the evidence does not establish that the third party’s conduct created a general atmosphere of fear and reprisal, which rendered a fair election impossible. See Affiliated Computer Services, Inc., 355 NLRB No. 163 (2010) (in which the Board found that letters from elected officials expressing concern about the economic consequences of the employer’s employment policies were not objectionable); Galen Hospital Alaska, Inc., 327 NLRB 876 (1999) (in which the Board declined to set aside an election where a third party had given an employee a “vote no” button); O’Brien Memorial, 310 NLRB 943 (1993) (in which the Board declined to set aside an election where non-party employees accused a fellow employee, a nurse practitioner, of patient abuse allegedly because she was critical of the union).

In the instant case, Sanchez, a third party, allegedly offered employees money in exchange for supporting the Petitioner. The employees who provided affidavits, by their own testimony, declined the offer; one employee told Sanchez that he did not want the money and that he wanted nothing to do with the Petitioner. However, given the amount of money allegedly promised and the closeness of the election, in my view, the safer course would be to proceed to a hearing on the Employer’s objections. At the hearing, the Employer will have the opportunity to

present evidence on the extent of dissemination of the promise and whether other employees were subject to the promise to determine whether the alleged conduct rises to the level of objectionable third party conduct under Westwood Horizons Hotel.

SUMMARY AND RECOMMENDATIONS

In summary, I have directed that a hearing be held regarding the Petitioner's challenges to the ballots of Young Chung Chum, Jose Cuautle, Sharon Kim, and Seung Seup Lee. I have directed that the ballot of Maria Gomez be opened and counted.⁶ I have further directed that a hearing be held regarding the Petitioner's allegation in its first objection that the Employer interrogated employees prior to the election. I recommended overruling that portion of the Petitioner's first objection which alleged that the Employer pressured employees into voting for the Employer. I have approved the Petitioner's request to withdraw its second objection. I have further recommended overruling the Employer's objections.

NOTICE OF HEARING

Accordingly, pursuant to the authority vested in the undersigned by the National Labor Relations Board, herein called the Board,

IT IS HEREBY ORDERED that a hearing be held before a duly designated hearing officer with respect to the issues raised by the Petitioner's challenges to the ballots of Young Chung Chum, Jose Cuautle, Sharon Kim, and Seung Seup Lee, and the Petitioner's Objection No. 1 alleging that the Employer interrogated employees.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of

⁶ In order to safeguard the secrecy of Gomez's ballot, it will not be opened and counted until disposition of the remaining challenges or until at least one additional challenge is opened and counted.

conducting such hearing shall prepare and cause to be served upon the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board, as to the issues raised. Within fourteen (14) days from the date of the issuance of such report, any party may file with the Board, an original and seven copies of Exceptions to the report, with supporting briefs, if desired. Immediately upon the filing of such Exceptions, the party filing the same shall serve a copy thereof, together with a copy of any brief filed, upon the other parties. A statement of service shall be made to the Board simultaneously with the filing of Exceptions. If no Exceptions are filed thereto, the Board, upon the expiration of the period for filing such Exceptions, may decide the matter forthwith upon the record or make any other disposition of the case.

PLEASE TAKE NOTICE that on Tuesday, June 5, 2012, at 9:30 a.m., and on consecutive days thereafter until concluded, at Two MetroTech Center, 5th Floor, Brooklyn, New York, a hearing will be conducted before a hearing officer of the National Labor Relations Board on the issues set forth in the above Report, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony.

RIGHT TO FILE EXCEPTIONS

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8 as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party

files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing Exceptions

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on June 8, 2012, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁷ A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for

⁷ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Brooklyn, New York, on this 25th day of May, 2012.

 /s/ James G. Paulsen
James G. Paulsen
Regional Director, Region 29
National Labor Relations Board
Two MetroTech Center, 5th Floor
Brooklyn, New York 11201