UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

DIEGO BEEKMAN MUTUAL HOUSING ASSOCIATION, HOUSING DEVELOPMENT FUND CORPORATION,

Employer

AND **CASE NO: 02-RC-082719**

LOCAL 642, SECURITY ALLIANCE OF FEDERATED EMPLOYEES UNION,

Petitioner

DECISION AND DIRECTION OF ELECTION

Under a petition duly filed under Section 9(c) of the National Labor Relations Act (herein "the Act"), as amended, a hearing was held before a hearing officer of the National Labor Relations Board (herein "the Board").

Pursuant to Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Based on the entire record[1] in this proceeding, I find that:

1. The Hearing Officer's rulings are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that Diego Beekman Mutual Housing Association, Housing Development Fund Corporation (herein "the Employer"), a New York corporation located at 694 East 141st Street, Bronx, New York, provides real estate management services. Annually, in the course and conduct of its business operations, the Employer derives gross

[1] Both the Employer and the Petitioner declined to submit briefs in this matter.

revenues in excess of $500,000, and purchases goods and materials valued in excess of $5,000 directly from suppliers located outside the state of New York. Accordingly, I find that 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.

3. As a threshold matter, the labor organization status of the Petitioner, Local 642, Security Alliance of Federated Employees Union is in issue. For the reasons set forth below, I find that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

The sole witness presented at this hearing was Louis Aviles (herein "Aviles"), the Secretary/Treasurer of the Petitioner. Accordingly, all of the record facts summarized below are based on his testimony.

The Petitioner has been in existence for a little over four years. Although Aviles did not participate in the formation of the Petitioner, he has worked with the Petitioner for about three years and is paid by the Petitioner. The only other employee of the Petitioner is President Joey Bosco (herein "Bosco"). In that regard, Article VI of the Petitioner's Constitution and By-Laws, provides for the election of officers and the next election will be conducted in 2013.

Aviles testified that he has negotiated contracts for employees represented by the Petitioner on subjects including holidays, vacation, 401(k), sick days, and medical benefits. Employees represented by the Petitioner participate in discussions about bargaining priorities. The Petitioner conducts a ratification vote for all contracts negotiated between the Petitioner and an employer. Aviles also handles grievances. As an example, Aviles recalled handling a grievance regarding an overnight security guard who was caught sleeping during his shift.

Aviles was not able to remember the exact address of the Petitioner's offices, but he noted that it's next door to the Petitioner's attorney's office. He also was not sure if the Petitioner holds a lease for its office space.

The record demonstrates that the Petitioner entered into at least one collective-bargaining agreement. Pursuant to Article XVII, Welfare Fund, of this agreement, the employer agreed to contribute to the Petitioner's welfare fund, referred to as, "UBF." No further evidence was adduced regarding whether "UBF" is controlled by the Petitioner, jointly administered, or funded by another source.

Section 2(5) of the Act provides the following definition of "labor organization:"

> Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The statutory definition of a "labor organization" has long been interpreted broadly. *See Electromation, Inc.,* 309 NLRB 990, 993-994 (1992), *enf'd.* 35 F.3d 1148 (7th Cir. 1994). To fall within the definition of a "labor organization," the Board has held that employees must participate in the organization and it must exist for the purpose, in whole or in part, of dealing with employers on their behalf regarding their wages, hours of employment and other terms and conditions of employment. *See Alto Plastic Mfg. Corp.,* 136 NLRB 850, 851-852 (1962). Under this definition, an incipient union that has not yet actually represented employees may, nevertheless, be accorded Section 2(5) status if it was *formed* for the purpose of representing employees. *See Coinmach Laundry Corp.,* 337 NLRB No. 193 (2002); *The East Dayton Tool & Die Company*, 194 NLRB 266 (1971); *Butler Manufacturing Company*, 167 NLRB 308 (1967). A finding of labor organization status does not require proof that the entity in question has ever "dealt with" an employer. *Coinmach Laundry, supra; Armco, Inc.*, 271 NLRB 350 (1984);

Steiner-Liff Textile Products Co., 259 NLRB 1064, 1065 (1982). Rather, it is the intent of the organization that is critical in ascertaining labor organization status, regardless of the progress of the organization's development and what activities the organization has actually performed. *Edward A Utlaut Memorial Hospital*, 249 NLRB 1153, 1160 (1980). Indeed, even if such an organization becomes inactive without ever having represented employees, it is still deemed to have been a statutory labor organization if its organizational attempts "[c]learly . . . envisaged participation by employees," and if it existed "for statutory purposes although they never came to fruition." *Comet Rice Mills*, 195 NLRB 671, 674 (1972). Moreover, "structural formalities are not prerequisites to labor organization status." *Yale New Haven Hospital*, 309 NLRB 363 (1992) (no constitution, by-laws, meetings, or filings with the Department of Labor); *Butler, supra*, at 308 (no constitution, bylaws, dues, or initiation fees); *East Dayton, supra*, at 266 (no constitution or officers). Thus, the absence of a constitution or bylaws is an irrelevant consideration in analyzing whether a petitioner is a labor organization within the meaning of the Act. *Coinmach Laundry, supra.*

In the instant case, the record established that the Petitioner exists for the purpose of negotiating wages, hours, and working conditions on behalf of employees and that it has represented and bargained for security guard employees at another employer. It further appears that employees participate in the Petitioner's bargaining committee meetings and that all contracts are subject to ratification by the employees. The record also establishes that the Petitioner has a constitution and by laws, which regulate activities such as officer elections. Based on the evidence presented at the hearing, I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

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

In that regard, the Employer contends that even if the Petitioner is a labor organization, it is disqualified from representing these employees because it is directly or indirectly affiliated with a union that admits nonguards into membership. However, Aviles testified that the Petitioner only admits security guards into its membership. No record evidence was adduced to contradict that representation or in any way establish that the Petitioner is directly or indirectly affiliated with a union that admits nonguards.

Section 9(b) of the Act states, in pertinent part:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof: Provided, That the Board shall not . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the Employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership **or is affiliated directly or indirectly with an organization which admits to membership employees other than guards.** (emphasis added)

The Board has established that the non-certifiability of a guard union must be shown by definitive evidence. *See 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). The Board has found an "indirect affiliation" between a guard union and a nonguard union where the "extent and duration of [the guard union's] dependence upon [the nonguard union] indicates a lack of freedom and independence in formulating its own policies and deciding its own course of action." *U.S. Corrections Corp.*, 325 NLRB 375, 376 (1998), quoting *Magnavox Co.*, 97 NLRB 1111, 1113 (1952). Mutual sympathy, common purpose, and assistance between such unions are

not, standing alone, sufficient to show an indirect affiliation. *Wackenhut Corp. v. NLRB,* 178 F.3d 543, 544 (D.C. Cir. 1999), quoting *International Harvester, Co.,* 145 NLRB 1747, 1749 (1964).

The Board's "longstanding practice indicates a reluctance to disqualify a union from representing guards based on supposition or speculation that nonguards are members of a union." *See Elite Protective & Security Services, Inc.,* 300 NLRB 832 (1990). Moreover, the Board has long held that "though Section 9(b)(3) may literally be read to disqualify a petitioner because it accepts any nonguards as members, the purpose of the statutory provision is to prevent a guard union from bargaining on behalf of nonguard members." *See Sentry Investigation Corp.*, 198 NLRB 1074 (1972).

Based on the record in the instant case, I cannot conclude that the Petitioner should be disqualified. No record evidence suggests that the Petitioner is directly or indirectly affiliated with a nonguard union. To the contrary, Bosco and Aviles, the only employees of the Petitioner, organized the workers at the Employer's facility. The record does not disclose that the Petitioner organized the Employer's facility with assistance from any other union. Further, Aviles claimed that the Petitioner's exclusive source of revenue was from collecting membership dues – not from any other unions. Accordingly, allowing the election to be conducted is appropriate and consistent with Board law and I, therefore, direct that an election be conducted in the stipulated unit set forth below.

5. In the instant proceeding, the parties stipulated, and I find, that the following unit is an appropriate unit within the meaning of Section 9(b)(3) of the Act:

> **INCLUDED:** All full-time and regular part-time security employees.
>
> **EXCLUDED:** All other employees, including tour commanders, field supervisors, office clerical employees, professional employees, and supervisors as defined in the Act.

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 they desire to be represented for collective bargaining purposes by **Local 642, Security Alliance of Federated Employees Union** or by **no** labor organization.

NOTICE OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not

received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

LIST OF VOTERS

To insure that all eligible voters 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 directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 2's Office, 26 Federal Plaza, Room 3614, New York, New York 07728, on or before July 13, 2012. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be ground for setting aside the election whenever proper objections are filed.

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 DC 20570. This request must be received by the Board in Washington by July 20, 2012.

In the Regional Office's initial correspondence the parties were advised that 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 not 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 web site at www.nlrb.gov. On the home page of the website, select the **E-Gov**[2] 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.

DATED at New York, New York this 6th day of July 2012.

Karen P. Fernbach
Regional Director
National Labor Relation Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 07728

[2] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlrb.gov.