

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

PHOENIX TECHNOLOGIES/DEFENSOR
SECURITY LLC¹
Employer

and

Cases 05-RC-091671

NATIONAL UNION OF PROTECTIVE
SERVICE ASSOCIATIONS (NUPSA)
Petitioner

and

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

DECISION AND DIRECTION OF ELECTION

On October 19, 2012,² the National Union of Protective Service Associations (herein, Petitioner or NUPSA) filed a petition in the above-captioned case pursuant to Section 9(c) of the National Labor Relations Act, as amended, seeking an election to represent security guards employed by Phoenix Technologies/Defensor Security LLC (Employer). The International Union, Security, Police, and Fire Professionals of America (herein, Intervenor or SPFPA), subsequently intervened. On November 5, a hearing on the petition was held before a hearing officer of the

¹ The name of the Employer appears as amended at hearing.

² All dates herein are 2012 unless otherwise indicated.

National Labor Relations Board. The Employer, Petitioner, and Intervenor appeared at the hearing.³

I. ISSUE PRESENTED

The only issue in this proceeding is whether the Employer's voluntary recognition of the Intervenor on October 18 serves as a bar to the subsequent petition filed by the Petitioner on October 19 in this case seeking to represent the same group of employees. The Petitioner seeks to represent employees in the following unit:

All full-time and regular part-time security officers, sergeants, lieutenants, and captains employed by the Employer at the Uniformed Services University of the Health Sciences, currently located at 4301 Jones Bridge Road, Bethesda, Maryland and 8901 Wisconsin Avenue, Bethesda, Maryland; but excluding all clerical employees, professional employees, managerial employees, and supervisors as defined by the Act.

I have carefully considered the evidence and arguments made by the parties at the hearing.⁴ For the reasons set forth below, I find that the Employer's voluntary recognition of the Intervenor does not bar the instant petition, where Petitioner obtained an adequate showing of interest prior to the recognition. Accordingly, I shall direct an election herein.

II. STATEMENT OF FACTS

The Employer is a Virginia limited liability company, with an office and a place of business in Lorton, Virginia. The Employer provides security guard services to various firms and institutions, including the Uniformed Services University of the Health Sciences, currently located at 4301 Jones Bridge Road and 8901 Wisconsin Avenue in Bethesda, Maryland, the only locations

³ Robert Gooden, president, appeared on behalf of the Employer; JC Stamps, executive director, appeared on behalf of the Petitioner; and Horace Wilson, vice president for Local 462, appeared on behalf of the Intervenor.

⁴ All parties were accorded the opportunity to submit post-hearing briefs; none were received.

involved in this proceeding. The Employer employs approximately 20 employees in the unit sought by the Petitioner.⁵

Petitioner began actively organizing the petitioned-for unit in September and obtained authorization cards from the end of September to early October. In early October, the Intervenor also began its organizing campaign. Thus, by October, both the Petitioner and the Intervenor were engaged in simultaneous organizing campaigns to represent the same employees of the Employer. The Employer asserts that around the second week of October, the Intervenor, through Joe McCray, a regional director of SPFPA, contacted Gooden by telephone and asserted that a majority of employees were interested in being represented by the Intervenor. McCray then requested voluntary recognition, and the Employer agreed. Around that same time, Stamps telephoned Gooden on behalf of the Petitioner and told him that a majority of the employees supported NUPSA as their union representative.⁶ The Employer informed the Petitioner that other unions called him about recognizing them and the Petitioner would need to produce cards. Petitioner informed the Employer that he had the cards, and he ended the telephone call. The Employer communicated with both the Intervenor and the Petitioner by telephone, and did not see any cards. Thereafter, on October 17, the Intervenor sent the Employer a recognition agreement by facsimile requesting voluntary recognition. The Employer signed and returned the recognition agreement on October 18, granting voluntary recognition to the Intervenor. The Petitioner filed the instant petition on October 19.

⁵ The parties stipulated, *inter alia*, to the following: (1) the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board; (2) the Employer, in conducting its business operations described above, performed services valued in excess of \$50,000 in States other than the Commonwealth of Virginia during the past 12 months, a representative period; (3) the Petitioner and the Intervenor are labor organizations within the meaning of Sections 2(5) and 9(b)(3) of the National Labor Relations Act; and (4) that the petitioned-for unit is an appropriate unit for bargaining.

⁶ Stamps recalled that he spoke to Gooden by telephone on October 17, shortly after noon. Stamps asserted, contrary to the Employer's recollection, that he did not request recognition; he was only informing Gooden that he had majority support prior to filing a petition.

III. DISCUSSION & ANALYSIS

For the reasons that follow, I find that there is no recognition-bar to the petition herein and that a question concerning representation exists to warrant an election.

Under the Board's recognition bar policy, where an employer has voluntarily recognized a union based on majority support, the parties are accorded an opportunity to bargain and a petition is barred for a "reasonable period of time" following the recognition. *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). In *Sound Contractors*, 162 NLRB 364 (1996), bar was extended to representation cases where a lawful recognition occurred. The Board modified its recognition bar policy for situations involving simultaneous, active organizing campaigns by two or more unions in *Rollins Transportation System*, 296 NLRB 793 (1989). There, the Board held that recognition of one union could not bar a petition by a competing union that was also actively organizing the same employees. This approach did not address the level of support enjoyed by the petitioning union. In *Smith's Food & Drug Centers, Inc.*, 320 NLRB 844, 846 (1996), the Board again modified its policy, holding that the employer's voluntary recognition of a union bars the processing of a subsequent petition *unless* the petitioner demonstrates that it had a 30-percent showing of interest that predates the recognition. "Where such interest is shown, an election is warranted in order to guarantee employees an opportunity to express their desires in a definitive manner." *Id.* In modifying this recognition-bar rule for "two-union" situations, the Board ensured that a rival union capable of filing a petition at the time of recognition was not denied the opportunity for an election because it underestimated a competing union's support, or it simply arrived at the Board's office a little too late, thus effectuating employee free choice in their

selection of a bargaining representative. *Id.* The determination of whether the petitioner's 30-percent showing of interest existed at the time of recognition is an administrative matter not subject to litigation. *Id.* at 847, citing *O.J. Jennings & Co.*, 60 NLRB 516 (1946).

In this case, both the Petitioner and the Intervenor engaged in active and simultaneous organizing campaigns. The Employer voluntarily recognized the Intervenor on October 18. The Petitioner filed the instant petition on October 19. The parties were informed at and prior to the hearing that an administrative investigation of the showing of interest was conducted, and it revealed that the Petitioner had the requisite 30-percent showing of interest that predates the Employer's voluntary recognition of the Intervenor. Accordingly, there is no recognition-bar to the instant petition and I shall direct an election among employees in the stipulated unit.

IV. CONCLUSIONS AND FINDINGS

Based upon 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 are free from prejudicial error and are affirmed.
- 2) The Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
- 3) The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
- 4) The Intervenor is a labor organization within the meaning of Section 2(5) of the Act.
- 5) 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.

- 6) The Employer, a Virginia limited liability company, with an office and a place of business in Lorton, Virginia, provides security guard services to various firms and institutions, including the Uniformed Services University of the Health Sciences, currently located at 4301 Jones Bridge Road and 8901 Wisconsin Avenue in Bethesda, Maryland, the only locations involved in these proceedings. During the past 12 months, a representative period, the Employer, in conducting its business operations described above, performed services valued in excess of \$50,000 in States other than the Commonwealth of Virginia.
- 7) 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:
 - All full-time and regular part-time security officers, sergeants, lieutenants, and captains employed by the Employer at the Uniformed Services University of the Health Sciences, currently located at 4301 Jones Bridge Road, Bethesda, Maryland and 8901 Wisconsin Avenue, Bethesda, Maryland; but excluding all clerical employees, professional employees, managerial employees, and supervisors as defined by the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether they wish to be represented for purposes of collective bargaining by National Union of Protective Service Associations (NUPSA), International Union, Security, Police, and Fire Professionals of America (SPFPA), or by neither. The date, time, and manner of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before 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. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible 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 seven (7) days of the date of the issuance of this Decision, the Employer must submit to the Regional Office an election eligibility list, 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 the Regional Office, National Labor Relations Board, Region 5, Bank of America Center - Tower II, 100 South Charles Street - Suite 600, Baltimore, MD 21201, on or before November 21, 2012. 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 to the Regional Office by mail, by electronic transmission through the Agency website, www.nlr.gov, or by facsimile transmission at (410) 962-2198. The burden of establishing the timely filing and receipt of this list will continue to be placed on the sending party.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day 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.

VI. RIGHT TO REQUEST REVIEW

Right to Request Review: Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street NW, Washington, D.C. 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, D.C., by close of business on November 28, 2012, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it 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 a request for review 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 request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

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.

Re: Phoenix Technologies/Defensor
Security LLC

November

Filing a request for review 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 the Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review 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.

Issued at Baltimore, Maryland this 14th day of November 2012.

(SEAL)

/s/ Wayne R. Gold

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