

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

HBC MANAGEMENT SERVICES, INC.  
Employer

and

Case 5-RC-88593

UNITED SECURITY & POLICE OFFICERS  
OF AMERICA (USPOA)  
Petitioner

and

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

**DECISION, REVISED TALLY OF BALLOTS, AND CERTIFICATION OF  
REPRESENTATIVE**

Pursuant to a Consent Election Agreement<sup>1</sup> which I approved on September 18, 2012,<sup>2</sup> a secret ballot election was conducted, by mail, under my supervision. The mail ballots were sent to eligible voters on October 1. The ballots were commingled and counted on October 17, with the following results:

Approximate number of eligible voters	52
Void ballots	1
Votes cast for Petitioner	16
Votes cast for Intervenor	0
Votes cast against participating labor organizations	0
Valid votes counted	16
Challenged ballots	17
Valid votes counted plus challenged ballots	33

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<sup>1</sup> The unit is: All full-time and regular part-time officers employed by the Employer at the Naval Avionics Support Equipment Appraisal Military Support Command (NAVSEA/MSC) sites located at 1333 Isaac Hull Avenue, Washington Navy Yard, Washington, DC 20376, but excluding all lieutenants, clerical employees, and supervisors as defined in the Act. The eligibility period is the payroll period ending September 2, 2012.

<sup>2</sup> All dates are in 2012.

## THE CHALLENGES

The challenges are sufficient in number to affect the results of the election. No parties dispute that the 17 employees challenged were part of a larger group discharged on September 30, 2012 for failure to pass the physical fitness readiness test (PFRT).

To be eligible to vote in a Board election, the employee must be employed in the appropriate unit: (1) on the established eligibility date, which is normally during the payroll period, immediately preceding the date of the direct of election or election agreement; and (2) in employee status on the date of the election. *Plymouth Towing Co.*, 178 NLRB 651 (1969).

There is no dispute these 17 employees were not employed on October 1, 2012, the date the election commenced. Therefore, they were not eligible voters as they had been terminated prior to the date of the election and were not in employee status on the date of the election. To the extent it was alleged these employees were unlawfully terminated pursuant to Sections 8(a)(3) and (5) of the Act, an investigation was conducted in Case 05-CA-091135. The Intervenor had originally filed an identical charge in Case 05-CA-091426, but withdrew it two days later. The Region found that the employees were not unlawfully fired and that the Employer had not unilaterally implemented the requirements for the PFRT. The Intervenor had signed an assumption agreement in May 2012 acknowledging the Employer's obligation to conduct the test. The charge was dismissed and no appeal was filed. In the absence of a complaint, the Board will not consider some unfair labor practice issues in objections or challenge proceeding, especially those involving Section 8(a)(3). *Texas Meat Packers*, 130 NLRB 279 (1961). Since the discharges are presumed to be lawful, it follows that whatever voting rights the discharged employees may once have enjoyed have been extinguished. *Spray Sales and Sierra Rollers*, 225 NLRB 1089 (1976).

Accordingly I find that these 17 employees were not employed during the relevant time, and therefore the challenges to their ballots are sustained. Hence, the revised tally of ballots is as follows.

## REVISED TALLY OF BALLOTS

Approximate number of eligible voters	51
Void ballots	1
Votes cast for Petitioner	16
Votes cast for Intervenor	0
Votes cast against participating labor organizations	0
Valid votes counted	16
Challenged ballots	0
Valid votes counted plus challenged ballots	16

A majority of the valid votes counted has been cast for UNITED SECURITY & POLICE OFFICERS OF AMERICA (USPOA).

## THE OBJECTIONS

On October 24, the Intervenor filed timely objections to conduct affecting the results of the election.<sup>3</sup>

On October 31, the Intervenor timely filed its proffer of evidence.

### Objection 1

The Employer unilaterally changed the terms and conditions of employment resulting in the termination of numerous employees during the election period.

The Intervenor produced no evidence in support of this allegation beyond citing Article IV and VII of the current collective-bargaining agreement (CBA) between the Employer and the Intervenor which respectively covers Management's Rights and Discipline and Discharge. The Intervenor does not identify the unilateral change(s) that it asserts were made.

A post-election hearing is granted only when the party filing objections has supplied *prima facie* evidence raising "substantial and material issues" that would warrant setting aside the election. *NLRB v. Tio Pepe, Inc.*, 629 F.2d 964, 968 (4<sup>th</sup> Cir. 1980). In light of the absence of *prima facie* evidence in support of the objection, Objection 1 is overruled in its entirety.

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<sup>3</sup> The petition was filed on September 5, 2012. The undersigned will consider on its merits only that alleged interference that occurred during the critical period which begins on and includes the date of the filing of the petition and extends through the election *Goodyear Tire and Rubber Company*, 138 NLRB 453 (1962).

### **Objection 2**

The Employer unilaterally changed the terms of conditions of employment with respect to the grievable rights of employees who were terminated during the election period.

### **Objection 4**

The Employer terminated more than half of the bargaining unit during the voting period, leaving the remaining voters not representative of the bargaining unit.

The Intervenor offered no position or evidence in support of Objections 2 or 4. Section 102.69(a) of the Board's Rules provides, in pertinent part, that a party filing objections to conduct affecting the results of an election must supply its evidence "within 7 days after the filing of objections or such additional time as the Regional Director may allow...." The Board applies the deadline in its Rules strictly. *Star Video Entertainment*, 290 NLRB 1010 (1988).

If the objecting party does not submit its supporting evidence within the time required by the Rules, the objections will be dismissed. *Kano Trucking Serv.*, 295 NLRB 514, 515 (1989). Because the Intervenor here did not provide any evidence, such as affidavits from witnesses with personal knowledge, the names of potential witnesses, or documentary evidence, the objections themselves contain the only facts available to determine whether substantial and material issues exist which would warrant setting aside the election. Therefore Objections 2 and 4 are overruled in their entirety.

### **Objection 3**

The Employer proclaimed that numerous bargaining unit employees who were terminated during the election period were discharged without recourse to the grievance procedure or other appeal process.

In support of this objection, the Intervenor argued that employees who were fired for failing the PFRT were not given any recourse despite the fact that the CBA does not bar these employees from recourse. The Intervenor further argues that this constituted a unilateral change by the Employer. In dismissing Case 05-CA-091135, I found that the collective-bargaining agreement between the Intervenor and Employer provided that employees who did not meet the Employer's physical fitness requirements as evaluated by semi-annual physical fitness testing could be terminated by the Employer. The Intervenor failed to produce any evidence showing that employees had attempted to grieve or appeal their discharges. As previously discussed, the employees' discharge were not found unlawful, and the Region did not find that the Employer unilaterally changed the CBA. In the absence

of a complaint, the Board will not consider some unfair labor practice issues in objections or challenge proceeding, especially those involving Section 8(a)(3). *Texas Meat Packers*. Therefore, Objection 3 is overruled in its entirety.

#### **Objection 5**

The Employer terminated more than half of the bargaining unit during the voting period and intends in short order to replace them, leaving the remaining voters not representative of the bargaining unit.

The Intervener withdrew its Objection 5. I approve the withdrawal.

#### **Objection 6**

The Board Agent conducting the ballot count would not provide to the SPFPA's representative the postmark dates on the letters in which ballots were received.

The Intervenor requested that the Board agent provide the postmark dates for ballots so that the Intervenor could determine its position as to whether the ballots should be opened. The Board agent declined the Intervenor's request. Board law is clear that the postmark date on returned mail ballots is immaterial; the determinative issue is whether the mail ballot is received by the Region prior to the ballot count. Mail ballots received prior to the count must be counted. *Watkins Construction Co.*, 332 NLRB 828 (2000). Therefore, Objection 6 is overruled in its entirety.

#### **Objection 7**

The Employer, acting through its agents, acted in these terms and other manners that destroyed the conditions necessary for a fair election.

#### **Objection 8**

The Petitioner, through its agents, acted in these and other manners that destroyed the conditions necessary for a fair election.

Objections 7 and 8 reiterate the issues raised in Objections 1 through 6 and are "catch all objections." A "catch all objection" is an objection where no specific evidence is advanced and lacks the specificity contemplated by the Board's Rules and must be overruled. *Smithfield Packing Co.*, 344 NLRB 1, 172 (2004); *Airstream*, 288 NLRB 220, 229 (1988). Accordingly, Objections 7 and 8 are overruled in their entirety.

## SUMMARY

In summary, I overrule Objections 1 through 4 and 6 through 8, and approve the withdrawal of Objection 5, which disposes of the objections in their entirety. Based on the revised tally of ballots, I shall issue a Certification of Representative.

## CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots have been cast for

UNITED SECURITY & POLICE OFFICERS OF AMERICA (USPOA)

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit.

**Unit:** All full-time and regular part-time officers employed by the Employer at the Naval Avionics Support Equipment Appraisal Military Support Command (NAVYSEA/MSC) sites located at 1333 Issac Hull Avenue, Washington Navy Yard, Washington, DC 20376 but excluding all lieutenants, clerical employees, and supervisors as defined in the Act.

Dated at Baltimore, Maryland this 10<sup>th</sup> day of January 2013.

/s/ WAYNE R. GOLD

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