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

REPORT ON OBJECTIONS,

CHALLENGED BALLOTS[1], AND NOTICE OF HEARING

Pursuant to a Stipulated Election Agreement[2] approved by the Regional Director on September 18, 2012,[3] a secret ballot election was conducted by mail. 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

[1] On January 10, 2013, the Regional Director issued an erroneous Decision, Revised Tally of Ballots, and Certification of Representative in this proceeding. On January 15, 2013, an Order Vacating Decisions, Revised Tally of Ballots, and Certification of Representative issued, stating that the case would be processed further.

[2] 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.

[3] All dates are in 2012, unless otherwise noted.

THE CHALLENGES

Challenges were sufficient in number to affect the results of the election. The seventeen challenged ballots were of employees discharged on October 1, 2012. The Intervenor requested that the Region provide the postmark dates for those ballots so that the parties could determine their positions as to whether the ballots should be opened. See *Dredge Operators*, 306 NLRB 924 (1992), which held that voters in a mail ballot election are eligible "if they are in the unit on both the payroll eligibility cutoff date and on the date they mail their ballots to the Board's designated office." Id. Pursuant to the holding in *Dredge Operators*, the Region convened a meeting on January 18, 2013, to allow the parties to inspect the mail ballot envelopes of the determinative challenged ballots. Representatives of the Petitioner and the Intervenor participated in the meeting. During this meeting, the Region's representative called out the name of each challenged ballot and showed the parties the front and back of each mail ballot envelope, reading aloud the postal service cancellation stamp date which showed the date by which each envelope entered the United States Postal Service mail. Of the seventeen challenges, the inspection revealed that two ballots were postmarked before October 1, 2012. Subsequently, the parties agreed that the two challenged ballots with postal service cancellation dates stamp prior to October 1, 2012, should be counted. Accordingly, the Region opened and counted two of the original seventeen ballots that had been previously challenged. The two resolved challenges were sufficient in number to render the remaining fifteen challenges non-determinative and thus eliminate the need for further resolution of the challenges.

On February 6, 2013, the Region issued a Revised Tally of Ballots with the following results:

	Original Tally	Challenged Ballots Counted	Final Tally
Approximate number of eligible voters	52		
Void ballots	1	0	1
Votes cast for Petitioner	16	2	18
Votes cast for Intervenor	0		0
Votes against participating labor organization	0		0
Valid votes counted	16		18
Challenged ballots	17		15
Valid votes counted plus challenged ballots	33		33

The remaining undetermined challenged ballots shown in the Final Tally column are not sufficient in number to affect the results of the election. A majority of the valid votes counted plus challenged ballots as shown in the Final Tally has been cast for United Security & Police Officers of America (USPOA), Petitioner.

THE OBJECTIONS

On October 24, the Intervenor filed timely objections to conduct that it alleges affected the results of the election, a copy of which is attached hereto as Exhibit A.[4] Prior to the issuance of this report, the Intervenor requested withdrawal of Objections 4, 5, and 6. The Regional Director has approved the withdrawal of these objections. The remaining objections are 1, 2, 3, 7, and 8, and are discussed below.

Objection 1

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

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.

The Intervenor produced no evidence in support of Objection 1 other than citing Article IV (management rights) and VII (discipline and discharge) of the collective-bargaining agreement (CBA)[5] between the Employer and the Intervenor. While the CBA was provided in support of the Intervenor's objections, the Intervenor does not identify the unilateral change(s) that it asserts were made. In support of Objection 2, the Intervenor references Article XXI (training and requalification) of the CBA and asserts that the Employer unilaterally changed provisions of the CBA with respect to recourse to the grievance procedure for discharges. Specifically, the Intervenor alleges that the Employer made a unilateral change by failing to give any recourse to the employees who were discharged as a result of

[4] 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).

[5] The Employer assumed the existing CBA on or about May 3, 2012. That agreement expired on November 30, 2012.

failing the Physical Fitness Readiness Test (PFRT), despite the fact that the CBA does not bar these employees from recourse.

Under Section 102.69(d), the Regional Director may conduct either an administrative investigation of objections, or set them for hearing, or both. A post-election hearing is granted only when there are substantial and material issues of fact that would warrant setting the election aside. See *Care Enterprises*, 306 NLRB 491 (1992); *Speakman Electric Co.,* 307 NLRB 1441 (1992); *NLRB v. Tio Pepe, Inc.*, 629 F.2d 964, 968 (4th Cir. 1980), citing *Gulf Coast Automotive Warehouse Co. v. NLRB,* 588 F.2d 1096 (5th Cir. 1979). A party seeking to challenge an election may not rely upon "the Board staff to seek out evidence that would warrant setting aside the election." *U.S. Rubber Co. v. NLRB,* 373 F.2d 602, 606 (5th Cir. 1967) (internal citations omitted). Rather, the party seeking to set aside election results must submit prima facie evidence "of a kind which would be admissible into evidence at a hearing and subjected to evaluation as to its weight and probative force." *Grants Furniture Plaza, Inc.,* 213 NLRB 410 (1974). Thus, the objecting party's burden is heavy because conclusory allegations are insufficient and specific evidence is required. *NLRB v. Claxton Mfg. Co.*, 613 F.2d 1364, 1366 (5th Cir. 1980).

Assuming *arguendo* the Intervenor met its prima facie burden with respect to Objection 1, to the extent it is alleged that the Employer unilaterally changed the requirements for the Physical Fitness Readiness Test ("PFRT") and unlawfully terminated these employees, an investigation was conducted in Case 05-CA-091135. That charge alleged that the Employer violated the Act by unilaterally implementing the requirements of the PFRT and by unlawfully terminating employees who did not pass the PFRT. I dismissed that charge on November 29, 2012, finding it to be without merit. No appeal was filed from my dismissal. In dismissing Case 05-CA-091135, the Region found that the collective-bargaining agreement between the Intervenor and Employer provided that employees who did not meet physical fitness requirements as evaluated by the semi-annual PFRT could be terminated by the Employer. The investigation revealed the PFRT was a semi-annual requirement imposed by the terms of the Employer's contract with the federal government and the requirements for passing the test were set by the Navy, not the Employer. Furthermore, the Intervenor signed an assumption agreement in May 2012, acknowledging the Employer's obligation to conduct the test, therefore establishing it was not unilaterally implemented by the Employer, but rather agreed to by both parties. *NLRB v. Katz*, 369 U.S. 736 (1962). Based on this evidence, the Region found that the employees were not unlawfully fired and that the Employer had not unilaterally implemented the requirements for the PFRT.

With regard to Objection 2, the Intervenor alleges that the employer unilaterally changed the grievable rights of the employees who were terminated for failing the PFRT by not allowing them recourse to the grievance procedure or other appeal process**.**

Both Objections 1 and 2 would require a finding that the Employer unilaterally changed the requirements for the PFRT, and the grievance procedure, and as a result the employees were unlawfully fired. However, inquiries such as these can only be determined by the filing and investigation of an unfair labor practice charge "[W]here, as in the instant case, the conduct which is alleged to have interfered with the election could only be held to be such interference upon an initial finding that an unfair labor practice was committed, it is Board policy, not to inquire into such matters in the guise of considering objections to an election." *Texas Meat Packers,* 130 NLRB 279 (1961). The Board has also applied the rationale of *Texas Meat Packers* in cases in which the gravamen of the allegation is an 8(a)(5) violation. See *Virginia Concrete Corporation*, 338 NLRB 1182, 1186 (2003) ("[A]refusal to recognize and bargain would tend to interfere with the election, however, only if it violated Section 8(a)(5). Because there are no unfair labor practice charges before us, we are precluded from considering whether the Employer's conduct violated Section 8(a)(5)"); *Fibreboard Corp.*, 283 NLRB 1093, 1100 (1987) (because no 8(a)(5) violation was alleged, judge rejected union's argument that unilateral elimination of jobs precluded employer from challenging those employees' election ballots; "[a]bsent any contention in the unfair labor practice proceeding that Respondent's elimination of various jobs was violative of the Act, such job elimination must be presumed to be lawful"). In the instant case, the Intervenor did file an unfair labor practice charge in Case 5-CA-91426 on October 16, 2012, alleging the unilateral changes. However, that charge was withdrawn. As such, absent a finding that the unilateral change(s) constituted an unfair labor practice, I am precluded from considering them as objectionable conduct.

Finally, in addition to asserting the Employer unilaterally changed terms and conditions of employment that resulted in the termination of approximately thirty employees out of a unit of approximately 52 employees, the Intervenor suggests the terminations of over half of the unit should be given weight in making a recommendation on these objections regardless of its lawfulness because the remaining employees did not constitute a representative complement of the unit workforce. I note that more than 40 percent of the original bargaining unit was still employed on the date of the election, and thus, a representative complement of employees remained. This observation is based on the principles enunciated in *General Extrusion, Co, Inc.,* 121 NLRB 1165 (1958), where the Board found that a newly recognized union's collective-bargaining agreement did not bar a rival union's petition as long as the

employer employed at least 30 percent of its expected employee complement in at least 50 percent of the job classifications. Also see, *Asbury Graphite Mills,* 832 F.2d 40, 43 (3rd Cir. 1987) (enforcing Board order for an immediate election where the Board determined that a 13–member workforce constituted a substantial and representative complement of employer's projected workforce of 30 to 40 employees).

Based on all the foregoing, I recommend that Objections 1 and 2 be 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.

The Intervenor asserts that the Employer incorrectly cited the provisions of Article XXI, Section 2 of the CBA and misinformed the bargaining unit employees that the discharges were without recourse, thereby affecting the laboratory conditions required for the election. Furthermore, the Intervenor asserts that the Employer suggested to voters that the Intervenor could not protect those employees or grieve their terminations, which fed into the campaign propaganda of the Petitioner.

In support of this objection, the Intervenor provided Exhibit B, a correspondence from the Employer to the Intervenor which states the discharges are without recourse to the grievance procedure.

The Petitioner and the Employer deny any objectionable conduct occurred.

Substantial and material issues of fact are raised in Objection 3, and it is the opinion of the undersigned that those issues can best be resolved on the basis of record testimony and/or other evidence developed at a hearing.

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 insufficient on their face and should be overruled.

SUMMARY

In summary, I recommend that the Intervenor's Objections 1, 2, 7, and 8 be overruled in their entirety. Inasmuch as substantial and material credibility issues have been raised in the investigation of Objection 3, it is the opinion of the undersigned that those issues can best be resolved on the basis of record testimony and/or other evidence developed at a hearing.

NOTICE OF HEARING

IT IS HEREBY DIRECTED, pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, that a hearing be held Tuesday, April 23, 2013, at 1099 14th Street, NW, Washington, DC, beginning at 9:30 a.m. and continuing on consecutive days thereafter until completed, before a hearing officer of the National Labor Relations Board, who will take testimony for the purpose of resolving issues raised challenged ballots at which time the parties have the right to appear in person or otherwise and give testimony. The hearing officer designated for the purpose of conducting such hearing shall prepare and cause to be served upon the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said issues.

Dated at Baltimore, Maryland this 9th day of April 2013.

/s/ Wayne R. Gold

Wayne Gold, Regional Director
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 S. Charles Street, Ste. 600
Baltimore, MD 21201

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 **April 23, 2013** 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.[6] 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.nlrb.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 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.

[6] 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.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF:

IIBC MANAGEMENT SERVICES, INC.

Employer

and

UNITED SECURITY OFFICERS OF AMERICA (USPOA)

Case No. 05-RC-88593

Petitioner

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

Intervenor

/

International Union, SPFPA's Objections to the Election

The International Union, SPFPA files the following Objections to the Election for which the mail ballots were tallied on October 17, 2012:

1. The Employer unilaterally changed the terms and conditions of employment resulting in the termination of numerous employees during the election period.
2. The Employer unilaterally changed the terms and conditions of employment with respect to the grievance rights of employees who were terminated during the election period.
3. The Employer proclaimed that numerous bargaining unit employees who were terminated during election period were discharged "without recourse" to the grievance procedure or other appeal process.

Exhibit A

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.

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.

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.

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

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

The events described above all took place during the critical period. By these and other acts, the Employer and the Petitioner violated the Act and improperly interfered with the conditions necessary for a fair election. Therefore, the International Union, SPFPA requests that a rerun election be held without delay.

Respectfully submitted,

Scott A. Brooks
Gregory, Moore, Jeakle & Brooks, P.C.

Dated: October 24, 2012