

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

ELITE PROTECTIVE SERVICES, INC  
Employer

and

Case 5-UD-095760

YUSUF OSMAN  
Petitioner

and

NATIONAL ASSOCIATION OF SPECIAL POLICE  
AND SECURITY OFFICERS (NASPSO)  
Union

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

Pursuant to a Stipulated Election Agreement<sup>1</sup> approved on January 17, 2013,<sup>2</sup> a secret-ballot election was conducted under my supervision on February 22, with the following results:

Approximate number of eligible voters	72
Void ballots	0
Votes cast in favor of withdrawing the authority of the bargaining representative to require, under its agreement with the Employer, that employees make certain lawful payments to the Union in order to retain their jobs	25
Votes cast against the above proposition	1
Valid votes counted	26
Challenged ballots	0
Valid votes counted plus challenged ballots	26

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<sup>1</sup> The unit is: "All full-time and regular part-time security guard employees employed by the Employer at the Bureau of Labor Statistics in Washington, D.C.; but excluding all officers and directors, captains, lieutenants, and sergeant employees, project managers, officer clerical employees, professional employees, managers, non-guard employees, and supervisors as defined by the Act." The eligibility period is the payroll period ending January 5, 2013.

<sup>2</sup> Unless otherwise specified, all dates are 2013.

A majority of eligible voters did not vote to withdraw the authority of NASPSO to require that employees make certain lawful payments to the Union in order to retain their jobs.

### **THE OBJECTIONS**

By letter dated and filed on February 26, 2013, the Petitioner requests that a second election be conducted. Herein a copy of that letter is attached as Exhibit A. I shall treat that letter as timely filed objections<sup>3</sup>. The Objections contained in the letter raise assertions that concern voters not receiving their mail ballot kits by February 8, a Union agent following the Petitioner from his workplace, and Union propaganda containing racially charged language. I will treat these as Objections 1, 2 and 3, respectively.

In Objection 1, the Petitioner asserts that an unspecified number of voters had not received their mail ballot kits by February 8, or perhaps did not return a kit, because their addresses were wrong on the eligibility list. He asserts this caused voters to return their marked ballots after February 15. The Petitioner also asserts the Region should have extended the mail ballot election period so as to allow for more time for the ballots to be returned to the Washington Resident Office. The Petitioner, however, failed to present any evidence to support his contention that any errors which may have been on the eligibility list were the cause or reason for any ballots to be returned after the count.

The Board will issue certifications where there is adequate notice and opportunity to vote, and employees are not prevented from voting by the conduct of a party or by unfairness in the scheduling or mechanics of the election. *Lemco Construction, Inc.*, 283 NLRB 459, 460 (1987).

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<sup>3</sup> The petition was filed on January 3, 2013. I will consider on its merits only that alleged interference which 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).

Employees' opportunity to vote is not compromised by mail delivery problems that prevent the timely receipt of potentially-determinative ballots. See *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1094-96 (D.C. Cir. 2002) (upholding certification where four employees did not receive mail ballots and election decided by three votes); *J. Ray McDermott and Company v. NLRB* 571 F.2d 850 (5th Cir. 1978). In that case, three potentially-determinative mail ballots were not received, and each individual testified that he or she mailed a timely ballot. *Id.* at 853. The regional director found that the election was conducted fairly, and that the non-receipt of ballots was an unplanned occurrence beyond the control of the parties, the region, or the individual voters. *Id.* at 855. The Fifth Circuit noted that, "it cannot be said that an election by mail is per se invalid whenever a potentially decisive number of votes, no matter how small, is lost through the vagaries of mail delivery." *Id.*

In the instant case, the Petitioner, along with the other parties, signed a stipulated election agreement which they agreed, that ballots would be sent to the employees on February 1, and that in order for a ballot to be counted, it had to be received in the Washington Resident Office before the count commenced on February 22. These arrangements afforded voters three weeks to return their ballots once the mail ballot kits were deposited in the U.S. Mail on February 1, a full week more than the normal two-week period to conduct mail ballot elections. See *NLRB Casehandling Manuel*, Sec. 11336.2. Even assuming *arguendo*, there may have been a number of eligible employees who needed to call the Region to request duplicate ballots, there was still ample time for them to receive and return their ballots. Every employee who called in to the Region and requested a duplicate ballot was sent one without delay. The Region's records reveal that 9 election kits were returned as undeliverable. Corrected addresses were obtained for those kits and duplicates were sent to the voters. A total of 20 duplicate kits were sent to eligible

voters with enough time for receipt and return prior to the count. The parties did not agree to waive the stipulated count date. See *Sadler Bros. Trucking & Leasing Co.*, 225 NLRB 194, 194 (1976). Based on the foregoing, it is recommended that Objection 1 be overruled.

In its Objection 2, the Petitioner alleges that the Union sent one of its agents, Sampson Mgbaja, to his work location on January 11, to harass him. In support of this contention, the Petitioner relates and asserts that on at least five separate occasions that same day, Union agent Mgbaja instructed co-workers of the Petitioner to call his work post and request that the Petitioner meet with Mgbaja. After the Petitioner denied these repeated requests, Union agent Mgbaja waited for him to finish his shift and then exited the building at the same time, and followed the Petitioner for several miles, from the workplace to Takoma Park, Maryland, near where the Petitioner resides, in order to further harass him. The Petitioner further asserts he disseminated Mgbaja's attempts to meet with him at work and following him after work to a few employees and to management shortly after it occurred.

The Union denies that Mgbaja is an agent of the Union; however, the Union admits he is the Vice President of its Maryland Local. Moreover, the Union denies they engaged in any of the conduct alleged in these proceedings, or any objectionable conduct.

Based on the foregoing, I find that substantial and material issues of fact have been raised which may best be resolved by record evidence. Therefore, a hearing is warranted with respect to whether Union agent Sampson Mgbaja followed the Petitioner and whether such conduct had a chilling effect on employees as asserted in Petitioner's Objection 2.

Finally, the Petitioner alleges in Objection 3, on January 30, agents of the Union came to the site and distributed flyers to the employees. The Petitioner states that the flyers contained an inflammatory and racially biased term "rogue" when referring to him. In support of this

objection, the Petitioner provided copies of the flyers which are attached as Exhibit B, C, D, and E. The Petitioner also provided additional flyers that were circulated by the Union. Other than the “rogue” reference, the Petitioner does not specify anything else contained in the flyers that tended to interfere with the employee’s freedom of choice and created an atmosphere of fear. Rather, the Petitioner merely states the flyer, in general, interfered with the employees’ freedom of choice and/or created an atmosphere of fear.

I have carefully reviewed the flyers submitted by the Petitioner, including the flyers that state the Petitioner has “gone rogue.” The Board normally will not censor or police preelection propaganda by parties to elections absent threats or acts of violence. Exaggerations, inaccuracies, partial truths, name-calling, and falsehoods, while not condoned, may be excused as legitimate propaganda, provided they are not so misleading as to prevent the exercise of a free choice by employees. *The Gunned Products Company*, 112 NLRB 1092 (1955). The flyer circulated by the Union about the Petitioner does not contain any overt or implied threats. Neither does it state any falsehoods that may have misled the employees. Traditionally, the Board does not set aside an election because of campaign flyers that may contain misrepresentations of fact. *Midland National Life Insurance Co.* 263 NLRB 127, 133 (1982). The flyer circulated by the Union does not appear to raise any issues that would warrant overturning the election, as such, it is recommended that this objection be overruled.

### **SUMMARY**

In summary, I recommend Objections 1 and 3 be overruled and order that a hearing be conducted regarding Objection 2.

**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 Friday, April 19, 2013, at 1099 14<sup>th</sup> 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 5<sup>th</sup> day of April 2013.

/s/ Wayne R. Gold

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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 19, 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.<sup>4</sup> 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](http://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.

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<sup>4</sup> 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.