UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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FJC SECURITY SERVICES, INC.
Employer

and

G. MICHAEL SCHIMPF & EBRAAM MAKAR **Case No. 22-RD-083707**
Petitioners

and

PROTECTIVE SECURITY OFFICERS ASSOCIATION
Intervenor

AND

FJC SECURITY SERVICES, INC. **Case No. 22-CA-086863**

and

PROTECTIVE SECURITY OFFICERS ASSOCIATION

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ANSWERING BRIEF IN OPPOSITION TO INTERVENOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Petitioners G. Michael Schimpf and Ebraam Makar, by their attorneys Gladstein, Reif & Meginniss, LLP, submit this answering brief in opposition to Intervenor Protective Security Officers Association's Exceptions to the Administrative Law Judge's decision and in support of her findings, conclusions, and recommendations that the Objection brought by Intervenor be overruled.

Petitioners, security officers employed by FJC Security Services ("FJC" or "the Employer"), filed a petition to decertify their union, the Protective Security Officers Association

("PSOA"), on June 21, 2012. Pursuant to a stipulated election agreement, a mail ballot election was conducted from August 2 to 16, 2012. The tally of ballots showed that of 109 eligible employees, 54 voted against union representation, while only 25 voted to remain with PSOA. There were 4 void ballots and 2 non-determinative challenged ballots. Joint Exhibit 1(c). On August 22, 2012, PSOA filed an Objection alleging that FJC "informed a member of the Bargaining unit represented by the Union that he should join SEIU, Local 32BJ and should talk to Makar about joining SEIU, Local 32BJ. This was done by the Employer after the decertification petition was filed." On January 29, 2013, the Regional Director issued a Complaint and Notice of Hearing alleging that FJC committed an unfair labor practice when Project Manager Angelo Guarino in June 2012 "warned and advised employees that approval of benefit requests was contingent upon their support for the decertification of the incumbent union." On February 9, 2013, the Regional Director ordered consolidation of the Objection and the ULP cases and the two were heard on April 9, 2013. On June 12, 2013 the Administrative Law Judge issued her decision ("ALJD") finding that the Employer had neither violated the Act nor engaged in objectionable conduct.

I. PSOA's Exceptions and Brief Should Be Struck for Their Failure to Comply with Rule 102.46

On July 10, 2013, the deadline for submitting exceptions to the ALJD, PSOA filed a document that purported to be a brief in support of its Exceptions to the ALJ's findings. The Executive Secretary properly rejected the document on the grounds that PSOA did not file any actual Exceptions to accompany the brief and "fail[ed] to state with any specificity the alleged errors in the judge's findings, recommendations, and conclusions, and d[id] not set forth the portions of the record or the evidence relied on" in violation of Section 102.46(b)(1) of the

Board's Rules and Regulations. Letter from Farah Z. Qureshi, Associate Executive Secretary, NLRB, to William P. Hannan, Counsel for PSOA (July 11, 2013). The Executive Secretary's office then very generously – albeit without consulting counsel for the other parties – provided PSOA with a two-day extension to correct these failings. Id.

On July 12, 2013, PSOA filed Exceptions and a brief that are little better than its timely submission. Exceptions to ALJ decisions must "set forth specifically the questions...to which exception is taken" and "state the grounds for the exception." NLRB Rules and Regulations 102.46 (b)(1)(i), (iv). "Any exception which fails to comply with the foregoing requirements may be disregarded." Rule 102.46(b)(2). Briefs in support of exceptions must make "reference(s) to the specific exceptions to which they relate" and "present[] clearly the points of fact and law." Rule 102.46(c). PSOA's Exceptions and brief fail to comply with these requirements. The Exceptions do not "set forth specifically" any questions. The citations to the ALJ's supposed "determination that she should not consider any actions occurring prior to the filing of the decertification election petition" are simply wrong. Exceptions pp. 2, 5 (citing to page 6 of the ALJD). The ALJ reached no such determination. As for the brief, it makes no "references to the specific [E]xceptions." (Indeed, PSOA's brief submitted on July 12, 2013 is identical to the one the Executive Secretary rejected two days earlier). The Board has discretion to disregard submissions that do not comply with Rule 102.46. *LIR-USA Mfg. Co.*, 306 NLRB 298, n.1 (1992) (Board denied exceptions that failed to designate with particularity which allegations should be remanded for specific findings); *JHP & Associates, LLC d/b/a Metta Electric*, 338 NLRB 1059 (2003) (Board noted it ''would [have] be[en] justified" in disregarding non-compliant exceptions). PSOA's brief and Exceptions should be struck for their non-compliance with the Board's Rules.

II. PSOA's Exceptions Should Be Denied Because They Are Wrong on the Facts and the Law

It is well-settled that representation elections are not lightly set aside. There is a strong presumption that ballots cast express employees' true desires. Accordingly, the burden of proof placed on a party seeking to set aside an election is a heavy one. *Delta Brands, Inc*., 344 NLRB 252-253 (2005). In order to prevail, the objecting party must establish that the conduct "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." *Phillips Chrysler Plymouth, Inc*., 304 NLRB 16 (1991), *citing Baja's Place*, 268 NLRB 868 (1984).

In the present case, the ALJ correctly applied Board law and her findings, conclusions, and recommendations are fully supported by the record. PSOA, on the other hand, misstates the facts and misreads the existing case law. The Board should therefore overrule PSOA's Exceptions and fully adopt the ALJD.

A. FJC's Guarino Did Not Condition Benefits on Employees' Union Support

PSOA claims that Guarino made Garcia's and Czyrny's vacation pay outs conditional on their supporting Local 32BJ over PSOA. In the Exceptions, it states "the plain text of the hearing Transcript...shows that Garcia's vacation payout would be denied unless Garcia began supporting a rival union." PSOA Exceptions, p. 3, citing to Tr. 35:10-20. In its brief, PSOA states "Czyrny testified to Guarino's statements that Czyrny would keep his seniority and vacation time if he supported 32BJ." Intervenor Brief ("Int. Br.") p. 8, citing to Tr. 49:11-22 and Tr. 50:8-15.

However, just as the ALJ found, the record evidence shows that Guarino did not make Garcia or Czyrny's benefits contingent upon their union support. Garcia never testified that Guarino conditioned his vacation pay out on his union support. Rather, in the portion of his

testimony to which PSOA cites for this proposition, Garcia testified that two PSOA officers told him that Czyrny had told them that Guarino had told him that his pay out would be denied unless Czyrny supported another union. Int. Br. p. 8, Tr. 35:10-20. This hearsay within hearsay within hearsay should not be afforded any weight.[1]

PSOA's citation to Czyrny's testimony also fails to show unlawful conditioning of benefits. Czyrny never testified that Guarino told him that he "would keep his seniority and vacation time if he supported 32BJ," as PSOA claims. Int. Br. p. 8. On the contrary, Czyrny testified that Guarino told him "better I join BJ32 because BJ32 can help me to keep my seniority post and my vacation time." Tr. 49:13-14. Statements to an employee that it would be "better" for him to join a particular union, or that the union "can help" him do not make that employee's benefits contingent on his union support. Rather, they are expressions of the supervisor's opinion in favor of the union. It is perfectly lawful for a supervisor to tell employees that they will benefit from union representation. *Sutter Roseville Medical Center*, 324 NLRB 218, 219 (1997) ("supervisory statements...pointing out the possible benefits of union representation ...are not objectionable when made without threats of retaliation or reward, [but] are permissible expressions of personal opinion"); *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969) (Section 8(c) permits employers to express their views about a particular union as long as those communications do not include threats of reprisals or promises of benefits).

In a de facto admission that the legal rule it cites is inapplicable to Guarino's lawful

[1] Garcia also testified that he later wrote, in a statement requested by the same two PSOA officers, that like Czyrny he "was denied my cash out, because I wasn't able to – because I didn't speak to [Makar] and join 32BJ – sign for 32BJ." Tr. 35-36. The written statement was not entered into evidence and Garcia only remembered it after being asked a series of leading questions and shown his *Jencks* affidavit for the third time. Tr. 34. PSOA does not cite to this portion of the transcript, presumably recognizing that a witness' claim that he at one point put certain allegations into writing does not confer evidentiary value on the witness' claims about the content or truth of the allegations.

suggestions that another union would be "better" for Czyrny and "help" him, PSOA itself summarizes all the cases to which it cites for this Exception as being about "threat[s]," "promises," "condition[ing]," "inducement[s]," or the creating of an "exchange" for employees' renunciation of the union. Int. Br. pp. 5-6, 9-10. The only case PSOA summarizes without using any terms that clearly show the employer in question attempted to make benefits conditional on union support is *P.S.K. Supermarkets*, 349 NLRB 34 (2007), where it claims the Employer's offense was merely to "tie...benefits to an employee's union participation." Int. Br. p. 6. In *P.S.K.*, the employer tried to induce his employees not to support the union by telling them that their union support would "slow down" the arrival of the 401(k) plan and medical benefits he was planning to give them. Id. at 34, fn. 1 and 40. He created an explicitly contingent relationship between their union support and their benefits. By contrast, in the present case, Guarino simply stated an opinion that the union would be better for Czyrny, then paid out the money that he believed the Employer owed. Tr. 49:9-51:3. Just as the ALJ found, this conduct was lawful.

B. PSOA's Exception that the Employer Acted Unlawfully and Objectionably by Favoring Another Union Is Based on an Incorrect Reading of Board Law

PSOA asserts that Board law "do[es] not permit an employer to disparage one union and demonstrate its support for a second union" and argues that the ALJ should have set aside the election because "FJC failed to take a neutral position in the election as required by the Act." Int. Br. pp. 10, 11. It claims that, although supervisors may say positive things about unionization when only one union is present, when employees are considering competing unions, the employer must remain neutral. Int. Br. p. 11. However, PSOA cites only one case in which a second union was present, *Flamingo Hilton-Laughlin*, 324 NLRB 72 (1997), and that case creates no such rule. In fact, the *Flamingo Hilton* Board clearly stated that "simply expressing, in

a noncoercive manner, a preference for one union over another in a multiunion election is not unlawful." Id. at 72, n.1 (citing to *Amboy Care Center*, 322 NLRB 207 (1996)). In other words, the rule is the precise opposite of what PSOA urges in its Exception, and the ALJ correctly found Guarino's statements lawful.

C. PSOA's Exception that the ALJ Erred in Not Considering Guarino's Pre-Petition Remarks Is Based on a Mistaken Reading of Law

PSOA argues that the ALJ made an error of law when she "[did] not consider" Guarino's March and May 2012 remarks to Garcia. Exceptions, pp. 2, 5. PSOA evidently means that the ALJ should have decided that these statements fell within an exception to the *Ideal Electric* rule that elections will not be set aside based on pre-petition conduct. Int. Br. pp. 6-7; *Ideal Electric & Mfg. Co*., 134 NLRB 1275 (1961). However, the error of law is entirely PSOA's.

There are only 2 exceptions to *Ideal Electric*. The first comes from the *Savair* line of cases about solicitation of authorization cards; the second comes from cases about solicitation of authorization cards by statutory supervisors. The cases PSOA cites, *Gibson's Discount Center*, 214 NLRB 221 (1974), *Lyon's Restaurants*, 234 NLRB 178 (1978), and *Madison Square Garden CT*, 350 NLRB 117 (2007), all fit into these lines of cases, are entirely distinguishable from the current facts, and create no foundation for finding an exception to *Ideal Electric*.

Gibson's and *Lyon's* are both part of the *Savair* line of cases that apply only to unions' solicitations of employees to sign authorization cards. In *Savair*, the Supreme Court ruled that allowing a union to promise waivers of initiation fees to those who sign before the election is unlawful because it enables the union "to buy endorsements and paint a false portrait of employee support during its election campaign." *Savair* at 277. The *Savair* Court stated that the manner in which employees are convinced to sign authorization cards is of unique sensitivity

because a union can become employees' exclusive bargaining agent simply by achieving a majority on cards without ever going to an election. *Savair* at 280. In *Gibson's*, decided the following year, the Board found that, because most solicitations to sign cards are necessarily pre-petition, in order to follow *Savair* it was required to hold that promises to waive initiation fees for card-signers constituted grounds for setting aside an election even where the promises were made before the petition was filed. *Gibson's* at 221-22. Later, in *Lyon's*, where a union supporter extracted authorization cards from employees during the pre-petition period by telling them that the union would cause non-signers to be fired, the Board cited to *Gibson's* in holding that threats surrounding the solicitation of authorization cards, even though made pre-petition, would suffice to set aside the election. Id. at 179.

In other words, the *Gibson's* and *Lyon's* exceptions to the *Ideal Electric* rule are based on the unique nature of authorization cards. In the present case, Guarino's remarks did not even mention cards. Also, the purpose of the impending election at FJC was to decertify a union, meaning that the legal justification behind the *Savair*-based exception to *Ideal Electric* – that employees should face no risk of being improperly induced to sign a card, because card-signing has the unique potential to cause them suddenly and without an election to be represented by a union they did not freely choose – simply do not exist here.

Nor is the rationale set out in *Madison Square Garden* for not following the *Ideal Electric* rule present under the current facts. *Madison Square Garden* is primarily concerned with the second of the two recognized exceptions to *Ideal Electric*, supervisory tainting of solicitation of authorization cards. Id., 350 NLRB at 120-21. In *Madison Square Garden*, supervisors solicited employees to sign authorization cards during the pre-petition period. After the petition was filed, the supervisors continued to speak to employees in favor of the union. Shortly before the election,

five supervisors distributed a pro-union leaflet bearing their signatures. One supervisor also tore down a company anti-union poster in the presence of employees. Supervisors made pro-union public remarks to employees at a large union meeting just one week before the election. The *Madison Square Garden* Board reiterated existing law that card solicitation by supervisors is "inherently coercive." Id. at 122. It then concluded, "[a]lthough the card solicitation occurred 8 weeks prior to the election, as noted above, supervisory prounion conduct continued to take place....The lingering effect of the solicitations therefore continued up to the election date." Thus the Board set aside the *Madison Square Garden* election based on a combination of "inherently coercive" pre-petition supervisor card solicitation and continuing supervisor pro-union activity throughout the election period.

No such combination exists in the present case. First, Guarino never solicited any employee to sign an authorization card. He merely expressed his opinion about unionization. Second, the latest occasion on which he made any union-related comments was only one day after the petition was filed – a far cry from *Madison Square Garden*, where supervisors continued their outspoken pro-union conduct up to the day of the election.

The ALJ was correct to analyze Guarino's March and May 2012 comments as pre-petition conduct subject to the *Ideal Electric* rule. In saying that she did not "consider" the comments, PSOA ignores the fact that, even after concluding that the *Ideal Electric* rule must apply, the ALJ examined whether the comments might nevertheless "add[] meaning and dimension to related post-petition conduct [i.e., Guarino's comments to Czyrny]." ALJD, 9:34-36 (applying *Dresser Industries*, 242 NLRB 74 (1979)).The ALJ rightly decided that, even considering Guarino's remarks together in this way, she still could find no grounds for setting aside the election because, as explained above, the remarks themselves were perfectly lawful.

D. Even If Guarino's Remarks Were Unlawful, PSOA's Objection to the Election Should Still Be Overruled

Even if the Board concludes, contrary to the ALJ, that Guarino's remarks somehow violated Section 8(a)(1), PSOA's Objection should still be overruled. PSOA's assertion that "setting aside elections is appropriate for any type of Section 8 (a) (1) violation related to the election" utterly misreads established Board law. Int. Br. p. 13. The accurate rule, as set forth in the ALJD, is that "not all conduct violative of Section 8(a)(1) will warrant setting aside an election; rather the focus is on whether the conduct is extensive enough to interfere with the election." ALJD 9:44-51 (n.15).

The factors the Board looks to in measuring the extent of objectionable conduct are: (1) the degree to which the misconduct can be attributed to the party; (2) the proximity of the misconduct to the election; (3) the number of incidents of misconduct; (4) the severity of incidents and whether they were likely to cause fear among unit employees; (5) the number of employees in the unit subject to the misconduct; (6) the extent of dissemination of the misconduct; (7) the closeness of the vote; and (8) the degree of persistence of the misconduct in the minds of employees. *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004); *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986).

In the present case, even if Guarino's remarks were unlawful, the above-listed factors strongly militate against setting aside the election. First, the remarks that occurred closest to the election were made only one day into the critical period and 6 weeks before the balloting even began. Moreover, no more than 2 employees actually heard Guarino's statements, and PSOA has not proved that either man disseminated reports of Guarino's remarks widely enough to affect the election. If not disseminated, even outright threats in violation of 8(a)(1) made during the critical period will not suffice to set aside an election. *Bon Appétit Management Co*., 334 NLRB 1042,

1043-44 (2001). The Board does not infer dissemination, even in cases involving highly coercive statements such as threats of plant closure. *Crown Bolt, Inc*., 343 NLRB 776, 777 (2004). The objecting party must not only generally prove dissemination, it must specifically prove that dissemination reached a large enough number of bargaining unit employees to affect the outcome of the election. In *Coca-Cola Bottling Co*., 232 NLRB 717, 718 n. 2 (1977), where only 2 employees out of 106 were affected by an unlawful interrogation, and the union had lost the election 56 to 40, the Board refused to set aside an election even though the employer had violated 8(a)(1) during the critical period. *See also Avis Rent-A-Car System*, 280 NLRB at 582 (union's win not set aside where only 2 workers knew of picket line misconduct and the margin of victory was 27 votes); *Sanitation Salvage Corp.*, 359 NLRB No. 130 (2013) (election decided by a margin of 12 not set aside where only 2 employees heard the objectionable statements and did not disseminate them to co-workers).

The ALJ rightly concluded that PSOA has not established dissemination to anywhere near enough employees to have impacted the outcome of the election, which was decided by the wide margin of 54 to 25. Czyrny testified that only a non-bargaining unit supervisor and a single other, unidentified person might have overheard Guarino's statements to him. Tr. 48. Also, as the ALJ concluded, the record does not demonstrate that he disseminated the statements to anyone.[2] ALJD 10:28-30. Garcia's testimony was also inadequate to establish sufficient dissemination – he could not name the individual who might have overheard his conversation with Guarino, nor

[2] Czyrny testified that he told unit employee and PSOA Secretary-Treasurer Catina Sampson something about Guarino and his vacation pay out, but whether he told her specifically about Guarino's supposedly objectionable statement or merely about the vacation grievance never became clear. Tr. 53-55. Not only was the content of what he reported to Sampson ambiguous, Czyrny at one point said that he had spoken to Sampson only *before* his conversation with Guarino – timing that would have made it impossible for him to disseminate the misconduct to her. Tr. 54. Even when PSOA's counsel followed up with leading questions, Czyrny never stated that he had told co-workers about Guarino's remark. Tr. 55. For example, when asked, "Did you talk to Tyrone Leak [a unit employee] about it, the union president?" Czyrny could only answer, "Yes, he's union president. He know about that." Tr. 55.

could he name all of the co-workers he claimed to have told about it. Tr. 16-17, 39. Of the co-workers he did name, none were called to corroborate his testimony.

As to the last of the eight factors, there is no evidence that Guarino's conduct persisted in the minds of bargaining unit employees, especially when only 2 out of over one hundred of them testified. Indeed, it seems no one but Garcia and Czyrny have any memory of Guarino's alleged comments. Their testimony was conspicuously uncorroborated. Both Garcia and Czyrny said that unit employee and PSOA President Tyrone Leak knew about the statements, yet Leak did not testify despite being present for the hearing. Secretary-Treasurer Catina Sampson, a unit employee, and shop stewards Mike Perella and Keith Alston also inexplicably failed to testify even though there was testimony from Garcia and Czyrny that they knew of the remarks. PSOA can hardly except to the ALJ's conclusion that Guarino's conduct was not sufficiently disseminated when even its own leaders who purportedly had knowledge of the conduct did not testify.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Board overrule PSOA's Exceptions, fully adopt the ALJ's findings, conclusions, and recommendations, and certify the results of the election.

Dated: New York, New York
July 25, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

Petitioners' Answering Brief is being electronically filed today (July 25, 2013) with the Executive Secretary of the National Labor Relations Board. Copies of this submission have been served today via email on counsel for all other parties, as follows:

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