FJC Security Services, Inc. *and* G. Michael Schimpf & Ebraam Makar, Petitioner and Protective Security Officers Association, Intervenor

FJC Security Services, Inc. *and* Protective Security Officers Association. Cases 22–CA–086863 and 22–RD–083707

October 18, 2013

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On June 12, 2013, Administrative Law Judge Mindy E. Landow issued the attached Decision and Report on Objection in this consolidated unfair labor practice and representation proceeding. The Charging Party/Intervenor filed exceptions[1] and a supporting brief, and the Petitioner filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified below, and to adopt her recommended Order and Certification of Results of Election.

[1] The Petitioner urges the Board to disregard the Charging Party/Intervenor's exceptions because they fail to comply with Sec. 102.46 of the Board's Rules and Regulations. We find that the Charging Party/Intervenor's exceptions are in substantial compliance with the Board's Rules, and we have therefore considered them.

[2] The Charging Party/Intervenor has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Because we dismiss the Acting General Counsel's complaint on substantive grounds, we find it unnecessary to pass on the judge's apparent finding that Project Manager Angel Guarino's interactions with employee John Garcia were outside the scope of the complaint because they took place before June 2012.

In finding that the Respondent, through Guarino, did not unlawfully warn or advise Garcia that approval of his benefit request was contingent on his support for decertification, the judge relied, in part, on the absence of evidence that Garcia "was ever denied any benefit to which he was entitled." We do not rely on this finding as a basis for dismissal, as the complaint did not allege that the Respondent actually denied benefits to Garcia.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

IT IS FURTHER ORDERED that, in Case 22–RD–083707, the Charging Party/Intervenor's objection to the election is overruled.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Protective Security Officers Association, and that it is not the exclusive representative of these bargaining-unit employees.

Dated, Washington, D.C. October 18, 2013

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Nikhil Shimpi and *Leah Jaffe, Esqs.,* for the Acting General Counsel.

Clifford J. Ingber, Esq. (The Ingber Law Firm), of Greenwich, Connecticut, for the Employer.

William S. Massey and *Amanda Bell, Esqs. (Gladstein, Reif & Meginniss, LLP),* of New York, New York, for the Petitioner.

William P. Hannan, Esq. (Oxfeld Cohen, P.C.), of Newark, New Jersey, for the Intervenor.

DECISION AND REPORT ON OBJECTION

STATEMENT OF THE CASE

MINDY E. LANDOW, Administrative Law Judge. On June 21, 2012,[1] G. Michael Schimpf and Ebraam Makar,[2] two security officers employed by FJC Security Services, Inc. (FJC, the Employer, or Respondent), filed a petition with the Board seeking to hold an election to decertify the Protective Security Officers Association (PSOA or the Intervenor), in the following unit of employees:

> All full time and regular part time security officers employed by the Company and assigned to Federal office sites in New

[1] All dates are in 2012, unless otherwise indicated.

[2] The General Counsel's unopposed request to amend the transcript to reflect the correct spelling of Petitioner Ebraam Makar's name is granted.

> Jersey under the Company's Federal Government contract HSCEE208A003, excluding all other employees, including office clerical employees, and supervisors, including sergeants, lieutenants and captains, as defined in the Act.

Pursuant to a Stipulated Election Agreement, a mail-ballot election was held between August 2 and 16. The tally of ballots showed that of 109 eligible employees, 54 voted against union representation by the PSOA and 25 voted for continued representation. There were also 4 void ballots and 2 challenged ballots, which were nondeterminative of the outcome of the election.

On August 22, the PSOA filed an objection to the election alleging as follows:

> In or about June 2012, The Employer informed members of the bargaining unit represented by the incumbent union that they should join another union, SEIU, Local 32BJ and should talk to Makar, one of the Petitioners, about joining SEIU, Local 32BJ.

After an investigation of the objection, the Regional Director for Region 2,[3] determined that the objection raised substantial and material issues which would best be resolved on the basis of record testimony.[4]

In addition, based upon an unfair labor practice charge filed by the PSOA on August 8, the Board, through its Acting General Counsel,[5] issued a complaint alleging that in June, Respondent, through its supervisor and agent, Angelo Guarino, warned and advised employees that approval of their benefit requests were contingent on their support for the decertification of the incumbent Union. Region 2 issued a Notice of Hearing and Objections and Order Consolidating Cases on February 5, 2013. At the hearing, counsel for the General Counsel stated that the allegations of unfair labor practice and objectionable conduct were, "[f]or all practical purposes. . . coextensive."

Respondent filed a timely answer denying the material allegations of the complaint. Pursuant to the Notice of Hearing on Objections and Order Consolidating Cases, this matter was heard before me in New York, New York, on April 9, 2013.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Intervenor, and the Petitioner herein, I make the following

FINDINGS OF FACT

I. JURISDICTION

FJC is a corporation, with an office and place of business located at 275 Jericho Turnpike, Floral Park, New York, and is engaged in the provision of security guard and related services for various Federal Government sites within the State of New Jersey, the only locations involved herein. During the past 12 months, FJC, in the course and conduct of its business operations has purchased goods and materials in excess of $50,000 from suppliers located outside the State of New Jersey. FJC admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act). FJC further admits and I find that the PSOA is a labor organization within the meaning of Section 2(5) of the Act.[6]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

FJC is a provider of security services at various locations throughout the New York metropolitan area. It provides such services to Federal facilities in New Jersey. The PSOA has represented the security guards employed by FJC for the past several years. Angelo Guarino is the project manager for New Jersey and approximately 120 guards report, through various other supervisory personnel, to him. From the record it appears that his responsibilities include processing and approving leave requests, including those for annual vacation.

The PSOA and FJC were parties to a collective-bargaining agreement which expired on August 31, 2012.[7]

As the record shows, after 1 year of work, employees are entitled to 2 weeks of vacation leave which is requested through the submission of an annual leave request form. Such requests are approved on the basis of employee seniority. In lieu of time off, employees may request a cash payout for this time, but such a request will not be approved, or paid, until after the anniversary of the particular employee's date of hire with the Company.

B. John Garcia's Leave Requests in 2012

John Garcia has worked for FJC since May 2010. At some point in time between January and March 2012,[8] he submitted a request to take vacation sometime during the month of March. He did not receive approval for the dates he requested and was put on the vacation schedule from May 5 to 11. He called Guarino and asked why he had not received his requested vacation time. As Garcia testified on direct examination, Guarino told him it was because of the PSOA. On cross-examination, Garcia testified that Guarino told him that his vacation request

[3] Although the instant matters arose in Region 22, they were transferred to Region 2 for further processing.

[4] The Regional Director further concluded that, while specifically not alleged in the objection, the investigation adduced evidence of additional alleged preelection objectionable conduct by the Employer including conditioning the approval of benefit requests and retention of vacation benefits on employee support for the decertification of the PSOA.

[5] Hereafter referred to as the General Counsel.

[6] I additionally take administrative notice that SEIU Local 32BJ, as it is referred to in this record, is a labor organization within the meaning of Sec. 2(5) of the Act, and that this labor organization admits nonguards to membership.

[7] Although no party sought to introduce this collective-bargaining agreement into evidence, it is referenced in the decertification petition.

[8] Garcia exhibited confusion and a lack of recollection regarding the dates of particular events, among other things, and was shown a pretrial statement to refresh his recollection on several occasions during his testimony. My findings as to the dates of conversations with Guarino and others are based upon his testimony and the conclusions that may be drawn from the record as a whole.

had been denied because it had been requested by officers with more seniority, and that was the end of the conversation.[9]

Several days later, Garcia encountered Guarino in the lobby of 970 Broad Street, in Newark, New Jersey. He again asked why his vacation request had been denied and, as Garcia testified, Guarino told him that he had to speak with Makar and join 32BJ. Garcia knew Makar as a fellow security officer who was recruiting his coworkers on behalf of that labor organization. At the time this discussion occurred, one other security officer, who Garcia could not identify by name, was in the vicinity—about 5–10 feet away. There is no specific evidence that this individual or anyone else overheard the foregoing discussion. Garcia testified that this discussion took place sometime during March 2012.

It appears from the record that in about May, Garcia asked for a cash out of his vacation pay. He submitted a form to Guarino who responded with a phone call informing Garcia that his request had been denied because of the PSOA. On cross-examination, Garcia clarified that he had been told that he had to wait until after his anniversary date to receive a cash out for that year.[10]

Some time after his conversations with Guarino, Garcia discussed his situation with fellow security officers Perella and Austin who advised him that other officers, including Ben Czerny, were in similar circumstances. Garcia was advised that he could not be denied a cash out for his vacation pay. He was told to write a statement, and provide it to PSOA President Tyrone Leak, which he did. As Garcia testified, he recounted in his statement (which was not introduced into evidence) that he was denied his cash out because he didn't speak to Makar or join Local 32BJ. Garcia further testified that he discussed his situation with other coworkers including: Leak, PSOA Secretary Katina Sampson, Austin, Perella, Jose Garcia, and Ben Czerny. Garcia further stated that there were about four other employees with whom he discussed the matter, but could not recall their names. There is no specific evidence as to when such discussions were held.

I note that the complaint does not allege, Garcia did not testify and the evidence otherwise fails to establish that Garcia was actually denied a cash out of his vacation pay, or the opportunity to take accrued vacation time. There is also no evidence as to his anniversary date or whether Garcia submitted a request for a cash out after that date had passed.

Guarino, who testified herein, failed to offer any testimony to rebut Garcia's assertions.

C. Ben Czerny's Requests for a Vacation Pay Out

Ben Czerny testified that he has worked for FJC for several years and his anniversary date is June 16. At some point he realized that he had not received a vacation payout for the years 2011 and 2012. As Czerny testified, in February 2012, he sent a letter to FJC Supervisor Captain Delucca requesting a cash payout and was advised that he would have to wait to receive the funds until after his anniversary date. In April, he contacted Guarino and was again told that he would have to wait until after his anniversary date. At some point between April and June he discussed this situation with PSOA Secretary Sampson. As Czerny reported, Sampson attempted to assist him by contacting the corporate office and filling out appropriate forms. He received assistance from Union President Leak, as well.

At some point, shortly after Czerny's June 16 anniversary date, he sent a text message to Guarino about the matter and was told to come into the office, located in Nutley, New Jersey. When Czerny arrived, three people were present: Guarino, Sergeant McKay, and one other individual working at a computer. Each individual was seated in a cubicle, behind dividers approximately 5–6 feet tall.

On direct examination, Czerny testified that he told Guarino that he had come for his vacation pay and Guarino responded that "better I join BJ32, because BJ32 can help me to keep my seniority post and my vacation time." There was also a discussion about the attorney for the PSOA, whom Guarino disparaged. Guarino also told Czerny that when he received a ballot for Local 32BJ he should vote "yes" because that Union had good health insurance. Czerny then made some reference to the fact that he already had health insurance and had been participating with the PSOA in a lawsuit against the prior union which had represented the security guards.

As Czerny then testified, Guarino looked his records up on the computer and stated that Czerny was owed 3 weeks of vacation. Czerny thought he was owed more time, but didn't want to dispute that calculation because he needed the money, so he went along with Guarino's assessment. When asked on cross-examination whether he had filed a grievance regarding the additional time he thought he was owed, Czerny stated that he had not done so.

According to Czerny, Guarino then assisted him in completing the vacation request form and faxed it to the corporate office on his behalf. As Czerny testified, "The whole thing was like—Mr. Guarino also faxed my request and he helped—he write up the vacation request. He fax it. I was, matter of fact, happy with that, because save time to me doing that." The whole matter took about 15 or 20 minutes and Czerny then left the office.

Czerny testified that, prior to his visit to the Nutley office, he had discussed his situation with Leak and Sampson, but after he visited Guarino he did not discuss what occurred there or what Guarino stated to him with any of his coworkers.

For his part, Guarino offered blanket denials to discussing the union election or health benefits with Czerny. He also testified that the PSOA contract goes by the employee's anniversary date and that employees may not cash out their vacation time prior to that date each year. He further testified that Czerny had made similar requests for vacation cash outs in prior years and had been advised that he would have to wait until after his anniversary date had passed.

[9] I note that this testimony was elicited by a nonleading question from counsel for the Respondent whereby Garcia was simply asked to recount his interactions with Guarino regarding his various requests for vacation time.

[10] Again, this testimony was in response to a nonleading question from Respondent's counsel.

III. ANALYSIS AND CONCLUSIONS

A. Scope of the Complaint

As noted above, the General Counsel has alleged that in June 2012,[11] Respondent, by Guarino, violated Section 8(a)(1) of the Act by warning and advising employees that approval of their benefit requests were contingent on their support for the decertification of the incumbent Union (the PSOA). In support of these contentions, the General Counsel relies upon comments made by Guarino to Garcia in March and May, and additional statements made to Czerny in June.

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activities. See *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 12 (2012) (collecting cases, and noting that the employer's subjective motive for its action is irrelevant).

As an initial matter, Guarino's discussions with Garcia all took place prior to the filing of the decertification petition, on June 21. There was no evidence that, at the time, Guarino was aware that such a petition was being planned, although it is not disputed that he was aware that Petitioner Makar was encouraging employees to support Local 32BJ. There is no evidence, however, of any discussion between Garcia and Guarino in June.

While it is the case that an unpleaded matter may support an unfair labor practice finding if it is closely connected to the subject matter of the case and has been fully litigated, see, e.g., *Pergament United Sales*, 296 NLRB 333,334 (1989), enfd. 920 F.2d 130 (2d. Cir. 1990), in the instant case, the General Counsel has made no relevant argument of fact or law to request, encourage, or support my making such a finding in the instant case.[12] Accordingly, I decline to undertake such an analysis on my own accord.

B. Guarino's Discussions with Garcia

Moreover, even if I were to consider the March and May conversations to be within the scope of the instant complaint, I would find that Respondent did not violate the Act as alleged with regard to these discussions. The evidence simply fails to establish that Guarino conditioned Garcia's receipt of benefits on supporting the decertification of the PSOA. As Garcia initially testified, his initial request for a specific time off was denied because of "the PSOA" but as he later clarified on cross-examination, Guarino made specific reference to the seniority rules governing the scheduling of such benefits. Garcia's subsequent complaints about Respondent's failure to provide him with a cash out of his vacation moneys were similarly met with an explanation that he would have to wait for his anniversary date to pass before he could receive payment. While there is unrebutted evidence that Guarino did state that Garcia should speak with Makar about joining Local 32BJ, under the circumstances, it is apparent that such comments were in response to Garcia's expressed dissatisfaction over the application of contract rules to his situation.

It is well settled that Section 8(c) of the Act gives employers the right to express their views about unionization or a particular union as long as those communications do not threaten reprisals or promise benefits. *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969). In *Poly-America, Inc.*, 328 NLRB 667, 669 (1999), the Board found that the respondent failed to violate the Act when it informed employees that the union was no good, had threatened to burn the plant facility, and would charge up to $300 in weekly or monthly fees because such comments failed to contain any threats of reprisal or promise of benefits.

In the context of the instant case, I find that Guarino's statements to Garcia were tantamount to an expression of an opinion of the relative benefits of membership in Local 32BJ versus the PSOA and did not contain the sort or threats or promises that rise to the level of interference, restraint, or coercion as would violate Section 8(a)(1) of the Act. *NLRB v. Gissel*, supra, *Poly-America*, supra; see also *Tecumseh Corrugated Box Co*., 333 NLRB 1, 7 (2001) (and cases cited therein).[13]

In particular, here, there is no evidence that Guarino conditioned Garcia's receipt of benefits to anything except the application of the PSOA contract, or that he was ever denied any benefit to which he was entitled. Moreover, as noted above, while it may well be the case that Garcia attempted to tell the

[11] The June 2012 date is specifically set forth in the charge, the complaint, was referenced by counsel for the General Counsel in his opening statement and reiterated in his posthearing brief. No other date for the commission of unfair labor practices was alleged.

[12] The closest the General Counsel comes to propounding such an argument is to assert that a failure to establish an exact date has not, in other circumstances, precluded the Board from finding a violation of the Act. In support of this contention, the General Counsel relies upon *Empire State Weeklies,* 354 NLRB 815 (2009), which as is acknowledged, is a two-member decision. See *Hospital Pavia Peria*, 355 NLRB 1300, 1300 fn. 2 (2010) (recognizing that a two-member Board "lacked authority to issue an order"). In other respects this decision would be inapposite in any event. In that case, the General Counsel made a posthearing motion to amend the complaint to conform the allegations to the facts adduced at trial relating to both the date and substance of an alleged unlawful conversation. After concluding that the matter had been fully litigated, the Board affirmed the judge's decision to grant the General Counsel's motion. Here, no such motion has been made. The General Counsel further relies upon *Safway Steel Products, Inc*., 333 NLRB 394, 399 (2001), where the ALJ, with Board approval, credited that meetings occurred even though there was confusion about the dates. There, the relevant analysis concerned the content of what occurred during the meetings; in particular, whether a wage increase had been offered and accepted. The confusion over the dates was found to be "not of critical importance." Here, based upon the allegations of objectionable conduct which, as the General Counsel has represented, are essentially coextensive with the alleged unfair labor practices, the dates take on particular significance.

[13] Obviously, Local 32BJ was not on the ballot in the forthcoming decertification election; however, I note that there is evidence that at least one of the petitioners was a supporter of that union and that this was known among employees.

truth to the best of his ability, I find that his testimony, while not specifically rebutted, was compromised by his general lack of memory about events, even after his recollection was refreshed on several occasions.

In sum, I conclude that the credible and reliable evidence fails to show that Guarino, by his comments to Garcia, violated the Act as alleged in the complaint.

C. Guarino's June Conversation with Czerny

Similarly, I find that the General Counsel has failed to show that Guarino warned and advised Czerny that approval of his benefit requests was contingent upon his support for the decertification of the incumbent union, or that Guarino stated or implied to Czerny that decertifying the PSOA and supporting Local 32BJ would be a remedy for his problems, as has more generally been alleged by the General Counsel in his posthearing brief.

As an initial matter, I credit Guarino's testimony that Czerny initially requested a payout of his vacation moneys prior to his anniversary date and note that this was corroborated by Czerny himself. After that date had passed, in June, Czerny contacted Guarino and was advised to come to the office, which he did. Guarino did not refuse Czerny his benefits at that time; nor did he exact any sort of quid pro quo for the cash out. Rather, as Czerny acknowledged in his testimony, it was Guarino who completed the requisite paperwork and forwarded it to the corporate office for further processing thereby saving Czerny time and effort. Such evidence fails to support the General Counsel's contention that Czerny was advised that his receipt of benefits was contingent on his support for Local 32BJ, his vote to decertify the PSOA, or any other decision to engage in or refrain from union activity.

I credit Czerny that Guarino said that Local 32BJ would help him keep his seniority and vacation time and that he should vote "yes" for Local 32BJ as that union had good health insurance.[14] Again, I find such comments to be permissible statements of opinion regarding the merits of a particular labor organization, without relation to any threat or promise of benefit, and therefore do not constitute interference, restraint, or coercion in violation of Section 8(a)(1) of the Act. *Poly-America*, supra, *Tecumseh Corrugated Box*, supra.

IV. THE OBJECTION TO THE ELECTION

A. Contentions of the Parties

The PSOA contends that the mail-ballot election held between August 2 and 16 must be set aside because: Guarino's statements to employees interfered with their Section 7 rights in violation of Section 8(a)(1) of the Act; FJC impermissibly made threats and promises to employees to encourage them to vote against the PSOA and that FJC was not permitted to support Local 32BJ over the PSOA. The petitioners argue that the PSOA's objection should be overruled because the PSOA, who bears the burden of proof, has failed to show: (1) that the complained of conduct occurred during the critical period; (2) that the conduct was unlawful or otherwise objectionable; or (3) even if the conduct occurred within the critical period and was objectionable, that it was not disseminated among a sufficient number of employees so as to interfere with their free and uncoerced choice in the election.

The facts relevant to a consideration of the PSOA's objection to the election are set forth above.

B. Analysis and Conclusion

It is well settled that representation elections are not lightly set aside. *Quest International*, 338 NLRB 856 (2003); *Safeway, Inc.*, 338 NLRB 525 (2002); *NLRB v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.,* 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)). "There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *NLRB v. Hood Furniture Mfg. Co.,* supra, 941 F.2d at 328, and the burden of proving a Board-supervised election should be set aside is a "heavy one." *Kux Mfg. Co. v. NLRB,* 890 F.2d 804, 808 (6th Cir. 1989) (quoting *Harlan #4 Coal Co. v. NLRB,* 490 F.2d 117, 120 (6th Cir.), cert. denied 416 U.S. 986 (1974). The objecting party must show that objectionable conduct affected employees in the voting unit. *Avante At Boca Raton, Inc.*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence unit employees knew of alleged coercive incident).

As the objecting party, the PSOA has the burden of proving interference with the election. See *Jensen Pre-Cast*, 290 NLRB 547 (1988). The test, applied objectively, is whether the objected-to conduct has the tendency to interfere with the employees' freedom of choice. See *Taylor Wharton Division*, 336 NLRB 157, 158 (2001); *Baja's Place*, 268 NLRB 868 (1984).

In *Taylor Wharton,* the Board delineated that:

> In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persisted in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.[15]

[14] I found the substance of Guarino's blanket denials to be unpersuasive as was his demeanor. Guarino repeatedly failed to wait for the question to be finished before he proffered his uncategorial denials. I further note that as a current employee, Czerny would have little, if anything, to gain by testifying against his supervisor and his employer. See *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1 (2006), quoting *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996).

[15] Not all conduct violative of Sec. 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. *Caron International*, 246 NLRB 1120 (1979). However, conduct which violates Sec. 8(a(1) of the Act is

See also *Avis Rent-A-Car*, 280 NLRB 580, 581 (1986).

As a general rule, the period during which the Board will consider conduct as objectionable—warranting the setting aside of an election, the so-called "critical period"—occurs between the filing of the petition through the date of the election. *Ideal Electric & Mfg. Co*., 134 NLRB 1275 (1961); *Wyandanch Day Care Center*, 323 NLRB 39 fn. 2 (1997). Here, this period falls between June 21 and August 16. It is the objecting party's burden to show that the conduct occurred during the critical period. *Gibraltar Steel Corp*., 323 NLRB 601 (1997).

With regards to Garcia's testimony, as discussed above, I have concluded that he never credibly placed any interaction with Guarino later than May 2012. Thus, neither of the discussions to which he testified could reasonably be construed as independent grounds for setting aside the election. The Board has also held, however, that prepetition conduct may be considered where it "adds meaning and dimension to related postpetition conduct." *Dresser Industries*, 242 NLRB 74 (1979). In the circumstances of this case, however, given the actual nature of the conduct at issue, I do not conclude that either of Guarino's conversations with Garcia would have had a tendency to interfere with the outcome of the election. This is particularly so because they were rooted in the reality of the contractual limitations under which employee benefits could be granted to employees at that time and, as I have found, were free from threats or promises of benefits. With regard to any possible issue of dissemination, there is insufficient reliable evidence to establish when Garcia discussed Guarino's comments with his coworkers, or exactly what he might have said when he raised such issues with them.

I conclude from the record as a whole that Czerny's discussion with Guarino took place on June 22, within the critical period. Nevertheless, it is the case that within the context of a representation election, an employer may express its views about unionization as long as such opinions do not threaten reprisals or promise benefits. Just as employers may criticize a union, they may also make remarks favorable toward a union. *U.S. Family Care San Bernadino*, 313 NLRB 1176, 1177 (1994); *Dai-Ichi Hotel Saipan Beach*, 326 NLRB 458, 460 (1998); *Sutter Roseville Medical Center*, 324 NLRB 218, 219 (1997) ("supervisory statements endorsing the union and pointing out the possible benefits of union representation . . are not inherently coercive and are not objectionable when made without threats of retaliation or reward, [but] are permissible expressions of personal opinion"). Moreover, an employer may lawfully express a preference for one particular union over another, as long as it does not engage in coercive conduct in doing so. *Flamingo Hilton-Laughlin*, 324 NLRB 72, 73 fn. 1 (1997), enfd. as modified 148 F.3d 1166 (D.C. Cir. 1998); See also *Regency Grande Nursing & Rehabilitation Center*, 355 NLRB 587 (2010) (incorporating by reference *Regency Grande Nursing & Rehabilitation Center*, 354 NLRB 530 fn. 7 (2009)).[16]

In *U.S. Family Care*, supra at 1177, the Board found that managers' remarks to employees that a union would bring better pay, benefits and job protection were unobjectionable. I find that Guarino's comments to Czerny about the potential benefits of representation by Local 32BJ were, in a similar vein, unobjectionable.

Even if I were to assume, however, that Guarino's comments to Czerny were objectionable I would not find them sufficient to warrant setting aside the election. In assessing whether conduct interfered with an election the board considers "the number of incidents, their severity, the extent of dissemination, the size of the unit and other relevant factors." *Archer Services*, 298 NLRB 312 (1990). Here, there is one instance of allegedly objectionable conduct, involving one employee,[17] and there is no evidence of dissemination among the voting bargaining unit. In this regard I note that the Board will not infer dissemination, even where the threat is a significant one; see, e.g., *Crown Bolt, Inc*., 343 NLRB 776, 777 (2004). Here, Czerny clearly testified that he did not discuss Guarino's June 22 comments with any of his coworkers.

I further note that the narrowness of the vote in an election, while not dispositive, is a relevant consideration. *Robert Orr-Sysco Food Services, LLC*, 338 NLRB 614 (2002). Where, as here, the margin of votes favoring decertification of the PSOA was a significant one, it would be difficult to conclude that one isolated instance of objectionable conduct, absent evidence of dissemination, would have a tendency to affect the outcome of the election.

Accordingly, I shall recommend that the objection filed by the PSOA in Case 22–RD–083707 be overruled, and that a certification of results be issued.

CONCLUSIONS OF LAW

1. FJC Security Services, Inc. (FJC) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Protective Security Services Organization (PSOA) is a labor organization within the meaning of Section 2(5) of the Act.

generally considered conduct which interferes with the exercise of a free and untrammeled choice in an election; see *Playskool Mfg. Co*., 140 NLRB 1417 (1963). This is because the test of what constitutes interference with the "laboratory conditions" under which an election must be conducted is more restrictive than the test of conduct which violates Sec. 8(a)(1) of the Act. See, e.g., *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). Thus, my conclusion that no violation of Sec. 8(a)(1) has occurred is not necessarily determinative of the question of whether FJC engaged in objectionable conduct, as alleged.

[16] Counsel for the Petitioner argues that there is no evidence that SEIU Local 32BJ played any role in the election campaign or the filing of the decertification petition. I note however, that the petition asks the filing party to provide information regarding, "[o]rganizations or [i]ndividuals other than Petitioner . . . which have claimed recognition as representative and other organizations and individuals known to have a representative interest in any employees in the unit described . . . above." The petition, as filed by counsel for the petitioner here lists SEIU Local 32BJ as such a party.

[17] The Petitioner has failed to adduce sufficient evidence to establish that either Sergeant McKay or the other unidentified individual in the room were eligible voters or that they actually did or could have overheard Czerny's discussion with Guarino. I further note that the bargaining unit specifically excludes sergeants and office clerical employees.

3. FJC has not violated the Act as alleged.

4. FJC has not committed objectionable conduct as alleged in the Notice of Hearing on Objections and Order Consolidating Cases.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The complaint is dismissed.

The objection filed in Case 22–RD–083707 is overruled, and it is further recommended that a Certification of Results be issued.

Dated, Washington, D.C. June 12, 2013

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings conclusions and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.