UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

PARAGON SYSTEMS, INC.
Employer

and

NATIONAL LEAGUE OF JUSTICE AND SECURITY PROFESSIONALS (NLJSP)
Petitioner

Case No. 29-RC-229372

and

LAW ENFORCEMENT OFFICERS SECURITY UNIONS, LEOSU, LEOS-PBA
Intervenor

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to Section 102.69 of the Board's Rules, I have considered the exceptions filed by National League of Justice and Security Professionals (NLJSP), herein called the Petitioner, to the Hearing Officer's report recommending disposition of objections filed to an election by mail ballot conducted from February 25, 2019 through March 20, 2019.[1] The election was conducted pursuant to an Amended Stipulated Election Agreement. The Tally of Ballots shows 7 ballots cast for the Petitioner, 167 ballots cast for Law Enforcement Officers Security Unions, LEOSU, LEO-PBA (herein called the Intervenor), 34 ballots cast against the participating labor organizations and one challenged ballot. Challenges were not sufficient in number to affect the results of the election. A majority of the valid votes cast was cast for the Intervenor. The Petitioner filed timely objections to the election.

On April 5, 2019, the undersigned issued a Report on Objections and Notice of Hearing. The April 5 Report directed that a hearing be held on the Petitioner's first objection and that portion of the Petitioner's second objection related to the erroneous paycheck dues deduction and refund made during the critical period. The remainder of the Petitioner's second objection was overruled. Pursuant to the April 5 Report, a hearing was held before a Hearing Officer on April 10, 2019.

[1] The ballots were mailed by the Region on February 25, 2019 to the employees at their addresses on the eligibility list furnished by the Employer. To be counted, the ballots had to be received by the Region prior to the counting of ballots, which took place on March 20, 2019.

On May 15, 2019, the Hearing Officer issued a Report in which she recommended that the Petitioner's objections be overruled. As described more fully below, the Petitioner filed exceptions related to the Hearing Officer's recommendation to overrule its first objection and that portion of its second objection related to the erroneous paycheck dues deduction and refund made during the critical period.

I find that the Hearing Officer's rulings made at hearing are free from prejudicial error and are hereby affirmed. I have reviewed and considered the evidence and the arguments presented by the parties and, as discussed herein, I agree with the Hearing Officer that the Petitioner's objections should be overruled. Accordingly, I am issuing a Certification of Representative.

The Petitioner's Exceptions

Objection No. 1:

The Petitioner excepts to the Hearing Officer's recommendation to overrule its first objection, alleging that the Employer failed to post Notices of Election in all work locations and failed to email the Notices of Election to all employees as required by the Board's Rules and Regulations. The Intervenor indicates support for the Hearing Officer's Report and Recommendations on Objections, asserting that the Petitioner's objections should be overruled, and a Certification of Representative should be issued. The Employer did not take a position on the Petitioner's exceptions.

Section 102.67(k) of the Board's Rules and Regulations states, "The employer shall post copies of the Board's Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least 3 full working days prior to 12:01 a.m. of the day of the election and shall also distribute it electronically if the employer customarily communicates with employees in the unit electronically... The employer's failure properly to post or distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed..."

Physical Posting of Notices of Election

The record evidence does not establish that the Employer failed to comply with its obligation to post Notices of Election at any work location. The testimony at hearing concerning the physical posting of Notices of Election referred to the observance of postings at the 26 Federal Plaza, New York, NY work location. Both unit employees who testified at the hearing testified that they saw Notices of Election posted at the 26 Federal Plaza location, their assigned work location. In this regard, employee witness Rudolph Petter testified that Notices of Election were posted in the men's lower and upper locker rooms at 26 Federal Plaza. Similarly, unit employee Tanya Thomas testified that Notices of Election were also posted in the women's locker room. The witnesses did not testify about the physical posting of the Notice of Election at any other work location. In its exceptions, the Petitioner asserts that employee witness Petter's testimony shows

that some employees may report to posts without using the locker room, suggesting they would not see the Notice of Election posted on locker room doors and mirrors. While Petter's testimony indicates that some employees may not change into their uniform in the locker room at work, he also testified that unit employees are mandated to take their breaks in the locker room and that they are not permitted to be outside or on the floors when they are on their breaks. Thus, as a result, they would see the Notices of Election as noted by the Hearing Officer in her Report.[2]

Employer Communication by Electronic Means

The Petitioner also contends that the Employer routinely communicates by electronic means to all employees and it was thus required to send the Notices of Election to employees by electronic mail, but failed to do so. The Intervenor asserts that while the Employer communicates with employees through a software application for the purposes of payroll, it does not regularly communicate by electronic means, indicating that the Employer was not required to electronically distribute the Notice of Election.

In support of its claim that the Employer routinely communicates with employees by electronic means, the Petitioner relies on the testimony of employee witness Rudolph Petter, that the employees receive electronic notices from the Employer when something is of "paramount" importance. However, as noted by the Hearing Officer, the only emails Petter could recall receiving from the Employer came during the hiring process regarding pre-hire issues of interviews and medical physicals. Employee witness Tanya Thomas similarly testified that she has not received any email from the Employer since she was hired. Indeed, Thomas testified that the Employer does not regularly communicate with employees by email. (Tr. 213- 214). Further, the Petitioner points to the Employer's use of a software application, referred to on the record as "Valiant" and "the Valiant app," that unit employees access on their mobile phones to check their schedule assignments. However, Petter specifically testified that other than schedules and payroll information, no other information is transmitted through the Valiant app. Indeed, the witnesses testified that the Employer's normal course of communication with employees is not through the Valiant app or email.[3] Rather, the employees testify about the Employer communicating by other means, such as posting notices on the door of the locker room, the post orders binder and direct communication with their supervisors. Thus, the evidence does not establish that the Employer customarily communicates with employees by email or by posting notices on the Valiant app. In the light of the foregoing, record evidence does not establish that the Employer customarily communicates with employees electronically to require the distribution the Notice of Election

[2] Petter did not testify about the physical posting of Notices of Election at any site other than the 26 Federal Plaza work location and the Petitioner did not present any witnesses to testify about the physical posting of Notices of Election at any other work location. I note that the Petitioner appears to contend in its exceptions that employees of the Employer frequently eat their lunches in the cafeteria on the upper floors of 26 Federal Plaza and the Petitioner "believes any employee of the Employer addicted to cigarettes would take a break to access an outside smoking area far from the locker rooms. ." However, such contentions are not established by record evidence.

[3] Record evidence shows that the Valiant app does not generate emails.

electronically and I agree with the Hearing Officer that the Petitioner's first objection should be overruled.

Objection No. 2:

The Petitioner excepts to the Hearing Officer's recommendation to overrule its second objection, alleging that the Employer engaged in objectionable conduct during the critical period by erroneously withdrawing an extra dues payment for incumbent union Local 32BJ, SEIU [4] and then refunding that payment to unit employees. The Intervenor indicates support for the Hearing Officer's Report and Recommendations on Objections, asserting that the Petitioner's objections should be overruled, and a Certification of Representative should be issued. The Employer did not take a position on the Petitioner's exceptions.

The Board's rule set forth in *Kalin Construction Co.*, "prohibits changes in the paycheck process, for the purpose of influencing the employees' vote in the election, during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls. The term "paycheck process" encompasses the following four elements: 1. The paycheck itself. 2. The time of paycheck distribution. 3. The location of paycheck distribution. 4. The method of paycheck distribution. If there is a change in any one of these four elements during the proscribed period, the Board will set aside the election upon the filing of valid objections, absent a showing that the change was motivated by a legitimate business reason unrelated to the election." 321 NLRB 649, 652 (1996).[5]

The Hearing Officer found that although the evidence shows that the Employer made irregular payroll deductions and reimbursements during the critical period, the Petitioner failed to present evidence that the Employer made any payroll changes within twenty-four hours of the election. Thus, the Hearing Officer found the Petitioner failed to meet its burden of establishing objectionable conduct under *Kalin Construction Co.*, 321 NLRB 649 (1996).

The Petitioner takes exception to the Hearing Officer's reliance on *Kalin Construction Co.*, *supra,* in overruling its second objection. The Petitioner argues that the Hearing Officer's reliance on the Board's decision in *Kalin Construction Co* to this mail ballot election does not "meet the interest" of voters in the circumstances of the case. The Petitioner sets forth a number of matters, in addition to the erroneous deduction of extra dues and the reimbursement of the extra deduction encompassed by this objection, which it indicates should be considered. Specifically, the Petitioner points to (1) its contention that the undersigned misapplied the Board's decision in *UGL-UNICCO Service Company*,[6] in the December 18, 2018 Decision and Order;[7] (2) that Region 29

[4] Local 32BJ, SEIU was not a choice on the ballot in this election.

[5] The Board in *Kalin Construction* noted that this rule was similar to the rule in in *Peerless Plywood Co.*, 107 NLRB 427 (1953) as it prohibited the kind of last-minute pressure to persuade which is disruptive of the election process.

[6] 357 NLRB 801 (2011).

[7] In connection with the Petitioner's assertion, as background, I note the procedural history that on October 15, 2018, the Petitioner filed the instant petition seeking to represent security officers employed by the Employer at Federal Protective Service sites previously covered under a predecessor employer's 2016 to 2021 collective bargaining

issued a Notice of Election which was followed by the discovery of the Intervenor's showing of interest and the issuance of an amended Notice of Election; and, (3) the Intervenor's filing of an unfair labor practice charge in Case No. 02-CA-236190 and related campaigning by the Intervenor to make employees believe the Intervenor was an effective representative.

Application of Kalin Construction to the instant case

The Hearing Officer found that the Employer made irregular payroll deductions and reimbursements during the critical period.[8] In this regard, the record indicates that the Employer deducted an extra dues payment in the amount of $75. Employee Rudolph Petter's testimony shows that he received a $75 dues reimbursement on February 21, 2019 through direct deposit. (Tr. 232). Employee Tanya Thomas testified that she was aware that at one point during the campaign the Employer had deducted extra dues and that on February 21, she received a text message from a representative of Local 32BJ stating that "the second dues deduction was reimbursed by the Employer." (Tr. 217, Intervenor Exhibit 1). Thomas testified that she did not receive $75 back. (Tr. 230). On February 25, 2019, the ballots were mailed by the Regional Office to the employees at their addresses on the eligibility list furnished by the Employer. As noted above, under the Board's decision in *Kalin Construction*, changes in the paycheck process are prohibited during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls. Thus, in this mail ballot election, the prohibition period began twenty-four hours before the ballots were scheduled to be mailed, i.e. February 25, 2019 [9] and ended on March 20, 2019. There is no evidence that the Employer made any payroll changes within the prohibition period. In these circumstances, I agree with the Hearing Officer's finding that the Petitioner did not present any evidence that the Employer made any payroll changes which would constitute objectionable conduct under *Kalin Construction.*

Further, the record does not establish that the employees would reasonably view the Employer's conduct of deducting extra dues followed by a refund of the erroneous deduction as a benefit to them. Compare *Durham School Services, L.P.*, 360 NLRB 708 (2014) (where an unprecedented correction of paycheck shortages occurring a week before the election evinced an attempt to fix a longstanding problem of great concern to the employees, one that the employer had not addressed prior to the organizing campaign, the Board found the substantial cash payments

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agreement with Local 32BJ. Local 32BJ and the Employer asserted that an election was not appropriate because the petition was precluded under the successor bar doctrine, as set forth in *UGL-UNICCO Service Company*, 357 NLRB 801 (2011). The Petitioner asserted, among other things, that the successor bar doctrine did not apply. On December 18, 2018, the undersigned issued a Decision and Order in the above-captioned matter, dismissing the petition based upon application of the successor bar doctrine. On December 28, 2018, the Petitioner filed a request for review of the Decision and Order. Thereafter, on January 9, 2019, the Petitioner filed a Consolidated Motion for Reconsideration and Extension of Time, seeking a reopening of the hearing "because of facts unknown at the time of the hearing." On February 4, 2019, the Board granted the Petitioner's January 31, 2019 request to withdraw its request for review of the undersigned's December 18, 2018 Decision and Order.

[8] The Petitioner does not except to this finding.

[9] The Board considers the scheduled opening of the polls as the time the ballots are scheduled to be mailed. See e.g., *Guardsmark, LLC*, 363 NLRB No. 103 (2016).

were a benefit, and as such constituted objectionable conduct warranting setting aside the election). In this regard, there is no evidence that the Employer's change in payroll procedures during the critical period responded to a request made by employees before the organizing campaign.

As noted above, in addition to the erroneous deduction of extra dues and the reimbursement of the extra deduction encompassed by this objection, the Petitioner indicates the following additional matters should be considered herein: (1) the Petitioner's contention that the undersigned misapplied the Board's decision in *UGL-UNICCO* in the December 18, 2018 Decision and Order; (2) that Region 29 issued a Notice of Election which was followed by the discovery of the Intervenor's showing of interest and the issuance of an amended Notice of Election; and, (3) the Intervenor's filing of an unfair labor practice charge in Case No. 02-CA-236190 and related campaigning by the Intervenor to make employees believe the Intervenor was an effective representative. However, the first two sets of issues do not bear directly on this objection, were not raised by the Petitioner in its timely filed objections as affecting the results of the election, and, there is no contention by the Petitioner that such matters were newly discovered or previously unavailable to the Petitioner.[10] Finally, the issues raised concerning the Intervenor filing an unfair labor practice in Region 2 and the Intervenor's related campaigning, were overruled in my April 5, 2019 Report on Objections and Notice of Hearing. Accordingly, these additional enumerated issues, raised by the Petitioner in its exceptions to the Hearing Officer's Report, were not before the Hearing Officer for disposition and do not present grounds for reversing her findings.

CONCLUSION

Based on the above and having carefully reviewed the entire record, the Hearing Officer's Report and Recommendations on Objections, the exceptions and arguments made by the Petitioner, I overrule the Petitioner's objections, and I shall certify the Intervenor as the representative of the appropriate unit.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of valid ballots has been cast for Law Enforcement Officers Security Unions, LEOSU, LEO-PBA, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time armed and unarmed security officers employed by Paragon Systems, Inc. at the Federal Protective Service sites located in Manhattan, the Bronx, West Nyack, Yonkers, New Rochelle, White Plains, and Peekskill, New York,

[10] It is noted with regard to the application of *UGL-UNICCO* in the December 18, 2018 Decision and Order, on February 4, 2019, the Board granted the Petitioner's January 31, 2019 request to withdraw its request for review of the undersigned's December 18, 2018 Decision and Order. After the election, no timely objections were filed related to the application of *UGL-UNICCO* in the December 18, 2018 Decision and Order or to the issues concerning the inclusion of the Intervenor on the ballot and the issuance of an amended Notice of Election. Indeed, the parties entered into an Amended Stipulated Election Agreement which set forth the parties' agreement that the Intervenor be included on the election ballot and that a notice of such election be posted.

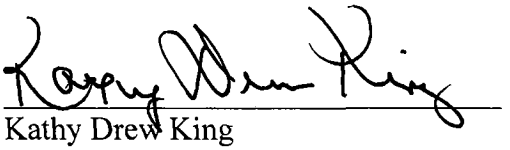
covered under Paragon Systems, Inc.'s June 1, 2018, service contract with the United States Government, but excluding all other employees and supervisors as defined by Section 2(11) of the Act.

REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, D.C., a request for review of this decision. The request for review must conform to the requirements of Section 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by **October 7, 2019.** If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated at Brooklyn, New York, on September 23, 2019.



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