

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

SEA GATE ASSOCIATION  
Employer<sup>1</sup>

and

LAW ENFORCEMENT EMPLOYEES  
BENEVOLENT ASSOCIATION  
Petitioner

Case No. 29-RD-1096

and

SPECIAL AND SUPERIOR OFFICERS  
BENEVOLENT ASSOCIATION  
Intervenor<sup>2</sup>

**DECISION AND DIRECTION OF ELECTION**

The Sea Gate Association (“Employer”) operates a gated residential community in Brooklyn, New York and, among other things, provides security services there. The Law Enforcement Employees Benevolent Association (“Petitioner”) filed a decertification petition under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of approximately 24 police officers, who have been represented for collective bargaining purposes by the Special and Superior Officers Benevolent Association (“Intervenor”) since at least 2003.

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<sup>1</sup> The Employer’s name appears as amended at the hearing. (See Board Exhibit 2.)  
All references to exhibits in the record will hereinafter be abbreviated as follows: “Bd. Ex. #”, “Er. Ex. #” and “Pet. Ex. #” refer to Board Exhibit numbers, Employer Exhibit numbers and Petitioner Exhibit numbers, respectively.

<sup>2</sup> Special and Superior Officers Benevolent Association intervened in this proceeding, based on its status as the recognized collective-bargaining representative of the petitioned-for bargaining unit.

The somewhat confusing chronology of this case is described below in more detail. But, briefly, the Petitioner filed a petition on November 26, 2007<sup>3</sup> (Case No. 29-RD-1093) concerning the same unit of employees, and withdrew that first petition on December 6. The Petitioner faxed a second petition that same day, on December 6. The Region mistakenly docketed another copy of the *first* petition, rather than the *second* petition, as Case No. 29-RD-1096. (The second petition was never docketed.) In the meantime, on December 4, the Employer and the Intervenor signed a Memorandum of Understanding, extending and modifying their prior collective bargaining agreement (which had expired almost a year earlier, on December 30, 2006) for four more years.

The parties have essentially raised three issues. First, the Intervenor declined to stipulate that the Petitioner is a labor organization as defined in Section 2(5) of the Act. Second, the Employer and Intervenor contend that no petition is actually pending at this time, since the Petitioner's first petition was withdrawn, and there is insufficient record evidence (according to the Intervenor) of the Region's receipt of the second petition, which was never docketed. Third, the Employer and Intervenor both contend that, even assuming *arguendo* that a second petition was filed, their December 4 Memorandum of Understanding bars the further processing of that subsequent petition. The Employer and Intervenor have moved to dismiss the petition on that basis.

A hearing on these issues was held before Linda Harris Crovella, a hearing officer of the National Labor Relations Board. The Petitioner's president, Kenneth Wynder, testified regarding the Petitioner's status as a labor organization, and regarding the circumstances of his filing the two petitions. In support of its position regarding the

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<sup>3</sup> All dates hereinafter are in 2007, unless otherwise indicated.

Memorandum of Understanding, the Intervenor called the Employer's attorney and primary negotiator, Denise Forte, to testify. As described in more detail below, the record was also supplemented by an affidavit from Board attorney Kevin Kitchen, regarding the circumstances of the two petitions.

For the reasons discussed below, I reject the contentions that no valid petition is pending, and that the December 4 Memorandum of Understanding would bar the further processing of a second petition at any rate. I also find that the Petitioner is a labor organization as defined in Section 2(5) of the Act. I will therefore direct an election below in the relevant bargaining unit, with both labor organizations appearing on the ballot.

### **Labor organization issue**

#### *Facts*

Kenneth Wynder is president of the Law Enforcement Employees Benevolent Association, the Petitioner in this case. Wynder testified that the Petitioner represents law enforcement personnel, in both the public and private sectors, for collective bargaining purposes. For example, he testified that the Petitioner was certified in 2005 by the New York City Office of Labor Relations as the exclusive collective-bargaining representative of police officers employed by the City Department of Environmental Protection. In 2006, the Petitioner was certified by the National Labor Relations Board to represent a bargaining unit of security officers employed by Brinks, Inc., in New Jersey. Wynder testified that the Petitioner is currently negotiating contracts with those two employers, concerning the officers' wages, health and pension benefits, hours and other working conditions. The Petitioner has also handled grievances regarding discipline for

officers in those two units. Furthermore, Wynder testified that employees also participate in the organization by attending meetings.

Finally, Wynder testified that the Petitioner represents only guards, and is not affiliated with any other labor organization.

Discussion

Section 2(5) of the Act defines a labor organization as:

any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

See also Alto Plastics Mfg. Corp., 136 NLRB 850 (1962).

Wynder's testimony clearly establishes that the Petitioner exists for the purpose of dealing with employers concerning grievances and other terms and conditions of employment, and that employees participate in the organization. Thus, the Petitioner meets the broad definition of labor organization in Section 2(5) of the Act.

Accordingly, I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.<sup>4</sup>

**Filing of the two petitions, and the contract bar issue**

Facts

The following description of the facts is based on the testimony of both Kenneth Wynder and Denise Forte. In addition, due to confusion about the Region's processing of the two petitions, the parties agreed to allow the admission of a post-hearing affidavit from Board attorney Kevin Kitchen. I hereby admit said affidavit into the record as

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<sup>4</sup> I also find that the Petitioner is a guard union within the meaning of Section 9(b)(3) of the Act. The parties stipulated at the hearing that the Intervenor is a guard union.

Board Exhibit 7, along with the exhibits referenced therein (Exhibits A, B and C) and the parties' subsequent agreements to admit it into evidence (Exhibits D, E and F). A copy of Board Exhibit 7 (including Exhibits A through F) is attached to this Decision.

The chronology starts when the Petitioner filed a decertification petition via facsimile (Bd. Ex. 3) on or about November 26,<sup>5</sup> and sent the original "hard copy" in the mail. For identification purposes, it is noted that this first petition included neither a description of the bargaining unit (Section 5 of the petition form) nor the number of employees in the unit (Section 6). It also had two minor typographical mistakes (the word "Special" of Intervenor's name and Kenneth Wynder's first name were not capitalized). The Region docketed the faxed copy of the petition as Case No. 29-RD-1093, and issued a Notice of Hearing scheduling a hearing for December 6.

On Tuesday, December 4, two days before the scheduled hearing in Case No. 29-RD-1093, the Employer and Intervenor signed a Memorandum of Understanding ("MOU," Er. Ex. 1), which extended their expired 2003 – 2006 collective bargaining agreement (Er. Ex. 2), with some modifications. The MOU is a four-year agreement, effective retroactively from January 1, 2007, through December 31, 2010. Forte's testimony regarding the negotiation process need not be detailed herein. At the hearing, the Employer submitted signature pages and fax cover sheets (Er. Exs. 3 and 4) to demonstrate that the MOU was executed by both the Employer and the Intervenor on December 4. There appears to be no dispute that the MOU was indeed executed on that date. The MOU also included a provision acknowledging that the petition in Case No.

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<sup>5</sup> The Region inadvertently typed the filing date as November 16. However, this particular mistake is irrelevant to the issues involved herein.

29-RD-1093 was pending at that time, and stating that the retroactive wage increase would not be paid unless and until the representation issue had been resolved.

On Wednesday, December 5, the day before the hearing in Case No. 29-RD-1093, the Region received a petition from the Petitioner in the mail. In hindsight, it is obvious that this was the “hard copy” of the petition which had been faxed and docketed on November 26. It had the same exact signature, the same lack of unit description and number of employees, and the same capitalization typos as the petition docketed as Case No. 29-RD-1093. It was time-stamped as being received by the Region on “2007 DEC – 5.” However, the hard copy received on December 5 was not processed by the Region on that day. As described below in more detail, this copy was eventually – and mistakenly – docketed as a second petition, i.e., the petition in Case No. 29-RD-1096 (part of Bd. Ex. 1).

On Thursday, December 6, the hearing date in Case No. 29-RD-1093, the Petitioner failed to appear at the Regional office. Board Agent Kitchen telephoned Wynder, who said he had been out of his office all week, and had not opened his mail, which included the Notice of Hearing. Since Wynder was located two hours away from Brooklyn at that time, he would not be able to make the hearing on time. However, Wynder asked permission to withdraw the petition in Case No. 29-RD-1093 and to file another petition, rather than having the first petition dismissed. The Region agreed. Later that same day (December 6), at approximately 11:00 a.m., Wynder indeed faxed a written withdrawal request (Bd. Ex. 4), which was approved by the Region (Bd. Ex. 5) some time later that same day, although the record does not indicate what time the withdrawal was approved.

Wynder also filed a new petition by fax that same day, Thursday, December 6, at approximately 2:30 p.m. (See Pet. Ex. 1.) This was a different petition form, which included a unit description, the number of unit employees, and correct capitalizations. However, for some reason, the faxed petition was lost in the Regional office, and was never docketed. Instead, the hard copy of the original petition in Case No. 29-RD-1093 (received in the mail the previous day, as described above) was mistakenly docketed as the new petition, now known as Case No. 29-RD-1096. (See Bd. Ex. 1.) Although Wynder testified that he also mailed a hard copy of this second petition, it is not clear from the record what happened to the mailed copy. In any event, the Region typed in the “date filed” as “12/5/07,” apparently reflecting the time stamped on the hard copy of the first petition. The Notice of Hearing for the “second petition” was signed on Monday, December 10. The Region’s cover letter and affidavit of service were dated on Tuesday, December 11. The Notice of Hearing set a hearing on December 17 for Case No. 29-RD-1096. By a subsequent Order Rescheduling, the hearing was postponed until December 27.

It was during the December 27 hearing that the confusion and mistakes regarding the different petitions finally came to light, and that the Employer and the Intervenor argued that their December 4 MOU served to bar further processing of the second petition. At this hearing, the Petitioner moved to amend its “petition” (i.e., the mistakenly-docketed hard copy of the first petition) to include a unit description and the number of unit employees. The Hearing Officer granted the motion to amend, over the Intervenor’s objections. However, no evidence was submitted at the December 27 hearing to show that the Region had actually received the second petition (Pet. Ex. 1).

On January 8, 2008, the parties submitted briefs regarding the labor organization issue and the contract bar/timeliness of second petition issue. The Employer's and Intervenor's arguments relied, in part, on their assumption that the Region never actually received the second petition (Pet. Ex. 1) which Wynder said he had faxed.

The Region then invited the parties to submit additional briefs regarding a possible problem with the contractual union security clause, which arguably could prevent the contract/MOU from barring an election.<sup>6</sup> The parties subsequently filed supplemental briefs regarding the union security issue.

While the Region started preparing to write the instant Decision, it became obvious that the record needed to address whether the Region actually received the petition (Pet. Ex. 1) which the Petitioner had allegedly faxed on December 6. As described above, the parties agreed on January 29, 2008, to allow Board agent Kitchen's affidavit to be introduced as Board Ex. 7. Kitchen stated, *inter alia*, that he received the second petition (i.e., Pet. Ex. 1) by fax at approximately 2:30 p.m. A copy of the Petitioner's fax cover sheet accompanying the second petition, indicating the time as

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<sup>6</sup> Specifically, Article 2 of the collective bargaining agreement (Er. Ex. 2) provides in part: "It shall be a condition of employment that all employees covered by this agreement who are members of the Union in good standing on the execution date of this agreement shall, in strict accordance with the applicable provisions of the Labor Management Relations Act of 1947, as amended, remain members in good standing and those who are not members on the execution date of this agreement, or the effective date, whichever is later, shall, on or after the thirtieth day following said date, become and remain members in good standing in the Union. It shall also be a condition of employment that all employees covered by this agreement and hired on or after its execution or effective date, whichever is later, shall, on or after the thirtieth day following **said date**, become and remain members in good standing in the Union." [emphasis added]

2:30 p.m., is attached to Kitchen's affidavit as Exhibit B.<sup>7</sup> Furthermore, the Region's fax transmission log (Exhibit C, line 6) shows the Region's receipt of the second petition at "14:29," i.e., at 2:29 p.m.

On February 11, 2008, the Intervenor then filed a Second Supplemental Brief on the contract bar/timeliness issue, in light of the additional evidence of the second petition's receipt.

*Discussion – whether a petition is properly pending*

As a preliminary matter, I must address the Employer's and Intervenor's argument that no petition is properly pending at this time. The Intervenor specifically contends that the record evidence is insufficient to show that the Region ever received the "second petition" (Pet. Ex. 1), which was allegedly filed the same day that the first petition was withdrawn, i.e., on December 6.

As stated above, the record includes the following evidence: (1) Wynder's testimony that he faxed a second petition (Pet. Ex. 1) to the Regional Office on December 6 at 2:30 p.m.; (2) Board Agent Kitchen's affidavit stating that he received the second petition by fax that day at approximately 2:30 p.m.; (3) a copy of a fax cover sheet from Petitioner indicating a 2:30 p.m. transmission (Exhibit B attached to Bd. Ex. 7); and (4) the Region's fax transmission log indicating the transmission time as "14:29" (Exhibit C attached to Bd. Ex. 7). Contrary to the Intervenor, I find this evidence

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<sup>7</sup> To add to the confusion, two of the exhibits attached to Kitchen's affidavit were mislabeled. The exhibits are hereby corrected and labeled as follows: Exhibit A (two-paged) is the Petitioner's 11:00 a.m. fax cover sheet and withdrawal request; Exhibit B is the Petitioner's 2:30 p.m. fax cover accompanying the second petition; Exhibit C is the Region's fax transmission log, showing faxes received from the Petitioner at 10:58 and 14:29. As stated above, the parties' written agreements to admit the affidavit and attachments are labeled as Exhibits D through F.

sufficient to establish that the Petitioner did indeed file the second petition, even though it appears to have been lost in the Regional office and was not properly docketed.

Section 102.114(f) of the Board’s Rules and Regulations provides in part: “[P]etitions in representation proceedings ... will be accepted by the Agency if transmitted to the facsimile machine of the appropriate office.... [R]eceipt of the transmitted document by the Agency constitutes filing with the Agency” (emphasis added). The evidence indicates that the Petitioner indeed “filed” the second petition (Pet. Ex. 1) when the Region received it on December 6.

In sum, I find that the second petition was indeed filed with the Regional office, even though the hard copy of the first petition was docketed in its stead.<sup>8</sup> Admittedly, the Region made many troubling mistakes in processing these petitions, and created undue confusion. However, I conclude that the Region’s mistakes are no reason to deprive the Petitioner of its right to pursue a petition or, more importantly, to deprive employees of an opportunity to exercise their free choice in selecting a bargaining representative at this time.

*Discussion – the contract bar/timeliness issue*

In establishing the contract bar doctrine, the Board has attempted to strike a balance between preserving employees’ right to choose their representative freely, and maintaining some stability in the parties’ collective bargaining relationship. This doctrine provides that when parties have executed a collective bargaining agreement, they are entitled to a reasonable period of stability in their relationship without

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<sup>8</sup> The deficiencies of the hard copy version (lack of unit description and number of employees) were also resolved when the Petitioner amended the hard-copy version at the December 27 hearing.

interruption. General Cable Corp., 139 NLRB 1123 (1962). Consequently, employees who are covered by an existing contract, but who wish to change or eliminate their bargaining representative, must wait until a specified “open period” to file their petition. Leonard Wholesale Meats, 136 NLRB 1000 (1962). However, it should go without saying that there can be no contract bar when there is no contract in effect, such as after a contract’s expiration.

As stated above, the prior contract between the Employer and the Intervenor had expired on December 30, 2006, eleven months before the Petitioner filed its first petition (Case. No. 29-RD-1093) in November 2007. Thus, there was no contract in effect, and no possible contract bar. It is undisputed that a question concerning representation (“QCR”) was timely raised at the time of the first petition. In fact, the Employer and Intervenor’s December 4 MOU (Er. Ex. 2) expressly and properly acknowledged that “there may be a question concerning representation” because of the then-pending petition in Case No. 29-RD-1093, and therefore that the proposed retroactive wage increases would not be paid unless and until the QCR was resolved.

The specific issue in this case is whether the Petitioner’s *second* petition, which was filed two days after the Employer and Intervenor executed their 2007 – 2010 MOU, is barred by that MOU – that is, whether the Petitioner’s withdrawal and second filing on the same day changed the existence of a question concerning representation, in terms of the timeliness of the second petition filed during the new contract term.

Board cases on this issue inevitably involve detailed chronologies. In Weather Vane Outwear Corp., 233 NLRB 414 (1977), an incumbent union (intervenor) represented a production and maintenance unit, and had a contract due to expire on

12/1/1976. In the meantime, a rival union (petitioner) timely filed a “RC” petition to represent the production and maintenance unit on 9/8/1976, during the relevant open period of the existing contract. The intervenor quickly initiated a no-raid procedure under Article XX of the AFL-CIO’s constitution. Approximately two months later, on 11/24/1976, the AFL-CIO ruled that the petitioner had violated the no-raid rule. However, the petitioner did not withdraw its RC petition immediately. A week later, on 11/30/76, the employer and intervenor executed a new contract. One day later, on 12/1/1976, an employee filed a decertification (“RD”) petition, while the first RC petition was still pending. On 12/3/1976, the petitioner finally requested permission to withdraw its RC petition and, on 12/15/1976, the Agency approved the withdrawal. The specific issue in Weather Vane was whether the decertification petition, which was clearly filed after the new contract was executed, should be barred by that contract. The Board held that the contract was *not* a bar in those circumstances. Specifically, the Board noted that the first, timely-filed petition had raised a question concerning representation, which still remained unresolved when the subsequent RD petition was filed:

“When one petition under Section 9(c) is timely filed, and a second petition is filed *during the pendency of the unresolved question concerning representation raised by the earlier one*, our contract-bar doctrine is rendered inoperative as to the later petition.”

Id. at p. 415, emphasis added. The Board has held likewise in many other cases, whose chronologies will not be detailed here. *See, e.g.,* General Dyestuff Corp., 100 NLRB 72 (1952); Continental Can Co., Inc., 119 NLRB 1851 (1958); and Marinette Paper Co., 127 NLRB 1319 (1960).

In the instant case, the Petitioner's first petition was filed months after the prior contract had expired, and timely raised a question concerning representation. The Employer and Intervenor chose to execute their MOU two days before the hearing scheduled for the first petition, when they obviously knew a petition was pending. Two days later, on December 6, one petition was withdrawn and a second petition was filed on the same day. Based on Weather Vane and other cases cited *supra*, I conclude that second petition is not barred by the MOU because *the question concerning representation raised by the earlier petition still existed* when the second petition was filed on December 6.<sup>9</sup>

As noted above, the record in this case does not indicate what time the Region approved the Petitioner's 11:00 a.m. request to withdraw the first petition, in comparison to the 2:30 p.m. facsimile filing of the second petition. In its Second Supplemental Brief, the Intervenor contends, in part, that there is no evidence that the first petition was actually still pending at the time when the second petition was filed. However, as described above, the Region had agreed that the Petitioner's president could withdraw one petition and file another one on December 6, in lieu of having the first petition dismissed. The Petitioner proceeded to do exactly that, sending a withdrawal and new petition that very day, as agreed, with the obvious intent that one petition would replace

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<sup>9</sup> A contract containing an unlawful union security clause cannot bar an election. Paragon Products Corp., 134 NLRB 662 (1961). I also find that the contractual union security provision (excerpted above in fn. 6) prevents the MOU from operating as a bar. In this respect, the union security provision provides, in part, that: "It shall also be a condition of employment that all employees covered by this agreement and hired on or after its execution or effective date, whichever is later, shall, on or after the thirtieth day following **said date**, become and remain members in good standing in the Union." [emphasis added] The phrase "said date" appears to refer to the "execution or effective date, whichever is later," not to the employee's hiring date. Thus, on its face, the contract does not provide new employees the statutorily-required 30-day grace period *from their date of hiring*.

the other. In my view, it is immaterial whether the administrative/clerical mechanisms for processing the withdrawal happened to occur slightly before, simultaneously or slightly after the second petition was filed that day. The essential point is that the two pieces of paper were clearly intended as a “package” to continue the question concerning representation raised by the first petition. The rights of the Petitioner – and especially of the employees – should not be held hostage to the vagaries of processing those two pieces of paper.

Furthermore, this situation is analogous to the “amended petition” situation addressed in such cases as Deluxe Metal Furniture Co., 121 NLRB 995 (1958). The Board has held that when a petition is timely filed, but then amended after an incumbent’s contract has been executed, *the filing date of the original petition is controlling* -- as long as the same employer, operations and employees involved were contemplated in the original petition, and the amendment does not substantially enlarge the character or size of the unit. Id. at fn.12. In the instant case, the Petitioner has consistently sought to represent the same unit of approximately 24 security officers employed by the Employer at its Sea Gate location. Neither the second petition filed on December 6, nor the amendment of “the petition” (i.e., the hard copy of the Case No.29-RD-1093 petition which was mistakenly docketed as Case No. 29-RD-1096) at the December 27 hearing, changed the identity or size of the bargaining unit involved. Under these circumstances, I conclude that the original date of the Petitioner’s first petition (November 26) should be controlling.

In sum, I have found that the Petitioner is a labor organization as defined in Section 2(5) of the Act; that the Petitioner filed a second petition on December 6,

although the wrong piece of paper was docketed; that the mistakenly-docketed petition form was amended at the hearing to include *inter alia* a unit description; that the second petition was filed when a question concerning representation still existed based on the first petition, which was filed before the execution of the 2007 – 2010 MOU; that, under Weather Vane, the second petition is not barred by the MOU; and that the union security provision further prevents the MOU from barring an election.

Accordingly, I find that a question concerning representation exists at this time. I will direct an election in the unit of police officers employed by the Sea Gate Association, with both interested unions on the ballot. I hereby deny the Employer and Intervenor's motions to dismiss.

### **CONCLUSIONS AND FINDINGS**

Based on the entire record in this proceeding, including the parties' stipulations and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that Sea Gate Association is an unincorporated association of home owners, with its principal office and place of business located at 3700 Surf Avenue, Brooklyn, New York. It has been engaged in operating a gated community for its members who own property at the Sea Gate location in Brooklyn. During the past year, which period is representative of its annual operations generally, the Employer has derived gross revenues in excess of \$500,000, and has purchased and received at its Brooklyn location, goods and materials valued in excess of \$5,000, directly from points outside the State of New York.

Based on the parties' stipulation, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. As noted above, I have found that the Petitioner and Intervenor are both labor organizations within the meaning of Section 2(5) of the Act.

4. As discussed in detail above, I have found that a question affecting commerce exists concerning the representation of certain employees of the Employer, within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Based on the parties' stipulations, on the contractual description of the existing unit (Er. Ex. 2), and on the record as a whole,<sup>10</sup> I hereby find that the following unit of employees constitutes an appropriate unit for purposes of collective bargaining, within the meaning of Section 9(b) of the Act:

All full-time and regular part-time police officers employed by the Sea Gate Association from its office located at 3700 Surf Avenue, Brooklyn, New York, but excluding all civilians and non-police officers; and those ranked as sergeants or higher.<sup>11</sup>

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Those eligible shall vote whether they desire to be represented for collective bargaining

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<sup>10</sup> The parties stipulated to an appropriate unit (Transcript pp. 27-28), which is essentially a paraphrasing of the existing contractual unit. However, I have changed the word "peace" officers to "police" officers to conform with the contract, and I have added the Employer's location.

<sup>11</sup> The record indicates that the sergeants and lieutenants employed by the Sea Gate Association are in a separate bargaining unit represented by Local 813, International Brotherhood of Teamsters.

purposes by the Law Enforcement Employees Benevolent Association, or by the Special and Superior Officers Benevolent Association, or by neither labor organization.

### **Voting Eligibility**

Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

### **Employer to Submit List of Eligible Voters**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full

names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, Two MetroTech Center, 5th Floor, Brooklyn, New York 11201 on or before **March 19, 2008**. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

#### **Notice of Posting Obligations**

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to the commencement of the election that it has not received the notices. Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

#### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by **March 26, 2008**.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board website: [www.nlr.gov](http://www.nlr.gov).

Dated: March 12, 2008.

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