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April 5, 2011

Hon. Kenneth Conboy
Election Appeals Master
Latham & Watkins
885 Third Avenue, Suite 1000
New York, NY 10022

RE: Appeal of *Fabiano et al*, 2011 ESD 176, and *Taylor et al*, 2011 ESD 177

Dear Judge Conboy:

The Election Supervisor's decisions in these two cases resolved six protests. In ESD 176, the Election Supervisor addressed protests concerning observer rights at the printing and mailing of ballots. The decision in ESD 177 addressed protests concerning observer rights with respect to ballots returned as undeliverable.

The *Rules* grant candidates or their designees the right to observe every phase of the election process, including the printing and mailing of ballots and the pickup of ballot packages returned as undeliverable. Here, as found in ESD 176, the printer printed ballots a day early, with only his employees and no one else present, including observers. When the local union's election administrator and the observers appeared the next morning, on the date the printer should have printed ballots, the administrator sought to remedy the error. Thus, she counted all the ballots the printer printed in the presence of observers. This count showed that the number printed was 77 short of the order the local union made. Accordingly, the administrator directed that the printer complete the run of ballots, which was done in the presence of observers. The printer signed the printer certification in the presence of observers; this certification verified the number of ballots printed, as counted by the administrator. The ballots were folded and ballot envelopes stuffed with ballots, secret ballot envelopes, and ballot return envelopes and labeled with members' names and addresses in the presence of observers. The assembled and addressed ballot packages were walked to the post office and delivered to a postal service employee on the loading dock in the presence of observers.

On these facts, the Election Supervisor found that observer rights at the printing of ballots and assembly of ballot packages were substantially honored. Although the printer printed the bulk of the ballots a day early without observation, the ballots he printed were counted and ballot packages assembled and mailed under direct observation. This observation distinguished the matter from *McNiff*, 2006 ESD 173 (April 6, 2006), where the printer printed *and mailed* a day early, without any observation whatsoever, and, because of

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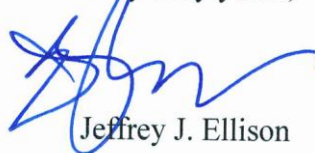
the early mailing, also impacted the potential effectiveness of a campaign mailing the protestor had timed to arrive with ballots.

In ESD 177, the Election Supervisor found observer rights substantially honored for the pickup of ballot packages returned as undeliverable. Protestors' complaints were as follows. First, on the first day when three ballot packages were picked up from the post office box, Jackie Hopkins, the local union's designated agent for pickup of undeliverables, did not permit observers to inspect the names and addresses on those packages; after checking with OES, she corrected herself and permitted the inspection of those three packages the next day and, after each subsequent pickup for the balance of the election, permitted inspection of undeliverables immediately upon return to the union hall from the post office. Second, protestors complained that Jack Haas, Hopkins' assistant, held the undeliverables for the ride back to the union hall from the post office; this was done under direct observation of Hopkins and observers and no allegation is made that Haas did anything inappropriate with the ballot packages. Third, protestors complained that Hopkins lost a key to the post office box for a day; Hopkins found it the morning after she lost it, inside the post office box, and no evidence was found that the missing key resulted in missing ballot packages. Fourth, protestor Taylor complained that his returns from a campaign mailing exceeded the returns from the mailing of ballots; however, the mailing list used for his mailing was several months older than that used by the union for mailing of ballots. Finally, protestors complained that Hopkins, equipped with a key and a passcode, had 24 hour access to the post office box and could have accessed it without observation, although they appear to stop short of alleging that improper access actually occurred.

The Election Supervisor denied these protests, finding that observers were accorded their rights to monitor the pickup of returned ballot packages at the post office. The protestors' claims do not present a substantial basis for reversing this decision.

For the foregoing reasons, we respectfully request that the Election Supervisor's decisions on these cases be affirmed in all respects.

Very truly yours,



Jeffrey J. Ellison