

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
(Honolulu, Hawaii)

KUKUI GARDENS CORPORATION

Employer

and

HOTEL EMPLOYEES & RESTAURANT  
EMPLOYEES, LOCAL 5, AFL-CIO

Petitioner

**37-RC-3874**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 1/
3. The labor organization(s) involved claim(s) to represent certain employees of the Employer. 2/
4. 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. 3/
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 4/

All full-time and regular part-time 5/ building maintenance foremen, building maintenance employees, grounds lead persons, groundskeeper/custodial employees and industrial mechanics employed by the Employer at its Honolulu, Hawaii, location; excluding all office clerical employees, professional employees, guards and supervisors 6/ as defined in the Act.

**DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) 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. Eligible to vote are those in the unit(s) 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. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll

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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. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Hotel Employees & Restaurant Employees, Local 5, AFL-CIO**.

#### LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB. Wyman-Gordan Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 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 No. 50 (1994). In order to be timely filed, such list must be received in the Subregion 37 Office, 300 Ala Moana Boulevard, Room 7-245, Post Office Box 50208, Honolulu, Hawaii 96850, on or before February 12, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

#### 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, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by February 19, 1999.

Dated \_\_\_\_\_

at San Francisco, California  
Regional Director, Region 20

/s/ Alan B. Reichard

Kukui Gardens Corporation  
Decision & Direction of Election  
Case 37-RC-3874

- 1/ The parties stipulated, and I find, that the Employer is authorized to do business in the State of Hawaii and is engaged in the operation of a residential housing project located in Honolulu, Hawaii. The parties further stipulated, and I find, that during the 12-month period ending January 31, 1999, the Employer derived gross annual revenues in excess of \$500,000 and received at its Hawaii facility, goods valued in excess of \$50,000 from outside the State of Hawaii. Based on the parties stipulation to such facts, I find that the Employer is engaged in commerce and that it will effectuate the purposes and policies of the Act to assert jurisdiction herein.
- 2/ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.
- 3/ The parties stipulated, and I find, that there is no contract bar to this proceeding.

The Employer contends that the petition herein should be dismissed as premature because of the imminent expansion of the unit occasioned by its intention to hire 5 new unit employees on the day after the hearing. In the alternative, the Employer asserts that these new employees should be included in the unit. The Petitioner takes the position that the petition is not premature .

By its amended petition, the Petitioner seeks to represent approximately 15 employees in the following unit: All full-time maintenance grounds and custodial employees and part-time employees who work 20 hours per week employed by the Employer at its Honolulu, Hawaii, location, but excluding all office clerical, professional employees, guards and supervisors as defined in the Act.

Background. The Employer operates a 19 acre housing project with 822 apartments in Honolulu, Hawaii. The employees petitioned for herein are in 3 departments of the Employer's operation: the building maintenance department, the groundskeeper/custodial department and the mechanic shop department. With the exception of Industrial Mechanic Edwin Lagon, who is supervised solely by Facilities Operations Manager Allen Lau, all of the petitioned-for employees are supervised by Lau and Office Manager Fanny Yit-Leung both of whom the parties stipulated to be statutory supervisors. Within the building maintenance department, there is a foreman named Robert Banis and there is a lead person for the groundskeepers named Roger Taong. All of these departments and employees are housed in one building.

The Building Maintenance Employees. The building maintenance employees perform their work in and around the physical structures of the Employer's housing project pursuant to work orders called in by tenants. They repair broken glass, replace screens, paint doors, refurbish apartments and unclog drains. In addition, because of current renovation work, which is described more fully below, they also help to relocate tenants temporarily into vacated apartments within the project while renovation work is being done on their apartments.

The record contains a job description for employees in the classification of building maintenance grade II and III that was formulated by the Employer in early January 1999. The job description states that employees in these classifications are within the maintenance department; their supervisor is Robert Banis; and they are paid \$12.60 to \$13.40 an hour. The job description describes the function of these employees as performing minor building repairs involving electrical, plumbing, and carpentry work in apartments and office buildings and requires that they be proficient in one specialty trade. The educational and/or experience requirements these positions are an associate of arts degree or its equivalent and six months to one year of related experience or training; or an equivalent combination of training and experience. The job description further requires that these employees possess a valid drivers license and the ability to operate basic electrical or pneumatic powered hand tools, drills or saws and be able to solder or seat joints, etc.

Groundskeeper/Custodial Employees. The groundskeeper/custodial employees perform janitorial maintenance work largely outdoors including picking up trash and raking leaves, etc. The record contains a job description for groundskeeper/custodial employees that was created in early January 1999. It reflects that employees in this classification receive a salary of \$10.05 an hour and states that their supervisor is Lead Person Robert Taong. The educational and/or experience required for this classification is a high school diploma or its equivalent and one to three months related experience or its equivalent. The only certification or license required is a valid Hawaii driver's license.

The Mechanic Shop. The mechanic shop consists of one individual, Industrial Mechanic I Edwin Lagon, whose position is described below.

The Employer's Renovation Project and Its Hiring of New Employees. Operations Manager Lau testified that in March 1998, the Employer began a renovation project involving all 822 apartments in its complex that is scheduled to be completed in June 2000. The Employer hired approximately 8 subcontractors to perform demolition; electrical; painting; plumbing; flooring; and plaster work. The work includes asbestos removal; Americans With Disabilities Act (ADA) modifications; the replacement of cabinets, counters and plumbing; the installation of GFI units; and painting work.

According to Lau, in the fall of 1998, as a cost-cutting measure, he proposed that the Employer's executive board replace the painting subcontractor with in-house personnel to do the painting portion of the renovation work. The Employer's executive committee approved this proposal and it was approved by the full board of the Employer's directors on December 29, 1998. The proposal called for the hiring of 3 additional groundskeeper/custodial employees at the rate of \$10.05 per hour, the entry level rate for employees in this classification. These employees were to be subject to temporary transfers to the building maintenance department to perform painting and refurbishment work as needed at a pay rate of \$11.30 an hour. The minutes of the December 29, 1998 meeting of the Employer's board of directors describe these 3 positions as "temporary positions."

Lau also recommended to the Board the hiring of 2 part-time building maintenance employees at a \$10.50 an hour rate to perform the same type of work as existing building maintenance workers. According to Lau, \$10.50 is the entry level rate for building maintenance employees. The minutes of the December 29, 1998, board of directors meeting state that these employees were to be hired primarily to paint the kitchen and bathrooms in the renovated apartments.

The minutes from the board of directors meeting reflect the anticipated cost of these additional employees. The cost of the groundskeeper/custodial employees were computed on the basis of 1740 hours and the rate for the part-time building maintenance employees is computed on the basis of 988 hours. According to Operations Manager Lau, the hours utilized to compute the cost of the new positions were derived from the number of hours projected by the painting subcontractor for the completion of its work.

Lau testified that he had interviewed applicants to fill these positions prior to the hearing; that he had decided to hire 5 of the applicants; and that he would be offering them jobs within a few days of the hearing. At the hearing, Lau testified that he will inform the new hires that they are being hired for not less than 6 months or more than 10 months and that they will be given 30 days notice prior to being laid off. Lau further testified that he will inform the new hires that there is a possibility that other workers may retire or quit and that they may be able to continue working for the Employer beyond 10 months but that this was not likely to occur.

According to Lau, the new hires will be paid the starting wage rate of employees in their respective classifications; they will be eligible for the same benefits as other employees; they will perform the same type of work in the same area as other employees; and they will have the same supervision.

Kukui Gardens Corporation  
Decision & Direction of Election  
Case 37-RC-3874

Lau testified that the new part-time building maintenance employees may work more than 20 or less than 20 hours in some weeks. According to Lau, the Employer currently employs no employee who works less than 4 hours a week; all of its employees are regularly scheduled; and none of them are on-call employees.

Analysis: Whether the Petition Should Be Dismissed As Premature. As noted above, the Employer contends that the petition should be dismissed because it is expanding its workforce. Contrary to the Employer, the Petitioner asserts that the petition should not be dismissed.

In cases involving an initial representation election where an employer is expanding its workforce, the Board applies the substantial and representative complement rule to determine the appropriate time for an election. See Toto Industries (Atlanta), Inc., 323 NLRB 645 (1997). The Board will hold an election if the present employee complement is both substantial and representative of the employer's projected future work force. In determining whether a given unit is substantial and representative of a projected future work force, the Board examines several factors, including: (1) the size of the present work force at the time of the representation hearing; (2) the size of the employee complement eligible to vote; (3) the size of the expected ultimate employee complement; (4) the time expected to elapse before a full work force is present; (5) the rate of expansion, including the timing and size of projected interim hiring increases prior to reaching a full complement; (6) the certainty of the expansion; (7) the number of job classifications requiring different skills which are currently filled; (8) the number of job classifications requiring different skills which are expected to be filled when the ultimate employee complement is reached; and (9) the nature of the industry. See also Laurel Associates, Inc. d/b/a Jersey Shore Nursing and Rehabilitation Center, 325 NLRB No. 102 (April 9, 1998).

In its brief, the Employer asserts that it has hired the 5 new employees about whom Lau testified at the hearing and that it intends to hire another employee during the first week of February 1999. At the time of the hearing in this case, the petitioned-for unit was comprised of about 15 employees. The record establishes that the new employees are to be hired into existing job classifications and perform work that is currently of a type performed by the unit employees. Accordingly, as the unit existing at the time of the hearing represents over 70% of the projected workforce after the new hires, and the projected additional jobs do not represent separate and distinct skills and functions, it is concluded that the existing workforce is both substantial and representative of the Employer's projected future workforce. Accordingly, I do not find that the petition is premature and I decline to dismiss the petition on this basis. Toto Industries, supra.

- 4/ The Petitioner contends that Building Maintenance Foreman Robert Banis and Lead Person (Groundskeeper) Roger Taong are supervisors within the meaning of the Act and that they should be excluded from the unit on that basis. Contrary to the Petitioner, the Employer asserts that these individuals are not statutory supervisors and should be included in the unit.

The Employer contends that Industrial Mechanic I Edwin Lagon should be excluded from the unit on the basis that he is statutory supervisor; a managerial employee; or because he lacks a community of interest with the other unit employees. The Petitioner takes the contrary view.

Stipulation. The parties stipulated, and I find, that Facilities Operations Manager Allen Lau and Office Manager Fanny Yit-Leung should be excluded as supervisors under the Act.

Prior Stipulated Election. The record contains a Certification of Results of Election dated August 19, 1997, in Case 37-RD-309, a stipulated election involving the Employer and United Public Workers, AFSCME, Local 646, AFL-CIO. Edwin Lagon (who is one of the individuals at issue in the instant case) was the Petitioner in that case. The certification states that a majority of valid ballots had not been cast in the following unit:

All full-time maintenance, grounds and custodial employees of Kukui Gardens and part-time employees who work 20 hours per week, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

There appears to be no dispute between the parties in the instant case that all three of the individuals who are at issue herein, Edwin Lagon, Robert Banis and Roger Taong, were allowed to vote in the election in Case 37-RD-309.

Building Maintenance Foreman Robert Banis. As indicated above, Robert Banis is described in the job description for building and maintenance employees as the supervisor of said employees.

However, Facilities Operations Manager Lau testified that Banis has no authority to hire or fire employees and cannot recommend such action. Banis does not do employee performance appraisals and is not authorized to call employees back to work. According to Lau, while Banis may have employees work overtime if their work is not completed by 4 p.m., he must first obtain Lau's approval and must use an established overtime list in order to decide who will work the overtime. The record does not disclose how the overtime list is determined. With regard to disciplinary matters, the record reflects that Banis reports rule infractions and misconduct to Lau and it is Lau who decides whether and how to discipline employees. Banis earns \$13.60 an hour which is 20 cents more an hour than the highest paid building maintenance employee.

Lead Person Robert Taong As indicated above, the job description for the groundskeeper/custodial employees lists Taong as their supervisor. Taong has worked for the Employer since 1982. Lau testified that Taong has no authority to hire or fire employees or to recommend that such action be taken. Nor does he possess the authority to discipline employees; call employees to come into work; or to require employees to work overtime. Lau testified that Taong does have, however, the authority to recommend that employees be disciplined and that he has done so on at least one occasion. In this regard, Lau described an occasion where Taong gave employees specific orders to use face shields, safety glasses and back supports and a worker refused to do so. According to Lau, Taong reported the incident to Lau and the employee was counseled. Lau also testified that Taong actively participates in the counseling of employees. On the particular occasion referred to above, this consisted of Taong confirming that he had instructed the employee to use the safety equipment. The record discloses no other instance where Taong was been involved in the counseling of an employee.

Lau testified that the decision to discipline employees is Lau's and that Taong merely reports the misconduct to Lau without a recommendation as to disciplinary action. Taong does not do performance appraisals on employees. Taong earns less than \$13.30 an hour and is eligible for overtime pay.

Industrial Mechanic I Edwin Lagon. Lagon works in the mechanic shop and is supervised directly by Facilities Manager Lau. Lau testified that he considers Lagon to be on the same level as Banis and that Lagon does not take orders from Banis or from Taong. Lagon performs his work in the mechanic's garage and has a desk there. Only Lau and Lagon have a key to this garage. The garage contains heavy equipment, tools and supplies. No one may obtain access to the mechanic's shop without Lau's or Lagon's permission.

The record reflects that Lagon is responsible for repairing all the Employer's maintenance equipment such as its screw guns, drills, lawnmowers, riding carts, man lift and vehicles. He is capable of rebuilding engines. He also orders supplies and parts for the Employer and picks them up from vendors. He has access to a company vehicle to perform this task. The record does not contain any evidence regarding his ability to directly pledge the Employer's credit.

Lagon performs some of his work inside the housing units, such as repairing refrigerators, air conditioners and garbage disposals. When he does such work he is supervised by Lau. Once or twice a week he also handles other types of repair orders and in doing so sometimes works along with other building maintenance employees performing jobs that are similar to the type of work they usually perform. Sometimes, another employee is assigned to work with Lagon when he needs help such as in removing an engine. In such instances, Lagon directs the other employee's work.

Lagon is more mechanically skilled than the other maintenance employees and is a certified mechanic. However, his job description, which is discussed below, does not require a mechanic's certification but only a valid driver's license. Lau further testified that when he hired Lagon, Lau did not require a mechanic's certification for the job but was told by Lagon that he possessed such a certification.

Kukui Gardens Corporation  
Decision & Direction of Election  
Case 37-RC-3874

Lagon works the same hours as other employees but determines what repairs need to be made and does them. Lagon recommends to Lau if he needs to work overtime in order to complete a repair project and Lau decides whether he may do so.

According to Lau, Lagon's current position was created at the end of 1997 and Lagon was a mechanic prior to that time. Lau testified that the only difference between

Kukui Gardens Corporation  
Decision & Direction of Election  
Case 37-RC-3874

Lagon's work as a mechanic and his current position is that he now handles more equipment and reports directly to Lau.

The record contains a job description for the Industrial Mechanic I position that was created in early January 1999. It lists the salary level for this position as \$13.30; the supervisor for this position as Facilities Manager Lau; and the department for this position as the Mechanic Shop.

The job description for the Industrial Mechanic I position states that the person occupying the position is required to repair, overhaul and maintain electric, diesel, and gasoline industrial/commercial/utility vehicles or equipment and hydraulic equipment by performing the duties listed therein. The job description lists a number of duties and responsibilities that overlap with those of the building maintenance employees, including those pertaining to building and repairing counters and cabinets; re-facing damaged ceiling tile; installing glass in windows; installing light fixtures; and installing and removing major appliances.

The job description further states that the education and/or experience required for the job is a high school diploma or general education degree; or three years related experience and/or training; or equivalent combination of education and experience. The only certificate, license or registration required is having a valid Hawaii Driver's license. Under other skills and abilities, is listed the requirement to have a complete set of standard and metric tools. Under supervisory responsibilities, the description states: "May supervise tree cutting crews as required as directed by Grounds Supervisor, including cutting, pickup and removal of green waste." The record discloses no instance where Lagon has done this type of work.

Lau testified that Lagon has no power to hire or fire employees or to recommend that such actions be taken by the Employer. He cannot call employees to work and, while he does not possess any authority to discipline employees, he may recommend that employees be disciplined. However, according to Lau, Lagon has never made a disciplinary recommendation. In addition, Lau testified that Lagon has authority to authorize overtime but has never done so.

Lagon does not attend management meetings other than his one-on-one meetings with Lau.

Lau testified that Lagon makes recommendations concerning how the Employer will comply with safety regulations and that Lau has accepted all of his recommendations in this regard. According to Lau, Lagon is responsible for creating and implementing some of the most basic policies of the Employer regarding safety and health. In this regard, Lau testified that Lagon had recommended that only he (Lagon) should fuel the Employer's equipment because of the safety risk posed by the fact that some employees smoked while they were fueling the equipment. According to Lau, this

Kukui Gardens Corporation  
Decision & Direction of Election  
Case 37-RC-3874

policy was adopted by the Employer and a memo was distributed to employees. Lau further testified that Lagon speaks to employees on behalf of management at monthly safety meetings, discussing the safety requirements and concerns for the machinery that he repairs.

Lau further testified that Lagon has effectively recommended and implemented the purchase of most of the Employer's equipment. Recently, in connection with its decision to take over the painting portion of the renovation work described below, the Employer purchased a paint sprayer and a compressor based on Lagon's recommendation. Lau testified that he has always followed Lagon's recommendations as to equipment purchases. According to Lau, he recently followed Lagon's recommendation to have the Employer's \$30,000 man-lift repaired rather than replaced.

As indicated above, Lagon earns \$13.30 per hour which is more than Taong earns and 30 cents less than Banis. Lagon receives the same benefits as do other unit employees; punches a time clock as do other unit employees; is eligible to earn overtime; parks in the same parking lot as other employees; uses the same lunchroom; attends Employer functions such as its Christmas party; and attends meetings attended by building maintenance employees and groundskeeper/custodial employees.

Unlike other unit employees, Lagon has his own office and has access to a company vehicle during the day in order to pick up parts and machinery. He does not take a company vehicle home. He also makes recommendations regarding whether he should work overtime to complete a project he is working on.

Analysis. As indicated above, the Petitioner asserts that Banis and Taong should be excluded from the unit as statutory supervisors and the Employer takes the opposite position. The Employer asserts that Edwin Lagon should be excluded as a statutory supervisor and the Petitioner takes the opposite position.

The term "supervisor" is defined in Section 2(11) of the Act as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances. or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

"To meet this definition, a person needs to possess only one of the specific criteria listed, or the authority to effectively recommend, so long as the performance of that

function is not routine but requires the use of independent judgment.” Nymed, Inc., d/b/a Ten Broeck Commons, 320 NLRB 806, 809 (1996).

As observed by the Board in Providence Hospital, 320 NLRB 717, 725 (1996):

In enacting Section 2(11) of the Act, Congress distinguished between true supervisors who are vested with “genuine management prerogatives,” and “straw bosses, lead men, and set-up men” who are protected by the Act even though they perform “minor supervisory duties.” NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-81 (1974).

An employee does not become a supervisor if his or her participation in personnel actions is limited to a reporting function and there is no showing that it amounts to an effective recommendation that will effect employees’ job status. Ohio Masonic Home, 295 NLRB 390, 393 (1989).

Whether an individual is a supervisor is to be determined in light of the individual’s actual authority, responsibility, and relationship to management. See Phillips v. Kennedy, 542 F.2d 52, 55 (8th Cir. 1976). Thus, the Act requires “evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority.” Oil Workers v. NLRB, 445 F.2d 237, 243 (D.C. Cir. 1971).

With regard to Banis and Taong, there is no evidence that they possess any of the indicia of supervisory status as set forth in Section 2(11) of the Act. Thus, they do not have authority to hire, fire, discipline or to recommend any of these actions by the Employer. At most they report their observations to Lau who makes disciplinary decisions for the Employer. The fact that Taong has been involved in a counseling of an employee by reporting that he had told the employee to use safety equipment and the employee had refused to do so, is insufficient to establish his status as a statutory supervisor. Nor is the fact that Banis and Taong are referred to as supervisors in the job descriptions for the building maintenance and groundskeeper/custodial employees sufficient to support a finding of their supervisory status.

In its brief, the Petitioner asserts that “information, subsequent to the hearing, now convinces Petitioner that both [Banis and Taong] are supervisors within the meaning of the Act. . . .” However, the Petitioner did not move to have the hearing reopened to adduce any new evidence in this regard. Accordingly, its unsupported assertion cannot establish that Banis and Taong are statutory supervisors.

With regard to whether Edwin Lagon is a statutory supervisor, the record discloses that Lagon is the only employee in the mechanic shop. He does not oversee any other employee on a regular basis. The only evidence regarding Lagon’s oversight of other employees is Lau’s testimony that other workers are sometimes assigned to help

Lagon with a project and in such circumstances, Lagon instructs them as to what to do. There is no evidence as to how frequently this occurs or whether Lagon's role on such occasions goes beyond the routine direction of work. In this regard, it is plain from the record that Lagon is the most highly skilled mechanic employed by the Employer.

Lau testified that Lagon has the authority to effectively recommend his own overtime and that of others. However, according to Lau, Lagon has never recommended overtime for any other employee. Lau further testified that Lagon can make recommendations regarding the disciplining of employees but has never done so.

Under such circumstances, I find that the mere assertion that Lagon possesses such authority, without more, is insufficient to establish his supervisory status.

Finally, the job description for Lagon states that he "may supervise tree cutting crews as required as directed by Grounds Supervisor. . . ." However, the record contains no further evidence regarding instances where Lagon performed this function. As noted above, the mere assertion of such authority in a job description is not sufficient to establish that Lagon is a statutory supervisor. The other issues raised by the Employer with regard to Lagon's status are discussed below.

In these circumstances, I find that the record does not establish that Banis, Taong and Lagon are statutory supervisors and they will not be excluded from the unit on that basis.

Whether Lagon is a Managerial Employee. The Employer also contends that Lagon is a managerial employee and must be excluded from the unit on that basis. The Petitioner takes the opposite position.

The Board, with Supreme Court approval, has long defined managerial employees as those who:

Formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy. [*General Dynamics Corporation*, 213 NLRB 851, 857 (1974).]

*The Bakersfield Californian*, 316 NLRB 1211, 1213 (1995); *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980); *NLRB v. Bell Aerospace Co.*, 416 NLRB 267, 288 (1974), quoting *Palace Laundry Dry Cleaning*, 75 NLRB 320, 323 fn. 4 (1947).

The record evidence does not establish that Lagon formulates management policy or exercises discretion in the performance of his job independent of the Employer's established policy. Rather, the record reflects that Lagon is a highly skilled and

experienced certified mechanic who repairs the Employer's equipment and vehicles; makes recommendations regarding the purchase and repair of supplies, parts and equipment; makes recommendations about Employer safety policies regarding its equipment; and speaks to employees about safety in using equipment. There is no evidence that Lagon possesses unreviewed discretion to commit Employer credit in substantial amounts in order to purchase supplies, parts or equipment. Cf. Concepts & Designs, Inc., 318 NLRB 948, 957(1995). Rather, it appears from the record that the Employer relies on his skill and experience as a mechanic in reviewing his recommendations as to purchases.

Nor does the fact that Lagon has an office or uses an Employer vehicle to pick up parts or equipment during his workday transform him into a managerial employee. Sampson Steel & Supply, Inc. 289 NLRB 481 (1988).

As with his recommendations regarding the purchase of equipment and supplies, the record reflects that the Employer relies on Lagon's expertise as a mechanic in reviewing his recommendations regarding safety policies. Thus, the evidence does not establish that Lagon's recommendations regarding safety policies are independent of Employer review and established policy. The fact that the Employer has Lagon discuss safety policies with its employees does not transform him into a managerial employee.

In sum, Lagon is an employee who spends most of his time performing mechanical repair work. The fact that his experience and expertise cause management to rely on his recommendations with regard to purchasing decisions and safety matters does not warrant the conclusion that he is a managerial employee and I do not find him to be so. Accordingly, he will not be excluded from the unit on that basis. See Sampson Steel & Supply, Inc., *supra*; The Bakersfield Californian, *supra*.

Whether Lagon Shares A Community of Interest With Other Unit Employees. As indicated above, the Employer also contends that Lagon should be excluded from the unit because he lacks a community of interest with other unit employees. The Petitioner takes the opposite position.

The test applied by the Board to determine whether an employee shares a community of interest with other unit employees is whether there are (1) differences or similarities in wages, compensation and benefits; (2) whether that employee shares common supervision with other unit employees; (3) whether that employee has similar hours of work as other unit employees; (4) differences or similarities in qualifications, training and job skills; (5) job functions; (6) frequency of contact with other unit employees; (7) functional integration and interchange with other unit employees; and (8) bargaining history. See P.J. Dick Contracting, Inc., 290 NLRB 150, 151, 1988); Kalamazoo Paper Box Corp., 136 NLRB 134 (1962).

In the instant case, the evidence establishes that Lagon's wage rate is comparable to that of other unit employees and he receives similar benefits. Lagon also has similar working hours as the other unit employees. While Lagon is supervised by Lau, and the maintenance, groundskeeper/custodial employees are supervised by the Office Manager, the record reveals that Lau makes disciplinary decisions for all of these employees. Thus, Lagon and the other unit employees share common supervision in Lau.

With regard to qualifications, training and job skills, while Lagon is more skilled than the other unit employees and has a mechanic's certification, the record establishes that this is not a requirement for his position. As to job function, while Lagon primarily performs work of a more highly skilled mechanical nature than do other unit employees, he also performs the typical work of other building maintenance employees at least once or twice a week.

With regard to the frequency of Lagon's contact with other unit employees, as discussed above, the record reveals that at least once or twice a week, Lagon performs the same type of work as other

building maintenance employees and may work side by side with them in performing such jobs. Further, building maintenance employees are sometimes assigned to help Lagon with a job. In addition, he attends regular monthly meetings attended by other unit employees; parks in the same parking lot; uses the same employee lunchroom; and attends Employer functions such as its Christmas party which are attended by other unit employees.

While there is no evidence that Lagon substitutes for unit employees or that unit employee substitute for him, the record does support the conclusion that Lagon's work is functionally integrated with that of unit employees given that he repairs the equipment they use to perform their jobs. Thus, Lagon's work is integral to the performance of work by unit employees and to the Employer's maintenance of its facility.

Finally, there is no collective bargaining history relevant to the issue of whether Lagon shares a community of interest with other unit employees.

In these circumstances, and as Lagon has comparable wages and similar benefits; common supervision; similar working hours; overlapping job functions; regular contact; and functional integration with the unit employees, I find that Lagon shares a substantial community of interest with other unit employees warranting his inclusion in the unit. *Sampson Steel & Supply, Inc.*, *supra*, at 483.

- 5/ The Petitioner seeks to define the eligibility of part-time employees as being those who work in excess of 20 hours a week and the Employer takes the position that the Board's standard eligibility rule should be applied.

Under the Board's long-standing and most widely used test for voter eligibility, an employee is found to have a sufficient community of interest with unit employees if the employee regularly averages 4 or more hours of work per week for the last quarter prior to the eligibility date. See *Milford Plains Limited Partnership d/b/a Hampton Inn*, 309 NLRB 942, 947 (1992); *Pat's Blue Ribbons*, 286 NLRB 918 (1987); *Mid-Jefferson County Hospital*, 259 NLRB 831(1981); *Muncie Newspapers, Inc.*, 246 NLRB 1088 (1979); *Davison-Paxon Co.*, 185 NLRB 21 (1970).

In the instant case, the record establishes that the Employer has no on-call employees; all of its employees are regularly scheduled; and all employees work at least 4 or more hours a week.

The Petitioner asserts that the unit set forth in the prior decertification election in Case 37-RD-309 should be utilized because it represents an established bargaining history between the Employer and the prior labor organization and because there is no showing that the Employer employs any part-time employees who work less than 20 hours a week. The record does not disclose any facts regarding the bargaining history between the Employer and the UPW in Case 37-RD-309. Accordingly, I cannot give controlling weight to the stipulated unit in that case. Further, the evidence does not establish that the Employer employs any individual who works less than 20 hours a week.

In these circumstances, the record does not support the use of the alternative formula sought by the Petitioner. In the absence of a demonstration of special circumstances establishing that the alternative formula should apply, the Board's standard eligibility rule will be used to determine the part-time status of employees in the unit.

- 6/ As indicated above, the parties stipulated, and I find, that Facilities Operations Manager Allen Lau and Office Manager Fanny Yit-Leung are statutory supervisors and should be excluded from the unit on that basis.

Kukui Gardens Corporation  
Decision & Direction of Election  
Case 37-RC-3874

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