

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

ECKERD CORP., d/b/a ECKERD DRUG¹

Employer

and

Case 4-RC-19636

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 1776, AFL-CIO

Petitioner

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.

3. The labor organization involved claims to represent certain employees of the Employer.

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.

5. The Employer operates a multi-state chain of retail drugstores, including a drugstore located at 2512 Island Avenue, Philadelphia, Pennsylvania (herein called the Island Avenue Store). The Petitioner seeks to represent a unit of approximately 29 non-professional employees (associates), including one driver in the pharmacy department, three express photo finishing department associates and two pharmacy technicians employed by the Employer at its Island Avenue Store. The Employer contends that the unit sought by the Petitioner is inappropriate and that the appropriate unit consists of associates in three separate district-wide departmental units, the front end, pharmacy and

¹ The name of the Employer appears as amended at the hearing.

express photo-finishing departments. The parties agree that all professionals, including pharmacists, Store Managers, Assistant Store Managers and Express Photo-Finishing Managers, guards and supervisors should be excluded from any unit found appropriate. The Petitioner, contrary to the Employer, would exclude the two service assistants employed at the Island Avenue Store from the unit as supervisors within the meaning of the Act. The Petitioner is not willing to proceed to an election in any unit other than the petitioned-for unit.

The district in which the Island Avenue Store is located consists of a geographical grouping of 21 stores. The district extends on the Pennsylvania side of the Delaware River from just north of the Ben Franklin Bridge in Philadelphia through just south of the Commodore Barry Bridge in Chester, Pennsylvania. There is a store manager for each store. The store manager reports to a District Operations Manager; the pharmacists at each store report to a District Pharmacy Manager; and the express photo manager reports to the Express Photo-Finishing District Manager. The District Managers report to the Regional Vice-President.

The Employer's corporate office determines the pay classifications, pay ranges and benefits for all employees. There is centralized orientation for new hires and all employees are subject to the same policy and procedures manual. All stores receive merchandise from the same warehouse and merchandise is transferred between stores based on stock levels. The Island Avenue Store opened in January 1999, and is the only store in the Employer's 21-store district that is open 24 hours per day. Front-end District Operations Manager Carl Harder estimated that there are between 200 and 250 front-end associates employed in the district, with anywhere from 5 to 35 front-end associates per store. There is no prior collective bargaining history at any of the 21 stores in the district. The greatest distance between any two stores in the district is 20 to 25 miles.

Front-end associates are responsible for operating cash registers; providing customer service, including handling returns and exchanges and refunding customers for purchases up to \$10; stocking and straightening shelves; marking items down and making other price changes; straightening sales areas; receiving merchandise deliveries; keeping track of inventory and ordering merchandise if trained to do so; and cleaning. The two service assistants who work at the Island Avenue Store work at night and during overnight hours, often when the Store Manager or Assistant Manger are not present. Service assistants open and close the store; deposit store proceeds in the bank; sometimes do payroll; handle voids on registers; count out the cashiers' drawers in the front end, pharmacy and express photo-finishing departments; respond to customer complaints; handle returns and refunds; and check to see if front-end associates are stocking shelves properly. Like associates, service assistants are paid on an hourly basis and receive overtime for hours worked over 40. While front-end associates are required to wear a navy shirt and khaki pants, service assistants are given the option of wearing a light blue shirt with khaki pants or a white shirt and black pants. There is no record evidence that the service assistants at the Island Avenue Store have the authority to, nor have they, issued any discipline to other employees.

The Store Manager and Assistant Store Manager at the Island Avenue Store are salaried and supervise front-end associates and service assistants. The Store Manager independently interviews and hires front-end department employees, schedules their hours, grants them time off, evaluates them for purposes of raises, counsels them, and issues discipline up to the level of suspension under the Employer's progressive disciplinary system. The Store Manager reports to Front-End District Operations Manager Harder, who visits the Island Avenue Store once per week. Harder tries to visit at least three stores of the 21-store district each day.

The Employer employs both drug associates and pharmacy technicians in the pharmacy department. Pharmacy technicians and drug associates report to the pharmacist, who grants them time off, does their performance appraisals, and recommends them for pay increases. The record is unclear as to who schedules pharmacy employees. All pharmacists report to the District Pharmacy Manager, who visits the Island Avenue Store about once per week. Pharmacy technicians have more training than drug associates and wear white smocks. Pharmacy technicians take prescriptions from customers, handle third-party payee and insurance forms and materials, operate the cash register, handle the telephone, dispense prescriptions, keep track of inventory in the pharmacy and order pharmacy merchandise when trained to do so, and keep their area neat and organized. A former front-end associate is currently working at the Island Avenue Store as a pharmacy technician. Drug associates perform clerks duties, e.g., they retrieve prescriptions and operate the cash register in the pharmacy area. Unlike front-end associates, all pharmacy employees receive special training to give them greater knowledge of over-the-counter drugs.

Within the Employer's organizational structure, the driver is part of the pharmacy department. Drivers deliver prescription and non-prescription items to customers using the Employer's vehicles. At the time of the hearing, the Employer employed one driver at the Island Avenue Store. The Island Avenue store driver does not operate the cash register. He is given items to deliver by a drug associate. The pharmacist determines the delivery times, although the Store Manager has changed the delivery times without discussion with the pharmacist. The Island Avenue Store driver worked at the Employer's Elmwood store from October 1997 until March 1998 as a front-end associate, and from March 1998 until December 1998, as both a driver and a front-end associate until the Elmwood store closed. Since January 1999, he has been working as a driver exclusively at the Island Avenue Store. When he worked as both a driver and a front-end associate at the Elmwood store, the Store Manager supervised him.

While the pharmacy is generally a restricted area in the store because controlled substances are located there, front-end associates at the Island Avenue Store operate the cash register in the pharmacy on a relief basis, and pharmacy employees and express photo-finishing employees stock shelves in the front end once each week. Front-end associates also stock the areas immediately in front of the pharmacy counter. When it is busy in the pharmacy, customers can bring their prescriptions to the front-end to pay for them. Conversely, if it is busy in the front end, customers are directed to the pharmacy or express photo-finishing department to pay for their purchases. On each cash register in the front end, there is a photography key and a pharmaceutical items key, which permit a cashier to credit a sale to the express photo-finishing or pharmacy department rather than to the front end. All of the registers in the store are also looped together and lead into one controller in the front so that all information ultimately goes to the one controller.

The Island Avenue Store express photo-finishing department at the only one of its kind in the district. The express photo-finishing associates report to, and are supervised by, an Express Photo-Finishing Manager. The Express Photo-Finishing Manager, who works at the Island Avenue Store, reports to the Express Photo-Finishing District Manager. This Manager visits the store about once per week. Express photo-finishing associates' duties include receiving new negatives or prints from customers and operating special equipment to reproduce photographs for the customer, operating the cash register in their area, giving refunds up to \$10, and straightening up and cleaning their work area. Front-end associates stock freestanding film racks in front of the express photo-finishing department. In order to operate the equipment in their department, the express photo-finishing associates must receive training not provided to front-end associates or pharmacy employees. The express photo-finishing associates, like the pharmacy employees, wear a white smock, but they wear the same blue shirt and khaki pants as worn by front-end associates under this smock.

The front-end associates, pharmacy technicians, drug associates and express photo-finishing associates operate the cash registers, perform customer service functions, and keep their areas clean and organized. The petitioned-for employees along with the disputed service assistants are all hourly employees, receive the same benefits, and are subject to the Employer's various policies and procedures which are consistent throughout the district. Within the 21-store district, the record reflects that on two to three occasions since November 1998, two or three employees have been sent from one store to another to work on specific projects. In addition, there has been one permanent transfer of a service assistant from one store to another when the Assistant Manager in the latter store becoming incapacitated and one

associate worked at two different stores under a Store Manager who managed both stores. The Employer has transferred management personnel more frequently from one store to another.

It is well-settled that when considering a multi-facility operation, a single location unit is presumptively appropriate for collective bargaining. *J&L Plate*, 310 NLRB 429 (1993), citing *Dixie Belle Mills*, 139 NLRB 629, 631 (1962); *Bowie Hall Trucking*, 290 NLRB 41, 42 (1988). The presumption in favor of a single location unit can only be overcome by a showing of functional integration so substantial as to negate the separate identity of a single facility unit. *Courier Dispatch Group*, 311 NLRB 728 (1993); *Globe Furniture Rentals*, 298 NLRB 288 (1990); *Esco Corp.*, 298 NLRB 837, 839 (1990). To determine if the presumption has been rebutted, the Board looks to such factors as central control of labor relations, including the extent of local autonomy; similarity in employee skills, functions and working conditions; degree of employee interchange; distance between locations; and bargaining history, if any. *Esco Corp.*, supra, 298 NLRB at 839; *Sol's*, 272 NLRB 621 (1984). The burden is on the party opposing a petitioned-for single location unit to present evidence to overcome the presumption. *J&L Plate*, supra, 310 NLRB at 429; *Red Lobster*, 300 NLRB 908, 910-911 (1990). The statute does not require that a unit for bargaining be the only appropriate unit or even the most appropriate unit. Rather, the Act requires only that the unit be an appropriate unit. *Morand Bros. Beverage*, 91 NLRB 409, 418 (1950), enfd. on other grounds 190 F.2d 576, 28 LRRM 2364 (7th Cir.1951). Thus, the unit sought by the Petitioner is always a relevant consideration. *Overnite Transportation*, 322 NLRB 723 (1996); *Lundy Packing*, 314 NLRB 1042, 1043 (1994); *Dezcon, Inc.*, 295 NLRB 109, 111 (1989).

Examining all of the above factors, I conclude that the Employer has failed to rebut the presumption that the single store location sought by the Petitioner in this case is inappropriate. The record reflects significant local autonomy at the Island Avenue Store with respect to the Store Manager controlling scheduling, hiring, evaluations that have an impact on pay increases and discipline up to suspension for front-end associates who comprise the vast majority of employees employed at the Island Avenue Store. While the Store Manager at the Island Avenue Store may not perform these functions for the five or six remaining employees at Island Avenue, the record reflects local supervision also for the relatively few pharmacy employees and express photo-finishing employees at the store. The evidence also establishes that all of the employees in the store perform substantially similar functions. Although pharmacy employees and express photo-finishing employees receive some additional training not provided to front-end associates, all of the employees at the Island Avenue Store, with the exception of the driver, share the same basic duties of operating cash registers, customer service and cleaning. All of the employees are hourly paid, have the same benefits, work together at the same store and share a common lunchroom. They operate registers outside of their departments when needed on a relief basis, and both pharmacy and express photo-finishing employees assist front-end employees with straightening and stocking shelves on a regular basis. As for employee interchange, while there have been instances of employees at the Island Avenue Store having worked in other departments at the store or its predecessor on Elmwood Avenue, the record reflects very few permanent transfers of employees from one store in the district to another. This is so despite the fact that some stores are only a few miles from each other and the greatest distance between any two stores in the district is 20 to 25 miles. There is no history of bargaining among the Employer's 21 stores in the district.

While there is centralized control of personnel and labor relations matters in the nature of formal discipline, approval of wage increases, transfers, and common personnel policies and procedures, the significant local autonomy described above coupled with infrequent visits by district management to the Island Avenue Store outweigh these factors and support the single store presumption. *Walgreen Co.*, 198 NLRB 1138 (1972). Similarly, I do not find dispositive the Employer's stocking of the same products at each store, its transfer of products from one store to another and the delivery of these products to each store from a central location. These practices reflect modern, efficient, business practices and do not defeat each store's separate identity for bargaining purposes. *Black & Decker Mfg.*, 147 NLRB 825, 828 (1964).

As for the Petitioner's contention that the two service assistants at the Island Avenue Store should be excluded from the unit as supervisors, I find that the Petitioner has not met its burden of establishing their supervisory status. The burden of establishing supervisory status rests on the party asserting that such status exists. *Northcrest Nursing Home*, 313 NLRB 491, 496 fn. 26 (1993); see *Bennett Indus.*, 313 NLRB

1363 (1994). To establish supervisory status, a party must show that the purported supervisor possesses one or more of the indicia of supervisory authority set forth in Section 2(11) of the Act. *Providence Alaska Medical Center*, 320 NLRB 717, 725 (1996), *enfd.* 121 F.3d 548, 156 LRRM 2001 (9th Cir. 1997). The Board has stated that the supervisory exemption is not to be construed too broadly because the inevitable consequence would be to remove individuals from the protection of the Act. *Providence Alaska Medical Center*, *supra*, 320 NLRB at 725. The legislative history of Section 2(11) of the Act makes it clear that Congress considered supervisors who responsibly direct employees to be different from lead employees or straw bosses who merely provide routine direction to other employees as a result of superior training or experience. S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947), reprinted in 1 Legis. Hist. 407, 410 (LMRA 1947). Where evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989); *The Door*, 297 NLRB 601 fn.5 (1990).

In the instant case, the Island Avenue Store service assistants do not possess any of the primary indicia of supervisory status required to find them supervisors within the meaning of Section 2(11). Rather, they are hourly employees who receive the same benefits as other Island Avenue Store employees and work along side them. While they may have additional customer service duties and handle voids and counting out the cashier's drawers, these duties alone do not render them supervisors. *Valu King*, 206 NLRB 1, 4 (1973) (Ray Mundie). Their authority to see if front-end associates are stocking shelves properly involves only routine direction that does not require the use of independent judgment. *Mack's Supermarkets*, 288 NLRB 1082, 1087-1088 (1988); *Town & Country Supermarkets*, 244 NLRB 303, 308 (1979) *enfd.* 666 F.2d 1294, 109 LRRM 2116 (10th Cir. 1981); *Footie's Dixie Dandy*, 223 NLRB 1363, 1365 (1976). Accordingly, I find that the services assistants are not supervisors within the meaning of the Act.

Based on the foregoing, I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time non-professional employees (associates), including front-end, express photo-finishing and drug associates, service assistants, pharmacy department driver and pharmacy technicians employed by the Employer at its Island Avenue, Philadelphia, Pennsylvania store, excluding pharmacists and other professional employees, Store Manager, Assistant Store Manager, Express Photo-Finishing Manager, guards and supervisors 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 found appropriate at the time and place set forth in the notice of election to be issued subsequently,² subject to the Board's Rules and Regulations. Eligible to vote are those 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. 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 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

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² Your attention is directed of Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

LIST OF VOTERS

In order to ensure 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 v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 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 359, 361 (1994). The list must be clearly legible, and computer-generated lists should be printed in at least 12-point type. In order to be timely filed, such list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **May 11, 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, Franklin Court, 1099 14th Street, NW, Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by May 18, 1999.

Dated May 4, 1999

at Philadelphia, PA

/s/ Dorothy L. Moore-Duncan

DOROTHY L. MOORE-DUNCAN

Regional Director, Region Four

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