

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

THE SARA LEE BAKERY GROUP

Employer

and

Case 10-RC-15315

BAKERY, CONFECTIONERY, TOBACCO
WORKERS AND GRAIN MILLERS
INTERNATIONAL UNION, LOCAL 611

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, The Sara Lee Bakery Group, operates a commercial bakery in Fort Payne, Alabama, employing approximately 750 production and maintenance employees. The Petitioner, Bakery, Confectionery, Tobacco Workers And Grain Millers International Union, Local 611, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all part-time and full-time office clerical employees employed by the Employer at its Fort Payne, Alabama facility, excluding all quality control, production, maintenance, truck drivers, guards and supervisors as defined in the Act.

The unit sought by the Petitioner consists of twelve office clerical employees from which the Employer would exclude three employees, i.e. the two Human Resource Assistants (HR Assistants) and the Secretary I. The Employer contends that all three employees are confidential employees and further asserts that the two HR Assistants are supervisors within the meaning of the Act.

The parties have a current collective bargaining agreement covering the employees in the production and maintenance unit at this facility, but there is no history of collective bargaining concerning the proposed unit. Both parties submitted briefs that were fully considered herein. As discussed below, I conclude that insufficient evidence was presented to establish that the HR Assistants are supervisors or that the HR Assistants and the Secretary I are confidential employees.

I. OVERVIEW OF OPERATIONS

The bakery operates nine production lines on twenty-two shifts, five days a week, twenty-four hours a day, with regular weekend operation.

II. CONFIDENTIAL EMPLOYEES

The Board applies a narrow test in making determinations as to whether an employee is confidential and excludes employees from bargaining units only if the employee assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. *PTI Communications*, 308 NLRB 918 (1992). The Board also excludes employees who have access to confidential information concerning collective bargaining negotiations strategy and proposals. However, mere access to personnel or statistical information upon which the proposals are based is insufficient to establish confidential status. *Pullman, Inc.* 214 NLRB 762 (1974). The burden of proving confidential status rests with the party asserting that such status exists. *Intermountain Electric Assn.*, 277 NLRB 1 (1985).

The two Human Resource Assistants and the Secretary I all report to Human Resources Manager, Cecile Gray. The HR Assistants are supervised by Gray only, while the Secretary I also reports to the Total Quality Manager and to the Safety Supervisor. It is not in dispute that Cecile Gray, the HR Manager “formulate[s], determine[s], and effectuate[s] management policies with regard to labor relations”. The *B. F. Goodrich Company*, 115 NLRB 722, 724 (1956). Thus, if the disputed employees act in a confidential capacity to Cecile Gray, or have access to confidential information directly related to the formulation of the Employer’s labor relations policies, they will be excluded from the unit.

The duties and responsibilities of the Safety Supervisor and of the Total Quality Manager, for whom the Secretary I also works, were not established. Therefore, only the Secretary I’s relationship to Cecile Gray is in issue.

a. Human Resource Assistants

The HR Assistants are responsible for scheduling the Employer’s call-in employees, maintaining attendance records and maintaining various payroll records. In addition, prior to the most recent 2000 contract negotiations, the Human Resource Assistants maintained a notebook in which they recorded their “wish list” for contract proposals. In this book, the HR Assistants noted suggested changes to the collective bargaining agreement for the production and maintenance unit. The suggested changes related directly to call-in employee scheduling, attendance and personnel records. The HR Assistants discussed these issues with Gray and would note them in a spiral notebook. Some of the suggestions were incorporated into the current collective bargaining agreement, but the HR Assistants did not participate in negotiations nor were they advised of the Employer’s bargaining strategy with regard to these proposals.

Notwithstanding the HR Assistants’ contract “wish list”, the record does not establish that the HR Assistants participate in any discussions with Gray regarding the Employer’s labor relations. The HR Assistants do not type or prepare the Employer’s bargaining proposals or other labor relations matters.

They do not participate in the Employer's planning sessions for negotiations nor do they participate in actual negotiations. The HR Assistants do not have access to the Employer's contract proposals prior to negotiations nor are they informed of labor policy matters before unit employees. There was no testimony that the HR Assistants were privy to any confidential matters, or that their relationship with Gray was such as to expose them to such matters.

There was no probative evidence that the HR Assistants have a confidential relationship with Cecile Gray. In order to establish that an employee enjoys a confidential relationship, the Board requires evidence that the employee is "involved in a close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding the policy before it is made known to those affected by [such decisions]." *Intermountain Rural Electric Assn.*, 277 NLRB 1, 4 (1985). The Employer presented no evidence the HR Assistants enjoy a close working relationship with Gray or that Gray relies upon the HR Assistants to maintain any confidential labor relations information. Further, there was no evidence that the HR Assistants are privy to any confidential labor relations matters, collective bargaining strategies or proposals. Based thereon, I must conclude that the Employer has failed to establish that the HR Assistants are confidential employees.

b. Secretary I

The Secretary I job functions include substitution for the HR Assistants. There was no testimony to establish that the Secretary I enjoys a confidential relationship with Gray. Further, no testimony was elicited to establish whether the Safety Supervisor and the Total Quality Manager formulate, determine or effectuate management policies in the field of labor relations. Therefore, as I have already determined that the HR Assistants are not confidential employees, substitution for the HR Assistants does not render the Secretary I a confidential employee.

The Employer argues that the Secretary I's role in reporting workers' compensation claims for the Employer exposes her to "confidential" matters and that she should, therefore, be excluded as a confidential employee. The Secretary I reviews supervisor-prepared accident reports concerning on-the-job injuries. While reviewing the report, the Secretary I may determine that the accident claim is "questionable." If she determines that it is questionable, she would report that determination to the workers' compensation reporting firm. Unless the Secretary I identifies a report as questionable, the workers' compensation claim is paid immediately by the Employer's insurance carrier. If the Secretary I identifies the claim as questionable, the claim is subject to further investigation by the Employer's workers' compensation adjuster.

The Employer analogizes the Secretary's role to that of a confidential secretary. In *Bakersfield Californian*, 316 NLRB 121 (1995), the secretary at

issue was asked to type notes of the employer's collective bargaining strategy. Based on her exposure to the employer's collective bargaining strategy, the Board concluded she was a confidential employee in part because the secretary's knowledge of the employer's strategy could give the union an unfair advantage at negotiations if she revealed the information.

The Employer argues that the Secretary I's role in making initial determinations with regard to workers' compensation claims is analogous, because the Union represents employees in workers compensation claims.¹ Thus, the Employer argues that including the Secretary in the unit may result in the appearance that she has sought to influence the workers compensation claims.

The Board has narrowly construed the definition of confidential employee. *The B. F. Goodrich Company*, 115 NLRB 722 (1956). Mere access to confidential information does not establish confidential status. *Rhode Island Hospital*, 313 NLRB 343 (1993); *Associated Day Care Services*, 269 NLRB 178 (1984). The Board requires that the operative access be to labor relations matters, not merely confidential personnel matters. As the Employer failed to establish that the Secretary I has access to confidential labor relations information, its argument for extension of the Act to workers' compensation matters must fail under established Board law. I cannot, on this record, conclude that the Secretary I is a confidential employee.

III. SUPERVISORY STATUS

The Supreme Court has established a three-part test for determining supervisory status: Employees are statutory supervisors if (1) they hold the authority to engage in any of the 12 listed supervisory functions, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer." *NLRB v. Kentucky River Community Care, Inc.*, 121 S. Ct. 1861, 1867 (2001) (quoting *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994)). The burden of proving supervisory status lies with the party asserting that such status exists. *Kentucky River Community Care, Inc., supra*; *Michigan Masonic Home*, 332 NLRB No. 150, slip. op. at 1 (2000).

Lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home, supra*, slip op. at 1. Mere inferences or conclusory statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

¹ There is no testimonial basis for this conclusion.

No evidence was adduced that HR Assistants hire, fire, suspend, layoff, recall, promote, reward employees, adjust grievances, responsibly direct, or effectively recommend such actions. I have concluded, as discussed below, that the HR Assistants do not possess the required primary indicia of supervisory status.

A. Overview of H.R. Assistants Positions

The primary job of the HR Assistants is scheduling call-in employees. One HR Assistant spends approximately 75% of her time scheduling employees, while the other HR Assistant spends about 45% of her time scheduling call-in employees. The remaining work time of the HR Assistants is spent maintaining the attendance cards of the call-in employees, entering data into the Employer's computer system for employee change in status, and processing Family Medical Leave requests.

B. Assignment of Work

The HR Assistants receive information, on the computer, from the supervisors and managers in the production departments concerning the amount of work on each shift and the need for additional employees. Based on established staffing charts, the HR Assistants can determine the number of employees required to staff each shift. The HR Assistants cannot alter these staffing chart guidelines.

Armed with the established guidelines, the HR Assistants determine how many employees should be called to work from the Employer's on-call list. The call-in list is comprised of employees who are not assigned a regular bid job and remain on call. The HR Assistants telephone the call-in employees to determine if they will work a specified shift and position. The order in which employees are called and offered work is predetermined by the collective bargaining agreement. Full-time employees are called first, then call-in employees in the order of their seniority. The HR Assistants have no authority to alter the call-in procedure.

Occasionally, there will not be enough call-in employees to fill the available positions. When this occurs, the HR Assistants follow established procedures and will leave certain positions unmanned. This practice is referred to as shorting the position. The Employer's Operations Manager established a procedure for determining which jobs the HR Assistants would "short". Following the procedure established by the operations manager, the HR Assistants will not fill 4-hour positions with on-call employees, but will leave those unmanned and allow a supervisor or department manager to rearrange the staffing of regular full-time employees to fill those positions.

The Employer asserts that the HR Assistants' responsibilities for scheduling call-in employees is tantamount to assigning employees work. However, the Employer failed to establish that the assignment of call-in

employees requires the HR Assistants to exercise independent judgment. The number of employees to be called in is determined by established guidelines. The order in which the employees are contacted is similarly defined by established procedure. Determining which positions to fill and which positions to “short” also requires rote application of the Employer’s established procedures. Therefore, it was not established that either HR Assistant has any discretion in assigning work.

The HR Assistants exercise little or no judgment in filling the available positions, and this function is controlled by extant guidelines. In *Chevron Shipping Co.*, 320 NLRB 717, 729 (1996) the Board found that if an employer constrains the degree of judgment of an individual by, for example, detailed orders or regulations, that individual does not rise to the level of a statutory supervisor. Therefore, I conclude, that HR Assistants do not assign work using independent judgment.

C. Recommendation of Discipline

The attendance policy for all employees in the production and maintenance unit, including call-in employees, is defined by the parties’ collective bargaining agreement. The HR Assistants maintain attendance cards for the call-in employees. Pursuant to the contract, after an absence due to illness, a call-in employee has 24-hours to produce a physician’s statement. If a physician’s statement is required, the HR Assistants notify the employee. After notifying the employee of the requirement, the HR Assistants monitor the records to ensure the requisite paperwork is provided. If the employee fails to produce the physician’s statement within 24-hours they are subject to discipline.

Other attendance restrictions are set forth in the contract, and those also are monitored by the HR Assistants for the call-in employees. For instance, if an employee is tardy more than three times in a one-year period, they are subject to discipline. The HR Assistants record the call-in employees’ attendance and while doing so become aware of any infractions of the attendance policy.

When an attendance issue arises with the call-in employees, the HR Assistants send the attendance cards to Cecile Gray. Gray will review the card, relying on the facts presented by the HR Assistants, and will formulate a decision on discipline and take appropriate action.

The HR Assistants also complete employee change of status forms to reflect when an employee has been discharged or has ceased his or her employment. Certain conduct results in the dismissal of call-in employees. For instance, when the HR Assistants are unable to reach a call-in employee on five separate occasions, pursuant to the policy set forth in the collective bargaining agreement, the call-in employee is discharged. Therefore, when the HR Assistants are unsuccessful at contacting an employee the HR Assistants complete a change of status form indicating discharge. The change of status

form notifies the payroll department that the employee has been discharged and the basis for the discharge.

Cecile Gray approves all change of status reports without independent investigation. Gray relies upon the facts provided by the HR Assistants but may inquire whether the HR Assistants have documented their attempts to call the employees. Gray may discuss the incident with the HR Assistants before approving the form, but performs no independent investigation of the facts. Additionally, if a call-in employee fails to report for their shift, their failure to report is communicated to the HR Assistants by production managers. The HR Assistants note this on the attendance card and the employee is subject to automatic discharge for this infraction. In conformity with the contract, the HR Assistants complete a change of status form reflecting the employee's separation for failure to report. Gray also approves these change of status forms.

Additional evidence concerned the HR Assistants' role in the evaluation and retention of probationary employees. The Employer presented evidence that in 1999, the HR Assistants completed new employee evaluation forms for probationary employees. The HR Assistants no longer complete these forms. Currently, if the HR Assistants have a concern about a probationary employee they may verbalize this to Gray. However, the HR Assistants spend a limited amount of time with probationary employees and do not participate in orientation. Gray offered no specifics but indicated that very recently the HR Assistants had commented that a probationary employee suffered from a bad attitude and should not be retained. Gray did not identify the probationary employee and did not indicate whether the employee was retained. Moreover, in addition to the verbal recommendations from the HR Assistants, Gray still receives the written evaluations from each department. There was no testimony as to the weight afforded the verbal comments and recommendations of the HR Assistants with regard to retention.

The HR Assistants' role in completing the attendance records and referring those with infractions to Cecile Gray is insufficient to instill supervisory status. The duties of the HR Assistants are purely ministerial or reportorial; the Assistants simply record the call-in employees' attendance. Based on the information contained on the attendance cards, the HR Assistants identify those call-in employees who have violated the established attendance policy. The HR Assistants have no room to exercise discretion or judgment, but merely report any call-in employee who has violated the established attendance rules. The HR Assistants do not recommend discipline, but simply flag the records for Cecile Gray to review and make determinations regarding the appropriate discipline.

Similarly, when completing employee change forms, the HR Assistants complete forms based on information they are provided. If a call-in employee commits certain established infractions of the employee rules, the employee is removed from the payroll records. The determination to remove an employee is based upon established protocol and must be approved by Cecile Gray.

The actions of the HR Assistants are ministerial in nature, do not require the exercise of independent judgment and, therefore, cannot suffice to establish that the Assistants have supervisory authority.

D. Job Bidding

Each production department contacts the Human Resources Department when there is an open job. The HR Assistants post the available job and rank candidates by seniority and contractually defined qualifications. Once the bidding period ends, the list of eligible employees is compiled and job offers are extended.

The HR Assistants will contact the first five employees on the list, in the order they are ranked, and offer these five employees the position. If all five people with the top seniority decline the position, the bid list is returned to the department for selection of a candidate. Gray testified that the HR Assistants might influence the selection process at this stage by suggesting candidates. Gray failed to offer any specific examples of situations where the HR Assistants have attempted to influence the selection of employees. Moreover, there was no testimony as to the weight afforded the HR Assistants' recommendations.

The ranking of employees for a job opening is carried out following established procedures as set forth in the parties' collective bargaining agreement. The HR Assistants exercise no discretion in preparing the list of candidates for an open position. The HR Assistants' role in preparing and administering the job bid lists does not vest them with supervisory authority, as they exercise no discretion.

Based on the foregoing, the evidence presented was insufficient to establish that the HR Assistants exercise independent judgment in the selection of candidates to fill open positions. Absent evidence of independent judgment, I cannot conclude that the HR Assistants act in a supervisory capacity in this regard.

E. Administering Family Medical Leave

Only the Plant Manager, Gary Kennedy and HR Manager, Cecile Gray, can approve employees' requests for Family Medical Leave. The HR Assistants make initial determinations as to whether the requested leave is qualified Family Medical Leave. One HR Assistant has received special training on administering the Family Medical Leave Act, and is currently training the other HR Assistant. The determination as to whether certain leave is qualified as Family Medical Leave is controlled by Federal law. While the HR Assistants make the initial determination, based upon their training, the ultimate decision to approve such leave rests with the managers.

While the HR Assistants exercise some degree of independent judgment in determining whether leave is qualified, their decisions are controlled by the parameters of the law. Further, no testimony was offered to establish that the HR Assistants' recommendations are effective. Because a manager must approve all requests, it is the Employer's burden to establish that the HR Assistants initial classification and recommendation is afforded deference by the managers. No such evidence was presented.

I cannot conclude on this record that the HR Assistants hold the authority, in the interest of the Employer, to make binding determinations regarding employee leave requests using the exercise of independent judgment as contemplated by applicable precedent. *Kentucky River Community*, supra.

F. Secondary Indicia

The record shows that HR Assistants receive the same pay grade as other office clerical employees. The HR Assistants use the same time clock and break room as other office clerical employees. These facts do not indicate that the HR Assistants possess supervisory authority.

I conclude that there are no other factors to indicate that the HR Assistants are statutory supervisors.

G. Conclusion

I find that the Employer, as the party asserting supervisory status, has not met its burden in proving that the HR Assistants have the authority to carry out any of the functions set forth in Section 2(11) of the Act, or to effectively recommend such functions and utilize independent judgment in the execution of such functions. Therefore, I find the HR Assistants are not statutory supervisors but rather are employees properly included in the bargaining unit

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are 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 in this case.
3. The Petitioner 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 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:

All full-time and regular part-time office clerical employees employed by the Employer at its Fort Payne, Alabama facility, including the HR Assistants and the Secretary I, but excluding quality control employees, the quality control lead technician, production and maintenance employees, truck drivers, guards and supervisors as defined in the Act.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570. This request must be received by the Board in Washington by October 25, 2002.

Dated: October 11, 2002, at Atlanta, Georgia

/s/ Martin M. Arlook

Martin M. Arlook, Regional Director
National Labor Relations Board
Region 10

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