

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

In the Matter of

L.E. SMITH MANAGEMENT CO., INC.

Employer¹

and

MASSACHUSETTS LABORERS' DISTRICT
COUNCIL, LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO

Petitioner

Case 1-RC-21583

DECISION AND DIRECTION OF ELECTION²

The Massachusetts Laborers' District Council seeks to represent a bargaining unit of eight janitors and maintenance employees employed by L.E. Smith, Inc. out of its Cambridge, Massachusetts location. The only issue litigated at the hearing was the supervisory status of maintenance supervisor Lorenzo (Buzz) Williams, whom L.E. Smith maintains is a statutory supervisory. I find that L.E. Smith has failed to

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

² 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. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 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 in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 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.

demonstrate that Williams possesses Section 2(11) authority and shall include him in the unit.³

Background

L.E. Smith, whose headquarters is in Boston, Massachusetts, provides building management services for the owners of apartment house buildings, including renting units, collecting rents, paying bills, responding to tenant complaints, and maintaining the buildings.⁴ The Union seeks to represent janitorial and maintenance employees who work out of L.E. Smith's field office at 200 Columbia Street in Cambridge, Massachusetts. That location services about 15 properties composed of about 30 buildings that contain in excess of 250 apartment units.

Loring Smith is the president of the company. Beverly Dorsey is the property manager for the Cambridge location. Charles Flynn, who reports to Smith, has been the Director of Maintenance for the Cambridge location since October 14, 2002.⁵ He has overall responsibility for maintaining the properties for which he is responsible. In addition to overseeing the janitorial and maintenance staff, he is also responsible for obtaining bids from contractors for painting, roofing, and the like, and meeting with L.E. Smith's clients/building owners, utilities inspectors, personnel from state agencies, and mortgage companies. He spends about 75 to 80 percent of his time away from his office at the Cambridge facility at meetings and about 20 to 25 percent of his time in the office doing paperwork.

Maintenance supervisor Lorenzo Williams has been employed by L.E. Smith for 20 years. He reports to Flynn, and five janitors and two maintenance employees report to Williams. The janitors clean the buildings and maintain the grounds. They perform duties such as emptying the trash, shoveling and sanding walks, cutting grass, trimming bushes, raking leaves, and watering plants. The two maintenance employees perform

³ On January 6, 2003, L.E. Smith filed a motion to strike or reject the Union's post-hearing brief on several grounds. The motion is granted; I have not relied on the Union's brief in reaching my decision in this matter. Briefs were due on December 30, 2002. The Union's brief, which was faxed to the Region and to L.E. Smith on January 3, 2002, was untimely. I note that under Section 102.114 of the Board's Rules and Regulations, briefs may not be filed by facsimile transmission and also may not be served on another party by facsimile transmission without the consent of the party being served. Finally, the brief is defective in that it contains numerous facts not in evidence at the hearing.

⁴ L.E. Smith primarily services apartment complexes in Massachusetts, although the company also services one building in Vermont and one in Connecticut.

⁵ Dorsey formerly ran the maintenance department in addition to performing her other duties, but Smith transferred that responsibility to Flynn in October due to various problems. Flynn worked in a similar capacity for the company, but as a consultant, for three months prior to becoming the Director of Maintenance in October. Flynn has worked for L.E. Smith in various capacities for 12 to 14 years over the last 35 years.

work such as repairing doors or windows, retiling, and responding to tenants' complaints about lack of heat or leaky faucets or toilets. They are not licensed.

Each morning the janitors and maintenance employees report to the office in Cambridge to punch in. Flynn made up a work schedule when he became Director of Maintenance, under which he assigned the janitors to particular buildings. Flynn testified that the janitors generally follow this schedule, unless Williams tells them to do something different.

The work of the two maintenance employees is assigned by means of the department's computerized work order system. When Flynn receives a message about a needed repair, he inputs the information into a computer and prints out a work order.⁶ He then assigns the work orders to the maintenance employees each morning. The two maintenance employees are also predominantly assigned to certain buildings, and Flynn generally gives each work order to the employee who is assigned to the building in which the work is located, or to someone else if that person is busy. Sometimes Flynn gives Williams the work orders to distribute, although not every day. Williams also makes the assignments when Flynn is on vacation or out of town. The record does not reveal how often this occurs.

As noted above, Flynn is often not in the office, and Williams deals with emergencies in his absence. Notwithstanding Flynn's assignments, if something more urgent comes up during the course of the day, Williams can overrule Flynn's assignment and reassign the employees to a different task. The record does not reflect how often this occurs. Williams may tell Flynn about the reassignment after the fact. Flynn has a cell phone, however, and he talks to Williams about eight to ten times a day. Flynn occasionally checks on the work of the janitors and maintenance employees, about once a week. He testified that he looks to Williams to make sure that they are doing their work properly.

Williams spends about 25 percent of his time doing hands-on maintenance work himself. He spends a small amount of his time accompanying contractors to a job site, but the unit employees may also take inspectors or contractors to apartment units to let them in. He spends the rest of his time telling the janitors and maintenance employees what to do.

On October 10, 2002, Flynn encountered a janitor, Jorge Carcamo, who complained about a task that Williams had assigned him to perform. Flynn told Carcamo that Williams was his boss and that he should perform the task. When Carcamo continued to argue with Flynn, he terminated Carcamo.

⁶ He is the only one who knows how to use the computer.

In a memo dated October 3, 2002, Dorsey notified the staff that overtime for the janitors had been suspended effective immediately until further notice⁷ and stated that, if overtime is required, it must be approved by Williams and Dorsey. In the same memo, Dorsey explained that maintenance staff on call to respond to emergencies would be eligible for overtime, but that they must write up work orders for emergency calls received after 4 p.m. and give the work orders to Williams for approval and then to Dorsey, without exceptions. Flynn testified at one point that, since he became Director of Maintenance, he “or” Williams approve overtime. He also testified, however, that the October 3 memo, under which both Dorsey and Williams had to approve overtime, remained in effect after he became the Director of Maintenance, except that he is now substituted for Dorsey.

With respect to overtime for the maintenance employees, Flynn further testified that Williams and the two maintenance employees rotate being on call for emergencies after hours. If one of the maintenance employees on call receives a call about an emergency at one of the buildings, he must first check with Williams, who decides, within guidelines, whether to send the maintenance employee or a contractor and whether the problem can wait until the next day. If the emergency is a “no-heat” call, he calls a plumbing contractor rather than sending out a maintenance employee. He regularly tells the two maintenance employees not to respond to emergency calls if, for example, he knows that a contractor is scheduled to be there to handle it the next day anyway. No examples were given of any instances in which Williams actually approved overtime.

With respect to authority to grant time off, Williams occasionally reports to Flynn that one of the employees had to leave early, e.g., for a doctor’s appointment. Flynn testified that he does not know whether the employees actually seek Williams’ permission to leave early or simply notify him that they are doing so. Employees have asked Flynn for permission to leave early for a doctor’s appointment, and he has never refused.

Williams reviews the employees’ time cards at the end of each pay period and submits them to Flynn, who signs and submits time sheets to L.E. Smith’s payroll department. Flynn asks Williams if he has a question about the employees’ hours.

Flynn testified that Williams’ role is to “interact” between Flynn and the rest of the staff. If the janitors or maintenance employees have a work-related problem, such as not being able to access a job or not having a necessary piece of equipment, they either decide what to do independently or call Williams. Williams prioritizes their work. Flynn refers the janitors and maintenance employees to Williams if they have questions or gripes, but he testified that he would handle serious issues himself. No examples were given of any complaints or grievances resolved by Williams.

⁷ The record does not reveal whether this was a permanent or temporary suspension of overtime. The memo did provide for one exception, permitting janitorial overtime to maintain the trash compactor during the weekend at one of the buildings.

Flynn recently hired a new janitor. Flynn had received inquiries and/or resumes from about 200 applicants, out of which he interviewed Sergio Pinto and one other applicant. Flynn and Williams jointly interviewed both candidates. After Pinto's interview, Flynn asked Williams what he thought, and Williams said he thought Pinto was a good candidate. Williams checked Pinto's references and told Flynn that the references checked out. Flynn hired Pinto. He could not recall whether he asked Williams for his opinion of the other candidate. There is no formal evaluation system for current employees.

Only Flynn and Williams are authorized to sign purchase orders, which employees generally need to purchase supplies from the hardware store.⁸ Williams may only order items from pre-approved vendors, although he may choose between pre-approved vendors that sell the same item. Flynn did not know the largest dollar value of supplies Williams has ordered, although the largest one submitted into evidence was for \$318.

Williams, the maintenance employees, and the janitors are all hourly paid. Williams earns \$10.28 per hour, the maintenance employees earn \$14.42 and \$16.40 per hour, and the janitors earn from \$9 to \$12.36 per hour. As part of Williams' compensation, L.E. Smith provides him with an apartment, the fair market value of which is \$2500 per month.⁹ Williams and Flynn have access to a company pickup truck, although the employees may also use the truck to shop for supplies. Williams has a company credit card to purchase gas for the truck. Williams and Flynn each have an office with a desk and a telephone, and Williams has the key to Flynn's office. The janitors and maintenance employees do not have offices. Flynn testified that one of the janitors referred to Williams as "the boss" in a conversation with Flynn.

Analysis

Pursuant to Section 2(11) of the Act, the term "supervisor" means any 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 recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. Chicago Metallic Corp.¹⁰ The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. New Fern Restorium Co.¹¹ The burden of proving

⁸ Employees can make minor purchases, under \$100, without a purchase order.

⁹ Williams is not required to live there as part of his job duties.

¹⁰ 273 NLRB 1677, 1689 (1985).

¹¹ 175 NLRB 871 (1969).

supervisory status rests on the party alleging that such status exists. NLRB v. Kentucky River Community Care¹² The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. Quadrex Environmental Co.¹³

L.E. Smith asserts that Williams is a supervisor because he possesses authority to assign work and responsibly direct employees, handle grievances, and effectively recommend hiring, and because he possesses several secondary indicia of supervisory status. L.E. Smith has failed to demonstrate that Williams possesses statutory authority.

In applying the indicia of assignment and responsible direction, the Board distinguishes between the exercise of independent judgment and the giving of routine instructions. Mere authority to assign work does not establish statutory authority; assignment must be done with independent judgment before it is considered to be supervisory under Section 2(11). KGTV.¹⁴ With respect to assignment of work, Flynn has pre-assigned the janitors and maintenance employees to work in particular buildings. The janitors generally follow the same schedule every day, unless Williams tells them to do something different, but there is no evidence as to how often Williams reassigns their tasks, the circumstances under which this occurs, or whether such reassignments are anything other than routine. Flynn also assigns most of the work orders to the maintenance employees, although Williams sometimes assigns the work orders and may reassign the maintenance employees from one task to another if something more urgent arises during the course of the day. Since work orders are generally assigned to the maintenance employee who is assigned to work in the building where the job is located, I find that it requires no independent judgment for Williams to make such assignments. With respect to his role in reassigning maintenance employees from one task to another in the case of an emergency, there is no record evidence as to how often this occurs, the circumstances, or whether such reassignments require any independent judgment. I also note that Williams talks to Flynn eight to ten times a day by telephone, so that his decisions are constantly monitored.

With respect to Williams' power to authorize overtime, there is no record evidence regarding the frequency with which he approves overtime or regarding any instance in which he actually authorized overtime. According to Dorsey's memo, overtime for the janitors has been suspended, so there should be no occasion for Williams to do so. To the degree Williams does have a role in authorizing overtime for

¹² 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

¹³ 308 NLRB 101, 102 (1992).

¹⁴ 329 NLRB 454, 456 (1999).

maintenance employees¹⁵ or janitors, the memo requires that overtime be approved without exception by both Williams and Dorsey, who has now been replaced by Flynn.¹⁶ Decisions that are subject to approval by higher managers do not confer supervisory authority. Esco Corp.¹⁷

Because L.E. Smith presented no evidence as to the nature of the directions, if any, that Williams provides to the janitors or maintenance employees in the performance of their tasks, it cannot be said that he uses independent judgment in responsibly directing them. North Shore Weeklies, Inc.¹⁸ (no showing that press supervisors use independent judgment in directing the work of their crews, where the record does not reveal the particular acts and judgments that make up their direction of work). Flynn's testimony that Williams occasionally reports to him that an employee has left early does not establish supervisory status, since Flynn did not know whether employees need Williams' permission to leave or simply notify him that they are leaving. Williams' role in reviewing time cards does not confer supervisory status, as the Board has found this to be a clerical function that requires no independent judgment. Tree-Free Fiber Co.¹⁹ Adco Electric, Inc.²⁰ Flynn's assertion that he sends employees with gripes to Williams does not prove that Williams has authority to adjust grievances, where L.E. Smith presented no evidence that Williams has ever resolved a grievance and no evidence even as to the types of grievances he has authority to adjust. I note, in addition, that Flynn testified he would handle serious issues himself.

Nor has L.E. Smith demonstrated that Williams effectively recommends hiring. Mere participation in the hiring process, absent the authority to effectively recommend hire, is insufficient to establish Section 2(11) authority. North General Hospital.²¹ Authority effectively to recommend generally means that the recommended action is

¹⁵ I note that Williams does not select the person who will perform the overtime work, as he and the two maintenance employees rotate being on call, and the work goes to whoever is on call that day.

¹⁶ Flynn testified at one point that he or Williams could approve overtime, but also testified that the October 3 memo, which requires the approval of both Williams and his superior for overtime, is still in effect. I find that the documentary evidence submitted by L.E. Smith is the best evidence of the extent of Williams' authority to approve overtime. At best, L.E. Smith has failed to clarify an ambiguity in the record with respect to Williams' authority and has thus failed to meet its burden to establish supervisory authority on this basis.

¹⁷ 298 NLRB 837, 839 (1990).

¹⁸ 317 NLRB 1128 (1995).

¹⁹ 328 NLRB 389, 392 (1999).

²⁰ 307 NLRB 1113, ALJD at 1126 (1992).

²¹ 314 NLRB 14, 16 (1994).

taken without independent investigation by superiors, not merely that the recommendation is ultimately followed. Children's Farm Home.²² Although Williams participated in interviews of two job applicants, and his recommendation to hire one of them was followed, the candidates were also interviewed by his superior, Flynn, who actually made the hiring decision. Thus, it cannot be said that Williams' recommendation was followed without independent investigation by a higher authority. California Beverage Co.²³

It is true, as L.E. Smith contends, that Williams possesses some secondary indicia of supervisory status, such as use of an apartment, use of a company truck and credit card, an office, authority to sign purchase orders, and at least one employee's perception that he is "the boss." Nonetheless, secondary indicia are insufficient by themselves to establish supervisory status when there is no evidence presented that an individual possesses any one of the several primary Section 2(11) indicia. Ken-Crest Services.²⁴

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and part-time maintenance and janitorial employees employed from the Employer's 200 Columbia Street, Cambridge, Massachusetts location, but excluding all other employees, clerical employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. 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. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States 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

²² 324 NLRB 61 (1997).

²³ 283 NLRB 328, 329 (1987).

²⁴ 335 NLRB No. 63, slip op. at 3 (2001).

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 purposes of collective bargaining by Massachusetts Laborers' District Council, Laborers' International Union of North America, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, two 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 Regional Director, who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before January 15, 2003. No extension of time to file this list may 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 this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by January 22, 2003.

/s/ Rosemary Pye

Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 8th day of January 2003.

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