UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

SKYVIEW TOWERS HOLDING L.L.C.
Employer-Petitioner

and Case No. 29-RM-912

LOCAL 32B-32J, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO
Union[1]

DECISION AND DIRECTION OF ELECTION

The Employer, Skyview Towers Holding LLC, owns and operates two residential apartment buildings on 59th Avenue in Queens, New York. The Union, Local 32B-32J, Service Employees International Union, AFL-CIO, has represented a unit of building superintendents, handymen, porters and doormen employed at those buildings. The Employer filed a petition under Section 9(c) of the National Labor Relations Act on May 9, 2003, seeking an election to determine whether a majority of unit employees still wish to be represented by the Union for purposes of collective bargaining. The Union contends that, although the building superintendent, Rudolph Popovic, is part of the existing bargaining unit, he is nevertheless a supervisor as defined in Section 2(11) and therefore ineligible to vote in any election. The Employer denies that Popovic is a statutory supervisor. A hearing was held before Rachel Zweighaft, a hearing officer of the National Labor Relations Board.

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1 The Union's name appears as corrected at the hearing.

As discussed in more detail below, I find that the superintendent is not a supervisor as defined in Section 2(11) of the Act, and must be included in the bargaining unit as set forth below.

In support of its position on the supervisory issue, the Union called Popovic to testify. The Employer called the buildings' owner and manager, Anthony Pistilli, to testify.

Facts

Skyview Towers consist of two buildings, with a total of more than 200 apartments. The Employer employs one superintendent and three porters there. Those four individuals are covered by the parties' 2000-2003 collective bargaining agreement (Joint Exhibit 1).

The porters are responsible for cleaning the buildings and taking care of the garbage. They work from Monday through Friday, 7:30 a.m. to 4:30 p.m. They punch in and punch out with timecards. There is no evidence that they ever work overtime.

The superintendent is generally responsible for the buildings' maintenance, including relatively minor repairs such as fixing tenants' clogged sinks and toilets, replacing light bulbs, checking the hot water and so forth. (The Employer hires outside contractors for any major repairs, such as for the elevators and boilers.) Popovic lives in an apartment on the premises, as provided by the parties' collective bargaining agreement. He testified that he is "on call" 24 hours per day, 7 days per week. Approximately three or four times per week, he must respond to tenant emergencies after 4:30 p.m. Popovic also testified that he sometimes has to take care of cleaning and garbage on the weekends when the porters are not there. Pursuant to the collective bargaining agreement, he earns $800 per week. It is unclear from the record whether he earns overtime.

The buildings' owner and manager, Anthony Pistilli, has an office in the lobby of one building. Nearby in the same lobby, there is a "shop" with cleaning and repair supplies, a storage area for uniforms and other items, and a phone. Popovic and the porters all have keys to the shop.

The manager, Pistilli, is in frequent contact with Popovic and the porters, both in person, by telephone and by two-way radios. Pistilli, not Popovic, oversees the work of the porters. There is no evidence that Popovic has any responsibility to set the porters' schedule, or to direct or monitor their work. Rather, Pistilli communicates directly with the porters. There is no evidence that Popovic evens relays assignments from Pistilli to the porters.

The Union introduced no evidence whatsoever that Popovic has authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, direct, reward or discipline employees, or to adjust their grievances, or to recommend any such actions. In fact, Popovic testified that he does not have authority to take any such actions. He does not grant time off for the porters. The porters' wages and benefits are determined by the parties' collective bargaining agreement.

Popovic wears the same uniform as the porters. He does not attend management meetings.

Discussion

Section 2(11) of the Act defines a supervisor as follows:

> 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 to recommend such action, if in connection with the foregoing

> the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

A party who seeks to exclude alleged supervisors from a bargaining unit has the legal burden of proving their supervisory status. NLRB v. Kentucky River Community Care, 121 S.Ct. 1861, 1866-67 (2001); Tuscan Gas & Electric Co., 241 NLRB 181 (1979); The Ohio Masonic Home, Inc., 295 NLRB 390, 393 (1989).

In this case, the Union has utterly failed to meet its burden of proving that the building superintendent is a supervisor as defined in the Act. The Union provided no evidence that the superintendent possesses any of the types of authority enumerated in Section 2(11), the so-called "primary indicia" of supervisory status. Furthermore, the Union did not even provide evidence of so-called secondary indicia, such as attending management meetings. The record reveals that the Union presented neither oral testimony nor written evidence in support of its contention that Popovic is a statutory supervisor.[2]

In sum, the Union has fallen far short of meeting its burden to prove, by specific and competent evidence, that the superintendent is a supervisor as defined in Section 2(11) of the Act. Accordingly, the superintendent classification will be included in the unit found appropriate below.

CONCLUSIONS AND FINDINGS

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

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The Employer, Skyview Towers Holding LLC, is a domestic corporation with its principal place of business located at 47-30 and 47-50 59th Avenue, Queens, New York, where is owns and operates residential apartment buildings. During the past year, which period represents its annual operations generally, the Employer derived gross revenues in excess of $500,000, and purchased and received at its Queens facilities goods and supplies valued in excess of $5,000 directly from points outside the State of New York. 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 Union, a labor organization, 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 constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

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[2] In light of the absence of any evidence whatsoever in support of its assertion, resulting here in the unnecessary expenditure of the agency's limited resources, the Union should be cautioned regarding the raising of frivolous issues in formal Board proceedings.

All full-time and regular part-time superintendents, porters, handymen and doormen, employed by the Employer at its Skyview Towers buildings, 47-30 and 47-50 59th Avenue, Queens, New York, but excluding all other employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Local 32B-32J, Service Employees International Union, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before 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 any 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. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since

the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

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, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One MetroTech Center North, 10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before **June 5, 2003.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at

(718) 330-7579. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office, Region 29.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

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, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **June 12, 2003.** The request may **not** be filed by facsimile.

Dated: May 29, 2003.

/S/ ALVIN BLYER

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