

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

MOORE COLLEGE OF ART & DESIGN

Employer<sup>1</sup>

and

Case 4–RC–20609

AMERICAN FEDERATION OF STATE,  
COUNTY & MUNICIPAL EMPLOYEES,  
DISTRICT COUNCIL 47

Petitioner<sup>2</sup>

**REGIONAL DIRECTOR’S DECISION AND  
DIRECTION OF ELECTION**

The Employer, Moore College of Art & Design, operates a non-profit college located in Philadelphia, Pennsylvania. The Petitioner, American Federation of State, County & Municipal Employees, District Council 47, 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 the full-time and regular part-time Life Drawing and Fashion Fit models who work at the college. A hearing officer of the Board held a hearing, and the parties filed briefs with me.

The parties disagree as to whether the models that the Employer uses for class instruction are “employees” within the meaning of Section 2(3) of the Act. The Employer contends that the models are independent contractors and therefore expressly excluded from the statutory definition of employee. The parties also disagree as to the eligibility formula to be used if an election is directed.<sup>3</sup> The Employer employs about 30 to 40 models.

I have considered the evidence and the arguments presented by the parties concerning the employee status of the models and the appropriate eligibility formula. As discussed below, I have concluded that the models are statutory employees, not independent contractors. Accordingly, I have directed an election in a unit of all Life

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<sup>1</sup> The Employer’s name appears as amended at hearing.

<sup>2</sup> The Petitioner’s name appears as amended at hearing.

<sup>3</sup> The parties stipulated that if the models are found to be employees, the unit will exclude those who are referred by outside agencies, as well as all models under the age of 18.

Drawing and Fashion Fit models employed at the Employer's Philadelphia, Pennsylvania college using the eligibility formula set forth below.

To provide a context for my discussion concerning the issues, I will first provide a brief overview of the Employer's operations. Then, I will review the factors that must be evaluated in determining independent contractor status and present in detail the facts and reasoning that support my conclusion. Finally, I will discuss the eligibility formula to be used in the election.

## **I. OVERVIEW OF OPERATIONS**

The Employer offers various classes leading to a Bachelor of Fine Arts degree after successful completion of the curriculum. The Employer also conducts Continuing Education classes and Young Artist workshops during the summer. The college has a number of different departments, including Basics<sup>4</sup>, Illustration, and Fashion.

The Academic Dean is Dana Lantz, who is responsible for overseeing the faculty, curriculum, and academic programs. William L. Hill is the Vice President of Finance and Administration, and he is in charge of the Employer's business operations. Hill's responsibilities include the oversight of financial matters, the physical facilities, and human resources. The Model Coordinator, Joshua Greenberg, is in charge of overseeing the models.

The school has two 15-week semesters during each school year, one from September to December and the other from January to May. Each class is scheduled for three or six hours at a time, one or two times a week.

The Employer uses live models to aid in instruction for various classes. Life Drawing classes use models on a regular basis.<sup>5</sup> Additionally, instructors use models for drawing and sculpture classes in the Basics and Illustration Departments, so that students can study gender, body types and multiple figures in space. Approximately one-fifth of the classes in the Basics Department and one out of 16 or 20 classes in the Illustration Department use Life Drawing models.

Approximately one-sixth of the classes in the Fashion Department use models, to fit garments prepared by students. The Fashion Fit models mostly work at the end of the fall semester and throughout the spring semester to prepare for the students' fashion shows. They sometimes work for more than one class period at a time and can work as much as nine hours in a day.

There is no set minimum number of hours that a model works, and the models who testified stated that they also work as models for several other art schools or colleges. The Life Drawing models work a varying amount of hours each month

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<sup>4</sup> The Basics Department is considered a part of a student's foundational year.

<sup>5</sup> Life Drawing classes require live models but occasionally, if a model becomes unavailable, the class may still go on with students drawing a stationary object such as a skeleton.

depending on their individual schedules and the needs of the Employer. Thus, model Joseph Dugan testified that he has worked the Employer since 1989 and now works approximately 12 to 16 hours a month, about a third of his work time. Thomas Dura testified that he has worked for the Employer since 1994 and his work hours vary from year to year. Dura estimates that in the past year he spent about one-seventh of his time working for the Employer, less than in previous years. Claire Hankins testified that she works for the Employer no more than 24 hours per month, and as few as six hours, although sometimes she does not work for the Employer at all. Naomi Littel testified that she started modeling for the Employer in September 2000, and in that first year, she worked for the Employer about 25 percent of the time. Thereafter, Littel took a year off, but she later modeled for the Employer for approximately 20 hours during the fall semester of 2002.

In general, there is a considerable disparity in the number of hours worked by different models. The models' hours in 2002 ranged from three to 49.25 hours a month. Out of about 39 active models in that year, approximately 12 models worked more than 100 hours, five models worked between 50 and 100 hours, four models worked between 25 and 50 hours, seven models worked between 10 and 25 hours, and 11 models worked less than 10 hours.

In January and February 2003, 21 models were active. Eight models worked for more than 12 hours during this period, three models worked between nine and 12 hours, six worked between three and six hours, and one worked exactly three hours. The vast majority of models working in 2003 had also worked in this capacity in 2002.

## **II. FACTORS RELEVANT TO EVALUATING INDEPENDENT CONTRACTOR STATUS**

Section 2(3) of the Act expressly excludes “any individual having the status of an independent contractor” from the definition of “employee” and thus the protection of the Act. The party asserting that an individual is an independent contractor has the burden of establishing that status. *BKN, Inc.*, 333 NLRB No. 14, slip op. at 3. In assessing whether an individual is an employee or an independent contractor, the Board applies common law agency principles to the factual context. *NLRB v. United Insurance Company of America*, 390 U.S. 254, 258 (1968). The multifactor analysis set forth in *Restatement (Second) of Agency, Section 220* includes the following factors to be examined: (1) the control that the employing entity exercises over the details of the work; (2) whether the individual is engaged in a distinct occupation or work; (3) the kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time the individual is employed; (7) the method of payment, whether by the time or by the job; (8) whether the work in question is part of the employer's regular business; (9) whether the parties believe they are creating an employment relationship; and (10) whether the principal is in the business. *BKN, Inc.*,

supra, slip op. at 2. The Board has indicated that the *Restatement* factors are not exclusive or exhaustive, that no single factor is controlling, and that, in applying the common-law agency test, it will consider “all the incidents of the individual’s relationship to the employing entity.” *BKN, Inc.*, supra; *Slay Transportation Company, Inc.*, 331 NLRB 1292, 1293 (2000); *Roadway Package System*, 326 NLRB 842, 850 (1998).

In determining independent contractor status, the Board also considers an individual’s entrepreneurial risk in performing a service. *BKN Inc.*, supra, slip op. at 3; *DIC Animation City, Inc.* 295 NLRB 989, 991 (1989). Entrepreneurial risk is evidenced where a person’s earnings are dictated by self-determined policies, personal investment, and market conditions. *The News Journal Company*, 227 NLRB 568, 570 (1976).

### **III. FACTS**

#### **A. Work Assignments and Scheduling**

The models<sup>6</sup> apply for work and interview directly with the Model Coordinator, who meets with them at the beginning of each semester to schedule class assignments. Many models work at more than one school or have other jobs, and they are permitted by the Employer to reject job assignments without penalty or discipline.<sup>7</sup> Models are generally scheduled for an entire three or six hour class period, but sometimes a model is only needed for a portion of a class.

After determining the models’ availability for assignments, the Model Coordinator shows the faculty members a grid that indicates which models are available at which times. Each instructor has the discretion to decide the gender and body type of the model needed for the class. After receiving input from the instructors, the Model Coordinator contacts the models and makes all necessary changes before the schedule is finalized. Once the schedule is set, if the model becomes unavailable, he or she is responsible for contacting the Model Coordinator as soon as possible so that he can find a replacement.

#### **B. Contractual Requirements and Other Rules and Policies**

Models are required to sign a non-negotiable one-page contract prepared by the Employer, which sets forth their terms and conditions of employment. The contract can be terminated by the model with one week’s notice.

The contract indicates that the instructor is in charge of the classroom at all times. Models must pose for the assigned three to six hour classes but are entitled to a five-minute break every 20 minutes. If an instructor wishes the pose to continue beyond 20 minutes without a break, the instructor must ask the model’s permission, and the model is

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<sup>6</sup> Unless otherwise indicated, the term “model” refers to both Fashion Fit and Life Drawing models.

<sup>7</sup> For example Thomas Dura is also a professional flamenco dancer, and he spends half of his work time dancing.

free to decline the request. The contract further requires the model to maintain good personal hygiene and a pleasant professional attitude in the classroom. Models must wear a robe or other clothing during their breaks. The contract also provides that if a person other than the class professor or a student in the class seeks to enter the room, the model must be clothed or give consent. Models may not be photographed without their permission. Pursuant to the contract, the Employer supplies padding, heaters and model stands for their use. If a model requires additional heating while posing, he or she may request additional heating from the instructor. In cases of extreme cold, the model must consult with the professor or Model Coordinator and may choose to pose clothed.

The contract also sets forth rules concerning class cancellations. If a model is sick or must otherwise miss class, he or she must contact the Model Coordinator as soon as possible. The contract emphasizes that a model who does not attend a scheduled class without personally contacting the Model Coordinator will be automatically dismissed, without exception. The contract provides that repeated cancellations and tardiness is grounds for dismissal, and the record shows that at least one model has been discharged for arriving late. Additionally, a model can be immediately terminated for becoming sexually aroused when posing, and, in fact, a model was discharged for violating this policy. The Employer also reserves the right to terminate the contract for violation of any contractual rules or “for any other disciplinary matter.”

In practice, a model can pose standing, seated, or reclining, among other positions, and the specific pose and the duration of the pose depend on the instructor’s lesson plan.<sup>8</sup> Unless physically unable, the model must perform the pose requested by the instructor. The instructor also provides any props that are used during a pose.

The models are generally not involved in lesson planning or instruction of students, and they do not interact with students during classes.<sup>9</sup> Once a pose has been set, a model is not permitted to speak to students. Models do not receive a formal evaluation of their work from the Model Coordinator or the class instructor.

According to several witnesses, the previous Model Coordinator told models to report to her before going to their assigned classes, but there is conflicting evidence as to whether this practice is still required.<sup>10</sup> Model assignments are not guaranteed from semester to semester.

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<sup>8</sup> Sometimes a model will be required to do a series of short poses called “croquis.”

<sup>9</sup> Dura stated that he has aided in preparing lesson plans about once a year. For example, he and the instructor jointly decided that he would wear a flamenco outfit to one class.

<sup>10</sup> The Model Coordinator does not work at night or on weekends when some of the models work. According to Dura, Greenberg requires him to check in before going to his classroom. Dura did not report on one occasion, and Greenberg came to his class to ascertain that he was there. Dura was not disciplined on that occasion.

### **C. Compensation**

The Employer pays Life Drawing models \$11 an hour and pays Fashion Fit Models between \$11 and \$25 an hour.<sup>11</sup> The models generally keep track of the hours they work on timesheets provided by the Employer. After a model completes a class, the model notes the hours on the timesheet, and the instructor and the model sign it. The model then returns the timesheet each week to the Model Coordinator, who submits it to the business office. The Employer pays the models on a monthly basis through accounts payable checks. The model can either pick up the check personally or have it sent by mail.

Prior to January 1, 2003, the Employer paid its models through its payroll system, withheld taxes, and issued a W-2 tax form at the end of the year. Under this method of payment, the Employer paid half of the models' FICA taxes, and paychecks could be directly deposited into the model's bank account. Vice-President of Finance and Administration Hill testified that in December 2002 he decided to change the method of payment in order to conform to what he believed was the area practice for art models. The Employer now pays models through accounts payable, does not withhold taxes, and will issue them a Form 1099 at the end of the year. Direct deposit is no longer available. Hill testified that in determining area practice, he contacted local art programs, including the Pennsylvania Academy of Fine Arts, Drexel University, Temple University, and the University of Pennsylvania and also relied on his prior experience as the comptroller for Philadelphia's University of the Arts. A model testified, however, that when he works at Temple University and the University of Pennsylvania, as well as at the Art Institute of Philadelphia, those schools pay him through payroll, withhold taxes, and issue a W-2 form at the end of the year.

The only compensation a model receives from the Employer is the hourly rate. Models do not receive benefits, such as health and dental insurance or tuition reimbursement. Models also do not receive an employee handbook, e-mail account or mailbox at the school. The Employer provides models with identification cards, which allow access to the school building and permit them to borrow books from the library and to use the school gym, which is located in an off-site hotel. The Employer does not offer or require training for the models.

Models do not have the right to use pictures of themselves nor are they compensated for the use of their image. Certain models buy some of their own supplies or get a massage after a strenuous pose, but the Employer does not reimburse them for these expenditures.

### **IV. ANALYSIS**

I find that the Employer has failed to meet its burden to establish that the models are independent contractors. The evidence indicates that the models perform functions

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<sup>11</sup> Some Fashion Fit Models are hired and paid through employment agencies. As noted above, the parties stipulated that the agency models are not part of the unit.

that are an essential part of the Employer's normal operations under the Employer's direction and control. Live models are necessary to enable students in various drawing and sculpture classes to visualize human bodies performing poses and gestures. During the time that the models work for the Employer, the Employer monitors and directs their work. Thus, in the classroom, the instructor determines the position and duration of the poses to be used by the models, subject to a contractually specified break period. Models are required to report for their assignments punctually and to maintain specified standards of behavior during classes, including maintaining proper personal hygiene, avoiding sexual arousal, refraining from speaking to the students, and wearing clothes when they are not posing. Further, the contract signed by the models provides that violation of the contractual disciplinary policies may result in the model's termination, and the Employer has discharged models for violating its policies. The Employer provides the few supplies regularly used by the models.

The Employer also sets the models' hourly fee, which is not subject to negotiation. The models have no substantial proprietary interest in their jobs and no entrepreneurial opportunity for gain or loss when they are modeling for the Employer. Rather, the models are paid the hourly fee set by the Employer, and other than working additional hours, they have no ability to realize profits from their images or otherwise to increase their compensation through the exercise of discretion.<sup>12</sup> Additionally, there are no financial risks involved in their employment by the Employer. Some models work at more than one school providing modeling services and in some cases have outside careers, but the fact that they do not work exclusively for the Employer does not preclude a finding of employee status. See, e.g., *American Federation of Musician (Royal Palm Theatre)*, 275 NLRB 677, 681-682 (1985). Moreover, the fact that the Employer recently stopped making deductions from models' paychecks is not dispositive of independent contractor status, and this factor is significantly outweighed by the factors demonstrating that the models are employees. *Gary Enterprises*, 300 NLRB 1111, 1112 n.3 (1990), *enfd.* 958 F.2d 368 (4<sup>th</sup> Cir. 1992). Accordingly, I find that the models are employees within the meaning of the Act. *BKN, Inc*, *supra*, slip op. at 3; *Roadway Package System*, *supra*; *American Federation of Musicians*, *supra*.

## V. ELIGIBILITY FORMULA

The models do not all have steady regular employment but have varying schedules depending on the Employer's needs and the models' other commitments. It is therefore necessary to devise an eligibility formula tailored to the specific circumstances involved. In devising eligibility formulas to fit the unique conditions of any particular employer or industry, the Board seeks, "to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." *DIC Entertainment City, Inc.*, 328 NLRB 660 (1999); *Trump Taj Mahal Casino Resort*, 306 NLRB 294, 296 (1992). The Board has sought to be flexible in devising various formulas suited to unique conditions in situations in which employees are hired to work on a day-by-day or basis or

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<sup>12</sup> The Board has found an employee relationship when an Employer unilaterally establishes pay rates. *Adderly Industries*, 322 NLRB 1016,1023 (1997).

for specific events, in order to afford employees with a continuing interest in employment the optimum opportunity for meaningful representation. See, e.g., *Blockbuster Pavilion*, 314 NLRB 129, 142-143 (1994) enfd. in relevant part and remanded, 82 F.3d 1074 D.C. Cir. 1996) (pavilion stagehands eligible where they worked on at least two productions during the past year); *Berlitz School of Languages of America, Inc.*, 231 NLRB 766 (1977) (“on call” language teachers eligible if they worked for at least two days during the preceding year); *Medion, Inc.*, 200 NLRB 1013 (1972) (film industry stagehands eligible where they worked on two productions for a minimum of five days over one year). The Board also considers whether employees have a reasonable expectation of future employment. *Berlitz School of Languages of America, Inc.*, supra; *Medion, Inc.*, supra.

The Employer has proposed a formula that would include all models that provided any modeling services during the fall semester of 2002 and have worked or are scheduled to work as models during the spring semester or summer schedule. The Petitioner proposes a formula to include all models that worked an average of three or more hours per week in the last calendar quarter and worked at least 50 hours in 2002.

Having considered these proposals and the unique circumstances of the models’ employment, I have created a formula that seeks to include those models with a continuing likelihood of working for the Employer while excluding those with only a tenuous connection to the school. With these considerations in mind, I find that the appropriate voting eligibility formula would include models who worked at least 25 hours in 2002 and at least nine hours during the first calendar quarter of 2003.

## **VI. CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter 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 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 of the 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 purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All Life Drawing and Fashion Fit models employed by the Employer at its Philadelphia, Pennsylvania college, EXCLUDING models referred by outside agencies, models below the age of 18, all other employees, office clerical employees, guards and supervisors as defined in the Act.

## **VII. 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 the purposes of collective bargaining by American Federation of State, County & Municipal Employees, District Council 47. 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.

### **A. Voting Eligibility**

Eligible to vote in the election are those in the unit who worked for the Employer for at least 25 hours during the calendar year 2002 and at least nine hours during the first three months of the calendar year 2003. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their status as such during the eligibility period, and the replacements of those economic strikers. 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.

### **B. 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). The 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 Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **April 16, 2003**. No extension of time to file this list shall 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 (215) 597-7658. 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.

**C. 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 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 non-posting of the election notice.

**VIII. 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, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST on **April 23, 2003**.

Signed: April 9, 2003

at Philadelphia, PA

/s/

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DOROTHY L. MOORE-DUNCAN  
Regional Director, Region Four

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