

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

GOLDCREST LLC d/b/a SYOSSET FAIRFIELD INN

Employer

and

Case No. 29-RC-10184

**LOCAL 348-S, UNITED FOOD AND COMMERCIAL
WORKERS UNION, AFL-CIO**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Henry Powell, a Hearing Officer of the National Labor Relations Board, herein called 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 hereby are affirmed.
2. The record indicates that Goldcrest LLC d/b/a Syosset Fairfield Inn, herein called the Employer, is a domestic corporation, with its principal office and place of business located at 24 Oak Drive, Syosset, New York, herein called its Syosset facility. The Employer is engaged in the overnight hotel and guest services industry. During the past 12-month period, which period is representative of its operations in general, the

Employer's gross revenues exceeded \$500,000 from performance of such services. Also during the past 12-month period, the Employer purchased and received at its Syosset facility, goods, supplies and materials valued in excess of \$5,000, directly from entities located within the State of New York, which entities, in turn, purchased said goods, supplies and materials from entities located outside the State of New York.

Based on the stipulation of the parties, and on the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein 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 Sections 2(6) and (7) of the Act.

5. Local 348-S, United Food and Commercial Workers Union, AFL-CIO, herein called the Petitioner or the Union, seeks to represent the following unit:¹

All full-time and regular part-time room attendants, laundry employees, breakfast attendants, maintenance assistants, house persons, front desk employees, and night audit front desk employees, but excluding all other employees, managers, guards and supervisors as defined in the Act.

Positions of the Parties

The only issue litigated at the hearing was the supervisory status of Jose Velado,

¹ The petitioned-for unit appears as amended at the hearing. The amendment added front desk employees to the unit, but inadvertently omitted the petitioned-for laundry employees. Since there is no evidence of any intention to omit the laundry employees, or any basis for doing so, I have included them in the unit.

Assistant Executive Housekeeper. The Employer took the position that he is a supervisor. The Union initially refused to take a position on Velado's alleged supervisory status, but was willing to stipulate that Velado is not in the petitioned-for bargaining unit. At the close of hearing, however, the Union took the position that Velado is not a supervisor and should be included in the bargaining unit.

The Employer's witnesses were Jose Velado, Assistant Executive Housekeeper, Jason D'Agostino, Assistant General Manager, and Frank Lodico, General Manager. The Employer filed a brief, and the Union declined to call witnesses or file a brief.

Conclusion

As discussed in detail below, I have concluded that Jose Velado is a statutory supervisor. In reaching this conclusion, and in summarizing the relevant facts, I have relied exclusively on Velado's testimony, rather than that of management officials.

Case Law

Under Section 2(11) of the Act, the burden of proving that an employee is a statutory supervisor is on the party alleging such status. *Kentucky River Community Care, Inc.*, 121 S.Ct. 1861, 1866 (2001). In light of the exclusion of supervisors from the protection of the Act, this burden is a heavy one. *See Chicago Metallic*, 273 NLRB 1677, 1688, 1689 (1985). Employees are statutory supervisors only if (1) they hold the authority to engage in one of the twelve supervisory functions set forth in the Act, (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." *See Kentucky River*, 121 S.Ct. at 1867. The exercise of "some supervisory

authority in a merely routine, clerical, perfunctory, or sporadic manner,” or through giving “some instructions or minor orders to other employees,” does not confer

supervisory status. *Chicago Metallic*, 273 NLRB at 1689; *see Kanawha Stone Company, Inc.*, 334 NLRB No. 28, slip op. (2001).

Facts: Section 2(11) Supervisory Functions Performed by Jose Velado

Assign / Direct

Velado testified that his position as Assistant Executive Housekeeper primarily involves inspecting the guest rooms of the hotel after they have been cleaned by the housekeeping staff. If he inspects a room and is not satisfied with the way it was done, he points out the deficiencies to the employee who performed the work and directs him or her to do the room over. The record reflects that in July, 2003, when a room attendant failed to change the linen in a room, Velado “immediately” assigned another employee to perform the work. However, Velado maintained that if the deficiency is a minor one, he performs the work himself. Sometimes he counsels employees informally, to help them do a better job. He works from Sunday through Thursday, and has been employed by the Employer for about a year.

As Assistant Executive Housekeeper, Velado reports directly to the Executive Housekeeper, Adonay Fernandez. Velado testified that when Fernandez is not present, he (Velado) is in charge of the housekeeping department, consisting of eleven employees. This occurs on Fernandez’s days off every Sunday and Monday, during Fernandez’s vacations and leaves of absence, and when Fernandez is working at other hotels.² When he is in charge of the department, Velado holds daily meetings with the housekeeping

² Several of the Employer’s exhibits indicate that the Employer is part of the Marriott chain of hotels. (Er. Ex. 1, 2, 9-16, 18, 19, 22)

staff, to take attendance, “go over the bases of the day,” and encourage employees to adopt a positive attitude towards the guests of the hotel. In addition, Velado “breaks out the house,” which involves determining which room attendants will clean which rooms. When the hotel is full, Velado has to shift room attendants to sections of the hotel to which they are not normally assigned. When a room attendant is absent, Velado reassigns that person’s work to another employee. In addition, about once every three months, Velado drafts the weekly work schedule, which determines which days of the week each room attendant must report to work.

Finally, when Fernandez is not present, Velado trains new room attendants in “the appropriate use of supplies, cleaning agents and equipment,” and shows them around the building on their first day of work.

Discipline

Velado testified that when an employee performs poorly, he has to report this to Fernandez or another manager. This extends to non-housekeeping employees. For example, a written warning signed by D’Agostino and witnessed by Velado in October, 2003, grew out of a front desk employee’s failure to answer the telephone when Velado attempted to call the front desk. When Velado entered the lobby, moreover, the said front desk employee “continued to watch television” when she “saw it was Jose.” The warning emphasizes, in boldface type, that Jose Velado “is a supervisor of this hotel” who is “due all the respect that any other manager would commend [sic].”

The record reveals that documents signed in July, 2003, by “Jose Velado, Asst. Housekeeping manager,”³ included a write-up describing an employee’s failure to change

³ No other supervisory or managerial employee signed these documents.

the linen in a guest's room, a write-up of that same employee's unauthorized use of the bathroom in a guest's room, a disciplinary warning regarding an employee's failure to call in or show up for work, and a "Sunday Report" stating that Velado directed an employee to finish cleaning a dirty room, and she refused to do so.

Velado testified that he was directed to write up these incidents by various management personnel, and that he did not take any action on his own. However, Velado conceded that on a number of occasions, Fernandez has asked his opinion on whether an employee should be disciplined. Velado did not indicate how often his recommendations have been followed.

Discharge

The record reflects that in late March or April, 2004, Velado recommended that the Employer's houseman be discharged. Management acted on this recommendation immediately.

Velado testified that he, Fernandez, and Lodico had discussions about the fact that the houseman was "calling in sick a lot"; Velado thought he should be fired because "he wasn't showing up for work." Shortly before the hearing in this matter, Velado told Fernandez "that we needed a new houseman because this person was calling in sick a lot...I told him that we needed to do something, yes." The houseman was discharged shortly thereafter.

Hire

Employer's Exhibits 7 and 8 are pay rate authorization forms for two new housekeeping employees, Susanna Villatos and Danery Majano, dated April 14, 2003.

The “Supervisor Approval” signature line on both forms contains Velado’s signature.⁴

When questioned regarding his role in hiring these two employees, Velado testified that he merely served as a translator while the General Manager interviewed Susana Villatos for the position. Later, he checked her references, as directed by the General Manager. However, Velado acknowledged that he recommended hiring Villatos, and that Villatos was subsequently hired by the Employer.

Similarly, with respect to Majano, Velado initially stated that he merely served as a translator during her job interview and checked her references. However, under questioning by the Hearing Officer, he testified as follows:

Q: Did you interview her?

A: Yes, I sat down with her, yes.

Q: Did you interview her by yourself?

A: First, when she got there, when those people used to get there, yes, they used to sit down for a few minutes with me and then with the General Manager. (Tr. 49-50)

However, Velado also indicated that he and the Acting General Manager interviewed Majano simultaneously: “It was Alec who was the General Manager at the time and the three of us sat down and he decided to hire her after I checked her references.”

Velado’s testified that he was asked for his opinion regarding the hiring of Majano:

A: Well, we discussed with the General Manager what did I think about that person, yes.

Q: Well, what did you think of her?

A: I think she was good, she had experience.

⁴ When asked why the “General Manager Approval” signature line on Majano’s “Rate Authorization Form” is blank, Velado initially claimed that “There was no manager at the place, at the time, there was nobody around to fill out those papers.” (Tr. 48-49) However, he subsequently testified that there was an Acting General Manager at the time—either Jason or Alec. (Tr. 49-50)

In this regard, Velado told the Acting General Manager that he “had checked her references and she was a good person.” The record reflects that Majano was subsequently hired by the Employer.

However, Velado asserted that he had no involvement in more recent hiring decisions. (Tr. 52, 113) Rather, he testified that since April, 2003, his only role has been to help prospective employees fill out their application forms. (Tr. 156-57)

Transfer

Velado testified that sometime last year, D'Agostino told him about the Employer's need to fill a position in the breakfast room. Velado replied that room attendant Majano was “a person that could work there.” (Tr. 177) Management followed this recommendation and transferred Majano to the breakfast area. (Tr. 177)

Discussion and Conclusion

The record reflects that during the year that Velado has worked for the Employer, he has exercised supervisory authority with respect to several of the supervisory indicia set forth in Section 2(11) of the Act. Thus, he effectively recommended the transfer of Majano to the breakfast area, and the discharge of the houseman. Further, he issued written disciplinary warnings to two employees. A third employee was given a written disciplinary warning by a manager, in part because of her failure to accord Velado the respect due a supervisor.

Finally, the record indicates that Velado assigns and direct employees in their work. While performing inspections, Velado directs room attendants to correct work deficiencies, and counsels them on how to improve their performance. He is in charge of the housekeeping department at least two days per week (more than 40% of his working

hours). When he is in charge of the department, he assigns and reassigns work, reviews work assignments with employees, and trains new employees.

The record does not establish that Velado has the authority to hire employees, or that his hiring recommendations are followed in the absence of an independent investigation by management. However, the absence of supervisory authority with respect to one of the indicia set forth in Section 2(11) does not preclude the finding of overall supervisory status. *See Kentucky River*, 121 S.Ct. at 1867.

Based on his authority to assign, direct, and discipline employees, and to effectively recommend discharge and transfer of employees, I find that Jose Velado, the Employer's Assistant Executive Housekeeper, is a statutory supervisor, as defined in Section 2(11) of the Act, and must be excluded from the petitioned-for bargaining unit. Accordingly, an election will be conducted in the following unit, which the parties stipulated and which I find to be appropriate for the purposes of collective bargaining within the meaning of Section 9(a)(1) of the Act:

All full-time and regular part-time room attendants, laundry employees, breakfast attendants, maintenance assistants, house persons, front desk employees, and night audit front desk employees, but excluding all other employees, managers, 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 they wish to be represented for purposes of collective bargaining by Local 348-S, United Food and Commercial Workers, 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, Brooklyn, New York 11201, on or before **May 6, 2004**. 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 or by electronic transmission at Region29@NLRB.gov. 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 or E-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

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 **May 13, 2004**. The request may be filed by electronic transmission through the Board's web site at NLRB.Gov but **not** by facsimile.

Dated: April 29, 2004, Brooklyn, New York.

Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
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Brooklyn, New York 11201