

BEFORE THE NATIONAL LABOR RELATIONS BOARD
UNITED STATES OF AMERICA
REGION 19

Early Head Start Family Center of Portland

Employer

and

Case 36-RC-6243

American Federation of State, County
and Municipal Employees, Council 75, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

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, hereinafter referred to as 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 record¹ in this proceeding, the undersigned finds:²

SUMMARY

The Employer is part of a federally funded childcare program established in order to address problems arising from child and family poverty in the United States. The Petitioner filed the instant petition seeking a unit of all regular full-time and part-time employees of Early Head Start Family Center of Portland, excluding all substitute, confidential, managerial, supervisory employees and guards within the Employer's service area.³ The Employer contends that ten of its Childcare Family and Child Development Specialists and twelve of its Center-Based Family and Child Development Specialists are supervisors under the Act and, therefore, should be excluded from the unit of employees sought by the Petitioner. The Petitioner contends that these employees are not supervisors and, thus, should be included in the unit.

¹ Briefs from both parties were timely received and duly considered.

² The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein; the labor organization herein involved claims to represent certain employees of the Employer; and 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.

³ There are approximately 94 employees in the petitioned-for unit.

Based on the following facts and legal analysis as well as the record as a whole, I find, in agreement with the Union, that the Employer's Center-Based and Childcare Development Specialists are not statutory supervisors. Accordingly, I shall include them in the unit.

Below, I have set forth the evidence presented in the hearing on this matter describing the Employer's operations generally and the Developmental Specialists' role in assigning, directing, evaluating, hiring, disciplining, and transferring Developmental Assistants and Teaching Assistants in their classrooms. Following the evidence section is my analysis of the applicable legal standards and a section setting forth the direction of election.

1. **EVIDENCE:**

The Early Head Start Family Center of Portland Program is a Federal Government program authorized under the Head Start Act (42 U.S.C. § 9801, et seq.), which provides early childhood education, nutrition, health and social services, along with a strong parent involvement focus, to low-income children nationwide. The Employer receives about 65% of its funding through the Federal Government, with the remaining funding coming from the State of Oregon and the City of Portland. The Employer currently has five sites: North Skidmore, Normandale, Gladstone, Brentwood-Darlington, and Portland Relief Nursery.

The petitioned-for unit is a wall-to-wall employee unit including the Employer's Child and Family Development Specialists ("Development Specialists"), Development Assistants ("DAs") and Teaching Assistants ("TAs"), health services employees, transportation employees, kitchen employees, and family services employees. At issue in this case are the Employer's Development Specialists in its Center-Based and Childcare Programs. The Employer contends that these employees are supervisors because they have authority to assign, direct, evaluate, discipline, effectively recommend hiring, and effectively recommend transfers.

A. Child and Family Development Specialists

The Employer has Development Specialists in three different departments: Home-Based, Center-Based, and Childcare.

In the Home-Based program, the Development Specialist meets with each child and the child's parent(s) at their home on a weekly basis for approximately an hour and a half. Since Home-Based Development Specialists do not work with DAs or TAs, the Employer stipulated that these employees are not statutory supervisors.⁴

The Employer's Center-Based program consists of both classroom time and home visits. The children in these programs will have two or three days of classroom

⁴ The parties also stipulated that the Employer's Home-Based and Center-Based Development Specialists, Male Involvement Coordinators, Recruitment Specialists, Family Advocates, Community Involvement Specialists, SW Network Coordinators, and Parent Involvement Coordinators were professionals within the meaning of the Act.

time per week plus one or two home visits per month. If a child has class time two times a week, she or he will have two home visits from the Development Specialist each month, and if the child has three classes a week, she or he will have one home visit per month. Each Center-Based class has a Development Specialist and a DA and classes meet for half days. Generally only the Development Specialist will go on home visits.⁵ There are approximately eight children in each class.⁶ Stipulated supervisor Education/Disabilities Manager Amy Altenberger oversees eight of the twelve Center-Based classes. Stipulated supervisor Early Childhood Education Supervisor Ginger Williams oversees the four remaining Center-Based classrooms. The parties stipulated that all Center-Based Specialists have the same duties, responsibilities, and authority.

The program's Childcare option was created for working families. It is a full day/full week childcare program with two home visits a year. There are eight children in each class. Each Childcare room has a Development Specialist, DA and a TA.⁷ Stipulated supervisor Associate Director Larry Mertsching is filling the role as interim Childcare Manager for the ten Childcare classes. This position was filled previously by Debbie Buta who left this position in February 2004.⁸ The parties stipulated that all Childcare Development Specialists have the same duties, responsibilities, and authority.

B. Program Structure and Regulations

The Employer has a Board of Directors, which provides fiscal oversight, as well as the Program's mission and vision. The Employer's Executive Director, Cynthia Wells, reports to the Board of Directors. Education/Disabilities Manager Amy Altenberger and Associate Director Larry Mertsching report directly to Wells, while Early Childhood Education Supervisors Ginger Williams and Debbie Buta report directly to Larry Mertsching. The Employer also has a Policy Council. The majority of Policy Council members are parents involved in the program. The Policy Council's duties include approving the Employer's hirings and grant funding, as well as dealing with any community grievances that might arise.

As is often the case with Federally created and funded programs, the Employer's program is closely regulated. Federal regulations covering Head Start programs provide specific performance standards, which all Head Start and Early Head Start

⁵ Although most DAs do not go on home visits, there was evidence that two DAs in the Center-Based program do make home visits as well.

⁶ The Employer runs two State funded Center-Based classes as well. The Oregon PreKindergarten (OPK) program mirrors the Early Head Start program, except that the classes are larger with 16-17 children in each. The OPK classes have a Development Specialist, and three to four assistants (DAs, TAs, and/or volunteers) in each class. These employees, exclusive of volunteers, are included in the petitioned-for unit.

⁷ Center-Based Development Specialists must have either a CDA (Child Development Certificate) or BA in Childcare Development and a minimum of two years of work experience. Childcare Development Specialists must have either a CDA, AA (Associate's degree), or BA in Early Childhood Education or five years of work experience. DAs are required to have a CDA or AA in Early Childhood Education and/or experience in a certified childcare center/program. TAs are required to have a High School Diploma or GED equivalent. Development Specialists earn from \$11.97 to \$13.24 an hour, DAs earn from \$9.70 to \$10.97 per hour, and TAs earn from \$8.37 to \$9.37 an hour.

⁸ While she held this position Debbie Buta was also a stipulated supervisor.

programs must follow. For example, the Federal guidelines require Head Start activities be child-initiated, allow for creative self-expression through art forms, encourage toilet training, provide children with nutritional meals, and mandate that there be one adult to every four children in the classroom at all times. These guidelines are closely followed and referenced throughout the Employer's guidelines and manuals. Child to adult ratios are carefully followed as most of the Employer's Childcare classrooms have eight children and at least three adults, while most of the Employer's Center-Based classrooms have eight children and at least two adults. Along with DAs and TAs, many classes are also provided with teenage or senior citizen volunteers, who perform many of the same functions of the Development Specialist, DAs, and TAs in monitoring and leading daily classroom activities.

In addition to Federal guidelines, the Employer has a comprehensive policy manual covering detailed day-to-day classroom protocol. The manual provides explicit step-by-step guidelines for, among other things, toileting, diapering, hand washing, tooth brushing, and releasing children at the end of the day. With regard to curriculum, the staff is guided by a computer program (Galileo), a Best Practices guide, and a Curriculum Manual put together by the Employer's Associate Director, Larry Mertsching. The Best Practices Manual and curriculum guide set forth specific curriculum requirements for the program, which must be followed by the classroom team (i.e., Development Specialists, DAs, TAs, and volunteers).

The Developmental Specialist has the responsibility of writing the weekly classroom lesson plan. Childcare Development Specialists write these up every week, while Center-Based Development Specialists write them up every other week. In both programs, the Development Specialist will run an updated goal list on the Galileo Program to discover which goals most of the children in their classroom are ready to learn. There are 39 developmental goals on the Galileo system. Typical goals of the Galileo system include: listens attentively to story, talks about an imaginary experience, hops on one foot, names common objects in a picture story, asks for something in order to satisfy a need, and uses color names to describe an object. When a report run on the computer program indicates that four or five of the children are ready to work on a particular goal, the Development Specialist will add that goal to the weekly curriculum plan.

Once the Development Specialist has identified the appropriate weekly goals from the Galileo program, he or she will discuss with the DA (and TA in the case of a Childcare class) what activities would help the children to achieve these goals. These discussions occur every week when the team meets up to discuss the lesson plan and any other classroom issues that might have arisen during the previous week. Once the staff has generated several activities, the Developmental Specialist will write these down in the lesson plan. Planned activities are purposefully open-ended. Examples of such activities include: singing songs of choice, placing snow or rice on the classroom sensory table, reading a story, and pretending to be monsters. There is a focus on child-initiated activity in the program so that if the children do not respond to the planned activity, the staff will adjust to accommodate the children's interest and these changes will be reflected in the lesson plan that is added to and updated throughout the week.

Each child also has a portfolio, which documents the child’s development during the year. The Early Head Start program requires that these individualized portfolios be updated monthly. The portfolios contain forms showing information that parents have provided, Galileo’s individualized goal sheets for that child, and forms for noting the child’s ongoing developmental accomplishments. A team member notes developmental accomplishments and observations about a child in the portfolio. A child’s completed projects or drawings may also be added to the portfolio.

C. Alleged Indicia

The Employer contends that the Employer’s Development Specialists are supervisors because they have authority to assign, direct, evaluate, discipline, and effectively recommend the hire and transfer of DAs and TAs in their classrooms.

1.) Assignment and Direction

Classroom time in the Center-Based Program is very similar to that of the Childcare Program. In both sets of classrooms, Daily Schedules are posted to remind the staff of the schedule. There are many examples of these daily schedules in the record and all of them are extremely similar. Below are examples of typical daily schedules from the Childcare and the Center-Based programs:

Typical Daily Childcare Schedule	Typical Daily Center-Based Schedule
7:00 Welcome and Free Play 8:30 Hand Washing, Breakfast, and Tooth brushing 9:00 Music, Movement, and Indoor Activities 10:00 Gathering Time: Songs, Stories and Literacy 10:15 Outdoor Activities 11:30 Hand Washing, Lunch and Diapering/Toileting 12:30 Nap Time 2:00 Children Waking and Quiet Activities 2:30 Hand washing, Snack, and Tooth brushing 3:00 Indoor Activities 4:00 Outdoor Activities 5:00 Stories, songs, Free Play and Goodbye’s	8:30 Arrival, Hang up coats, Book Time 8:45 Group Time-Singing/Story 8:50 Wash Hands, Breakfast, Brush Teeth 9:15 Choice Time 10:00 Start Toileting and Diapers 10:30 Outside Time and/or Indoor Park (if raining) 11:25 Music and Story Time 11:30 Wash Hands, Lunch 12:00 Departure

As demonstrated in the daily schedules above, a large percent of classroom time is necessarily taken up with routine necessities (e.g., diapering, meals, tooth brushing, napping, and hand washing). Between these routines, the class staff will focus on transitioning and usually will follow the children’s lead in activities. The program’s philosophy is that children learn through self-directed play, so specific activities are not

forced upon a child, but rather the child can opt to join in the activity or do something on his or her own. It is not expected that all of the children will participate and respond to the same activity at the same time. Rather, the adults in the class are expected to respond to the children's interests. Because of this philosophy, classrooms tend to follow what several of the Developmental Specialists and DAs referred to as a general "flow." As there are always two to three adult staff members to eight children in the classroom, the staff tends to fill in where needed.

The record is replete with examples of how staff members respond to the changing class dynamic in monitoring the children. Several staff members testified that if, for example, one staff member was sitting at the lunch table with four children who are still eating and the children at the other table were ready to move on, the other staff member would automatically get up and start helping the children wash their hands. Another example given by a TA from the Childcare Program was that if one staff member was busy with an activity, the others "would just start taking kids into the bathroom, or changing diapers, or just start setting up for lunch or planning the next activity."

Center-Based Specialist Bethune testified that her DA "might follow three [children] over to where they are playing, sit down on the floor, engage with them while I'm with another three children engaged in another activity." Bethune described the process as "an unspoken flow." A Developmental Specialist from the Childcare program described that when a child starts acting up in the classroom, the team members just give each other the eye and someone will say, "I'll go take care of it."

Several of the witnesses described this communication as an unspoken understanding, which is driven by routine. A DA in the Childcare Program described a relationship this way, "We do what we have to do to get the kids through their day—we don't have assigned tasks." A Developmental Specialist described that she does not give directions because, "we've all been doing this for a long time and we're just in a routine that we know what everyone is supposed to do and we do it." Many testified that the team members have access to the lesson plan and the Galileo printouts so they are well aware of what goals they should be working on with the kids. Several of the Development Specialists testified that they help new DAs and TAs learn mostly through role modeling for them while they are in the classroom rather than giving explicit direction. Team Members testified that it usually takes a new member of the team anywhere from a few days to two to three weeks to become integrated into the routine. As expressed by another Developmental Specialist, these activities are "for two and a half year olds" and are "very basic activities."

On the other hand, Center-Based Development Specialist Frank Mahler testified that although activities in his class are largely child-initiated, he might tell an experienced DA to monitor some children, who for example, were playing outside with the water table. Mahler indicated that he would consider the difficulty of managing the activity, the assistant's experience and his or her rapport with the children in deciding whom to send over. Of the seven witnesses with direct knowledge of classroom activity, only Mahler stated that he would consider the assistant's experience and skill in directing his assistants. Mahler has one DA, one TA, and one senior citizen volunteer in his classroom. As noted above, DAs have higher qualification requirements, more

experience, and are paid more than TAs. Likewise TA's have more training and experience than unpaid classroom volunteers. Thus, given the make up of Mahler's team, (indeed any classroom team), it would appear that making such assignments based on skill and experience would be a fairly clear-cut task. Moreover, it appears that Mahler is not generally in a situation where he can choose which assistant can help with a classroom activity since he testified that his DA and TA each spend approximately 50% of their day escorting children to the bathroom upon the child's request. Mahler testified that the two split bathroom time equally between them "so that neither one is out of the classroom, you know, all day long."

Generally, however, Mahler indicated that his classroom runs much the same way as the other Development Specialists' classrooms in that the children lead the class activities and the adults' role is to monitor or guide those activities. For example, in describing how he and his assistants work on goals with children, Mahler described that he and his DA will see "which children are working on different things, and then it would be whoever is sort of in that area where it seems reasonable to work on those goals while the kids work on them. So if I'm sitting at the art table, then probably I'll be the one encouraging kids to try their writing but then, you know, if Katie's [the DA] doing say painting at a different table, then what she'll be doing is like modeling for them, writing their name on their artwork."

Many of the classrooms follow a primary caregiver model where each of the adults becomes primarily responsible for a portion of children in the class. This includes anything from toileting to being responsible for that child's portfolio. When asked who makes these assignments, the staff members, without exception, described that they let the children choose. The Developmental Specialists described that the children naturally tend to connect with one of the adults in the classroom and that person will become the child's primary care giver.

Although Development Specialists sign employee timesheets, they do not approve overtime, vacation, or sick leave. Undisputed supervisors make those decisions. Development Specialists do not set DA and TA schedules as the schedules are generally determined by the preset classroom hours. Since there are only two staff members on the Center-Based team and there must be at least two adults present while the children are present, the Center-Based staff's hours are set by the class schedule. Although there is an opening, middle, and closing shift in the Childcare Program, the TA is automatically assigned to the middle shift because TAs are not certified to be alone with the children. Testimony of the Development Specialists and the DAs showed that they work out between the two of them which of the two will be responsible for the closing or opening schedules at the beginning of the school year.

Specific testimony regarding class time in both Center-Based and Childcare Programs, indicate that the daily functions of the Developmental Specialists, the DAs, the TAs, and even the volunteers to a great extent are the same. The only difference between the job responsibilities is that the Developmental Specialists are responsible for writing the class curriculum, ensuring that the class paperwork has been filled out, and ensuring the Program's policies are followed.

Although there was some testimony from Education Supervisor Amy Altenberger and Associate Director Larry Mertsching that Center-Based and Childcare Development Specialists examine skill level, knowledge, and competence, when considering which DA or TA to assign to diaper a child or lead an activity, their testimony was general and not based on first hand knowledge.

2.) Evaluations

Development Specialists from both the Center-Based and Childcare programs are expected to fill out two kinds of evaluations for DAs and TAs in their classrooms. The first is an evaluation, which is supposed to be completed 90 days after a new employee's hire. The second is an annual evaluation. When a DA works for multiple Development Specialists, each Development Specialist is expected to fill out an evaluation on that DA. The record demonstrated, however, that a number of Development Specialists had never actually filled out any evaluations and that some had not filled out an evaluation within the past several years. The Developmental Specialists, who have completed evaluations, testified that they send them to their immediate supervisors who forward them to the Human Resources department.

Human Resources Administrator Colbie Yockey testified that evaluations are placed in the employees' files and have no affect on wages, since the Employer does not award merit increases. Yockey testified that the evaluations might be reviewed when an employee is being considered for a transfer or a promotion. There is no evidence that evaluations have ever been used in this manner, however. In fact, Education Manager Amy Altenberger testified that she never reviewed or requested to review an employee's evaluation when she was contemplating transferring employees from one classroom to another and Development Specialist Frank Mahler testified that he never reviewed employee evaluations when he made transfer requests for DAs interested in transferring to his classroom.

3.) Discipline

The Employer has a fairly specific "Corrective Action Process" in its Policies and Procedures Manual, which consists of various corrective actions including: verbal concerns, plans of assistance, corrective interviews, suspensions, and involuntary dismissals. According to the Policy Manual, a Developmental Specialist may give an employee a verbal concern, which consists of orally communicating to an employee "suggestions, recommendations or observations of specific issues that will be helpful to the employee." The Employer produced typed notes from Center-Based Developmental Specialist Amanda DeBauw documenting the fact that DeBauw had discussed her concerns with a DA on several occasions.

The Development Specialist's Supervisor issues any disciplinary action that goes beyond a verbal concern. There were several examples of "plans of assistance" and "letters of reprimand" in the record and all of these were signed by undisputed supervisors. Although in *some* cases the Development Specialist had informed his or her supervisor about the problem for which the discipline was issued, there was no

indication in the record that any Development Specialist had specifically requested that a “plan of assistance” or a “letter of reprimand” be issued to an employee. Moreover, there were several instances in the record where the Development Specialist’s Supervisor would resolve an ongoing conflict between a Development Specialist and a DA or TA without resorting to formal discipline, but by speaking directly with the parties involved.⁹

The Executive Director and Policy Council must approve any decisions to terminate an employee. In fact, the record reveals that in one instance, Executive Director Wells terminated a Development Specialist’s DA and TA despite the Developmental Specialist’s desire to keep them on her team. There is no indication from the record that Developmental Specialists can unilaterally send employees home, even under egregious circumstances. There is no indication that a Development Specialist has ever done anything more than orally discuss performance problems with a DA or TA and there is no indication that the Employer’s disciplinary process is progressive.¹⁰

4.) Hiring

The Employer’s hiring process is also outlined in the Employer’s policy Manual. The Human Resources Administrator and the department manager screen applications. The Human Resources Administrator or designated manager will then organize a hiring committee comprised of at least: the director or designated manager, a Head Start Parent, a staff member in a similar position to the job opening. If the opening is for a DA or TA position, usually the Development Specialist for that classroom will sit in, but if she or he is unavailable, another Development Specialist or a DA or TA may sit in instead. The Human Resources Director testified that DAs and TAs sit in on hiring committees less than 25% of the time. Interviews are done in a group setting and consist of a standard list of questions that are asked of every candidate.

During the interview, each member of the committee will take turns asking the required questions and each committee member is asked to write down their impressions of the candidate on a preprinted form next to each interview question. After the interview is concluded, the committee will go around the table with each member giving his or her impression of the candidate, or candidates if there are multiple openings. The committee attempts to reach a consensus on the best candidate for the job. Usually, consensus is achieved. After the selection has been made, the

⁹ E.g., When Center-Based Development Specialist Smothers informed Supervisor Altenberger that her DA had been coming in late, Altenberger spoke directly with the DA and remedied the problem. Childcare Development Specialist Michaels informed Supervisor that a DA was using negative language with the children in her class and the Supervisor spoke directly with the DA who left the job shortly thereafter. In another instance, a TA went directly to Supervisor Altenberger and informed her of problems she was having with her Development Specialist in the classroom because of philosophical differences and Altenberger resolved these issues.

¹⁰ The Employer also contends that employees can raise grievances with Development Specialists, but the Employer’s Executive Director, Cynthia Wells, unambiguously stated that although a DA or TA may initially approach a Development Specialist or their supervisor with a complaint, any formal employee grievances go directly to Wells.

designated manager will call the candidate's references and forward the information to the Human Resources department for a criminal background check on the candidate. After the references are called, and the background check is cleared, the candidate's information is sent ahead for final approval. Next in the hiring process, the Executive Director and the Policy Council must approve the candidate before an offer of employment is extended. As stated previously, the Policy Council consists mainly of Early Head Start parents.

When the committee members do not immediately agree on their first choice of candidates, they will discuss the pros and cons of the candidates in an effort to achieve a consensus. The Human Resources Director described a meeting where the Development Specialist favored one candidate and the designated manager favored another. In that situation, after much discussion, the manager decided to go along with the Development Specialist's first choice because the DA candidate was being hired for that Specialist's classroom.

Center-Based Developmental Specialist Jeannette Bethune testified about a situation where consensus was not reached by the committee. In an interview involving multiple candidates, three Developmental Specialists favored a particular candidate, Jeanette Davis, and the three managers at the meeting preferred a different candidate, Morgan Pace. After discussing the candidates' strengths and weaknesses at length, the committee could not come to a consensus. According to Bethune, when it started getting late, Education Supervisor Debbie Buta turned to Amy Altenberger and said, "Well, you're the one with the first position opening, you're the supervisor, you need to make the decision." Amy Altenberger chose Morgan Pace and the meeting was concluded. Shortly thereafter, Altenberger sent an email to the other committee participants informing them that she had checked Morgan Pace's references and hired her for the DA position.¹¹ When Altenberger was asked about that committee meeting at hearing in this case, she remembered that a Developmental Specialist had preferred a different candidate from the one that was chosen, but she did not remember specifics.

5.) Transfer

With regard to employee transfer, the Employer's Personnel and Procedures Manual provides that:

Employees who wish to voluntarily transfer from one position to another may submit a written request to the Executive Director. It is within the sole discretion and judgment of the Executive Director as to whether to grant such transfer requests, based on the current needs of the program.

Testimony regarding the process for employees' transferring from classroom to classroom is limited. Amy Altenberger testified that on one occasion she would not have pushed for the transfer of an employee into a DA position if it had not been for the

¹¹ Thus, Morgan Pace became a DA for Development Specialist Bethune's class, even though she was not Bethune's choice.

Development Specialist's recommendation. Similarly, Center-Based Developmental Specialist Frank Mahler testified that he successfully recommended that three different assistants be transferred to his classroom. Larry Mertsching testified that the Employer had twice followed Childcare Development Specialist Grayce Reed's recommendation to allow a TA to transfer with her to a different classroom. However, Reed testified that when she requested that her TA accompany her on her transfer in January 2002, Supervisor Betty MacTavish told Reed that the TA would not be allowed to transfer because the TA's bilingual skills made her valuable to another classroom. Additionally, Development Specialist Michaels testified that her request to remain part of the same team as her DA and TA was denied.

6.) Secondary Indicia

The Employer also asserts that Secondary indicia also supports finding that the Employer's Development Specialists are statutory supervisors. Specifically, the Employer claims that the fact that Development Specialists are paid approximately two dollars an hour more than the DAs, are in control of a small a classroom budget, and are required to take classes on supervision, supports a finding of supervisory status.

2. **ANALYSIS:**

A. Overview of the Law

As noted above, the Employer contends that its Center based Child and Family Development Specialists and Childcare Child and Family Development Specialists are supervisors as that term is defined by Section 2(11) of the Act while the Petitioner maintains that the Employer has not met its burden of establishing that these employees possess supervisory authority.

The term supervisor is defined in Section 2(11) of the Act as follows:

[A]uthority, 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 routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. § 152(11).

It is well settled that Section 2(11) of the Act is to be read in the disjunctive and that possession of any one of the enumerated indicia establishes supervisory status as long as the performance of the function is not routine or clerical in nature but rather requires a significant degree of independent judgment. *Stephens Produce Co., Inc.*, 214 NLRB 131 (1974); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). "A worker is presumed to be a statutory employee and the burden of proving a worker is a supervisor within the meaning of Section 2(11) of the Act falls on the party who would remove the worker from the class of workers protected by the Act." *Hicks Oil & Hicksgas, Inc.*, 293 NLRB 84 (1989); *Kentucky River Community Care, supra*. "The Board has a duty to employees to be alert not to construe supervisory status too broadly

because the employee who is deemed a supervisor is denied employee rights, which the Act is intended to protect.” *Hydro Conduit Corp.*, 254 NLRB 433 (1981).

The Supreme Court in *Kentucky River* emphasized that the degree, not the kind, of independent judgment is critical with respect to a finding of supervisory status. Put another way, the judgments made by an individual must be of a level of difficulty exceeding that which is merely routine or clerical in nature. However, the complexity of a given task is deemed equally complex, or not, regardless of the identity of the performer. A judgment that would be complex for say, a high school graduate does not become routine or clerical when performed by a Ph.D. Complexity is evaluated on an absolute scale (presumably based on an “ordinary” person), not a scale that varies according to the training, schooling, or experience of the individual judgment maker. See *Phillips Industries, Inc.*, 295 NLRB 717, 735 (1989). Moreover, independent judgment occurs when a supervisor makes decisions independent of consultation with higher management.

B. Assignment and Direction

The Employer asserts that Development Specialists are supervisors because they assign and direct DAs and TAs to work with particular children, to perform certain responsibilities, and to perform lead activities with children. The Employer also asserts that the Development Specialists assign DAs and TAs to specific shifts.

It is clear from the record that the Development Specialists do not assign DAs and TAs to work with particular children. Testimony from Developmental Specialists and DAs clearly show that it is the children who choose their primary caregiver in the classroom and not the Development Specialist. Center-Based Development Specialist Debbie Smothers, Childcare Development Specialist Grayce Reed, Childcare DA Carrie Schneider, and Childcare Development Specialist Carolan Michaels all testified that the children in their classrooms bonded with different adults at the beginning of the year and because of that bond it was decided that those staff members would become the children’s primary caregiver. None of the team members testified that the Development Specialists assign children to specific DAs and TAs.

The Employer also asserts that Development Specialists assign certain tasks or lead activities to the DAs and TAs. The record simply does not support the Employer’s assertion. While it is true that the Developmental Specialists are responsible for writing class curriculum, ensuring that all classroom paperwork is completed, and making sure that the Programs policies are followed in the classroom, none of these responsibilities entails independent judgment in assignment and direction. The voluminous record testimony sets forth example after example of how these classrooms operate. The daily class schedule is generally the same everyday and is posted on every classroom wall. The Employer’s Administrative Policies and Procedures Manual provides detailed instruction sheets of program protocols for everything from how to diaper a toddler to guidelines on releasing children at the end of the day. The Employer’s Best Practices manual further details the Program’s philosophy relating to such subjects as how to speak to a child, give them positive reinforcement, conduct appropriate outdoor play, and how to encourage child-led activities. Additionally, the Galileo Program dictates

which goals the class is focusing on during a particular week. The Board has found that in situations like this where the alleged supervisor's role in directing employees is extremely limited and circumscribed by detailed orders and regulations issued by the Employer, the degree of judgment exercised by the alleged supervisor falls below the threshold required to establish statutory supervisory authority. *Dynamic Science, Inc.*, 334 NLRB 391 (2001).

Moreover, the overwhelming weight of the evidence shows that the Development Specialists, DAs, and TAs have an established routine where members of the team know what needs to be done and fill in where they are needed. Both Development Specialists and DAs testified about this unspoken flow of the classroom. It is clear from consistent testimony from all of the witnesses that have first hand experience in the classroom, that if a person completely unaffiliated with the program were to walk into one of these classes during the day, they would not be able to tell that one of the two or three adults in the room was a Specialist, as each team member performs the same set of responsibilities and the routines developed have obviated the need for direction. It is also well settled that the degree of independent judgment is reduced when directing employees in the performance of routine, repetitive tasks. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002).

The closest assertion of responsible assignment and direction came from the testimony of Employer witness Center-Based Development Specialist Frank Mahler. Mahler testified that he might consider a DA's experience and skill in deciding who should monitor children engaged in a more involved activity such as playing with the water table. Out of the seven staff members to testify, Mahler was the only one to state that he would consider the skills of the DA and the difficulty of the task in making such an assignment. The record, however, reveals that the qualifications and experience of Mahler's assistants are clearly demarcated by their positions, thereby drastically reducing the amount of independent judgment used by Mahler in making such an assignment. Moreover, as Mahler himself testified, his DA and TA each spend approximately 50% of their day escorting children to the bathroom to help them with toileting. Thus, it appears that at any given time Mahler would only have one of the two employees available to help out with a classroom activity. In addition, Mahler acknowledged that his classroom follows the model of the program, in which children effectively lead the activities and the adults' role is to guide or monitor the chosen activities. Under these circumstances, and particularly where Mahler's choices of assignment are generally limited to choosing between a qualified employee and a volunteer who might be either a teenager or senior citizen, I do not find that any such assignment entails the use of independent judgment required for a finding of statutory supervisory authority.

C. Evaluate

The Board has found that the authority to evaluate is not one of the indicia of supervisory status set out in Section 2(11) of the Act. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999). Accordingly, "when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual

performing such an evaluation will not be found to be a statutory supervisor.” *Elmhurst*, 329 NLRB at 536.

It is uncontested that the evaluations filled out by Development Specialists have no impact on employee wages. Although the Employer’s Human Resources Director testified that evaluations might be reviewed as part of the process for considering a possible transfer or promotion of a current employee, there is no indication that evaluations have ever actually been used in this manner. In fact, the two witnesses who testified about being involved in the transfer selection process, Altenberger and Mahler, both affirmed that they had neither reviewed nor requested to review the transferring employees’ evaluations. Indeed, the lack of significance of these evaluations is demonstrated by the fact that a number of Development Specialists have never even filled out an evaluation. Since the Employer has failed to identify or document any specific instances in which Development Specialists’ evaluations had any effect, the Developmental Specialists role in writing employee evaluations does not confer supervisory status. *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002).¹²

D. Discipline

The Employer asserts that Developmental Specialists are supervisors because they have the authority to issue “verbal concerns” and to initiate or recommend a “plan of assistance” to the DAs and TAs in their classroom. The record evidence reveals that verbal concerns are simply conversations that a Development Specialist might have with a DA or TA who is not following proper program protocol. These communications have no affect on the employee’s terms and conditions of employment. It is well established that an employee’s power to point out deficiencies in the job performance of other employees does not establish statutory supervisory authority. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). There is no evidence that documentation of verbal concerns have been placed in the employees’ personnel file or that the Employer has a progressive disciplinary system. Thus, the Development Specialist’s authority to issue verbal concerns does not confer supervisory status.

The record evidence does not support the Employer’s assertion that the Development Specialist’s authority to initiate or recommend a “corrective action plan” rises to the level of effectively recommending discipline. There is no single instance in the record of a Development Specialist recommending that that a Supervisor issue a “plan of assistance” or any other specific discipline to a DA or TA, let alone evidence that the Developmental Specialists’ recommendations are usually followed. Under these circumstances, I find the record does not establish that Development Specialists possess the authority to discipline employees or the authority to effectively recommend such action. See *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998) (Technician In Charge not a supervisor when his role in discipline beyond verbal warnings was merely reportorial); *Waverly-Cedar Falls Health Care Center*, 297 NLRB 390, 392 (1989)

¹² *Habor City Ambulance Squad*, 318 NLRB 764 (1995), cited by the Employer, is distinguishable from this case because in that case the evaluations had a direct impact on the employees’ merit increases.

(“mere authority to issue oral and written warnings that do not alone affect job status does not constitute supervisory status”) enfd. 933 F.2d 626, 630 (8th Cir. 1991).¹³

E. Hiring

The Employer asserts that the Development Specialist's role on the hiring committee confers supervisory status. As discussed above, after an initial screening process by the Human Resources Director and a designated manager, a hiring committee interviews candidates for TA and DA positions and recommends a candidate once it has reached a consensus. The Committee does not have final decision making authority however, as there are several more steps to the hiring process following interviews by the committee. In particular, the manager on the committee must call the candidate's references and the candidate must clear a criminal background check. Only when the candidate is cleared through that process, is the decision forwarded to the Executive Director and the Policy Council for final approval. There is no indication on the record that any Developmental Specialist on the hiring committee has veto power over hiring recommendations. Testimony regarding the decision to hire DA Morgan Pace, however, indicates that managers can override the preferences of Development Specialists when an impasse has been reached.

In consideration of the fact that the hiring team makes recommendations for hire on a consensus basis and the committee does not have final hiring authority, I find that the Employer has failed to show that Development Specialists have supervisory authority to hire. See *Children's Farm Home*, 324 NLRB 61, 64 (1997) (finding team leaders not to be supervisors when recommendations arrived at through consensus of panel as a whole and panel does not have final hiring authority); See also *Fordham University*, 193 NLRB 134, 135 (1971) (the role played by faculty members in governing the University is one of participation in a group determination and does not make them individually supervisors). Here, there is no indication from the record that Development Specialists on the committee possess veto authority. Compare, *Entergy Systems & Service, Inc.*, 328 NLRB 902 (1999).

Venture Industries, Inc., 327 NLRB 918 (1999), cited by the Employer is distinguishable. In *Venture Industries*, it was shown that the manager followed the supervisors' recommendations about 80-90 percent of the time. Initially, *Venture Industries* is not on point because it did not involve a multi-tiered decision-making process. Moreover, unlike *Venture Industries*, there is no record evidence here that the Development Specialists make individual hiring recommendations as the evidence shows that committee recommendations are made on a consensus basis.

¹³ Supervisor Amy Altenberger once issued a corrective action to a Developmental Specialist which listed “failing to properly supervise a DA,” in a long list of items that the Development Specialist needed to improve. The disciplinary letter, however, does not specify what is meant by “supervise” in this context.

F. Transfer

The Employer asserts that because Development Specialists provide significant input into the Employer's decisions to transfer employees, they are statutory supervisors. However, the record evidence does not support the Employer's assertion. Although the Employer has shown that some transfers recommended by Development Specialists have been successful, it has failed to demonstrate that even a majority of transfers endorsed by Development Specialist have succeeded. In fact there is evidence of at least two such requests that were rejected by the Employer. As the Employer's Policy Manual clearly states, it is the Executive Director who makes all decisions regarding transfers. Under these circumstances, the Employer has failed to establish that Development Specialists effectively recommend employee transfers.

G. Secondary Indicia

In support of its position that the Center-Based and Childcare Development Specialists possess supervisory authority, the Employer points to secondary indicia such as the Development Specialists' slightly higher rate of pay, a classroom budget that they are responsible for, and classes on supervision that they are required to take. Absent evidence that individuals possess any of the enumerated indicia of supervisory status in Section 2(11), "there is no reason to consider so-called secondary indicia, such as their titles, the employee-supervisor ratio . . . or pay differentials between them and their departments." *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 427 (1998).

H. Conclusion

Based on the foregoing and the record evidence, I find that the following employees of Early Head Start Family Center of Portland constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All regular full-time and part-time employees of Early Head Start Family Center of Portland, employed by the Employer within its service area, including the Employer's facilities located in North Skidmore, Normandale, Gladstone, Brentwood-Darlington, and Portland Relief Nursery; excluding all substitute and confidential employees, managers, guards, and supervisors as defined in the Act.¹⁴

With respect to the professional's unit, in view of the statutory requirement that the Board may not join professional and nonprofessional employees in a single unit without the desires of the professional employees being determined in a separate vote, I shall, pursuant to the Board's decision in *Sonotone Corp.*, 90 NLRB 1236 (1950), direct separate elections in voting groups 1 and 2. The employees in group 1, the professional employees, will be asked the following two questions on their ballots.

¹⁴ The parties stipulated at hearing that a new facility the Employer intends to open will also be included in the unit.

1. Do you desire to be included in the same unit as nonprofessional employees employed by the Employer for the purposes of collective bargaining?
2. Do you desire to be represented for the purposes of collective bargaining by American Federation of State, County and Municipal Employees, Council 75, AFL-CIO?

If a majority of the professional employees in voting group 1 vote yes to the first question, indicating their desire to be included in a unit with nonprofessional employees, they will be so included. Their vote on the second question will then be counted with the votes of the nonprofessional employees in voting group 2 to decide the representative for the combined bargaining unit. If, on the other hand, a majority of the professional employees in voting group 1 do not vote for inclusion, they will not be included with the nonprofessional employees and their votes on the second question will be separately counted to decide whether or not they wish to be represented by the Petitioner in a separate professional unit.

The ultimate determination as to the appropriate unit or units is based on the result of the election. However, I make the following findings with regard to the appropriate unit.

1. If a majority of the professional employees vote for inclusion in a unit with nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All regular full-time and part-time employees of Early Head Start Family Center of Portland, employed by the Employer within its service area, including the Employer's facilities located in North Skidmore, Normandale, Gladstone, Brentwood-Darlington, and Portland Relief Nursery; excluding all substitute and confidential employees, managers, guards, and supervisors as defined by the Act.

2. If a majority of the professional employees do not vote for inclusion in the unit with the nonprofessional employees, I find the following two units to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

UNIT 1:

All full-time and regular part-time Home-Based and Center-Based Child and Family Development Specialists, Male Involvement Coordinators, Recruitment Specialists, Family Advocates, Community Involvement Specialists, SW Network Coordinators, and Parent Involvement Coordinators, employed

by the Employer within its service area, including the Employer's facilities located in North Skidmore, Normandale, Gladstone, Brentwood-Darlington, and Portland Relief Nursery; excluding all substitute and confidential employees, managers, guards, and supervisors as defined by the Act.

UNIT 2:

All full-time and regular part-time, Childcare Child and Family Development Specialists, Prenatal Development Specialists, Health Specialists, Development Assistants, Teaching Assistants, Cooks, Kitchen Assistants, Dishwashers, Admin. Clerks, Admin. Assistants, Receptionists, Driver/Dispatchers, Bus Drivers, Bus Monitors, Information Systems Managers, and Fiscal Assistants, employed by the Employer within its service area, including the Employer's facilities located in North Skidmore, Normandale, Gladstone, Brentwood-Darlington, and Portland Relief Nursery; excluding all substitute and confidential employees, managers, guards, and supervisors as defined by the Act.

3. DIRECTION OF ELECTION

Separate elections by secret ballot shall be conducted by the Regional Director among the employees in the unit and voting groups 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 and voting groups 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. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election and who retained their status as such during the eligibility period and their replacements. 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 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 American Federation of State, County and Municipal Employees, Council 75, AFL-CIO.

4. 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 their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Officer-in-Charge for Sub-Region 36 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Sub-Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Sub-Regional Office, 601 SW 2nd Avenue, Suite 1910, Portland, OR, 97204-3170, on or before May 11, 2004. 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 filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (503) 326-5387. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

5. NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations 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.

6. 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. This request must be received by the Board in Washington by May 18, 2004.

DATED at Seattle, Washington, this 4th day of May, 2004.

/s/ Richard L. Ahearn

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