UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
REGION 9

EXTENDA-CARE HEALTH FACILITIES, INC.
D/B/A ARBORS AT DAYTON [1]/

Employer

and Case 9-RC-17946

DISTRICT 1199, OH/WV/KY, THE HEALTHCARE
AND SOCIAL SERVICE UNION, SEIU, AFL-CIO [2]/

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

The Employer operates various healthcare facilities in the State of Ohio, including a facility in Dayton, Ohio, that provides care for the aged and infirmed. The Petitioner has 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 Employer's employees at this facility. There apparently is no history of collective bargaining affecting any of the employees involved in this proceeding.

A hearing officer of the Board held a hearing in this matter on October 12, 2004. At the hearing, the parties agreed that the appropriate unit in this case consists of all full-time, and regular part-time, state tested nursing assistants, nurse aides, dietary employees, activities aides, and maintenance employees, employed by the Employer at its Dayton, Ohio facility; but excluding all registered nurses, licensed practical nurses, professional employees, technical employees, business office employees, clerical employees, other employees and all guards and supervisors as defined in the Act. The unit described consists of approximately 80 employees. In agreement with the parties, I conclude that this is an appropriate unit for collective bargaining and will direct an election.

The only issue on which the parties disagree is whether the Maintenance Director, Cheryl Cobb, should be excluded from the Unit. The Employer, contrary to the Petitioner, contends that Cobb is a supervisor within the meaning of Section 2(11) of the Act and therefore

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[1]/ The name of the Employer appears as reflected in the record.

[2]/ The name of the Petitioner appears as reflected in the record.

must be excluded. The Employer, however, did not have any evidence at the hearing to develop a record on the issue of Cobb's supervisory status. Instead, the Employer merely asserted at the hearing that it believed a witness would be unnecessary because it anticipated that the parties would agree that Cobb's eligibility to vote could be subject to challenge. At the hearing, however, the Petitioner did not agree to subject Cobb's vote to challenge and instead sought to put the Employer to its proof regarding Cobb's supervisory status.

As more fully explained below, because the Employer did not seek to offer any evidence to support its position that Cobb is a supervisor within the meaning of the Act, I will include her among the employees eligible to vote in the election. [3]/

II. EVENTS AT THE HEARING

It appears from the record that the parties developed the unit description set forth above as part of an off-the-record discussion prior to the hearing. The Hearing Officer then read the unit description into the record. After the parties stipulated to the appropriateness of the Unit, the Hearing Officer indicated that it was her understanding that the parties had also agreed that Cobb would be able to vote subject to challenge. The Petitioner declined to enter into such a stipulation and took the position that the Employer should be required to prove Cobb was a supervisor within the meaning of the Act. The Employer opined that there was no need to put on any evidence to support its contention, since Cobb could vote a challenged ballot and any determination on her status could be left, if need be, to a later time. The Hearing Officer stated that because the Petitioner did not agree that Cobb could vote subject to challenge, it would be up to the undersigned to decide Cobb's supervisory status. The Hearing Officer further informed the Employer that it was its burden to prove the supervisory status of Cobb and thus far, it had not met this burden. Although the Employer offered its rationale as to why Cobb should be considered a supervisor, the Hearing Officer cautioned that such would not be considered evidence. The Employer did not request any delay in the proceeding to procure a witness on the issue nor did it seek to withdraw from the stipulation on the Unit.

III. ANALYSIS AND DETERMINATION

The burden of establishing that an individual is a supervisor within the meaning of Section 2(11) of the Act rests on the party - in this instance, the Employer - who asserts supervisory status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Thus, mere assertions by a party claiming that an individual is a supervisor within the meaning of the Act, in lieu of presenting actual evidence on the point, will result in a finding that such a party has not met its burden; the consequence being that the individual in issue will be treated as a non-supervisor. *St. Barnabas Hospital*, 334 NLRB 1000, fn. 2 (2001). In initial representation case proceedings, the failure of the party seeking to disenfranchise an employee on the basis of his/her supervisory status to meet its burden results in the employee being considered an eligible voter for purposes of the representation election. See, e.g., *Los Angeles Water and Power Employees' Association*, 340 NLRB No. 146 (November 28, 2003); *Cook Composites and Polymers Co.*, 313 NLRB 1105, 1108 (1994).

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[3]/ In reaching this determination, I have considered not only the arguments made by the parties at the hearing in this matter, but those contained in their post hearing briefs.

In the instant case, the Employer came to the hearing and did not call any witness or present any evidence to support any contention it made with respect to Cobb's supervisory authority. The Employer did not claim at the hearing, nor does it claim in its brief, that it was misled regarding the need to present evidence to support its positions. Moreover, when faced with the supervisory issue and the Petitioner's unwillingness to vote Cobb by challenged ballot, the Employer did not request additional time to procure a witness on this point. Accordingly, I find that the Employer has failed to meet its burden to establish that Cobb is a supervisor within the meaning of the Act.

Based on the forgoing, and the record as a whole, I conclude that Cheryl Cobb is eligible to vote in the election ordered herein as a maintenance employee included within the Unit. [4]/

IV. 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 is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner claims to represent certain employees of the Employer.

5. 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.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time, and regular part-time, state tested nursing assistants, nurse aides, dietary employees, activities aides, and maintenance employees, employed by the Employer at its Dayton, Ohio facility; but excluding all registered nurses, licensed practical nurses, professional employees, technical employees, business office employees, clerical employees, all other employees and all guards and supervisors as defined in the Act.

[4]/ The Employer has not raised any eligibility issue with respect to Cobb other than her supposed supervisory status.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by District 1199, OH/WV/KY, The Healthcare and Social Service Union, SEIU, 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.

A. 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 then 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.

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). 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, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **October 27, 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 (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **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 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.

VI. 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 **November 3, 2004**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 20th day of October 2004.

/s/ Gary W. Muffley

Gary W. Muffley, Regional Director
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Classification Index

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