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

In the Matter of LIFELINKS, INC. Employer and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 509 Petitioner	Case 1-RC-21975

DECISION AND DIRECTION OF ELECTION[1[1]]

The Employer, Lifelinks, Inc., is a nonprofit human services agency that supports adults with developmental disabilities and their families in day, residential, and community settings. The Employer operates facilities at 22 separate locations in Massachusetts.[2[2]] The Petitioner

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[1[1]] 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. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby 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 matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 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.

[2[2]] 145 Lexington Avenue, Lowell (the Employer's corporate office); 55 Middlesex Street, North Chelmsford; 79A Groton Road, North Chelmsford; 79B Groton Road, North Chelmsford; 5 Judith Road, Chelmsford; 28 Russell Road, North Chelmsford; 285 Nesmith Street, Lowell; 1904 Middlesex Street, Lowell; 87 Bedford Avenue, Lowell; 50 Cidalia Drive, Lowell; 158 Columbia Road, Lowell; 11 Locust Street, Lowell; The Woodland Inn, 1581 Varnum Avenue, Lowell; 101 Varnum Avenue, Lowell; 1 Parham Road, Tyngsboro; 4 Pondview Lane, Tewksbury; 1 Gerrish Avenue, Dracut; 63 Gilmore Street, Dracut; 57 Nancy Avenue, Dracut; 145 Newbury Street, Dracut; 261 Old Marsh Hill Road, Dracut; and 210 Parker Street, Lowell.

seeks to represent a unit consisting of all full-time and regular part-time and per diem[3[3]] nonprofessional employees, including direct care staff, case managers, drivers, CNAs, LPNs, developmental specialists, direct care self-directed team, independent living case managers, and part-time intermittent direct care workers,[4[4]] employed by the Employer at its 22 Massachusetts locations. The positions in dispute include the independent living case managers and the self-directed teams. The Employer argues that the independent living case managers are ineligible for inclusion in the unit because they are professional employees, and that self-directed team members are ineligible because they are statutory supervisors.

I find that the Employer has not met its burden of establishing either that the independent living case managers are professional employees, or that the self-directed team members are statutory supervisors. Therefore, I find that both the independent living case managers and the members of the self-directed teams are eligible for inclusion in the bargaining unit of nonprofessional employees sought by the Petitioner.

INDEPENDENT LIVING CASE MANAGERS:

Facts

The Employer's chief executive officer is Yvonne LaGarde, and its director of community services is Cheryl Follien. Follien oversees the independent living services program, which consists of six case managers who work in the Greater Lowell area. Follien has served in her current position for 16 of the 19 years that she has worked for the Employer.

1. The work of the case managers:

The independent living case managers work as a team, serving, together with Follien, 48 mildly retarded clients who live independently or semi-independently in the community. Each case manager has his or her own caseload, and is also required to be familiar with other case managers' clients in order to be able to cover for them.

According to the job description for the position, the case managers support, advocate for, and assist their clients in acquiring and maintaining government benefits, including social security, transitional assistance, subsidized housing, Medicaid/Mass Health, fuel assistance, and Medicare. Such assistance may include helping a client appeal an adverse determination with respect to their eligibility for such benefits. Case managers are expected to develop relationships with the clients' health care providers, therapists, housing managers, family members, and others

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[3[3]] The parties stipulated that per diem employees would be eligible for inclusion in the unit if they regularly averaged four hours or more of work per week during the quarter prior to the election eligibility date, in accordance with the Board's per diem standard. *See* Brattleboro Retreat, 310 NLRB 615, 627 (1993).

[4[4]] At the conclusion of the hearing, the Petitioner asserted that it no longer sought to represent classroom instructors, rehabilitation aides, or certified occupational therapy aides, and withdrew its objection to the inclusion of part-time intermittent direct care workers in the unit.

who support them in the community. They link clients to care providers and therapists, help them organize their daily routines, support them in work, day service, or volunteer positions, and, when needed, provide them with transportation. They also teach clients about identified and observed skill deficits (i.e., money and budgeting, shopping, cooking, nutrition, household tasks, and transportation), support them in making decisions about their lives, and provide informal counseling to assist them in self-determination. Case managers are expected to attend and participate in case conferences, develop plans and goals, and complete needs assessments and other paperwork.

Case managers are responsible for monitoring the safety and wellbeing of their clients, reporting any issues to their supervisor, and following emergency protocols in crisis situations. In the performance of their jobs, they are called upon to discern whether a particular client behavior was triggered by a one-time stressor or by a pattern of behavior requiring professional treatment. They must also evaluate whether a client's complaints of physical distress are, in fact, physical or psychological in origin, and then they must figure out which service will be most effective in alleviating the client's discomfort. In evaluating the nature (physical or psychological) of the distress, the case managers use established survey questions to assist them.[5[5]]

Follien meets with the team of case managers for two hours weekly to review cases. During these meetings, the case managers discuss all their cases and Follien makes recommendations. In addition, she reviews each case manager's cases on a quarterly basis, and is responsible for training them, teaching them how to write client assessments, quarterly reports, and progress and case notes. During their orientation and training period, the independent living case managers shadow other case managers, learn to write accurate case notes, and learn about various government benefit programs. They become independent after about six months of training.

2. Requirements of the position:

The position description for the independent living case manager position requires a bachelor's degree from a four year college, five plus years of experience working with individuals with developmental disabilities, or a combination of both.[6[6]] The bachelor's degree requirement was instituted by the Employer within the past three to four years. The incumbents, none of whom has a bachelor's degree in a related field, were grandfathered in with respect to the bachelor's degree requirement, based on their experience. The Employer's organizational chart indicates that three of the incumbents have associate's degrees in arts ("AA"), and one has a bachelor of science degree. The remaining two case managers have certificates of human service (CHS), which they earned by completing a one-year program at Middlesex Community College.

[5[5]] The Employer maintains that in performing these aspects of their work, its independent living case managers routinely exercise independent judgment and discretion.

[6[6]] Follien testified, more specifically, that the degree requirement is for a bachelor's degree in a health-related field, or for coursework in psychology. She was uncertain of the specific course requirements.

Follien testified that she was unsure whether the Employer's organizational chart accurately reflects the incumbents' educational background. Shola Odujun, one of the case managers, is listed as having an associate's degree; however, Follien testified that she believes Odujun has a bachelor's degree, and has been accepted into a master's program, both in hotel management. Similarly, although case manager Jane Castle is listed on the organizational chart as having an associate's degree in arts, Follien testified that she believes that Castle has a bachelor's degree in an unrelated field. Case manager Dean Douglas, who is listed as having a bachelor of science degree, apparently has taken coursework in psychology.

Although the Employer maintains that, since it instituted the bachelor's degree requirement for this position, it has consistently required that new hires meet the requirement, it appears that none of the incumbents was hired after the requirement was imposed. Follien, the case managers' direct supervisor, is a licensed medical technologist. Although she does not have a bachelor's degree, she has many years of experience in the field.

Neither the Employer nor the Commonwealth of Massachusetts requires independent living case managers to be licensed or to belong to a professional organization. However, within the last three years, the State Department of Mental Retardation (DMR) began requiring regulation and quality reviews of their work.

3. Wages and hours:

Except for Follien's testimony that the independent living case managers are paid in the same wage range (and receive the same benefits) as other employees of the Employer, the record contains no evidence of how much they earn. They receive mileage reimbursement because they use their own cars to perform their job duties.

Although independent living case managers work about 40 hours a week, their hours conform to the needs of their clients, and, therefore, are not standardized.[7[7]] They spend about 80 percent of their time outside the office, which enables them to share one office, each using it about one day per week. The case managers have appointments to visit clients at specified times each week, but the nature of their work requires them to be flexible and to reschedule appointments and reprioritize when a client issue arises that requires their immediate attention.

No independent living case manager has progressed to another position within the Employer, and other employees of the Employer do not work as independent living case managers when a case manager is not able to perform his or her duties. Rather, as noted above, the case managers' colleagues are expected to be familiar with their cases in the event that they might need to cover for them in their absence.

[7[7]] They may, for example, need to take a client in for a medical procedure on a Friday night.

Analysis

The Employer argues that the independent living case managers are professional employees, and are, therefore, ineligible for inclusion in the unit sought by the Petitioner.[8[8]] The Petitioner contends that they are nonprofessional employees. I find that the six independent living case managers are nonprofessional employees and that they should be included in the unit found appropriate.

Section 2(12) of the Act defines the term professional employee as (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes. The Act defines a professional employee in terms of the work performed rather than in terms of individual qualifications. Although educational background does not control, the Board examines educational background for the purpose of deciding whether the work of the group satisfies the "knowledge of an advanced type" requirement. If a group of employees consists primarily of individuals with professional degrees, the Board may presume that the work requires "knowledge of an advanced type." Conversely, if few in the group possess the appropriate degree, it follows that the work does not require the use of advanced knowledge. Avco Corp.[9[9]]

The Employer seeks to analogize between the social service representatives who were excluded from a service unit in Duke University,[10[10]] and the independent living case managers in the instant case. I find Duke to be distinguishable, however. In Duke, the Board did not make a determination about whether the social service representatives were professional employees, but rather, determined that they should be excluded from the unit sought "as either technical or professional" employees. The Board in Duke explained that it had reached this conclusion because the social service representatives were all college graduates with training and experience in the general field of social services, and were performing work in their field of study. Id. at 473. None of the independent living case managers here has a college degree and training and experience in a field related to his or her position. Moreover, based on the record, it appears that none of the incumbents in the instant case is performing work in his or her field of study. For these reasons, I find that the independent living case managers in the instant case are not comparable to the social service representatives in Duke.

[8[8]] The act mandates 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. Sonotone Corp., 90 NLRB 1236 (1950).

[9[9]] 313 NLRB 1357 (1994).

[10[10]] 226 NLRB 470 (1976).

I find Express-News Corp.[11][11] to be more instructive in my analysis. In that case, the Board affirmed a regional director's determination that newspaper journalists are not professional employees within the meaning of the Act. In upholding the regional director's determination, the Board identified the critical issue as being whether the journalists' work met the requirements of Section 2(12)(a)(iv), which requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital. The Board noted that, although it might be desirable for a journalist to have knowledge of the type described in that clause, the work generally did not require such knowledge. The Board also noted that, although the employer in Express-News had a few employees with advanced degrees in journalism, its news department was not predominantly composed of such individuals, and, thus, did not appear to require that the journalists' knowledge be customarily acquired through specialized study.

In the instant case, a bachelor's degree is not a prerequisite for the job, since applicants are permitted to substitute related experience for a degree. In fact, while most of the incumbents have a substantial amount of experience in the field, the evidence indicates that not one of them has a bachelor's degree in a related field. Thus, as in Express-News, the evidence indicates that the position of independent living case manager does not require the kind of knowledge customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning. For these reasons, I find that the independent living case managers are not professional employees within the meaning of Section 2(12) of the Act, and that they should be included in the unit found appropriate. See Community Health Services.[12][12]

SELF-DIRECTED TEAMS:

Facts

The Employer's group homes services division, directed by Kelly Hart, provides residential services to people with mental disabilities through its operation of 19 group homes. Kelly DuBois is the assistant director of the division.

Sixteen of the homes operated by the division are traditional managed group homes, managed by group home managers. For about seven years, the remaining three homes have been managed by self-directed teams. These teams manage the homes collectively by delegating among their members various administrative responsibilities which, in a traditional group home, would be the responsibility of the group home manager. The three self-directed team homes are all located in Lowell, Massachusetts, at 87 Bedford Avenue, 158 Columbia Road, and 1904 Middlesex Street. Two to five individuals live in each home, depending on its size. The self-directed team members do not live at the homes, although, working in shifts, they provide 24-hour coverage.

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[11][11] 223 NLRB 627 (1976).

[12][12] 259 NLRB 362 (1981).

At the time of the hearing, the Employer employed 14 employees as members of self-directed teams: six at Bedford Avenue, three at Columbia Road, and five at Middlesex Street.[13[13]] With the exception of relief staff, who are called upon (as needed) multiple times each week to fill in for absent team members, no direct care staff is employed on a regular basis at the self-directed team homes. A facilitator, Thompson Stephens, is responsible for guiding the self-directed teams and making sure that they follow state regulations.[14[14]] No house managers are employed at these homes.

All but one of the team members work 40 hours per week. They spend 35 or more of those hours providing direct care for residents in the self-directed team homes, doing laundry, cooking, distributing medication, vacuuming, cleaning, taking out trash, and checking on the residents every 30 minutes to make sure there have been no incidents. The team members also spend at least two hours per week in a mandatory staff meeting, and two to three hours per week on non-direct care work.

At their weekly meetings, team members discuss and vote on issues related to the management of the home, following Roberts Rules of Order. In addition to the Employer's personnel policies, team members are guided by a document written approximately seven years ago by facilitator Thompson Stephens, together with members of the self-directed teams, entitled, "An Introduction to Self-Directed Teams." This document describes the differences between the managed team and the self-directed team models, and the principles that should guide the self-directed team, some of which are respect, team agreement, and common vision.

1. Self-directed team positions:

A team member's non-direct care duties depend on the additional team responsibilities (s)he assumes. After three months working on a self-directed team, a member is eligible to take on additional responsibilities by assuming one or more of the following positions: secretary, household manager, financial officer or comptroller, fire and safety officer, advocate, and medications manager. To apply for one of these positions, a team member notifies others on the team of his or her interest and intention to apply for the position. The team then interviews the applicant and determines whether (s)he is suited to the position. If the team is satisfied with the interview, the secretary will offer the position to the team member.

According to the job description provided by the Employer, the <u>secretary</u> of the self-directed team is responsible for providing information to other team members and for acting as administrator of the home.[15[15]] His duties include maintaining and posting work schedules;[16[16]]

[13[13]] At the time of the hearing, there were five vacancies on the self-directed teams.

[14[14]] The facilitator attends regular supervisory meetings. Members of the self-directed teams do not normally attend these meetings, although occasionally the secretary will attend. The facilitator's status is not at issue in this case.

[15[15]] All of the job descriptions provided for members of the self-directed team were created by team members approximately seven years ago.

maintaining records of staff usage of, and receiving staff requests for, paid time off; finding coverage when a team member is out; completing and submitting various paperwork concerning training travel, relief vouchers, and time sheets to headquarters; maintaining an updated "to do" list for the house and reporting at team meetings what has and has not been accomplished; taking minutes at team meetings; bringing agenda priorities to the attention of the facilitator; maintaining and updating the message book; filing data, notes, and incident reports about individuals living in the home; and training new staff on administrative and personnel procedures.

The comptroller of the self-directed team maintains the checking account for the home, makes sure the team has sufficient funds, that the funds are spent consistent with Employer and State policy, and that expenditures are documented. The comptroller develops a budget; prepares for audits and responds to problems raised by audits by the Employer's financial department; reviews weekly receipts; monitors staff use of household money; certifies new staff to permit them to manage money on the team; and oversees use of individual and house money by relief workers. The comptroller also manages the personal money of the individuals living in the home by maintaining accounting records for them; making sure they have enough money and that it is being used correctly; and providing reports about how an individual's money is being spent to families, the Employer, and DMR.

The self-directed team's medications manager makes sure that the individuals living in the home have medications available as prescribed, and that the medication is dispensed as required.[17][17] The medications manager's duties include, but are not limited to, maintaining an updated medication manual; making sure that medication sheets are matched to prescriptions and doctors' orders; reviewing each individual's medications at team meetings; training new staff on medication procedures; reviewing medication errors; and taking residents to medical appointments. All direct care staff and self-directed team members must be licensed to dispense medication to residents and must follow medication administration procedures (MAP).

The household manager is responsible for making sure that the home has enough food and household supplies, and that the building is clean and properly maintained. The household manager makes sure the home has a menu that meets the nutritional needs of the residents; develops and updates shopping lists and purchases the items on the list; and makes sure there are enough cleaning supplies, light bulbs, batteries, toilet paper, trash bags, and other household items. In addition, the household manager develops a cleaning schedule for the house; ensures that towels and sheets are laundered regularly, that cleaning equipment works properly, that the house or appliances get needed repairs, and that trash does not collect in the house or on the property; trains new staff in household procedures; and makes sure that the van is clean, gets oil changes, and that its annual inspection sticker is renewed.

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[16][16] The secretary prepares the work schedule by filling in the shifts that particular individuals are working.

[17][17] The job description contained in the record for the medications manager is for the Columbia Road home. There was no testimony in the record to indicate that the job duties of the medications manager at that location differ from those at the two other self-directed team locations.

The advocate must be familiar with the record of the individual (s)he represents and for updating it as necessary; attends annual individual support plan (ISP) meetings and makes recommendations for developing and implementing goals; writes and disseminates quarterly progress reports; makes sure the individual has appropriate clothing and maintains proper grooming and hygiene; helps the individual monitor his or her nutrition and health; assists in developing a daily routine for the individual; and attends medical appointments with the individual.

The fire and safety officer is responsible for ensuring the safety of both staff and residents at the home by holding fire drills and documenting the results; being trained in fire safety; teaching staff how to use the fire alarm; making sure that designated meeting and evacuation sites are posted, and that fire extinguishers have been inspected. The fire and safety officer is also required to make sure that accurate emergency numbers are posted near all phones in the home; that the home has emergency procedures in place; that staff know where the fuse box, water, and power shutoffs are located; and that the DMR-required safety plan is accurate, available, and accessible.

The Employer allots self-directed team members a fixed number of "non-direct" hours per week, during which they are not required to be in the home performing direct care duties. The number of hours each member is allotted corresponds to the additional duties (s)he performs on the team. For example, the secretary is allotted three non-direct hours, while the household manager is only allotted two.[18[18]] During their weekly allotted non-direct hours, team members are permitted to work from home or be on the road, completing paperwork and performing other non-direct care administrative functions.

2. Hiring and removing self-directed team members:

If a vacancy exists on one of the self-directed teams, the secretary either informs the facilitator or contacts the Employer's human resources department directly, to make sure that there are applications on file that meet the criteria for the vacant position. Human resources screens the applicants to make sure they have the appropriate credentials (they must either have a human services certificate, have completed 21 credits in psychology coursework, or be in the process of completing that coursework) and conducts a Massachusetts CORI (Criminal Offender Record Information) check. If the applicant survives the screening, human resources forwards the application to the team, which reviews it and sets up an interview.

The team interviews the applicant together, and then votes on whether to offer him or her a position on the team. In making such decisions, the team follows Roberts Rules of Order: one member makes a motion, another one seconds the motion, the team discusses the application, and if they agree that the person is suited to be on the team, they vote. The facilitator does not vote. If a majority of those voting vote in favor of offering the position to the applicant, the secretary contacts the individual, tells him or her to contact human resources, and offers him or her the position.

[18[18]] The record did not contain a breakdown of the number of non-direct hours allotted to each position.

In response to a vacancy at the Bedford Avenue location about four months prior to the hearing, human resources sent over one application. Similarly, human resources sent over two applications for multiple vacancies at Columbia Road, and two applications for two vacancies at Middlesex Street. The Bedford Avenue applicant was offered the position and accepted the offer, but did not show up for work. The applicants at Columbia Road were interviewed, but the team opted not to offer either one a position. Both of the applicants at Middlesex Street were selected. At the time of the hearing, there were two vacancies at Columbia Road and three at Bedford Avenue. According to the record, the Employer has always honored the team's hiring and other decisions.

Similarly, the self-directed team is empowered to remove a member from one of the six positions on the team if (s)he is not performing the duties of that position satisfactorily, or to remove a member from the team entirely. A member may be removed from the team for not pulling his or her weight, or for engaging in behavior that violates the standards of conduct set forth in the Employer's personnel policies.[19[19]] If such an issue arises, it is discussed by team members at a staff meeting. If the team determines that the individual's conduct supports his or her removal from the team, the team writes a letter recommending the staff member's removal from the team, which it forwards to human resources. Removal from the team does not necessarily result in discharge from the Employer, as the team does not have the authority to terminate an employee from the Employer's employ. In fact, if a staff member is not working out as a member of the self-directed team, other members of the team can recommend to human resources that the individual be transferred from that house to another of the Employer's facilities. There is no evidence in the record, however, with regard to how much weight, if any, such a recommendation carries with the Employer. Similarly, while the team can recommend one of its members for promotion to a managerial position at another Employer home, there is no evidence to indicate whether such a recommendation carries weight with the Employer.

3. Disciplining self-directed team members:

Members of the self-directed team also have the authority to discipline team members, although there is no evidence that such discipline results in any adverse consequences for the team member in question.[20[20]] If an issues arises that may warrant discipline, it will be discussed by the team in a staff meeting. The secretary summarizes each team member's contribution in a disciplinary letter that is signed by the secretary (and sometimes by other team members) and is then forwarded to human resources to be put in the individual's personnel file. While evidence was presented that the self-directed teams have voted to take away a member's additional duties (such as those of household manager or secretary), there was no evidence presented that they have ever suspended or terminated an employee.

[19[19]] The Employer's personnel policies are distributed to all employees, including members of the self-directed teams. The policies set forth a list of standards of conduct which may serve as a basis for disciplinary action.

[20[20]] The record contains no evidence of what weight, if any, disciplinary and other actions taken by the self-directed teams are given by the Employer.

If a member of the self-directed team has a complaint about another team member's work performance, the team will discuss the issue at a staff meeting and try to iron out any differences between the staff members. Nicholas Bull, the secretary at Bedford Avenue, testified that a team member might, for example, bring to the team a complaint about another staff member's inadequate communication with other staff during their shift. The team will discuss and attempt to resolve the problem, with all team members present, with the goal of trying to help team members to work together better so that the home can operate more effectively.

The Employer requires a review of employees' performance six months after they are hired, and annually thereafter. The self-directed teams conduct the performance reviews of team members, with the assistance of the facilitator. When it is time for a team member's review, the facilitator distributes evaluation forms (which consist of questions drafted by the team members) to each member. Each member completes the form and returns it to the facilitator, who compiles the information and presents it to the team member who is being evaluated. The purpose of these performance reviews is not to determine whether a member is eligible for a wage increase, but rather, to demonstrate the individual's performance level. There is no evidence in the record to indicate that members of the self-directed team make recommendations with respect to wage increases in connection with their evaluations of fellow team members. The Employer's personnel policies indicate that salary increases are not associated with performance appraisals, and are granted only if the Employer receives increased funding or has a budget surplus. Members of the self-directed teams all receive their wage increases from the Employer at the same time.

4. Wages and benefits of self-directed team members:

The record was inconsistent as to what, if any, additional compensation self-directed team members receive for assuming additional job duties. Thompson Stephens, the facilitator of the self-directed teams, testified that team members earn between $12. and $13.75 per hour, depending on the additional responsibilities they assume. He testified that the household manager and advocate earn $13.75 per hour and that, as a group, self-directed team members earn more than other employees. Richard Gabdibe, the household manager at Bedford Avenue, testified, however, that when he joined the self-directed team, his salary went from $11 to $11.19 per hour, where it has remained since he joined the team more than two years ago. He denied that he receives a stipend for serving as household manager. Nicholas Bull, secretary at Bedford Avenue, did not testify to the amount of his base salary, but testified that he earns a stipend of about 30 cents per hour for performing his secretarial duties.

The Employer's personnel policy sets forth benefits for hourly employees, including members of the self-directed teams. Members of the self-directed team are entitled to the same vacation, sick and personal leave, and other benefits as other hourly employees. In addition to other employee benefits, the Employer budgets funds to recognize and show appreciation for employees' good work. Examples of awards employees receive may include gift certificates or being taken out to lunch. These awards are distributed to employees at the discretion of the supervisors.

In the self-directed team homes, team members can recommend to the facilitator that a particular employee receive a token of recognition by being taken out to lunch or some other small reward. Neither the team nor the facilitator has the authority to give an employee a monetary award. Rather, if team members recommend to the facilitator that a particular team member receive an award, the facilitator can forward the recommendation to his supervisor, the director of group homes, who has the authority to determine what kind of reward, if any, is appropriate.

Recently, certain employees who were eligible for a bonus were given either a laptop computer or a monetary bonus. Although Thompson Stephens, the facilitator, was offered a laptop, no members of the self-directed team were given laptops or bonuses.

5. Time and attendance of self-directed team members:

If a team member is unavailable to work, the secretary of the self-directed team is authorized to find a temporary replacement. The Employer maintains a pool of part-time intermittent employees who are used for this purpose.[21[21]] In addition, the Employer contracts with outside relief agencies who provide staffing when part-time intermittent staff cannot meet coverage needs. The secretary is expected to first ask a team member to fill a vacancy. If a team member is unavailable, a Lifelinks part-time intermittent employee will be sought, and finally, if necessary, help will be sought through one of the designated relief agencies. In the past, any member of the self-directed team was authorized to call for relief staff. However, because of past abuses by team members in filling vacancies, currently the secretary is the only team member who is authorized to call in replacement or relief staff.

Relief staff who fill in for an absent self-directed team member only perform direct care work. They do not perform any of the additional duties (e.g., household manager or secretary) for which the absent team member is usually responsible. Instead, the remaining team members temporarily absorb the absent team member's additional duties. Members of the team instruct the relief staff person as to what tasks (such as laundry or vacuuming) need to be performed. Relief staff can refer to a relief staff manual, developed by the self-directed teams, for information about the operation of the house in which they are working.

If the team is happy with the work of a particular relief staff person or part-time intermittent employee, it can request that person again the next time it needs additional staff. Similarly, if the team is unhappy with a particular relief staff person's performance, it can request that that individual not be sent to the home again.

Members of the self-directed team work out their vacation schedules among themselves, apparently without requiring management approval. They simply make sure that the functions of the absent team member will be performed in their absence. This is in contrast to other employees who, according to the Employer's personnel policies, must apply to use their vacation leave and get prior approval from a supervisor. Similarly, the self-directed team is authorized to approve up to twelve hours per week of overtime without seeking higher level authorization. In

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[21[21]] The parties stipulated to the inclusion of part-time intermittent employees in the unit.

the event that more than twelve hours of overtime are being assigned, the self-directed team must get prior approval from the facilitator. In the managed group homes, employees must get the manager's approval for overtime.

Analysis

The Employer argues that the members of the self-directed teams are supervisors within the meaning of Section 2(11) of the Act. The Petitioner, by contrast, argues that the Employer has failed to meet its burden of establishing the supervisory status of the self-directed teams, and that the team members are, therefore, eligible for inclusion in the bargaining unit. I find, in agreement with the Petitioner, that the Employer has failed to establish the supervisory status of the self-directed teams and for that reason I include them in the unit sought by Petitioner.

Pursuant to Section 2(11) of the Act, the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. Chicago Metallic Corp.[22[22]] The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. New Fern Restorium Co.[23[23]] The burden of proving supervisory status rests on the party alleging that such status exists. NLRB v. Kentucky River Community Care[24[24]] The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. Quadrex Environmental Co.[25[25]]

The Employer does not argue that each member of each self-directed team possesses the supervisory authority conferred by Section 2(11) of the Act. Rather, the Employer argues that supervisory status should be conferred upon all members of the self-directed teams because, collectively, they perform tasks such as hiring and disciplining one another, and review one another's performance, without input from human resources.[26[26]]

[22[22]] 273 NLRB 1677, 1689 (1985).

[23[23]] 175 NLRB 871 (1969).

[24[24]] 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

[25[25]] 308 NLRB 101, 102 (1992).

[26[26]] Inasmuch as I have determined that the self-directed teams do not, individually or collectively, possess any of the indicia required to confer supervisory status under the Act, I do not need to reach the question of whether supervisory status can be conferred upon a group of employees, as a team, where no individual member of the team possesses complete discretion with respect to any of the indicia set forth in Section 2(11) of the Act.

1. Hiring:[27][27]

In making its argument, the Employer contrasts the instant case to Tree-Free Fiber Co.,[28][28] in which the Board reversed the administrative law judge, finding that employees working in the classification of team leader were not statutory supervisors. I conclude, however, that Tree Free Fiber provides support for my determination. The team leaders in Tree-Free Fiber worked side-by-side with members of their teams, carrying out production or maintenance duties while also carrying out a leadership role on the team. The administrative law judge determined that the team leaders met several of the indicia of supervisory authority. The Board rejected the administrative law judge's determination that the team leaders exercised supervisory authority in hiring on the grounds that the core hiring team (undisputed management representatives) would weigh an applicant's essential objective qualifications for employment, and could reject an applicant at the initial stage, without referring him or her to the team leaders. If the core hiring team referred a candidate to the team leaders, the team leaders would interview him or her, and would relay the result of the interview, typically simply a statement of "yes" or "no," on the question of whether to hire the applicant. The Board concluded that, given the employer's corporate emphasis on the team production concept, it appeared that the team leaders' evaluative role was limited to deciding whether the candidate was compatible with existing team members in the department. It found that compatibility recommendations by team leaders – or team members – are insufficient to support a finding of hiring authority within the meaning of the Act.[29][29]

As in Tree-Free Fiber, here the Employer's human resources department screens job applicants to make sure they have the appropriate credentials and only if the applicant survives the screening, does human resources forward the application to the team.[30][30] In addition, the record in the instant case contains no specific evidence as to the factors that guide the self-directed team members' evaluation of a particular applicant. Like the team leaders in Tree-Free Fiber, the self-directed teams in this case have at least twice recommended rejection of an applicant, and management has never disagreed with their recommendation. Nevertheless, the Board in Tree-Free Fiber found that the team leaders' hiring role was insufficient to confer

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[27][27] Although I will discuss each indicia of supervisory status in turn, I note that team members spend the vast majority of their working hours caring for residents by performing the same kinds of direct care tasks that employees in the managed group homes (who are included in the unit sought by the Petitioner) perform on a daily basis. The record indicates that members of the self-directed teams spend only about ten percent of their time performing the functions that the Employer maintains confer supervisory status upon them. In addition, none of the functions detailed in the job descriptions provided by the Employer involve duties that would be considered supervisory in nature.

[28][28] 328 NLRB 389 (1999).

[29][29] Id. at 391.

[30][30] I note that in each of the three instances of hiring for the self-directed teams described in the record, human resources provided the teams with the same number of applications as there were vacancies, thus limiting the discretion of the team members in their selection of applicants.

supervisory status on them. The evidence indicates that, like the team leaders in Tree-Free Fiber, the members of the self-directed team essentially make a compatibility recommendation when they interview a candidate for a position on the team, determining whether a particular applicant will "be a good fit" with other members of the team. As noted earlier, such a recommendation is insufficient to confer supervisory status.

2. Removal:

Similarly, the self-directed teams' authority to remove a member from their team constitutes a compatibility recommendation which, by itself, is not sufficient to confer supervisory status. There is no evidence that a team's recommendation that a member be removed from the team affects that individual's employment status because there is no evidence that removal from a team constitutes discharge from the Employer. Thus, the fact that the self-directed teams have the authority to remove one of their members from the team does not establish that the teams' authority is supervisory in nature.[31][31]

3. Discipline:

The Employer also relies on the Board's determination in Tree-Free Fiber concerning the team leaders' exercise of supervisory authority with respect to disciplining members of their teams. In Tree-Free Fiber, the Board found, once again contrary to the administrative law judge, that the team leaders did not exercise supervisory authority with respect to disciplining members of their teams because the human resources manager was involved in, and managed, every disciplinary action from the beginning to its conclusion.[32][32] Although the facts of Tree-Free Fiber with regard to the team leaders' disciplinary authority are distinguishable from those in the instant case (because of the apparently limited involvement of human resources in the team's disciplinary decisions), I find that the self-directed team members' authority with regard to disciplining other team members does not confer supervisory status upon them because there is no evidence that they are empowered to do anything more than bring the fellow team member's and the Employer's attention to substandard performance, without any recommendations for future discipline. Passavant Health Center;[33][33] see also Concourse Village, Inc.[34][34] (finding that superintendents were supervisors where they exercised the authority to discipline employees and the warnings had a definite and severe effect on employment status) and Ohio Masonic Home, Inc.[35][35] (finding that the issuance by charge nurses of written warnings that do not

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[31][31] The Employer argues that the self-directed teams may recommend the transfer of team members, and/or their promotion, to other Employer facilities. The record is devoid of any evidence of such instances, and is insufficient to establish that such recommendations confer supervisory status upon the self-directed teams.

[32][32] Id. at 392.

[33][33] 284 NLRB 887, 889 (1987).

[34][34] 276 NLRB 12, 13 (1985).

[35][35] 295 NLRB 390, 393 (1989).

automatically affect job status or tenure do not constitute supervisory authority). For these reasons, I find that the disciplinary authority of the self-directed teams is insufficient to confer supervisory status on them.

4. Evaluations:

The Employer argues that the self-directed teams' authority to evaluate other team members' job performance is sufficient to bestow supervisory status on them. I disagree. In First Healthcare Corp. d/b/a Hillhaven Kona Healthcare Ctr.,[36[36]] cited by the Employer, the Board reversed the acting regional director when it determined that licensed practical nurses and registered nurses were supervisors because of their role in preparing evaluations of certified nursing aides (CNAs) that directly affected the CNAs' employment status. The Board's conclusion in First Healthcare was based on evidence that the LPN or RN, without consulting higher-level management, was expected to assign a numerical score to the employee being evaluated, on each of ten factors, and to provide a brief written comment on each factor. Depending on the average overall rating, the employee being evaluated was eligible for up to a six percent pay increase. If his or her rating fell below a 3.0 overall, the employee would be placed on probation and evaluated again in 30-60 days, and could be terminated if his or her performance did not improve.[37[37]]

In contrast, the facts of the instant case make it clear that the performance reviews done by the self-directed team members in no way affect the employment status of the individuals being evaluated. The Employer's personnel policies clearly state that wage increases are not associated with performance appraisals, and are granted at the Employer's discretion. This is consistent with the rest of the record with respect to the evaluative role of the self-directed teams in connection with performance appraisals. For these reasons, I find that the role of the self-directed teams in evaluating the performance of other team members is not sufficient to confer supervisory status upon them because such evaluations are not tied to wage increases or to employment status.

5. Scheduling:

The Employer argues that the self-directed team members' authority with respect to scheduling (including the scheduling of vacations), approval of overtime, recommendation of bonuses, and the assignment of work, all are indicative of their supervisory status. I find that, in each of these instances, the team members' performance of his or her duties is routine rather than requiring the exercise of independent judgment, and, therefore, that it does not confer supervisory status on them.

With respect to scheduling, the evidence indicates that the secretary of the team is responsible for slotting team members into shifts, and for making sure that the job duties of all team members are covered when a team member is absent. The record contains no evidence that

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[36[36]] 323 NLRB 1171 (1997).

[37[37]] Id. at 1171.

team members are empowered to decide, with respect to any other team member, whether they will be required to forego a planned vacation when another team member has one planned at the same time, or that any team member may require another member to work a night shift when that individual would prefer not to do so.

6. Approval of overtime, recommendation of benefits, assignment of work, and calling in replacements:

The Employer maintains that the team secretary's authority to approve overtime for team members, without seeking management approval, and the team's power to recommend bonuses for fellow team members, are indicative of their supervisory status. The evidence indicates however, that neither of these functions requires the exercise of independent judgment. The authority to approve overtime without management authorization is restricted to 12 hours per week. The record contains no evidence that the team's decision to approve such overtime requires it to exercise substantial or significant judgment so as to confer supervisory authority upon its members. Similarly, the team's recommendation that one of its members be taken out to lunch or granted some other non-monetary award, must first be presented to the facilitator, who transmits the request to his supervisor, who makes the ultimate decision with respect to the award. The record contains no evidence of what the team's recommendation is based upon, and whether such recommendation requires it to exercise independent judgment in its evaluation of another team member's skills and achievements. For these reasons, I find that the self-directed teams' limited approval of overtime and recommendations of benefits for other team members do not confer supervisory status upon them.

Likewise, while the team delegates work among its members, there is no evidence that any one member has the authority to direct another member to perform a particular task, or that the delegation of work by the team requires the exercise of independent judgment. The making of assignments based on an assessment of employees' skills when the differences in skills are well-known has been found to be routine, as have assignments made to equalize employees' work on a rotational or other rational basis. King Broadcasting Co.[38[38]] Thus, the team's decision to delegate certain duties to a team member, or to remove a member from those duties, constitutes an exercise of routine job assignment, and is not sufficient to confer supervisory status.[39[39]] Moreover, the degree of independent judgment is reduced when directing employees in the performance of routine, repetitive tasks. Franklin Hospital Medical Ctr. d/b/a Franklin Home Health Agency.[40[40]] Thus, when team members direct relief staff to perform tasks around

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[38[38]] 329 NLRB 378, 382 (1999).

[39[39]] Moreover, while the Employer contends that members of the self-directed team determine which team members will be compensated for performing additional duties, the record was inconclusive as to whether or not such additional duties are compensated with additional pay. Thus, on the record before me, I cannot conclude that the teams' authority to delegate certain additional duties to fellow team members, or to take those duties away, is tied to an increase or decrease in pay.

[40[40]] 337 NLRB 826 (2002).

the home such as vacuuming or laundry, such direction is inadequate to confer supervisory status.[41[41]]

The Employer also argues that team members' authority to call in replacements (relief staff) to fill in for an absent team member, without prior authorization from management, is evidence of the teams' supervisory status. Once again, I disagree. The evidence indicates that the Employer has developed a procedure for filling temporary vacancies, which the teams are expected to follow. Under this procedure, the secretaries are expected to first try to fill temporary vacancies with another team member, then with a Lifelinks part-time intermittent staff member, and finally, with someone from one of the designated relief staff agencies. Although the Employer emphasizes the authority of team members to seek out a particular relief staff person who has done the job well, or to refuse to use one who has not worked out well in the past, there is no evidence that in doing so the team is doing more than making a compatibility recommendation. For these reasons, I find that the teams' authority to call in relief staff is insufficient to confer supervisory status upon them.

7. Adjustment of grievances:

The Employer contends that the self-directed teams are empowered to adjust grievances among their members. One team member testified that, if a team member raises an issue with the team about how another member is performing his or her duties, the team's role is to try to get the team members to work together better by talking about the problem. Adjusting such minor complaints, however, does not establish supervisory status. Illinois Veterans Home at Anna L.P.;[42[42]] Ohio Masonic Home.[43[43]]

Finally, I note that if all the members of the self-directed teams were found to be supervisors, there would be only supervisors, and no subordinates, in the homes in which they are employed. Additionally, since almost 90 percent of the self-directed teams' weekly work is virtually identical to that of the direct care workers in the managed group homes who are included in the petitioned-for unit, a finding that the self-directed team members are all supervisors would remove a substantial amount of unit work from the unit.

In conclusion, I find that the Employer has failed to establish that the self-directed teams possess any indicia of supervisory status. Therefore, I conclude that the members of the self-directed teams are not supervisors, and that they are eligible for inclusion in the bargaining unit sought by Petitioner.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

[41[41]] Id. at 831.

[42[42]] 323 NLRB 890, 891 (1997).

[43[43]] Supra, 295 NLRB at 394.

All full-time, regular part-time, and per diem nonprofessional employees, including direct care staff, case managers, drivers, CNAs, LPNs, developmental specialists, direct care self-directed teams, independent living case managers, and part-time intermittent direct care workers employed by the Employer at the following Massachusetts locations: 145 Lexington Avenue, Lowell; 55 Middlesex Street, North Chelmsford; 79A Groton Road, North Chelmsford; 79B Groton Road, North Chelmsford; 5 Judith Road, Chelmsford; 28 Russell Road, North Chelmsford; 285 Nesmith Street, Lowell; 1904 Middlesex Street, Lowell; 87 Bedford Avenue, Lowell; 50 Cidalia Drive, Lowell; 158 Columbia Road, Lowell; 11 Locust Street, Lowell; The Woodland Inn, 1581 Varnum Avenue, Lowell; 101 Varnum Avenue, Lowell; 1 Parham Road, Tyngsboro; 4 Pondview Lane, Tewksbury; 1 Gerrish Avenue, Dracut; 63 Gilmore Street, Dracut; 57 Nancy Avenue, Dracut; 145 Newbury Street, Dracut; 261 Old Marsh Hill Road, Dracut; and 210 Parker Street, Lowell, but excluding all other employees, office clerical employees, professional employees, guards, and all supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit 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 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. Employees engaged in an 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. 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 Service Employees International Union, Local 509.

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 the 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.;[44[44]] NLRB v. Wyman-Gordon Co.[45[45]] Accordingly, it is hereby directed that

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[44[44]] 156 NLRB 1236 (1966).

[45[45]] 394 U.S. 759 (1969).

within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. North Macon Health Care Facility.[46[46]] In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before January 26, 2006 . 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 requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must by received by the Board in Washington by February 2, 2006. You may also file the request for review electronically. Further guidance may be found under E-Gov on the National Labor Relations Board web site: www.nlrb.gov.

/s/ Rosemary Pye

_____

Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 19th day of January, 2006.

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[46[46]] 315 NLRB 359 (1994).