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**Goddard Riverside Community Center and Local 74,
SEIU. Case 2–UC–583**

December 28, 2007

DECISION ON REVIEW AND ORDER REMANDING

BY MEMBERS LIEBMAN, KIRSANOW, AND WALSH

This case raises the issue of whether the Board will entertain a unit clarification petition to exclude a historically included classification, now alleged to be supervisory, where the parties had previously entered into a stipulated election agreement that did not specifically include or exclude the disputed position. Having carefully considered the matter, we find, contrary to the Regional Director, that the petition may be processed. Accordingly, we reinstate the petition and remand this case to the Regional Director for further processing.¹

Facts

The Employer is a settlement house that provides varied services in New York City, including Headstart, day-care, and homeless care and prevention. On January 22, 1990, after an election pursuant to a Stipulated Election Agreement, the Board certified the Union as the exclusive collective-bargaining representative of a unit of all full-time and regular part-time employees employed by the Employer at Project Reach Out, excluding all part-time bookkeepers, part-time secretaries, confidential employees and guards, professional employees and supervisors as defined in the Act. Project Reach Out is an umbrella program that provides services and advocacy for the mentally ill and homeless. There was no specific stipulation in the election agreement as to the status of the team leader classification at issue here.

Shortly after the Union's certification in 1990, the parties executed a collective-bargaining agreement. Article VIII of the agreement provided a list of job classifications for the purposes of layoff and recall. The classification of "outreach worker–team leader" is listed as the highest-rated classification in the unit. The parties have since maintained a collective-bargaining relationship, albeit the Union now represents the employees in Project Reach Out, the Other Place, the Social Service team at

¹ On February 5, 2007, the Regional Director for Region 2 issued a Decision and Order Dismissing Petition. Thereafter, pursuant to Sec. 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review. On April 14, 2007, the Board granted review. The Employer filed a brief on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

the Senate, the Social Service team at the Corner House, and other HUD-funded programs and add-on programs operated by the Employer at other sites in conjunction with or as an extension of Project Reach Out or the Other Place.² The team leader classification is listed under Project Reach Out, the Other Place, the Social Services team at the Senate and the Corner House, and the ACT Team. The parties' current agreement expires on June 30, 2008.

During negotiations for the current contract, the Employer proposed that the team leaders be excluded from the unit on the basis of their alleged supervisory status. The Union refused and directed the Employer to file a unit clarification (UC) petition instead. The Employer agreed to do so.

On September 21, 2004, 7 days after the current agreement was signed, the Employer filed the UC petition at issue here. The Employer asserts that the team leaders are supervisory employees who must be excluded from the unit or, in the alternative, professional employees under the Act who are entitled to vote for or against inclusion in a unit of nonprofessional employees.

Regional Director's Decision

In dismissing the petition, the Regional Director primarily relied on *Premier Living Center*, 331 NLRB 123 (2000). There, the Board found that the employer, who had specifically stipulated to the inclusion of a certain classification, could not thereafter litigate the supervisory status of that job classification through a UC petition because the employer had failed to raise the issue during the underlying representation proceeding, and had not presented any newly discovered and previously unavailable evidence or special circumstances. Here, the Regional Director found that it would be inappropriate to clarify the unit because the team leader classification existed at the time of the 1990 stipulated election agreement and has been included in the unit since that time. It is undisputed that the parties had the opportunity to litigate the issue of the team leaders' inclusion in the unit during the 1990 representation proceeding, but did not do so. The Regional Director therefore concluded that the parties should not be afforded the opportunity to litigate this issue in a subsequent unit clarification proceeding. Additionally, the Regional Director found no exception to the Board's "relitigation rule" because there was no evidence that the duties and responsibilities of the team leaders had changed since the unit was certified in 1990.

With respect to the Employer's assertion that its petition was timely filed because it reserved the right to file

² The Other Place is a psycho-social club where creative arts activities are used to engage individuals in their community.

such a petition during negotiations for its current contract, the Regional Director found that while the Employer may have satisfied the timeliness requirements for filing a UC petition, the Employer had not shown that it was exempt from the “relitigation rule” as set forth in *Premier Living Center*, supra.³ The Regional Director noted that timeliness was not an issue in *Premier Living Center*, since the petition there was filed within 1 month of the certification.

For these reasons, the Regional Director dismissed the petition.

Analysis

Unit clarification is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement. Unit clarification is also appropriate to resolve the placement of an existing classification—either included or excluded from the unit—that has undergone recent, substantial changes in duties and responsibilities of the employees. *Union Electric Co.*, 217 NLRB 666, 667 (1975). Clarification is not appropriate, however, for upsetting an agreement between or established practice of a union and employer concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent. *Id.*

However, where timely filed, a UC petition seeking to exclude a classification based on supervisory status may be processed even though the disputed classification has been historically included. *Washington Post Co.*, 254 NLRB 168 (1981), supports this proposition. There, a UC petition to exclude certain classifications was processed notwithstanding their historical inclusion in the unit. The Board reasoned that “[t]he Act provides specifically for the exclusion of ‘supervisors.’ . . . Thus, except in certain limited and well-defined factual situations, the Board, when presented with an appropriate petition or claim, is required to exclude positions from a bargaining unit where the inclusion of those positions would violate the principles of the Act.” *Id.* at 168–169. Further, the Board held that where the employees sought to be excluded by a UC petition have long been included under previous contracts, and the job duties of those positions have remained unchanged, nonetheless, if it can be shown that those employees meet the test for supervisory status, the Board is compelled to exclude them. See

³ The Union did not contest the Regional Director’s finding that the Employer may have satisfied the timeliness requirements under *Wallace-Murray*, 192 NLRB 1090 (1971).

also *Bethlehem Steel Corp.*, 329 NLRB 243, 244 fn. 5 (1999) (noting that the Board will clarify a unit to exclude a position that has historically been included where the petitioner has established a statutory basis for the exclusion); *Boston Cutting Die Co.*, 258 NLRB 771, 772 fn. 2 (1981) (emphasizing that the Board will consider UC petitions midterm where clarification is necessary to avoid violation of the Act or Board policy).

A clear exception to this principle exists when a party has specifically stipulated, in a representation case proceeding, to the inclusion of a particular classification and later attempts to file a clarification petition to exclude the classification on supervisory grounds. *Premier Living Center*, supra, and *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921 (1997), relied on by the Regional Director, fall into the category carved out by this exception. The rationale for this exception is to discourage parties from entering into a stipulation in a representation proceeding and then attempting to avoid being held to that stipulation. This rationale simply does not apply to this case. In both *Premier Living Center*, supra, and *I.O.O.F.*, supra, the respective employers stipulated to LPN units and then filed UC petitions claiming the LPNs were supervisors.⁴ In each of these cases, the Board dismissed the UC petition because the party attempted to clarify the unit after a representation case proceeding at which the inclusion of the belatedly-disputed classification was specifically stipulated to.⁵ By contrast, the parties here never stipulated to the inclusion of the team leaders.⁶

Premier Living Center, supra, and *I.O.O.F.*, supra, do not specifically address the question presented here of whether parties are precluded from litigating the disputed employees’ supervisory status where they did not specifically stipulate to the status of those particular employees. We recognize that *I.O.O.F.* does include language stating that parties are precluded from resorting to UC proceedings if they “could have” litigated supervisory status; and that language would seem, on the sur-

⁴ *Premier Living Center* was before the Board on a UC petition, and *I.O.O.F.* was before the Board on the employer’s refusal to bargain with the union.

⁵ The Board in *Premier Living Center*, supra at 125 fn. 5, and earlier in *I.O.O.F.*, supra at 923 fn. 7, distinguished *Washington Post Co.*, supra, by noting that the Regional Director, during the representation proceeding in that case, expressly authorized the parties to raise the supervisory issue by filing a UC petition after the certification in exchange for the parties’ agreement not to litigate the unit placement issue prior to the election. In *Premier Living Center* and *I.O.O.F.*, however, the employers had voluntarily abandoned their respective claims that the disputed positions were supervisory and actually stipulated to their inclusion in the unit.

⁶ The fact that the team leaders were included in the unit by way of the contract does not mean that their status had been specifically agreed upon in the representation proceeding.

face, to apply here. That language, however, was broader than necessary to decide *I.O.O.F.* because there, the parties not only “could have” but *did* expressly address the status of the disputed employees by stipulating to their inclusion in the unit. Accordingly, that language was dicta, and we will not rely on it here.⁷

Rather, we conclude that *Washington Post*,⁸ supra, provides the correct standard for determining whether the UC petition may be processed in this case. As explained above, that case specifically held that when presented with an appropriate petition, the Board is “required” to exclude positions from a unit where the inclusion of those positions would violate the basic principles of the Act. Because the disputed positions here are alleged to be supervisory and thus their inclusion in the unit would violate statutory principles, we need only to examine whether the petition was filed at an appropriate time. Based on the record testimony, we agree with the Re-

⁷ See, e.g., *U.S. v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 423 fn. 10 (6th Cir. 2006) (characterizing as dicta decisional language “the court . . . did not have occasion to apply”); *Best Life Assurance Co. of California v. Commissioner of Internal Revenue*, 281 F.3d 828, 834 (9th Cir. 2002) (“[D]ictum [i]s a statement . . . that is unnecessary to the decision in the case and therefore not precedential.”).

⁸ At the representation hearing in *Washington Post*, supra, the Washington Newspaper Union requested that the hearing on unit placement issues be postponed so that the employees sought in its petition for election could exercise their right to vote. After deliberation, the employer agreed to a proposal of the Regional Director that an election be held at which the employer would not challenge those it claimed to be properly excluded from the unit but after which, if necessary, the Regional Director would entertain an appropriate UC petition. Thus, the Board found that the UC petition was an offshoot of the earlier representation hearing. “In light of the earlier representations made by the Regional Director, we are satisfied that the unit clarification process is now a proper vehicle for a resolution of the issues presented.” See *Washington Post*, supra at 170.

gional Director that it was. It is undisputed that during negotiations, the Employer raised the issue of the team leaders’ exclusion from the bargaining unit, and the Union directed the Employer to file a UC petition instead. The Employer agreed to do so. Accordingly, the Employer’s filing of the petition only 7 days after the contract had been signed is timely because the Employer specifically reserved its right to do so during negotiations. See *Baltimore Sun Co.*, 296 NLRB 1023 (1989). Moreover, there is no contention before us now that the petition was untimely filed during the term of the contract.

In light of all of the above, we find that the processing of the UC petition is not precluded by the “relitigation rule” set forth in *Premier Living Center*, supra, and *I.O.O.F.*, supra, because the parties did not specifically address the status of the disputed team leaders in the prior representation proceeding.

ORDER

The petition is reinstated and the case is remanded for further appropriate action.

Dated, Washington, D.C. December 28, 2007

Wilma B. Liebman, Member

Peter N. Kirsanow, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD