

South Carolina Education Association, Employer-Petitioner and South Carolina Education Association Employees Council. Case 11-UC-26

February 5, 1979

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND MURPHY

Upon a petition of South Carolina Education Association for clarification of unit duly filed on September 28, 1978, under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held on November 13, 1978, before Hearing Officer Ronald M. Sharp. At the close of hearing, the Regional Director for Region 11, by Hearing Officer Sharp, issued an order transferring the case to the Board. Thereafter, briefs were filed by the Petitioner and the Union.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case,¹ the Board finds:

1. 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.

2. The Union involved herein is a labor organization within the meaning of the Act and claims to represent certain employees of the Employer.

3. The Employer is a South Carolina nonprofit organization chartered by the State of South Carolina with an office in Columbia, South Carolina, where it provides a variety of education-related services to members, including educators employed by the State. The Employer proposes to clarify the bargaining unit to exclude the personal secretary to the Employer's associate executive director, the Employer's business manager, the administrative assistant to the Employer's executive director, and a research consultant.²

The Employer and the Union have been parties to

¹ The parties stipulated, and the Hearing Officer ordered, that the record in Case 11-RC-4503 be made a part of the record in the instant proceeding. Accordingly, official notice is taken of the record in Case 11-RC-4503, as the term "record" is defined in Sec. 102.68 of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended.

² The parties stipulated that two other employees, the personal secretaries to the executive director and the president, should be excluded from the unit as confidential employees.

a series of collective-bargaining agreements, the first of which was entered into in 1973, following the Employer's voluntary recognition of the Union that same year. The employees in the disputed job classifications were covered by the 1973 agreement and by the agreement which followed it, effective until June 30, 1978.³ The bargaining unit was described in these agreements as "all full time non-management employees."

On or about February 3, the parties met to commence negotiations for a new collective-bargaining agreement. Due to disagreement as to the scope of the unit, negotiations were unsuccessful, and thereafter, on or about March 14, the Union filed a petition in Case 11-RC-4503 to certify the composition of the bargaining unit. Following a hearing on May 18, the Regional Director for Region 11 issued a Decision and Direction of Election in which he found that the personal secretary to the Employer's associate executive director was not a confidential employee, as the Employer alleged, and accordingly included her within the unit. In agreement with the Employer, the Regional Director also found that the business manager was a supervisor as defined in Section 2(11) of the Act, that the administrative assistant to the executive director was both a confidential employee and a supervisor, and that the research consultant was an independent contractor lacking a community of interest with bargaining unit employees. Accordingly, the Regional Director excluded those three individuals from the unit.

Thereafter, both the Employer and the Union filed timely requests for review of the Regional Director's decision. The Board, by telegraphic order dated June 19, denied the Employer's and Union's requests for review, "as they raised no substantial issues warranting review except as to the status of [the individuals involved herein], and the Board concluded that such issues can best be resolved through the challenge procedure."

While the Board's decision on the requests for review was pending, the election was conducted by mail and manual procedures and was concluded on June 13. The ballots were impounded pending the Board's determination on the requests for review. On July 3, the ballots were opened and counted. The challenged ballots of the individuals at issue herein were not determinative of the election results, and accordingly those ballots were not opened or counted. The Regional Director for Region 11 issued a Certification of Representative on July 14, leaving unresolved the status of the challenged voters.

Following unsuccessful attempts to resolve the unit composition question through negotiations, the

³ Unless otherwise noted, all dates herein are 1978.

Employer filed the instant petition on September 28. On November 13, at the close of the hearing, the case was transferred to the Board. The Employer's motion not to transfer or, alternatively, that the Regional Director reconsider the status of the position of personal secretary to the associate executive director was referred to the Board by the Hearing Officer. The motion is hereby denied, inasmuch as the record in the instant case and in Case 11-RC-4503 fully present the issues for determination.

Business Manager

The Employer alleges that the business manager, C. W. Rhyne, is both a supervisor within the meaning of Section 2(11) of the Act and a confidential employee. To the contrary, the Union argues that Rhyne is neither a supervisor nor a confidential employee and should be included as a member of the bargaining unit. Inasmuch as we agree with the Employer that Rhyne is a supervisor, we find it unnecessary to determine whether he is also a confidential employee.

The Regional Director, in his Decision and Direction of Election in Case 11-RC-4503, found that Rhyne determines grievances of employees working under him, evaluates and recommends reclassification of those employees, and can effectively recommend hiring, firing, layoff, promotion, and demotion of employees in the business office. Accordingly, the Regional Director found that the business manager is a supervisor as defined in Section 2(11) of the Act.

For the reasons set forth by the Regional Director, we agree that Rhyne is a supervisor and thus should be excluded from the bargaining unit.

Personal Secretary to the Associate Executive Director

The Employer takes the position that the personal secretary to the associate executive director, Carla Levy, should be excluded from the unit as a confidential employee. The Union argues that the Regional Director correctly found that Levy was not a confidential employee.⁴ We find, in agreement with the Employer, that the personal secretary to the associate executive director is a confidential employee and should therefore be excluded from the unit.

Levy is the personal secretary to the Employer's associate executive director, Dr. Walker E. Solomon. Solomon, as the second highest ranking executive

staff member responsible for administering the Association, exercises general supervisory powers over the Employer's operations, including participation in the grievance procedure in the executive director's absence. In 1974, Solomon was the Employer's chief negotiator with the Union, and his secretary, Levy's predecessor, was responsible for typing and assembling all bargaining proposals. While another official was the Employer's chief negotiator in 1976, Solomon was a member of the negotiating team. Furthermore, Solomon has again been appointed chief negotiator for the Employer in the 1978 negotiations and has been functioning as such.

Levy, as Solomon's personal secretary, has access to future bargaining proposals, bargaining strategies, and legal opinions concerning bargaining matters. In the normal course of her job duties, Levy has complete access to all materials kept in Solomon's office, does all of Solomon's filing and typing, and possesses keys to Solomon's office, desk, and files.

The Board has defined as confidential employees those who "assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *The B. F. Goodrich Company*, 115 NLRB 722, 724 (1956). Accordingly, in view of Solomon's involvement in determining the Employer's labor relations policies and the fact that Levy acts for him in a confidential capacity, we find that Levy is a confidential employee and therefore exclude her from the unit.

Administrative Assistant to the Executive Director

The Employer contends and the Regional Director agreed that the administrative assistant to the executive director, Laverne Martin, is a supervisor and a confidential employee and accordingly should be excluded from the unit. The Union contends that Martin is neither a supervisor nor a confidential employee and should be included within the unit. We concur with the Regional Director's finding that Martin is a supervisor within the meaning of Section 2(11) of the Act and therefore find it unnecessary to determine whether Martin is also a confidential employee.

The record reveals that Martin interviews and recommends for employment applicants for clerical positions. The record also reveals that her recommendations are usually followed by the Employer's executive director without independent investigation. Moreover, Martin directly supervises the Employer's receptionist and evaluates the receptionist on an annual basis. Also indicative of supervisory status is the fact that Martin is one of only four individuals who have access to the Employer's personnel files. The other three persons having access to these files, which

⁴ We note that in finding that Levy was not a confidential employee in Case 11-RC-4503 the Regional Director did not have the benefit of the record in the instant proceeding, which was devoted primarily to Levy's alleged confidential status.

are on a "two-key" system preventing any one of the four from opening them alone, are the Employer's president, executive director, and associate executive director. Martin, who occupies a private office between the executive director and associate executive director, has the authority to authorize, and has authorized, overtime work and time off to employees in the absence of the executive director.

For the foregoing reasons, we find that Martin is a supervisor as defined in Section 2(11) of the Act and shall exclude her from the unit.

Research Consultant

The Employer contends and the Regional Director agreed that the research coordinator, Terry Peterson, should be excluded from the unit because he is an independent contractor and because he lacks community of interest with unit employees. The Union argues that Peterson should be included in the unit because he is a regular part-time employee. We find, in agreement with the Union, that Peterson neither lacks community of interest with unit employees nor is an independent contractor, as we have defined the term.

In *The Beacon Journal Publishing Company*, 188 NLRB 218, 220 (1971), the Board set forth the following test to determine whether an individual is an independent contractor:

In determining the status of persons alleged to be independent contractors, the Board applies a "right of control" test, which turns essentially on whether the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, or whether he controls *only* the result. In the latter situation, the status is that of an independent contractor. The resolution of this question depends on the facts in each case. No one factor is determinative. [Footnote omitted.]

More recently, in *The News-Journal Company*, 227 NLRB 568, 570-571 (1976), we reaffirmed the principles of *Beacon Journal* in finding that certain photographers alleged to be independent contractors were, in fact, employees of the Employer.⁵ In reaching that result, we noted that the photographers "bear slight

⁵ Member Penello adheres to his dissenting opinion in *News-Journal* but, inasmuch as he finds the instant case distinguishable on its facts, joins in finding that Peterson is an employee of the Employer and not an independent contractor. Thus, unlike the photographers in *News-Journal*, the research consultant herein may not market his work product to anyone other than the Employer and does not furnish his own equipment or supplies. Rather, the Employer herein provides Peterson with all needed support, including office space and clerical assistance.

resemblance to the independent businessmen whose earnings are controlled by self-determined policies, personal investment and expenditures, securing business, and market conditions." More importantly, we also stated that "[a]lthough they have discretion to determine the manner in which assignments are to be performed, this factor carries little weight here because it appears that such discretion is in the nature of a photographers job."

In the instant case, Peterson is paid a set fee for working a set number of hours. If he works fewer than that amount, the Employer deducts a proportionate sum from his pay. The Employer withholds taxes and social security payments from Peterson's paycheck, provides him with an office and secretarial assistance at no cost, and covers him under its employee health insurance plan. Like the photographers in *News-Journal*, Peterson is assigned projects to complete by the Employer, although it exercises "practically" no supervision over the methods he uses to achieve the desired ends. The Employer's executive director testified that he does not tell Peterson how to do the assignments because he only "kind of" understands how Peterson performs his duties, and that he would not "presume to tell him how to do it." The record thus indicates that although Peterson has discretion to determine the manner in which his assignments are to be performed, this factor carries little weight in the instant case, because it appears that such discretion is in the nature of the job performed and the position and qualifications possessed by Peterson. Accordingly, we conclude that Peterson is not an independent contractor but is a regular part-time employee of the Employer.

We also disagree with the Regional Director's finding that Peterson does not share a community of interest with the unit members. Peterson shares a common work situs with the unit employees, enjoys the same general working conditions, is covered by the same health insurance plan, and, insofar as the record reflects, receives similar fringe benefits. Moreover, if Peterson is excluded from the unit, he would be the only unrepresented nonsupervisory or non-confidential employee of the Employer and thus would effectively be denied the opportunity to be represented in collective bargaining. *Victor Industries Corporation of California*, 215 NLRB 48 (1974); *Standard Brands Incorporated*, 175 NLRB 734 (1969). Accordingly, we shall include the research consultant in the unit.

ORDER

It is hereby ordered that the collective-bargaining unit of "All full-time and part-time employees of the

Employer at Columbia, South Carolina, including university representatives, office clerical employees, membership processing coordinator, custodian, governmental relations manager, secretaries, press operator, switchboard operator, receptionist, and manager of internal communications, excluding all cabinet level personnel, president, executive director, associate executive director, director of affiliate relations,

secretary to the president, secretary to the executive director” of South Carolina Education Association, represented by South Carolina Education Association Employees Council, be, and it hereby is, clarified by excluding the business manager, the personal secretary to the associate executive director, and the administrative assistant to the executive director, and by including therein the research coordinator.