Abbott Ambulance of Illinois *and* Professional EMTs & Paramedics (PEP), Petitioner. Case 14–RC–12491

August 2, 2006

DECISION AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

The National Labor Relations Board, by a three-member panel, has considered a determinative challenge in an election held on April 15, 2004, and the hearing officer's report recommending disposition of the challenge. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 28 votes for and 28 against the Union, with 3 challenged ballots, a number sufficient to affect the results.[1]

The Board has reviewed the record in light of the exceptions and brief and has adopted the hearing officer's findings[2] and recommendations.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 14 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Kelly Grant. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

CHAIRMAN BATTISTA, dissenting.

For the reasons discussed in my partial dissent in *Home Care Network*, 347 NLRB 80 (2006), I would not apply the test in *Red Arrow Freight Lines*, 278 NLRB 965 (1986), to determine the voting eligibility of individuals who are absent from their unit positions for medical reasons. Rather, consistent with the Board's eligibility standard for laid-off employees,[3] I would assess whether the employee, as of the date of the election, has a reasonable expectancy of returning to the unit. Applying that test, I would find that Kelly Grant was not eligible to vote in the election.[4]

Grant was employed by the Employer as an emergency medical technician (EMT) since 1999. On May 23, 2002, she sustained an injury to her left wrist. She subsequently underwent medical treatment, including surgery and physical therapy, for this condition. On April 12, 2004, 3 days before the election, Grant's surgeon informed her that she would be permanently restricted from lifting over 30 pounds.

The record shows that the Employer's EMTs and paramedics must be able to lift 283 pounds up to 25 percent of the time. In addition, employees in the remaining unit classifications, customer representatives and couriers, must be able to lift 75 and 100 pounds, respectively. Thus, Grant was permanently unable to meet the job qualifications for any unit position.

Under these circumstances, I find that, on the date of the election, Grant had no reasonable expectancy of returning to her EMT position, or any other job in the bargaining unit. Therefore, I would sustain the challenge to her ballot.

[1] The Regional Director approved the parties' agreement to sustain challenges to two of the challenged ballots. Only the challenge to employee Kelly Grant's ballot is before the Board in this case. We agree with the hearing officer, for the reasons stated in his report, that employee Grant was on disability leave and was neither affirmatively discharged nor had resigned at the time of the election, and was therefore eligible to vote under *Red Arrow Freight Lines*, 278 NLRB 965 (1986). The Board has recently reaffirmed the *Red Arrow* standard in *Home Care Network*, *Inc.,* 347 NLRB 80 (2006), and has responded in that decision to the Chairman's expressed disagreement with that standard. The dissent does not dispute Grant's eligibility under the *Red Arrow* test.

[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.,* 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

The Employer has also requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[3] See, e.g., *Madison Industries*, 311 NLRB 865 (1993); *S&G Concrete Co.*, 274 NLRB 895 (1985).

[4] Because I find that Grant was ineligible to vote because she lacked a reasonable expectation of returning to her unit position, I find it unnecessary to pass on the Employer's further assertions that Grant was not in the bargaining unit by virtue of her performance of light-duty work, that she had resigned, and that, had she not resigned, the Employer would have terminated her.