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Woodward Detroit CVS, LLC and Local 876, United Food and Commercial Workers International Union (UFCW). Case 7–RC–23299

September 16, 2010

DECISION AND DIRECTION

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

The National Labor Relations Board, by a three-member panel, has considered a determinative challenge in an election held on February 4, 2010, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 6 for and 5 against the Petitioner, with 1 determinative challenged ballot.

The Board has reviewed the record in light of the exceptions and briefs and has decided to adopt the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction.

The Employer has excepted to the hearing officer's recommendation that the challenge to the ballot of Obiageri Opara be sustained. For the reasons set forth below, we find merit in this exception.¹

The sole issue here is whether employee Obiageri Opara is a regular part-time employee. The standard for determining eligibility of regular part-time employees, in the absence of special circumstances, is set forth in *Davison-Paxon Co.*, 185 NLRB 21 (1970). In that case, the Board held that an employee is eligible to vote if that employee "averages 4 hours or more per week for the last quarter prior to the eligibility date." *Id.* at 24. The hearing officer applied the *Davison-Paxon* eligibility formula, but found that Opara was ineligible to vote because she did not work an average of 4 hours per week for the "calendar quarter" before the January 16, 2010 eligibility date. The Employer excepts to the hearing officer's use of the calendar quarter rather than the 13-week period immediately before the eligibility date.² We find merit in the Employer's exception.

¹ In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation to grant the Petitioner's unopposed request to withdraw its conditional objections.

² At the hearing, the parties stipulated that Opara performs the same duties as other full and part-time clerk/cashiers, and has similar wages, benefits, and working conditions. The parties also stipulated that if Opara's hours were sufficient to classify her as a regular-part time employee, then she would be included in the unit. Although the Petitioner appears to argue, in part, that Opara is a casual employee, her

The Board has explicitly held that the "last quarter prior to the eligibility date" refers to the 13-week period immediately before the eligibility date. *Hardy Herpolsheimer's*, 227 NLRB 652 (1976).³ The Board has more recently applied the same rule in other cases.⁴ This approach allows for an employee's eligibility to be evaluated based on a period that is closer in time to the election eligibility date, which in turn provides a more accurate and up-to-date assessment of the unit's composition. Under the calendar quarter approach, in contrast, the time between the end of the quarter and the eligibility date may vary by up to 3 months. Consequently, we find that Opara's eligibility should have been calculated using the 13-week period immediately before the eligibility date rather than the calendar quarter.

Applying the above standard, Opara worked a total of 60.75 hours, or an average of 4.67 hours during the 13-week period immediately before the election eligibility

unit inclusion is not at issue because there are no exceptions to the hearing officer's implicit finding that she was a part-time employee. Further, there are no exceptions to the hearing officer's use of the *Davison-Paxon* eligibility formula. Accordingly, the only issue before the Board is the meaning of "last quarter prior to the eligibility date" under *Davison-Paxon*.

³ The Petitioner filed no exceptions to the use of the *Davison-Paxon* formula. In its answering brief, however, as an alternative to using the calendar quarter, the Petitioner urges the Board to apply the eligibility formula set forth in *Scoa, Inc.*, 140 NLRB 1379 (1963). In that case, the Board determined that eligible employees were those who worked a minimum of 15 days in the 90 days before the election. That case was decided before *Davison-Paxon*. It has since been established that *Davison-Paxon* is the standard typically used by the Board, in the absence of special circumstances. See, e.g., *Steppenwolf Theatre Co.*, 342 NLRB 69, 71 (2004). Here, the Petitioner has failed to establish special circumstances justifying departure from the *Davison-Paxon* standard.

⁴ See *Ansted Center*, 326 NLRB 1208, 1210, 1212 (1998) (adopting Regional Director's findings based on calculations using the 13 weeks before the eligibility date); *Saratoga County Chapter NYSARC*, 314 NLRB 609, 610 fn. 5 (1994) (finding on-call employees ineligible because they did not average 4 hours per week during the 13 weeks before the eligibility date); *Sisters of Mercy Health Corp.*, 298 NLRB 483, 483–484 (1990) (calculating employees' hours during the 13 weeks before the eligibility date).

The Petitioner cites *Medplex of Connecticut, Inc.*, 319 NLRB 281, 299 (1995) (adopting, without comment, a judge's decision calculating eligibility based on two calendar quarters, one of which went beyond the eligibility date) and *BB&L v. NLRB*, 52 F.3d 366, 369 (D.C. Cir. 1995) (summarizing the Board's decision as adopting the hearing officer's recommendation to sustain a challenge to an employee ballot because the employee "averaged fewer than four hours of work per week in the first quarter of 1992, the last full quarter before the election"). It does not appear that the issue raised here was litigated in either of those cases, however, and neither case offered any explanation for the decision to use the calendar quarter rather than the 13 weeks before the eligibility date as the appropriate period for determining eligibility under *Davison-Paxon*. Although the Board has periodically used the phrase "calendar quarter" in its decisions, we do not construe this phrase as a repudiation of the principles set forth in *Hardy Herpolsheimer's*.

date. Accordingly, she is a regular part-time employee who is eligible to vote. We overrule the challenge to her ballot and direct that it be opened and counted.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 7 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Obiageri Opara, prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

Dated, Washington, D.C. September 16, 2010

Wilma B. Lebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD