

NOT INCLUDED IN
BOUND VOLUMES

BPH
Louisville, KY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RECALL SECURE DESTRUCTION SERVICES, INC.

Employer

and

Case 9-RC-18280

UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 227

Petitioner

and

GENERAL DRIVERS, WAREHOUSEMEN AND
HELPERS LOCAL UNION NO. 89

Intervenor

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on April 2, 2010, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 0 for the Petitioner, 2 for the Intervenor, and 0 against representation, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings¹ and recommendations, and finds that a certification of representative should be issued.²

¹ 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 have carefully examined the record and find no basis for reversing the findings.

In finding that Team Lead Andrew Pendleton cannot hold employees accountable for their performance and therefore does not responsibly direct employees within the meaning of Sec. 2(11) of the Act, the hearing officer drew an adverse inference against the Employer based on its failure to introduce Pendleton's annual performance evaluations into the record. The hearing officer apparently assumed that the Employer did not introduce them because they would fail to show any criticism of Pendleton for inadequately supervising the drivers. We decline to rely on the hearing officer's adverse inference, finding that the overall lack of record evidence of Pendleton's accountability is sufficient to reject the Employer's contention that Pendleton responsibly directs employees.

Further, in adopting the hearing officer's finding that Pendleton did not effectively recommend hiring with the use of independent judgment, we observe that the only evidence of Pendleton's involvement in the hiring process—his participation in the interviewing of two job applicants and the Employer's selection of the applicant that he recommended—occurred after the election and two weeks before the hearing, and there is no evidence that the Employer had ever before involved Pendleton in its hiring and/or rehiring decisions. In addition, there was no testimony concerning the criteria Pendleton used to recommend one applicant over the other and therefore no adequate evidentiary showing that Pendleton exercised any independent judgment in doing so.

² Having adopted the hearing officer's finding that Pendleton is not a statutory supervisor and having decided to issue a certification of representative, we deny the Employer's request to remand the case for a determination of whether Pendleton's pronoun conduct tainted the election results.

We disagree with our colleague's position that it was "incumbent on the hearing officer to specifically explain and distinguish" an earlier regional determination in a separate case that a Team Lead employed by the Employer at a separate facility was a statutory supervisor. It is well established that the party asserting supervisory status bears the burden of proof on the issue, *Oakwood Healthcare*, 348 NLRB 686, 687 (2006); see also *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-12 (2000), and that burden must be carried as to the particular individual who is alleged to be a supervisor. Placing a burden on the hearing officer to "explain and justify" her conclusion when the Employer failed to carry its burden of proof as to the individual is inconsistent with the Board's holding in *Staco, Inc.*, 244 NLRB 461 (1979). There, the Board reversed a judge's conclusion that a leadman was a supervisor when it was

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for General Drivers, Warehousemen and Helpers Local Union No. 89, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time drivers employed by the Employer at its 4770 Crittenden Drive, Louisville, Kentucky facility, but excluding all technical employees, quality control employees, temporary employees, office clericals, and all professional employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., March 1, 2011.

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting:

Contrary to my colleagues, I would remand this case to the hearing officer for a reasoned explanation of the different findings about a team lead's supervisory status in her report and in the Regional Director's determination in Case 9-RC-18285 (review

based on an inference that she performed the same supervisory duties performed by leadmen in other departments of the same facility rather than on evidence that the leadman at issue actually performed supervisory functions. *Id.* at 461-462. The Employer here offered only conclusory testimony in response to leading questions about the similarity of the duties of the two Team Leads. The Employer did not introduce the transcript or any other evidence from the earlier proceeding. The hearing officer correctly found that the Employer failed to carry its burden of proving that Andrew Pendleton was a supervisor. Nothing further was incumbent on the hearing officer.

denied by the Board in an unpublished decision dated June 17, 2010). In the latter case, the Regional Director found the Team Lead at the Employer's Lexington, Kentucky facility to be a statutory supervisor. The hearing officer here inconsistently recommended that Andrew Pendleton, who holds the same position at the Employer's Louisville, Kentucky facility, is not a statutory supervisor. Having taken "administrative notice" of the contrary decision in 9-RC-18285, it became incumbent on the hearing officer to specifically explain and distinguish that decision from her findings and recommendations in this case. That responsibility rests, in the first instance, with the Region and not with the Board directly. In my view, the hearing officer's general assertions that the facilities are "separate and different" and that she based her recommendations on the record evidence before her are insufficient to explain the facially contradictory results reached by the Region in these two cases. I would remand for a more fully developed analysis.¹

Dated, Washington, D.C., March 1, 2011.

Brian E. Hayes, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

¹ My colleagues in the majority misapprehend my position. My concern is of a procedural, not substantive, nature, and accordingly, *Staco, Inc.*, 244 NLRB 461 (1979), is inapposite. I do not suggest that Andrew Pendleton is a statutory supervisor *because* the Board determined the Team Lead in Lexington to be one. Neither do I quarrel with the majority's description of the Employer's burden to prove Pendleton's supervisory status. Rather, my point is simply that, upon acknowledging the inconsistent results between the Lexington and Louisville cases, the hearing officer assumed, and failed to adequately discharge, a duty to explain the facially contradictory outcomes reached in the two decisions.