

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 17**

**Overland Park, KS**

KANSAS ASSOCIATION OF PUBLIC EMPLOYEES  
d//b/a AFT KANSAS

Employer

and

Case 17-RC-073915

UNITED STEEL, PAPER AND FORESTRY, RUBBER,  
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL  
AND SERVICE WORKERS INTERNATIONAL UNION,  
AFL-CIO-CLC (USW)

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on February 16, 2012, before a hearing officer of the National Labor Relations Board, herein referred to as the Board, to determine whether the petitioned-for unit of employees constitutes an appropriate unit for the purpose of collective bargaining. At the close of the hearing, the parties<sup>1</sup> were afforded the opportunity to file briefs addressing the issues raised during the hearing. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon review of the entire record in this proceeding, including the parties' briefs, the undersigned makes the following findings:

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<sup>1</sup> The parties' names appear as amended during the hearing.

The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 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.<sup>2</sup> The Petitioner is a labor organization which claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

#### **A. ISSUES**

The Petitioner seeks an election in the following unit:

All full-time and regular part-time legislative community advocates, state federation organizers and union representatives employed by the Employer at its 1300 Southwest Topeka Boulevard, Topeka, Kansas facility, but excluding all office clerical employees, office manager, professional employees, confidential employees, guards and supervisors, as defined by the Act.

The sole issue is whether the legislative community advocate is appropriately included in the bargaining unit. The Employer contends that the legislative community advocate should be excluded from the unit because this job position is currently funded by a grant, the grant is reviewed quarterly, and it is not guaranteed that the grant will be renewed after July 2012. The Employer argues that it cannot effectively bargain about the legislative community advocate's terms and conditions of employment because the Employer has no control over the money available to fund wages for the position, and because the Employer cannot say whether it will continue to be able to offer a full-time community advocate position in the future. The Employer maintains that these funding issues, as well as other factors, create differences between the

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<sup>2</sup> At the hearing, the parties stipulated to the following commerce facts: The Employer is a Kansas corporation operating as a labor organization with a place of business in Topeka, Kansas, where it represents employees in bargaining with employers. During the preceding 12 months, a representative period, the Employer collected and received dues and initiation fees valued in excess of \$300,000 and remitted per capita taxes in excess of \$100,000 to the American Federation of Teachers (AFT) in Washington, D.C.

legislative community advocate's terms and conditions of employment and those of the other employees in the petitioned-for unit so that the legislative community advocate has a separate community of interest from the other employees in the unit.

As discussed below, based on my review of the evidence, the parties' arguments, and relevant Board precedent, I find that the legislative community advocate shares a community of interest with other employees in the unit and that the petitioned-for unit is appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

## **B. FACTS**

The Employer is a state labor federation, funded by the American Federation of Teachers (AFT) for the purpose of assisting affiliated local unions within Kansas. Lisa Ochs serves as the Employer's president and supervises a staff that currently includes a legislative community advocate, two organizers, a union representative, and an office manager.<sup>3</sup>

The Employer created and filled the legislative community advocate position in December 2010, hiring Mindy Brissey, who initially worked on a contract basis until she became a full-time employee on July 1, 2011. Unlike the Employer's other employees, who are paid from the Employer's general operating budget, Brissey's wages are funded from an AFT grant or "solidarity funds." The solidarity funds, which cannot be commingled with the Employer's general operating budget, are subject to yearly renewal and are based on the Employer's overall membership. The Employer is required to use the solidarity funds for political and legislative issues and training.

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<sup>3</sup> The parties stipulated that the office manager is a confidential employee and should be excluded from the appropriate unit.

Unlike the Employer's other employees, Brissey spends a portion of her workweek meeting with legislators and community groups. Nevertheless, Brissey works in the same office as other AFT employees, and they regularly assist one another in areas such as scheduling legislative activities, communicating strategies and legislative updates to the Employer's members, and training members to effectively lobby. Brissey receives benefits from the Employer such as life insurance, sick time, and paid vacation, and she was offered, but declined, health insurance.

### C. ANALYSIS

Section 9(b) of the Act empowers the Board to determine a unit appropriate for the purposes of collective bargaining. The Board enjoys broad discretion to determine the appropriate bargaining unit. See *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950). It is well established that the Board need not find "the most appropriate or comprehensive unit but simply *an* appropriate unit." *P.J. Dick Contracting*, 290 NLRB 150, 151 (1988) (emphasis in original). The petitioner's desired unit is a relevant consideration, though not dispositive, and the Board begins its analysis by examining the petitioned-for unit. See, e.g., *Marks Oxygen Co.*, 147 NLRB 228, 230 (1964); *Dezcon, Inc.*, 295 NLRB 109, 111 (1989). If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, but it also has discretion to select an appropriate unit that is different than the units proposed. See *Boeing Co.*, 337 NLRB 152, 153 (2001).

Based on the facts set forth above, I find that a unit including the legislative community advocate is an appropriate unit. Contrary to the Employer's assertion, the manner in which the Employer funds the legislative community advocate position does not warrant excluding the position from the petitioned-for unit. The record suggests that the Employer plans to staff the

legislative community advocate position as long as it has sufficient funds to do so. There is no evidence that the Employer created and filled the position to perform a discrete task of finite duration. Although the current solidarity grant expires in July 2012, it is not certain that the legislative community advocate position will be eliminated at that time. Even if the solidarity funds are not renewed, the Employer may seek alternative funding options, as it did before it obtained the current solidarity grant. At the very least, the legislative community advocate's tenure remains uncertain. Under these circumstances, it is appropriate to include the legislative community advocate in the unit, as the Board holds that employees with an uncertain tenure of employment are eligible to vote if they remain employed on the election eligibility date. See *MJM Studios of New York, Inc.*, 336 NLRB 1255, 1257 (2001).

The Employer's asserted lack of control over the solidarity funds also fails to demonstrate that the petitioned-for unit is inappropriate. Even assuming that the Employer has limited funds to devote to staffing the legislative community advocate position, this fact does not support its argument that meaningful collective bargaining cannot take place. Although not directly on point, there are parallels between the Employer's asserted lack of economic control in this case and the Board's decision in *Management Training Corp.*, 317 NLRB 1355 (1995). In *Management Training Corp.*, the Board overruled *Res-Care*, 280 NLRB 670 (1986), which held that the Board would not assert jurisdiction over an employer who obtained funds from an exempt entity if the employer "did not have the final say on the entire package of employee compensation." *Id.* at 674. Concluding that *Res-Care* and subsequent cases placed an unwarranted emphasis on an employer's control of economic terms, the Board explained:

While economic terms are certainly important aspects of the employment relationship, they are not the only subjects sought to be negotiated at the bargaining table. Indeed,

monetary terms may not necessarily be the most critical issues between the parties. In times of downsizing, recession, low profits, or when economic growth is uncertain or doubtful, economic gains at the bargaining table are minimal at best. Here the focus of negotiations may be upon such matters as job security, job classifications, employer flexibility in assignments, employee involvement or participation and the like. Consequently, in those circumstances, it may be that the parties' primary interest is in the noneconomic area. It was shortsighted, therefore, for the Board to declare that bargaining is meaningless unless it includes the entire range of economic issues.

Moreover, it is unrealistic to characterize such topics as disciplinary procedure, including arbitration; strike provisions; management-rights clauses; and employee promotions, evaluations, and transfers as unimportant to the bargaining process. They are matters which have traditionally been fought over by both parties during contract negotiations. To treat them as inconsequential demeans the very bargaining process we are entrusted to protect.

317 NLRB at 1357.

Like the circumstances in *Management Training Corp.*, there is no basis herein for concluding that the parties cannot bargain about the terms and conditions of employment for the legislative community advocate position simply because the Employer currently relies on outside sources to fund the position. Even if the Employer's authority to negotiate wages for this job position is wholly or partially circumscribed by the AFT, there is no evidence that it is prohibited from negotiating other benefits and non-economic terms of employment.<sup>4</sup> As the Board has recognized, non-economic terms and conditions of employment can be vitally important to employees, and it should be left to the employees, not the Board, to decide whether employees feel that collective bargaining would be beneficial. See *Kansas City Repertory Theatre, Inc.*, 356 NLRB No. 28, slip op. at 1 (November 16, 2010), citing *Management Training Corp.*, supra.

The record demonstrates that the legislative community advocate is appropriately included in the bargaining unit. The involved employees' community of duties and interests is a major

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<sup>4</sup> Although the record does not necessarily support the Employer's assertion that it would be unable to negotiate "just cause provisions" for the legislative community advocate, even assuming that such a limitation exists, it would not warrant excluding the legislative community advocate from the bargaining unit.

consideration in determining whether a petitioned-for unit is appropriate. See *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 138 (1936). As the party asserting that the legislative community advocate must be excluded from the bargaining unit, the Employer bears the burden of establishing that employees in the disputed job position lack a sufficient community of interest with other employees to be included in the petitioned for bargaining unit. See *Columbia College*, 346 NLRB 726, 729 (2006) (citations omitted). I find that the Employer has failed to meet its burden.

In determining whether employees share a community of interest, the Board weighs such factors as the functional integration of the employer's operations; frequency of employee contact; employee interchange; the employees' degree of skill and common functions; commonality of wages, hours, and other working conditions; and shared supervision. See, e.g., *Publix Super Markets, Inc.*, 343 NLRB 1023, 1024 (2004). Although the parties offered little evidence regarding unit employees' terms and conditions of employment, the testimony suggests that the legislative community advocate shares a strong community of interests and duties with the other employees whose inclusion is not contested. The legislative community advocate and other unit employees: work in the same office; share responsibilities for formulating legislative activity schedules; update the Employer's members about new and proposed legislation; provide lobbyist training to members; and are commonly supervised. It is not clear whether employees receive similar compensation and benefits.

Considering the employees' shared community of interests, I find that the legislative community advocate is appropriately included in the petitioned for unit even though the Employer does not fund the position from its general operating budget. The Employer has not

established that the legislative community advocate is a temporary employee or that collective bargaining would not be beneficial.

Finally, even if the record establishing a community of interest between the community advocate position and the other petitioned-for classifications is marginal, inclusion of the community advocate position is still warranted, otherwise there is a residual unit consisting of a single position; something the Board seeks to avoid. *Huckelberry Youth Programs*, 326 NLRB 1272 (1998); *United Rentals, Inc.* 341 NLRB 540, fn 11 (2004) (Although the record is sparse concerning the terms and conditions of employment of the branch associate, we include her in the unit because otherwise, she would be the only unrepresented employee at this facility).

#### **D. CONCLUSION**

For the reasons set forth above, I find that the petitioned-for unit set forth in Section A above is an appropriate unit for collective bargaining and that the unit includes the disputed legislative community advocate job position.

#### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are all employees employed in the bargaining unit during the payroll period ending immediately preceding the date of this Decision (payroll cutoff date), including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are

also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC (USW)**.

#### **NOTICES OF ELECTION**

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01 a.m. of the day of

the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

### LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that **two** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The list must be of sufficiently large type to be clearly legible. The undersigned shall make this list available to all parties to the election.

In order to be timely filed, such list must be received in Region 17's Office, Suite 100, 8600 Farley, Overland Park, Kansas 66212, on or before **March 5, 2012**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of two copies, unless the list is to be submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the

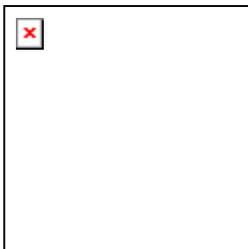
voting process itself, the names should be alphabetized. If you have questions, please contact the Regional Office.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m. (ET) on **March 12, 2012**.

This request may be filed electronically through E-Gov on the Agency's website, [www.nlr.gov](http://www.nlr.gov), but may not be filed by facsimile. Refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in filing electronically. Guidance for E-filing can also be found on the National Labor Relations Board web site at [www.nlr.gov](http://www.nlr.gov). On the home page of the website, select the E-Gov tab and click E-Filing. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file documents electronically will be displayed.

SIGNED at Overland Park, Kansas, this 27th day of February 2012.



*/s/ Daniel L. Hubbel*

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