

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

THE NEWSWALK CONDOMINIUM¹

Employer

and

Case No. 29-RC-10241

**NATIONAL ORGANIZATION OF INDUSTRIAL
TRADE UNIONS (NOITU-IUJAT)**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Rachel Zweighaft, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.
2. The parties stipulated that The Newswalk Condominium, herein called the Employer, a domestic corporation, with its principal office and place of business located at 535 Dean Street, Brooklyn, New York, herein called its Brooklyn facility, is engaged in the ownership and operation of a residential apartment building. During the past year, which period is representative of the Employer's annual operations generally, the

¹ The name of the Employer appears as amended at the hearing.

Employer, in the course and conduct of its business operations, derived gross annual revenues in excess of \$500,000, and purchased and received at its Brooklyn facility, goods valued in excess of \$5,000 directly from enterprises located outside the State of New York.

Based on the stipulation of the parties and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. National Organization Of Industrial Trade Unions (NOITU-IUJAT), herein called the Petitioner or the Union, seeks to represent a unit of all full-time and regular part-time doormen, concierges, porters, handymen and working superintendents employed at the Employer's Brooklyn facility, but excluding all other employees, office clerical employees, foremen, guards, watchmen and supervisors as defined in Section 2(11) of the Act.

Positions of the Parties

The Employer takes the position that the working superintendents are supervisors as defined in Section 2(11) of the Act, and should be excluded from the unit. The Union takes the contrary position. As its witness, the Employer called David Kalbfeld, the

management executive for Heron, LLC,² the Employer's managing agent. The Union's witness was Jerzy ("George") Szmygiel, who was employed until approximately July, 2004, as a working superintendent.

ALLEGED SECTION 2(11) STATUS OF WORKING SUPERINTENDENTS

Case Law

The burden of proving that an employee is a statutory supervisor is on the party alleging such status. *Kentucky River*, 121 S.Ct. at 1866. In light of the exclusion of supervisors from the protection of the Act, this burden is a heavy one. *See Chicago Metallic*, 273 NLRB 1677, 1688, 1689 (1985). Accordingly, when "there is inconclusive or conflicting evidence on specific indicia of supervisory authority, the Board will find that supervisory status has not been established with respect to those criteria." *Property Markets Group, Inc.*, 339 NLRB No. 31, slip op. at 7 (2003). Based on the facts and reasoning set forth below, I have concluded that the Employer has not met its burden with respect to establishing that the working superintendents are Section 2(11) supervisors.

In enacting Section 2(11) of the Act, Congress intended to distinguish "between true supervisors who are vested with 'genuine management prerogatives,' and 'straw bosses, lead men, and set-up men' who are protected by the Act even though they perform 'minor supervisory duties.'" *S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)*, quoted in *Providence Hospital*, 320 NLRB 717, 725 (1996). Accordingly, employees are statutory supervisors only if (1) they hold the authority to engage in one of the twelve supervisory functions set forth in the Act, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of *independent judgment*," and (3)

² It is not clear from the record whether the correct name of the managing agent is Heron, LLC, or Heron, Ltd.

their authority is held “in the interest of the employer.” See *Kentucky River Community Care, Inc.*, 121 S.Ct. 1861, 1867 (2001)(emphasis added). Secondary indicia of supervisory status, which are not specifically set forth in the Act, “are insufficient by themselves to establish statutory supervisory status. *Property Markets Group, Inc.*, 339 NLRB No. 31, slip op. at 7 (2003).

“It is well settled that an employee cannot be transformed into a supervisor merely by the visiting of a title and *theoretical* power to perform one or more of the enumerated functions in Section 2(11) of the Act.” *Property Markets Group, Inc.*, 339 NLRB No. 31, slip op. at 6 (2003)(emphasis added). Moreover, the exercise of “some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner,” or through giving “some instructions or minor orders to other employees,” does not confer supervisory status. *Chicago Metallic*, 273 NLRB at 1689; see *Kanawha Stone Company, Inc.*, 334 NLRB No. 28, slip op. (2001). The use of “independent judgment” must be demonstrated through evidence of “particular acts and judgments,” *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995), rather than through “general, conclusory claims.” *Crittenton Hospital*, 328 NLRB 879 (1999). Independent judgment must be established with respect to each and every supervisory function exercised by the alleged supervisor. *Property Markets*, 339 NLRB No. 31, slip op. at 6.

Proof of independent judgment in the assignment of employees entails the submission of concrete evidence showing how assignment decisions are made. See *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000); *Crittenton Hospital*, 328 NLRB 879 (1999). The assignment of tasks in accordance with an Employer’s set practice, pattern or parameters, or based on routine or obvious factors, does not require a sufficient

exercise of independent judgment to satisfy the statutory definition. *See Express Messenger Systems*, 301 NLRB 651, 654 (1991); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985). The Board and federal courts “typically consider assignment based on assessment of a worker’s skills to require independent judgment and, therefore, to be supervisory,” except where the “matching of skills to requirements [is] essentially routine.” *Brusco Tug & Barge Co.*, 247 F.3d 273, 278 (D.C. Cir. 2001) (citing *Hilliard Development Corp.*, 187 F.3d 133, 146, 161 LRRM 2966 (1st Cir. 1999)). Serving as a conduit for management’s instructions or for the assignment of predetermined tasks, without more, does not elevate an employee into the supervisory ranks. *See McCollough Environmental Services*, 306 NLRB 1565, 1566 (1992); *see also Quadrex Environmental Co.*, 308 NLRB 101 (1992).

Similarly, the degree of independent judgment required to direct employees in the performance of routine, repetitive tasks is correspondingly reduced. *Loyalhanna Health Care Associates*, 332 NLRB No. 86, slip op. at p. 3 (2000); *Ten Broeck Commons*, 320 NLRB 806, 811 (1996); *Maui Medical Group, Inc.*, 2002 WL 561329, 37-RC-3982 (ALJD 2002). For example, in the health care field, preparing a care plan and directing other employees to carry it out does not generally require the use of independent judgment. *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890, 891, 891 n.5 (1997); *Ten Broeck Commons*, 320 NLRB at 811, 811 n. 10 (1996). In a recent case, such a care plan was found to be a mere “check list” of routine job duties, or “a recipe of discrete tasks to be performed by an aide who is adequately trained in performing the work defined in the recipe.” *Franklin Hospital*, 337 NLRB No. 132, slip op. at 11 (2002)(citing *Meridian Home Care Services*, Case 22-RC-12098 (2002)(review denied in an unpublished

decision)). In addition, whether direction is “responsible” as required by Section 2(11) depends “on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs.” *Schnurmacher Nursing Home*, 214 F.3d 260, 267 (2nd Cir. 2000). Such accountability and responsibility can be established through evidence of disciplinary warnings and evaluations specifically holding supervisors accountable for their failure to direct and delegate work to subordinates. *Schnurmacher*, 214 F.3d at 266-67.

With regard to the authority to discipline employees, the power to “point out and correct deficiencies” in the job performance of other employees “does not establish the authority to discipline.” *Crittenton Hospital*, 328 NLRB No. 120 at 2 (citing *Passavant Health Center*, 284 NLRB 887, 889 (1987)). Writing reports on incidents of employee misconduct is not a supervisory function if the reports do not always lead to discipline, and do not contain disciplinary recommendations. *Schnurmacher*, 214 F.3d at 265 (citing *Meenan Oil Co.*, 139 F.3d 311 (2nd Cir. 1998); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996); *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890 (1997)). Likewise, an employee who inspects the work of others and either reports on improper work performance, or orders employees with performance problems to leave a work-site, is not a supervisor unless s/he has the authority to effectuate ultimate personnel decisions. See *Somerset Welding and Steel*, 291 NLRB 913, 914 (1988); see also *Quadrex*, 308 NLRB at 101.

Based on the standards set forth above, the Board has “often held that building superintendents were nonsupervisory employees.” *Cassis Management Corporation*, 323 NLRB 456, 458 (1997) (citing *Hagar Management Corp.*, 313 NLRB 438 (1993); *J.R.R.*

Realty Co., 273 NLRB 1523 (1985), *enf'd.*, 785 F.2d 46 (2d Cir. 1986); *Elias Mallouk Realty Corp.*, 265 NLRB 1225 (1982)). For example, in *Cassis*, the Board determined that a building superintendent who “interviewed job applicants and eliminated those he deemed to be unqualified” was not a supervisor, in part because the respondent’s General Manager “conducted his own interviews with the qualified candidates before making a hiring decision.” *Cassis*, 323 NLRB at 458. Although the building superintendent met with the porters and handymen each morning and gave them instructions “if something had occurred during the night that they were required to deal with before they returned to their normal routine,” the Board found that his “limited role in the parceling out of tasks to the other employees [was] attributable to [his] status as the most senior employee and the fact that he lived on the premises,” and did not require independent judgment. *Cassis*, 323 NLRB at 458.

Similarly, in *Property Markets Group, Inc.*, 339 NLRB No. 31, slip op. (2003), the Board found that a building superintendent’s authority was “limited to directing, overseeing, and assigning the routine daily functions of the employees at [the building], whose jobs [entailed] almost entirely the routine execution of daily duties.” *Property Markets*, 339 NLRB No. 31, slip op at 8. The emergency repair work performed by the superintendent and other employees was also routine in nature. *Property Markets*, 339 NLRB No. 31, slip op at 8. In determining whether to perform a given task, himself, or assign it to a handyman, the superintendent simply assessed “the relative skills and availability of the two men, with [the building superintendent] possessing greater experience.” *Property Markets*, 339 NLRB No. 31, slip op at 8. Under these facts, no “independent judgment” entered into either the building superintendent’s assignment of

routine daily tasks, or his assignment of tasks outside employees' regular job duties, and the superintendent was found not to be a supervisor. *Id.*

Facts and Discussion

The Employee Complement

In the instant case, the record indicates that Szmygiel was employed as a working superintendent from approximately December, 2003, until approximately early July, 2004. He reported directly to Kalbfeld, the management executive for the Employer's managing agent, Heron, LLC. Szmygiel's work schedule was from 8:00 a.m. to 4:00 p.m., Monday through Friday, with overtime work on weekends in emergency situations. At the time of the hearing, the superintendent position occupied by Szmygiel was vacant.

Szmygiel testified that during his tenure with the Employer, the employee complement included two porters, who worked from Monday through Saturday. One of the porters worked from 7 a.m. until 3:00 p.m., and the other, from 8:00 to 4:00 p.m. In addition, there were three doormen providing 24-hour coverage, with shifts from 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 p.m., seven days per week. There was also a "lobby person," hired in 2004, whose work schedule was not disclosed.

Szmygiel testified that the two porters swept the sidewalks, collected garbage and cleaned the building. The official job description states that these tasks are to be performed on a daily basis. In addition, the job description indicates that the porters conduct snow removal and water trees and flowers outside the building.

With regard to the lobby person, the official job description states that this individual cleans the lobby, elevators and basement, and waters the plants in the lobby.

Although the official job description for the doormen was not offered into evidence, Szmygiel testified that the doormen announced visitors, kept spare sets of keys and informed the building's occupants when their deliveries arrived.

Job Description of the Working Superintendent

Szmygiel testified that as a working superintendent, he spent 90% of his time making repairs, and 10% of his time "supervising" other employees. Although Kalbfeld claimed that the working superintendent's "first and foremost duty is to oversee and supervise all of the employees under him," he admitted that Szmygiel sometimes performed such non-supervisory functions as helping the porters with their assigned tasks, ordering supplies and materials and dealing with contractors. The official job description for the Employer's building superintendents, offered into evidence by the Employer, includes such non-supervisory functions as responding to emergency calls from unit owners and tenants, making repairs, replacing light bulbs, maintaining a fuel oil log, and performing "first echelon maintenance" on the trash compactor and the heating, hot water and ventilation systems. Although the job description states that the building superintendent "supervises" the staff, it emphasizes that "under no circumstances shall the Building Superintendent place anyone on the payroll without the approval of the Management Executive," that "only the Management Executive, except for emergencies, may authorize overtime," and that "vacation schedules are to be submitted to the Management Executive." Kalbfeld testified that the official job description accurately reflects the building superintendents' job duties.

Assign / Responsibly Direct

Kalbfeld testified that the superintendent “oversees,” “supervises,” “instructs,” and “shows guidance” to employees. According to Kalbfeld, the superintendent checks employees’ work at the end of each day, to make sure that their tasks were carried out “correctly and properly.” The superintendent then reports to Kalbfeld, who asks him, “Are the men, you know, doing what they’re supposed to do?” Kalbfeld has to “rely on his, you know, supervisory capacities to tell me that the doormen are doing their job, the porters.”

When asked whether the superintendents assign porters their “particular work assignments for the day,” Kalbfeld responded, “In general the, the schedules are pretty much set, the hours are set. But to answer your question, yes, if something arises it is only that position that would instruct, ‘I need this done now,’ or ‘I need that item done this afternoon.’” The superintendent provides “very clear instructions, you know, to supervise the porters as to, besides their normal duties what has arisen that day to do certain work on the roof deck or in the garage.”

Szmygiel asserted that the operation is largely “automatic,” since all the employees are familiar with their daily tasks. However, he conceded that the porters were required to listen to him when he asked them to perform a task.

Kalbfeld further testified that when two new porters were hired, in late December, 2003, or early January, 2004, he asked Szmygiel to “show them the building, what their duties are, you know, where certain things are. And then he would show them, train them as to how they are to perform their work.” The superintendent “would provide the

training of how to work the compactor, where to take their garbage, where to get supplies, how to do certain things.”

In addition, Kalbfeld maintained that employees requesting time off directed their requests to Szmygiel. Szmygiel, in turn, informed Kalbfeld of their request. Kalbfeld claimed that he normally granted any time off request that was okay with Szmygiel.

Szmygiel testified that he did not have the authority to change employees’ schedules. Rather, if a doorman wanted to work on a different day, he would contact the managing agent.

In sum, the record reflects that about 10% of the working superintendent’s job consists of overseeing other employees in the performance of routine tasks, which are largely identical from one day to the next. There is no evidence that the working superintendent exercises “independent judgment,” as defined in the case law, in assigning or directing employees.

Moreover, at the time of the hearing, there was no working superintendent on the Employer’s payroll; the doormen, porters and lobby person were performing their jobs without the benefit of a working superintendent’s oversight. Previously, when Szmygiel was employed as a working superintendent, the porters performed their jobs in his absence on Saturdays, and the doormen worked without his guidance on Saturdays, Sundays, and weekdays after 4:00 p.m. and before 8:00 a.m.

In conclusion, the Employer has failed to establish that the working superintendents assign or responsibly direct employees with the use of independent judgment, as defined in the Act.

Hire

The record reflects that sometime in 2004, the Employer hired a part-time lobby person, without any input from Szmygiel. However, Kalbfeld testified that Szmygiel was involved with the hiring of two porters in late December, 2003, or early January, 2004, to replace two porters who had resigned. At that time, Szmygiel placed advertisements for the two new porters in a local newspaper. After interviewing two applicants for the porter positions, Szmygiel told Kalbfeld that these two individuals were the right people for the job. However, Kalbfeld acknowledged that he did not follow Szmygiel's recommendation until after interviewing the two prospective porters himself. Szmygiel confirmed that he interviewed the two porters and recommended them, after reviewing a number of applications, but that Kalbfeld made the final hiring decision.

In addition, Szmygiel testified that on an unspecified date, he recommended someone he knew to fill in for an absent doorman for four weeks, in a situation where there was not sufficient time to conduct a search for a replacement. However, the record reveals that the managing agent made the final decision to hire this fill-in doorman.

The Employer did not provide any evidence that working superintendents employ "independent judgment" in making hiring recommendations. Indeed, the record does not reveal what criteria the superintendents consider in making such recommendations. Moreover, the record evidence shows that the managing agent does not follow working superintendents' hiring recommendations, in the absence of an independent interview. I note that the Employer's official job description prohibits superintendents from hiring employees without the managing agent's approval. Under these facts, the Employer has

failed to demonstrate that working superintendents hire employees with the use of independent judgment, as defined in the Act.

Discipline

Kalbfeld testified that the superintendent has the authority to discipline employees, and has “great latitude in disciplining and sitting down with employees and reprimanding, whether it’s poor performance or not following through and carrying through, as the, the really top position in the building there.”

Kalbfeld testified that on one occasion, Szmygiel told him that “one of the doormen were [sic] not treating [him] properly. George told me that he felt he was not given the respect or carry out his wishes. And there was a verbal, you know, minor thing where George told me that he had to tell this doorman that he could not do this...he mentioned to this doorman, you know, ‘I’m the superintendent. You have to follow my directions and rules. And how you’re acting or treating or answering me is not acceptable. I won’t stand for it.’”

With regard to this incident, Szmygiel asserted that after he asked the doorman to perform a task, the doorman threatened to beat him up. Szmygiel then informed Kalbfeld of the incident, which Kalbfeld “discussed” with the doorman and Szmygiel. Szmygiel testified that “this was a perfect situation to discipline somebody if I could,” but he did not have the authority to do so.

When asked whether the superintendent has the authority to issue written discipline, Kalbfeld testified, “To myself, he can write up an employee or converse with me, you know, any formal disciplinary actions.” Kalbfeld did not provide a specific example.

Szmygiel testified that during the time he worked for the Employer, no porters were suspended and no doormen were disciplined.

In sum, the record fails to establish that working superintendents have the authority to discipline employees. Rather, on one occasion, Szmygiel verbally protested a doorman's behavior and made a complaint to the managing agent. Although Szmygiel believed disciplinary action was appropriate, his wishes were overruled. There is no evidence that working superintendents have ever disciplined employees, or effectively recommended disciplining employees.

Discharge

With respect to the authority to discharge or terminate an employee, Kalbfeld testified that the superintendent's "comments would weigh extremely heavily. He would not be the absolute final say." However, Kalbfeld did not recall any specific instances in which Szmygiel recommended that an employee be discharged.

Szmygiel testified that during the time he worked for the Employer, no porters or doormen were discharged. Thus, the record evidence with regard to the working superintendents' authority to discharge employees, or to effectively recommend their discharge, is only theoretical, or hypothetical, in nature. In the absence of specific evidence, I am unable conclude that working superintendents have the statutory authority to discharge employees.

Adjust Grievances

Kalbfeld testified that the superintendent has the authority to handle grievances among the employees, but he did not provide specific examples. "Nothing comes to mind now where he had to intervene. But, it is expected that if there were some issues

with staff that as the, you know, the head of the building he's to try to work out, you know, any issues.”

Here, too, the record evidence with regard to the working superintendents' authority to adjust employees' grievances is purely hypothetical. In the absence of specific evidence, I am unable conclude that working superintendents have the statutory authority to adjust grievances.

Conclusion

In sum, the Employer has failed to provide evidence that working superintendents exercise “independent judgment” with respect to any of the supervisory indicia set forth in the Act. In the absence of such evidence, secondary indicia of supervisory status cannot be considered. *Property Markets Group, Inc.*, 339 NLRB No. 31, slip op. at 7. On this record, the Employer has not met its burden of establishing that the working superintendents are statutory supervisors. Accordingly, I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a)(1) of the Act:

All full-time and regular part-time doormen, concierges, porters, handymen and working superintendents employed at the Employer's Brooklyn facility, but excluding all other employees, office clerical employees, foremen, guards, watchmen and supervisors as defined in Section 2(11) of the Act.

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 employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, 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 or 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 to vote shall vote whether or not they desire to be represented for collective bargaining purposes by National Organization Of Industrial Trade Unions (NOITU-IUJAT).

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of

the date of this Decision, four (4) 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 who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor, Brooklyn, New York 11201 on or before **August 16, 2004**. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

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 No. 52 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

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 p.m., EST
on **August 23, 2004**. The request may be filed by electronic transmission through the
Board's web site at NLRB.Gov but **not** by facsimile.

Dated: August 9, 2004, Brooklyn, New York.

/S/ ALVIN BLYER

Alvin P. Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201