

R.D. # 0007-03  
Union, N.J.

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 22

<b>CMS MID-ATLANTIC, INC.</b> <sup>1</sup> Employer	
and	CASE 22-RC-12369
<b>SEIU, LOCAL 74, AFL-CIO</b> <sup>2</sup> Petitioner	

**DECISION AND DIRECTION OF ELECTION**

1. Introduction

The Petitioner seeks to represent a unit of all full-time and regular part-time field staff including gravediggers, the assistant superintendent and a gatekeeper employed by the Employer at its Union, New Jersey location. The Employer argues that the assistant superintendent is a supervisor within the meaning of Section 2(11) of the Act and the gatekeeper does not share a community of interest with the other unit employees; therefore, they should be excluded from the unit. For the reasons described below, I find that the assistant superintendent is not a supervisor and should be included in the unit. I further find that the record is insufficient for me

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<sup>1</sup> The name of the Employer appears as amended at the hearing.

<sup>2</sup> The name of the Petitioner appears as amended at the hearing.

to determine whether the gatekeeper shares a sufficient community of interest with other employees to be included in the unit with them. I will therefore allow the gatekeeper to vote subject to challenge.

Under Section 3(b) of the Act, I have the authority in this proceeding to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding,<sup>3</sup> I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. 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>4</sup>
3. The labor organization involved claims to represent certain employees of the Employer.<sup>5</sup>
4. 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.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

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<sup>3</sup> No briefs were filed.

<sup>4</sup> The Employer is engaged in cemetery management at the Hollywood Memorial Park and Cemetery in Union, New Jersey, the only facility involved herein.

<sup>5</sup> The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

**All full-time and regular part-time field staff including gravediggers and the assistant superintendent employed by the Employer at the Hollywood Memorial Park and Cemetery in Union, New Jersey, excluding all office clericals employees, professional employees, guards and supervisors as defined in the Act.**

The parties are in agreement that the appropriate unit in this matter should include all full-time and regular part-time field staff including gravediggers employed by the Employer at the Hollywood Memorial Park and Cemetery in Union, New Jersey. Likewise, they agree that all office clerical employees, professional employees, guards and supervisors as defined in the Act should be excluded. At issue is the supervisory status of Siegfried Turkewic, the assistant superintendent, whom the Employer contends is a supervisor within the meaning of the Act and whether the gatekeeper shares a sufficient community of interest to be included in the unit.

## 2. Facts

### A. Assistant Superintendent

The Employer engages in cemetery management at several locations, including the Hollywood Memorial Park and Cemetery in Union, New Jersey. It employs approximately 11 employees there, including a Superintendent, an Assistant Superintendent, a gatekeeper and gravediggers. The parties stipulated, and I find, that the Superintendent, Fred Maxwell, is a statutory supervisor. The Superintendent reports directly to Mario Cutugno, the Employer's Vice President of Operations.

Vice President of Operations Cutugno has day-to-day responsibility for the Employer's business operations throughout New Jersey and New York.

Superintendent Fred Maxwell, who oversees the Hollywood Memorial Park and Cemetery location, reports to Cutugno.

The record reveals that assistant superintendent Siegfried Turkezcic assumes authority for the operation of the cemetery during the Superintendent's absences.<sup>6</sup> He does not possess the authority to hire, fire, transfer, layoff or recall employees, nor to recommend such actions. Further, there is no evidence that he is involved in the hiring process by interviewing employees; recommends promotions or raises; or has authority to grant time off to employees. He does not schedule employees for work or determine their hours nor does he have authority to assign overtime, resolve employee grievances, evaluate employees' work performance or discipline employees.

With respect to the assignment of work, the record reveals that assignments are generated by the Superintendent and distributed by the assistant superintendent. In this connection, work assignments are distributed to the gravediggers at the start of each shift. There is no evidence in the record that the assistant superintendent exercises independent judgment in his distribution function, rather than merely conveying the assignments made by the Superintendent. The record reveals that the assistant superintendent reports employee misconduct to the Superintendent for consideration. For instance, at the end of July, the assistant superintendent reported an employee's misconduct to the Superintendent.<sup>7</sup> Although, the employee was terminated for his misconduct, the record reveals no evidence that the assistant

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<sup>6</sup> There is no evidence as to how frequently this occurs. However, the Board has held that isolated supervisory substitution does not warrant a supervisory finding. *Latas de Alumino Reynolds*, 276 NLRB 1133 (1985).

<sup>7</sup> The assistant superintendent memorialized this in a written incident report which was not produced at the hearing.

superintendent did anything more than report the incident. It is undisputed that the assistant superintendent is obligated to report such misconduct when he becomes aware of it. There is no evidence that he makes any recommendations as to disciplinary matters.

The record reveals that the assistant superintendent, like all other employees, shares the same primary duties and terms and conditions of employment. The parties agree that the assistant superintendent works together with other unit employees and spends a majority of his work time performing the same physical tasks as all other unit employees, such as set-up work, digging, trimming markers and driving a backhoe as needed. In addition, the assistant superintendent performs visual packaging and plumbing work.

The only notable distinctions between the assistant superintendent and other employees are their rate of pay<sup>8</sup> and his having keys to the office, as well as the fact that the assistant superintendent meets with the Superintendent each morning to receive instructions, which he in turn conveys to other employees.

#### B. Gatekeeper

The record reveals that Gabriel, the gatekeeper, is responsible for closing the front gate of the cemetery at night.<sup>9</sup> He is retired; his work for the Employer consists solely of closing the front gate and locking it after checking to ascertain that the cemetery is empty; in the event someone is still in the cemetery, he advises them to leave. It appears that Gabriel's duties require approximately 15 minutes to complete.

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<sup>8</sup> While Turwezic earns \$18.25 per hour, gravediggers' hourly pay ranges from \$9.00 to \$15.84. The Superintendent earns \$18.20 per hour.

<sup>9</sup> Gabriel's surname is unknown.

It appears that Gabriel does not have contact with other unit employees, since he arrives at the Cemetery after regular work hours. However, the record does not describe Gabriel's terms and conditions of employment, who supervises him, how he is paid, what benefits, if any, he receives nor who performs his function during his absence.

The rear gate is regularly opened and closed by gravedigger Orazio Diiusto. During Diiusto's absences, the assistant superintendent assumes this function. Only the front gate is left open for visitors after work hours and during the weekends.

### 3. Analysis

#### A. Assistant Superintendent

Section 2(11) of the Act defines a supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *Providence Hospital*, 320 NLRB 717, 725 (1996), the Board held, "In enacting Section 2(11) of the Act, Congress distinguished 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.'" *Id.* at 724, citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (quoting S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)). The legislative history instructs the Board not to construe supervisory status too broadly, because an employee who is deemed a supervisor loses the protection of the Act. See *Providence*

*Hospital*, above at 725; *Warner Co. v. NLRB*, 365 F. 2d 435, 437 (3rd Cir. 1966), cited in *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1073 (1985).

While the possession of any one of the functions enumerated in Section 2(11) is sufficient to establish supervisory status, Section 2(11) requires that a supervisor must perform those functions with independent judgment, as opposed to in a routine or clerical manner. *Bay Area-Los Angeles Express*, above at 1073 and cases cited therein. The burden of proving supervisory status rests on the party contending that status. *NLRB v. Kentucky River*, 532 U.S. 706 (2001); *Midland Transportation Co.*, 304 NLRB 4 (1991); *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979). Absent detailed, specific evidence of independent judgment, mere inference or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992)(citing *Sears Roebuck & Co.*, 304 NLRB 193 (1991)).

Further, whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established on the basis of those indicia. *The Door*, 297 NLRB 601 (1990) (quoting *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989)). It is well established that an employee's title, standing alone, is not indicative of supervisory status for purposes of the Act. *John N. Hansen Co.*, 293 NLRB 63 (1989); *Waterbed World*, 286 NLRB 425 (1987). The Board in *Providence Hospital* quoted with approval the court in *NLRB v. Security Guard Service*, 384 F. 2d 143, 151(5th Cir. 1967):

If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be

predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car.

Based upon the above and the record as a whole, noting that the assistant superintendent shares similar terms and conditions of employment as other unit employees and the absence of evidence that he has the independent authority as defined in Section 2(11) of the Act, I find that he does not possess any indicia of supervisory status that would warrant his exclusion from the unit. *Spector Freight System, Inc.*, 216 NLRB 551 (1975); *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995); see also *Browning Ferris, Inc.* 275 NLRB 292(1985).

The Employer can point to little direct evidence to support its assertion that the assistant superintendent is a statutory supervisor. In this regard, it asserts that Turkewic is a supervisor because he assigns work and recommends the hiring, firing, and discipline of unit employees. However, there is no indication in the record that Turkewic exercises independent judgment in assigning work, rather than merely conveying the assignments made by the Superintendent. In addition, there is no evidence that the assistant superintendent effectively recommends hiring, firing or discipline of employees. The Employer relies on a written incident report prepared by Turkewic. However, since the Employer failed to produce this document, which is in its possession, the Employer has failed to establish that Turkewic made a recommendation, rather than merely reporting the incident as required. The Board has held that the mere reporting of misconduct does not establish supervisory status. *Express Messenger Systems*, 301 NLRB 651, 653-654 (1991).

The Employer would have the Region define Turkewic as a supervisor based on certain secondary indicia of supervisory status present in the record. These include

Turkewic's enhanced salary, his having keys to the office and his meeting with the Superintendent to receive instructions. I note that secondary indicia of supervisory authority may be relied on only in a close case where some evidence indicated the existence of primary indicia. *GRB Entertainment, Inc. d/b/a Aardvark Post*, 331 NLRB 320 (2000). When there is no evidence that at least one of the primary statutory indicia of supervisory status exist, like here, the existence of secondary indicia is insufficient to establish supervisory status. *SDI Operating Partners*, 321 NLRB 111, 112 fn. 2 (1996). In any event, it is the Employer's burden to prove that the assistant superintendent is a supervisor as defined by the Act and I find that the Employer has failed to meet this burden. I therefore conclude that the assistant superintendent is not a supervisor and, therefore, he will be included in the appropriate unit.

B. Gatekeeper

With respect to the inclusion of the gatekeeper in the petitioned for unit, I find that the evidence is inconclusive. In this regard, it is noted that the Employer's assertions regarding his lack of community of interest with other unit employees is not supported by documentary evidence or by testimony. In this circumstance, noting that there is no evidence as to the terms and conditions of his employment, his supervision or other aspects of his employment, I will allow Gabriel to vote in the election subject to challenge. Cf. *Barre-National, Inc.*, 316 NLRB 877 (1995).

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set

forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before 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 an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began 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 **SEIU, LOCAL 74, AFL-CIO**.

#### LIST OF VOTERS

In order to ensure 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 in 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 hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters in the unit found appropriate above 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 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before **September 3, 2003**. 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.

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, DC 20570-0001. The Board in Washington must receive this request by **September 9, 2003**.

Signed at Newark, New Jersey this 26<sup>th</sup> day of August, 2003.

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Gary T. Kendellen, Regional Director  
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