

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
REGION 9

DISTRICT 1199, THE HEALTHCARE AND SOCIAL
SERVICE UNION, SEIU, AFL-CIO ^{1/}

Employer

and

Case 9-RC-17738

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 1794, AFL-CIO, CLC

Petitioner

**REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

The Employer, District 1199, the Healthcare and Social Service Union, SEIU, AFL-CIO, with its headquarters in Columbus, Ohio, is engaged in representation for the purposes of collective-bargaining of employees at various locations in Ohio, Kentucky and West Virginia. The Petitioner, Office and Professional Employees International Union, Local 1794, AFL-CIO, CLC, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent essentially an all employee unit comprised of the Employer's administrative organizers, organizers, field staff, receptionist, secretaries, accounts payable and accounts receivable employees, the newsletter editor, and the membership coordinator, employed by the Employer at its Ohio, Kentucky and West Virginia operations, excluding all managerial employees, confidential employees, and guards and supervisors as defined in the Act. There is no recent history of collective bargaining affecting the employees involved in this proceeding.

A hearing officer of the Board held a hearing and the Employer and Petitioner filed briefs with me, which I have carefully considered in reaching my decision. The Employer, contrary to the Petitioner, contends that there is a disqualifying conflict of interest that precludes the Petitioner from representing the Employer's employees. The parties also disagree about the unit placement of ten employees. The Petitioner seeks to exclude five employees from the unit on the basis that they are supervisors or, in the case of one of the five, that he is a managerial employee. The Petitioner also seeks to exclude an additional three employees, who are employed as organizing or membership interns, on the basis that they are temporary employees or that they lack a community of interest with unit employees. The Employer would include these eight employees in the unit as nonsupervisory and nonmanagerial employees, and, in the case of the

^{1/} The Employer's name appears as amended at hearing.

interns, as employees who are employed for an indefinite period and share a community of interest with the employees in the proposed unit. Contrary to the Petitioner, the Employer also seeks to exclude two employees on the basis that they are managerial employees, and in the case of one of the two, that he is also a confidential employee. I note that the Petitioner has stated a willingness to proceed to election in any unit found appropriate.

I have carefully considered the evidence and the arguments presented by the parties on the issues. I have concluded, as discussed below, that the Employer has not established the existence of a disqualifying conflict of interest and that the Petitioner is entitled to seek to represent a unit of the Employer's employees. I have also concluded, with regard to the Petitioner's unit placement contentions, that it has not met its burden of establishing that five of the disputed employees, Gabe Kramer, Mike Lauer, Tara O'Dowd, Mark Raleigh and John Burant, are statutory supervisors. Nor is there evidence that Burant is a managerial employee. Additionally, I find no basis to exclude the three organizing or membership interns, Dee Ahern, Emily Crabtree and Felicia Thomas, from the unit as the duration of their employment is uncertain and they share a community of interest with other employees in the unit. With regard to the Employer's unit placement contentions, I find no basis to conclude that Sherry McKinney is a managerial employee and no basis to conclude that Jason Perlman is a confidential employee. However, there is conflicting evidence about the managerial status of Perlman and I shall permit him to vote subject to challenge. Accordingly, I have directed an election in a unit of approximately 53 employees employed by the Employer at its Ohio, Kentucky and West Virginia operations.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. I will then present, in detail, the facts and reasoning that supports each of my conclusions on the issues.

I. OVERVIEW OF OPERATIONS

The Employer represents approximately 21,000 employees in the public and private sector. Many of the employees represented by the Employer work in nursing homes, hospitals, social services, academic institutions, libraries and in state government. The Employer operates from five offices located in Columbus, Cincinnati, Cleveland and Youngstown, Ohio, and in Huntington, West Virginia. The Employer has five elected officers: Dave Regan, president; Veronica Davis, secretary-treasurer; Tonya Ellison, executive vice-president; Lisa Hetrick, executive vice-president, and Bill Padisak, Jr., executive vice-president. The Employer's leadership also includes five rank-and-file vice-presidents and an executive board comprised of approximately 200 members. The Union employs a total of about 66 employees, including the 5 elected officers.

Several stipulated supervisors report directly to Regan or to one of the other elected officers. Reporting directly to Regan are: Scott Courtney, organizing director; Al Bacon, education director, and Gloria Fauss, assistant to the president for governmental affairs. Reporting directly to Davis is Connie Figgins, controller/CFO, and reporting directly to Hetrick are four team leaders who lead administrative organizers in four different sectors. The four team

leaders and their sectors are: Ann Mueller, Ohio area director – public sector; Becky Williams, Ohio area director – private sector; Carl Rollins, northeast Ohio nursing home director and the Ohio state chapter director, a currently vacant position. Each of the team leaders supervise three to six administrative organizers. The most current organizational chart for the Employer also reflects that Courtney supervises about 27 field organizers, including 3 positions designated on the Employer’s chart as lead organizers, although the names of the employees in those positions are not identified by the chart.

II. FACTS AND ANALYSIS – CONFLICT OF INTEREST

The Employer and the Office and Professional Employees International Union, SEIU, AFL-CIO, Local 514, are certified as the joint representatives of a unit of employees who are employed at Defiance Hospital located in Defiance, Ohio in northwest Ohio near the border with Indiana. The joint certification extends back several years, although the certification originally included Local 514 and SEIU, Local 3. Local 3 was merged into the Employer in May 1995. The employees who are in the jointly represented unit are divided by the joint representatives into two groups. The Employer is primarily responsible for the Group 1 employees, which includes employees who are predominantly service and maintenance employees. Local 514 is primarily responsible for the Group 2 employees, which includes technical employees such as respiratory and physical therapists and the licensed practical nurses. The Employer and Local 514 jointly negotiated and are currently parties to a collective-bargaining agreement with Defiance that is effective from January 15, 2002 through December 7, 2004. Under the current agreement, Defiance remits dues directly to each of the joint representatives. The Employer maintains that it is a competitor of the Petitioner and that the joint representation of the Defiance unit disqualifies the Petitioner from representing the Employer’s employees. For the following reasons, I disagree.

The Board has considered over the years two principal situations that may lead to the disqualification of a labor organization from representing employees for purposes of collective bargaining. One type of situation arises where the labor organization is a business rival of the employer and the other occurs where the labor organization and the union, acting as an employer, are affiliates of the same international union. *Alanis Airport Services*, 316 NLRB 1233 (1995)(intervenor with relationship to potential competitor of employer not disqualified where prospects of competition uncertain and speculative); *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954)(petitioner disqualified where it operated optical business in direct competition with the employer of the employees whom it sought to represent); *Teamsters Local 249*, 139 NLRB 605, 606 (1962)(petitioner disqualified where union acting as employer and petitioner are affiliates of the same international union); Cf. *Welfare & Pension Funds*, 178 NLRB 14 (1969)(“semi-beneficial” petitioner disqualified from representing employer that was a welfare and pension fund existing for benefit of the members of the petitioner’s sister locals). The Board has held that a showing of a “clear and present” danger is required to find that a union has a disabling conflict of interest. E.g., *Alanis Airport Services*, supra. Moreover, the burden on the party seeking to prove this conflict of interest is a heavy one. *Id.*

The Employer contends that the Petitioner is disqualified from representing its employees under both lines of cases discussed above. Thus, the Employer asserts that because it and the Petitioner seek to represent the same types of employees, those employed in the health care field, that it and the Petitioner are “general” competitors who may attempt to organize the same units. In this vein, the Employer argues that if its members are represented by the Petitioner they, “will be subject to discipline if they subordinate the interests of [the Petitioner] to those of [the Employer]” according to the Petitioner’s Constitution and By-laws. The thrust of the Employer’s argument is that its organizers will place themselves in peril with the Petitioner as representative by seeking to organize a unit also sought by the Petitioner or one of its affiliates.

I note initially that the language relied on by the Employer for the above proposition is not so clear. Thus, the Constitution of the Petitioner specifies only that members “may be penalized” for, “working in the interests of any organization or a dual union opposed to the interests of this Union.” I find that the Employer’s argument is speculative and remote in two significant respects. First, the Employer did not provide any empirical evidence to establish that it and the Petitioner are actually competitors for the same bargaining units, nor how often they are direct competitors for any such units. The record does not reflect the extent of the direct competition, if any, between the Employer and the Petitioner and without such information this contention is mere speculation, at best tenuous, and does not present the “clear and present” danger necessary to constitute a disqualifying conflict of interest. *Alanis Airport Services*, supra.

Second, even assuming significant evidence of direct competition, I find that it is speculative to conclude that the vague language set forth in the Petitioner’s Constitution will or may be used to discipline members for performing their jobs. It is extremely dubious that the framers of the Petitioner’s Constitution envisioned the circumstances involved here when the language in question was drafted. It is certainly arguable that members of the Petitioner employed by the Employer, and working on a campaign in which the Petitioner also seeks to represent employees, are working in the interests of the Petitioner when they perform their jobs for the Employer, thereby preserving their jobs and their membership. Moreover, the Employer has the same greater interest as the Petitioner does – the effective representation of working men and women, and as an organization is not opposed to the interests of the Petitioner.

The Employer also contends that the Petitioner is disqualified from representing its employees because of the joint certification of the Employer and a sister local of the Petitioner, Local 514, for the Defiance Hospital unit. The Employer notes in making this argument that, “The question of whether a joint certification disqualifies one of the partners from representing employees of the other may be one of first impression,” and it characterizes this issue as a conversion of the two lines of conflict of interest cases discussed above. The Employer poses the conflict here as one in which the administrative organizer of the Employer assigned to represent employees at Defiance Hospital becomes a member of the Petitioner and must represent the interests of the Employer against potentially competing interests of the Petitioner. The Employer again notes that its organizers would be subject to discipline if they subordinated the interests of the Petitioner to those of the Employer.

There is a long and a short answer to this second conflict of interest claim by the Employer. The short answer is that there can be no conflict of interest in such a situation because the law requires that the agents of the joint representatives owe a duty of fair representation to all of the employees in the bargaining unit, regardless of their classification or job duties. See, *Steelworkers Locals 196, 6850, 7508 etc.*, 226 NLRB 772 (1976), *supplemented by*, 243 NLRB 1157 (1979). Joint representatives of a single unit who bargain only for employees within their own jurisdiction act inconsistently with the concept of joint representation and may conceivably lose their certification. Cf. *Automatic Heating & Service Co.*, 226 NLRB 1065 (1972). Accordingly, I find that as joint representatives the Employer and Local 514, a sister local to the Petitioner, do not possess a conflict of interest because their interests are the same – the effective representation of their shared unit at Defiance Hospital.

I also find no conflict arising out of the joint certification of the Employer and Local 514 at Defiance Hospital because no conflict of interest exists on the part of the Petitioner such that a good-faith collective-bargaining relationship between the Petitioner and the Employer could be jeopardized. See, *Alanis Airport Services*, *supra*, citing *Bausch & Lomb*, *supra*. The conflict of interest contemplated here by the Employer involves the potential of divided loyalty that one of the Employer's employees may experience. This is not the type of conflict which has been found to disable a Petitioner as a bargaining representative. Moreover, I find that a single joint certification involving the Employer and a different local of the Petitioner's International Union at a different location from that in which nearly all of the Employer's employees are located is too remote and tenuous to constitute the "clear and present" danger contemplated by the body of precedent in this area. *Alanis Airport Services*, *supra*. In concluding that this argument of the Employer lacks merit, I note that "there is a strong public policy favoring the free choice of a bargaining agent by employees" and that "this choice is not lightly to be frustrated." *Quality Inn Waikiki*, 272 NLRB 1, 6 (1984).

In sum, the Employer has raised various arguments that would represent a significant extension of any conflict of interest ever found by the Board. Any conflict here is at most speculative and remote and does not represent the "clear and present" danger to the collective-bargaining process found by the Board under circumstances far more likely to involve an actual conflict of interest, such as where a labor organization effectively seeks to bargain with itself by representing employees of a sister local. *Teamsters Local 249*, *supra*. I am bound to follow Board precedent and will not extend the conflict of interest law to such a precipice. Accordingly, I find that the Employer has not met its heavy burden of establishing a disqualifying conflict of interest and conclude, therefore, that the Petitioner is qualified to represent the Employer's employees for purposes of collective bargaining. *Alanis Airport Services*, *supra*.

III. FACTS AND ANALYSIS – UNIT PLACEMENT ISSUES

The issues that remain to be addressed involve the unit placement of ten employees. The inclusion of many of these employees has been contested on the basis that they are putative supervisors under the Act. Accordingly, I begin this discussion with a recitation of the law and precedent that is dispositive to the question of supervisory status under the Act. It is well settled that the party seeking to exclude an individual from a bargaining unit on the basis that the

individual is a statutory supervisor has the burden of proving such status. *NLRB v. Kentucky River Community Care, Inc.*, 121 S.Ct. 861, 863 (2001); *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995); *Clark Machine Corp.*, 308 NLRB 555 (1992). Section 2(11) of the Act defines a supervisor as a person:

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

I note that in enacting Section 2(11) of the Act Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” See, Senate Rep. No. 105, 80th Cong., 1st Sess. 4, reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947. See also, *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985); *NLRB v. Bell Aerospace Co.*, 416 NLRB 267, 280-281, 283 (1974). Although the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status, such authority must be exercised with independent judgment and not in a routine manner. *NLRB v. Kentucky River Community Care, Inc.*, supra, at 1867; *KGW-TV*, 329 NLRB 378 (1999); *Entergy Systems & Service*, 328 NLRB 902 (1999); *Queen Mary*, 317 NLRB 1302 (1995). Thus, the exercise of “supervisory authority” in merely a routine, clerical or perfunctory manner does not confer supervisory status. *Feralloy West Corp. and Pohang Steel America*, 277 NLRB 1083, 1084 (1985); *Chicago Metallic Corp.*, supra; *Advanced Mining Group*, 260 NLRB 486, 507 (1982). Moreover, in the event that “the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Conclusory evidence regarding the possession of Section 2(11) indicia, whether the evidence is contained in job descriptions, *Crittenton Hospital*, 328 NLRB 879 (1999), or testimony, *Sears, Roebuck & Co.*, 304 NLRB 193 (1991), is insufficient to establish supervisory status. Thus, where there exists general conclusionary evidence that individuals are responsible for supervising, directing, or instructing others, such evidence, standing alone, is deemed insufficient to prove supervisory status because it does not shed light on exactly what is meant by such general conclusionary words or whether an individual engaging in these activities is required to exercise independent judgment. For example, as the Seventh Circuit aptly noted in *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151 (7th Cir. 1970), there is enough play in the meaning of such terms that the Board is not bound to equate them with supervision in the statutory sense.

I turn now to an application of the above principles to the individuals in this matter whose supervisory status is in dispute.

John Burant:

Contrary to the Employer, the Petitioner contends that Burant is a supervisor within the meaning of Section 2(11) of the Act. The record reflects that Burant is employed by the Employer as a researcher. He is referred to in the record as a Research Analyst. His responsibilities include conducting research through the Internet and traveling to various courthouses to review records, such as reviewing material on county budgets. Although he has a college degree, a degree is not required for the position. When he was hired he received an advance starting pay that put him into the “3.5-year step of the salary schedule.”

The record reflects that the Employer is contemplating hiring someone to fill the position of a Researcher/Strategic Campaigner. The Employer has instructed interested applicants to submit their “resumes, explanation of interest and writing samples” to Burant. The individual hired for this position will report directly to the “senior” research staff in Columbus. There is evidence in the record that Burant may be involved in screening applicants for the position. The Employer asserts that Dave Regan will make the hiring decision and will “probably” supervise the individual hired.

The Petitioner has failed to meet its burden of establishing that Burant is a supervisor within the meaning of the Act. Although Burant will receive resumes or information from applicants for the researcher position, there is no evidence in the record that he has the independent authority to hire any applicant or to effectively recommend the hiring of anyone. At most it appears that the Employer is merely using Burant as a contact person for individuals interested in employment. Although the Petitioner speculates in its brief that Burant will “supervise” the individual who is hired for the position, the record does not provide any support for this speculation. Accordingly, I conclude that Burant is not a supervisor and I will not exclude him from the unit on that basis.

I also note that there is no evidence that Burant is a managerial employee who formulates and effectuates management policies by expressing and making operative the decisions of the Employer. *Yeshiva University*, 444 U.S. 672 (1980). Accordingly, I also will not exclude him on that basis and I have included him in the unit.

T. Gabriel (Gabe) Kramer:

The Petitioner contends, and the Employer disputes, that Kramer is a supervisor and should be excluded from the unit found appropriate. The record reflects that Kramer is employed as a field organizer, although he currently performs duties as an administrative organizer. Depending on his duties, he reports either to Hetrick or Courtney. Kramer’s duties include assisting in recruiting potential new staff. He is also identified on the Employer's Internet Website as the individual to contact with “resumes and explanation of their interest.” Although the record reflects that other organizers also attempt to identify potential candidates to become organizers, Kramer contacts the potential candidates, talks to them about becoming organizers and then conveys the substance of his conversation with them to Courtney. There is no evidence in the record that Kramer makes any recommendations to Courtney about hiring.

Even though the record reflects that some employees consider Kramer to be the “go-to-guy” to get hired and that he has interviewed job applicants, there is no evidence that Kramer has the independent authority to hire employees or that he has effectively recommended the hiring of anyone.

The record reflects that Kramer “facilitates” or “assists” individuals who wish to attend a 3-day intensive staff training session held by the AFL-CIO's Organizing Institute. This program, which costs \$250 to attend, is paid by the Employer and provides a basis to determine an applicant’s suitability for employment. Kramer also encourages other individuals to participate in a 2-week apprenticeship program. It is not clear from the record how Kramer facilitates or assists those who want to attend the training. Finally, there is no evidence that he plays any role in evaluating the performance of those who attend the training or the apprenticeship program.

I find on the basis of the record that the Petitioner has failed to meet its burden of establishing that Kramer is a supervisor within the meaning of the Act. Although Kramer contacts individuals to determine whether they are potential candidates to become organizers and receives resumes or information from applicants interested in becoming organizers, there is no evidence in the record that he has the authority to hire any applicant or to effectively recommend the hiring of the applicant. At most, it appears that the Employer is merely using Kramer as a primary contact person for individuals interested in employment. In this connection, the record discloses that other organizers identifies potential candidates to become organizers. Accordingly, I conclude that Kramer is not a supervisor and I have included him in the unit.

Mike Lauer, Tara Dowd and Mark Raleigh:

Contrary to the Employer, the Petitioner asserts that Lauer, Dowd and Raleigh are supervisors within the meaning of Section 2(11) of the Act. The Petitioner contends that Lauer, Dowd and Raleigh are the “leads” who should be reflected by name on the Employer’s organizational chart. The organizational chart reflects that several organizers report to the various “leads.” The Petitioner contends that term means “team leader.” These leads are responsible for organizing campaigns and working with field staff who are less experienced. Although it appears that the Employer has a policy of providing additional pay to individuals who are team leaders, Lauer and Dowd do not receive team leader pay. Although it appears that Raleigh receives a rate of pay commensurate with being a team leader, the record does not support the conclusion that his rate of pay is related to performing any supervisory duties. Rather, the record reflects that Raleigh receives a higher rate of pay because of his experience as an organizer with the Employer during a prior period of employment.

The Petitioner has failed to meet its burden of establishing that Lauer, Dowd or Raleigh are supervisors within the meaning of the Act. There is no evidence that they possess any of the indicia of supervisory authority as defined by Section 2(11) of the Act. Although other employees consider them to be team leaders, this alone is an insufficient basis for finding them to be statutory supervisors. Accordingly, I conclude that Lauer, Dowd or Raleigh are not supervisors and I have included them in the unit.

Organizing Interns:

Contrary to the Employer, the Petitioner maintains that the three current organizing interns, Dee Ahern, Emily Crabtree and Felicia Thomas, should be excluded from any unit found appropriate. Although not clear from the record, it appears that the Petitioner would exclude these employees from the unit based on the temporary or uncertain nature of their employment. I disagree for the following reasons.

All three of these employees are employed by the Employer as part of an intern program. The intern program is provided for in various collective-bargaining contracts the Employer has with represented employers. Under the applicable collective-bargaining contracts between the Employer and represented facilities, employees of such represented shops may obtain a leave of absence to work in the Employer's intern program. Although it appears that the interns take leaves of absence from their regular employer, their internship with the Employer is of an indefinite duration. With respect to at least some of the interns, they have a 6-month leave of absence from other jobs. However, such leaves are subject to an extension. The interns may eventually be hired by the Employer, as permanent employees. Although it is not clear from the record the percentage of interns that are ultimately hired as full-time employees, it appears that some have been offered such employment.

The interns report to Organizing Director Scott Courtney and are assigned the same duties as full-time organizers working on specific organizing campaigns. They are paid on the Employer's payroll and their weekly salaries are similar to the starting rate of other organizers employed by the Employer. It is not clear whether the interns receive other benefits.

With respect to the current interns, Ahern was hired by the Employer on November 7, 2002. Although she is on a 6-month leave of absence from her prior work, the leave is subject to an extension and her employment with the Employer is of an indefinite duration. As Ahern's leave expiration date approaches, the Employer will evaluate and assess the situation to determine whether to hire her on a full-time basis.

Crabtree was hired on November 14, 2002. She was discharged by her prior employer but a grievance is pending. Like Ahern, her employment with the Employer is of indefinite duration and a subsequent decision will be made on whether employment with the Employer will be permanent.

Thomas' situation is slightly different from Ahern and Crabtree. Thomas was hired on October 2, 2002 as a part-time intern. Rather than being placed on a leave of absence by her prior employer, she continues to work for that employer while working part-time for the Employer in its intern program. Thomas is paid 1/2 the weekly starting salary of full-time organizers. Unlike the full-time organizers and Ahern and Crabtree, Thomas does not receive a regular travel expense allowance. However, she works in the same intern program as Ahern and Crabtree and performs the same work as other organizers. The tenure of her employment with the Employer is of an indefinite duration and like Ahern and Crabtree, she is subject to consideration for full-time employment.

The Board has long held that the test for determining the eligibility of individuals in positions similar to the interns here is whether they have an uncertain tenure. If the tenure of the disputed individuals is indefinite and they are otherwise eligible, they are permitted to vote. *Personal Products Corp.*, 114 NLRB 959 (1955); *Lloyd A. Fry Roofing Co.*, 121 NLRB 1433 (1958); *United States Aluminum Corp.*, 305 NLRB 719 (1991). On the other hand, where employees are employed for a specific job, or for a set duration, and have no substantial expectancy of continued employment and have been so notified, such employees are excluded from bargaining units. *B.F. Drew & Co.*, 133 NLRB 155 (1961). Here, the three interns in dispute perform the same duties, are paid a similar wage and work under the same supervision as other full-time employees. Although working under the Employer's intern program, their employment is of an indefinite duration and they may be converted to full-time status. Indeed, the interns here are similar to the CETA employees in *Evergreen Legal Services*, 246 NLRB 964 (1979), whom the Board included in the same unit with the full-time employees. The CETA employees in *Evergreen* were employed pursuant to a federally sponsored comprehensive employment and training act program, and like here, their employment was for an indefinite duration, involving the same work as the other full-time employees and in the past a number had been converted to permanent employee status. Relying on these factors, the Board included the CETA employees in the unit with the other full-time employees.

Based on the foregoing, the entire record and having carefully considered the arguments of the parties at the hearing and in their briefs, I find that the organizing interns here, like the CETA employees in *Evergreen*, are properly included in the unit. The interns are employed for an indefinite period, perform the same work under the same supervision as the other full-time employees and are considered for full-time employment. In reaching this decision, I note that the Petitioner has not cited any Board or Court precedent for excluding the interns from the unit. Accordingly, I will include the organizing interns, Dee Ahern, Emily Crabtree and Felicia Thomas, in the unit found appropriate.

Political Director – Sherry McKinney:

Contrary to the Petitioner, the Employer would apparently exclude Sherry McKinney from the unit as a managerial employee. McKinney was originally employed by the Employer as an administrative organizer. In August or September 2002, McKinney was appointed by the Employer as its political director, with no salary increase and apparently no change in benefits. She currently works under the supervision of the assistant to the president for governmental affairs, Gloria Fauss.

In her current position, McKinney is primarily assigned to the Employer's political activities in West Virginia, but performs some work in Ohio. McKinney is responsible for assisting in voter registration and "get out the vote" for political candidates endorsed or supported by the Employer. McKinney schedules staff for political activities and receives political donations for the Employer. In addition, she is a lobbyist for the Employer among the West Virginia State Legislature encouraging support among members of the State General Assembly for legislation sponsored or supported by the Employer. In carrying out her duties,

McKinney works with other staff members in the unit. In addition, she also participated in similar activities when she was employed as an organizer.

Although McKinney encourages participation in political efforts among the Employer's members, she does not have authority to grant incentives or awards to encourage participation by the membership. McKinney assists in planning and establishing goals for elections and other political activity, but this is similar to the type of things she did as an organizer. Any recommendations by McKinney or the allocation of staff to campaigns must be approved by other officials of the Employer.

The record discloses that McKinney does not possess any of the indicia of supervisory authority set forth in Section 2(11) of the Act. She cannot hire, discipline, discharge, layoff or reward employees. Nor can she adjust their grievances or affect their pay. Any authority to assign or direct staff involved in the Employer's political activities is routine and does not require the use of independent judgment. *Pine Brook Care Center*, 322 NLRB 740 (1996); *Sears, Roebuck & Co.*, 292 NLRB 753, 754 (1989).

Contrary to the Employer's position in its brief, I also find that McKinney is not a managerial employee. As briefly noted in my discussion of Burant's status, managerial employees are defined as employees who have authority to formulate, determine or effectuate an employer's policies by expressing and making operative the decisions of their employer and those who have discretion in the performance of their jobs independent of their employer's established policy. Such employees are "much higher in the managerial structure" than those explicitly mentioned by Congress which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was found necessary." *NLRB v. Yeshiva University*, supra. See also, *Tops Club, Inc.*, 238 NLRB 928 n.2 (1978); *Bell Aerospace*, 219 NLRB 384 (1975), on remand from the Supreme Court 416 U.S. 267 (1974). There is no record testimony that McKinney is responsible for formulating and effectuating management policies in any respect. Her role as political director and lobbyist is controlled by the Employer's established policies, and the duties carried out by McKinney are implemented with the approval and under the control of higher management. Certainly, there is no record evidence, and the Employer does not contend, that McKinney occupies such a high position in the managerial structure that she is responsible for implementing or making discretionary decisions that "effectively control or implement [the Employer's] policy." *NLRB v. Yeshiva University*, supra at 682-683. See also, *American Federation of Labor*, 120 NLRB 969 (1958); *Textile Workers UTWA*, 138 NLRB 269 n. 2 (1962).

Based on the foregoing, the entire record and having carefully considered the arguments of the parties at the hearing and in their briefs, I find that the Employer's political director, Sherry McKinney, is neither a supervisor nor a managerial employee. Moreover, in her capacity as political director, McKinney works with other unit employees and, in fact, performs on occasion the same types of duties that she performed when she was an organizer. Thus, McKinney shares a sufficient community of interest with the other unit employees to warrant her inclusion in the same unit. Finally, if McKinney were excluded from the essentially all employee unit sought by the Petitioner, she would be the only statutory employee excluded from

the unit and left without any possibility of representation. Accordingly, I will include the political director, Sherry McKinney in the unit found appropriate.

Communications/Website – Jason Perlman:

The Employer maintains that Perlman should be excluded from the unit as a managerial or confidential employee. On the other hand, the Petitioner contends that Perlman is appropriately included in the unit it seeks to represent. There is record testimony that Perlman is involved in operating the Employer's computerized predictive phone system and is responsible for working with a temporary agency to staff this operation. He also has duties in connection with placing material on the Employer's website. Although he apparently does not have any duties with respect to the Employer's direct employees, there is record evidence that arguably establishes that Perlman exercises some managerial authority in his position with respect to outside personnel. However, the record is not sufficient to enable me to determine with any degree of accuracy whether Perlman formulates and implements the Employer's policy in a manner sufficient to confer managerial status. With regard to the claim that Perlman is a confidential employee, I note that the evidence does not support such an assertion. Thus, there is no evidence that Perlman assists and acts in a confidential capacity to persons who formulate, determine and effectuate management policies with regard to labor relations, or regularly substitute for employees having such duties. *Ladish Co.*, 178 NLRB 90 (1969); *Chrysler Corp.*, 173 NLRB 1046 (1969). Accordingly, based on the insufficient evidence of managerial status, I will permit Jason Perlman to vote subject to challenge and I instruct my agent conducting the election to challenge his ballot if he appears at the polls to vote.

IV. EXCLUSIONS FROM THE UNIT

The parties agree, and the record shows, and I find that the following persons are supervisors with the authority within the meaning of the Act: Dave Regan, president; Veronica Davis, secretary-treasurer; Tonya Ellison, executive vice-president; Lisa Hetrick, executive vice-president; Bill Padisak, Jr., executive vice-president; Connie Figgins, controller and CFO; Scott Courtney, organizing director; Gloria Fauss, assistant to the president for governmental affairs; Al Bacon, education director; Ann Mueller, Ohio area director for the public sector; Carl Rollins, northeast Ohio nursing home director and Becky Williams, the Ohio area director for the private sector. Accordingly, I will exclude them from the unit.

The parties agree, and the record shows, that Mary Jo Ivan, executive assistant to the president, is a confidential employee who does not share a community of interest with unit employees. Therefore, I will also exclude her from the unit.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are 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 in this case.

3. The Petitioner 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 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:

All full-time and regular part-time administrative organizers, organizers, field staff, receptionist, secretaries, accounts payable and accounts receivable employees, the newsletter editor, membership coordinator, research analyst, political director, and organizing interns, employed by the Employer at its Ohio, Kentucky, and West Virginia operations, excluding all managerial employees, confidential employees, and guards and supervisors as defined in the Act.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Office and Professional Employees International Union, Local 1794, AFL-CIO, CLC. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

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 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. 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.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

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 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 hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **February 13, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VII. 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 **February 20, 2003**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 6th day of February 2003.

/s/ Richard L. Ahearn

Richard L. Ahearn, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

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