

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

Escanaba, MI

MDS COMMUNITY ACTION AGENCY, INC.¹

Employer

and

Case 30-RC-6645

**INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA (UAW), AFL-CIO²**

Petitioner

DECISION AND ORDER DISMISSING PETITION³

INTRODUCTION

The Employer provides state and federally funded care and programming to children from low-income families in Upper Michigan. On August 22, 2006, the Union filed a petition to represent all full-time and regular part-time teachers working for the Employer at its facilities.⁴

¹ The parties stipulated at hearing that the petition and all other documents should be amended to reflect the change in the Employer's name.

² The parties stipulated at hearing that the petition and all other documents should be amended to reflect the change in the Petitioner's name.

³ Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended ("Act"), a hearing was held before a hearing officer of the National Labor Relations Board ("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 makes the following findings: (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; (3) the Petitioner ("Union") is a labor organization within the meaning of the Act; and (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.

⁴ On August 23, 2006, following a stipulated election, the Union was certified in Case No. 30-RC-6642 as the exclusive collective-bargaining representative of "[a]ll full-time and regular part-time center aides, associate teachers, program assistants, EHS home visitors, bus drivers, bus monitors, teaching assistants, family service workers, maintenance employees, custodians and kitchen aides, employed by the Employer at its facilities located in the counties of Menominee, Delta and Schoolcraft, Michigan; excluding all early childhood directors, program managers, coordinators, teachers, substitute employees, center manager, casual employees, secretary, guards and supervisors as defined in the Act."

The principal issue to be resolved is whether these teachers are supervisors under Section 2(11) of the Act. The Employer contends they are supervisory because they possess the authority to transfer, suspend, assign and direct other employees, and the ability to effectively recommend the hire, discipline and/or termination of other employees. The Union disputes these claims and contends that they are professionals who participate in the training of other employees.

Based upon my review of the evidence and relevant law, and for the reasons set forth below, I conclude that the teachers are statutory supervisors and, therefore, I am dismissing the petition.

FACTUAL SUMMARY

Background

The Employer offers health, education, and support services, including Head Start and Michigan School Readiness Programs, to approximately 500 children from low-income families in the counties of Menominee, Delta, and Schoolcraft, Michigan. Funding for these services comes from state and federal grants.

The Employer is headed by an Executive Director. Under the Executive Director is the Early Childhood Program Director, Kim Johnson, who oversees the Employer's two Family Partnership Program Managers, four Child Development Program Managers, one Transportation and Facilities Coordinator, one Human Resources / Community Partnerships Coordinator, one Health and SN Coordinator, and one Administrative Program Manager. The Child Development Program Managers supervise the Employer's twenty-four teachers.

The Employer's main office is located in Escanaba, Michigan and its classrooms are at facilities in Manistique, Rapid River, Gladstone, Escanaba, Hermansville (North Central), and Menominee, Michigan. At most of these facilities, there are no administrators, and the teacher

typically acts as the administrator for the facility. The number of classrooms at each facility varies. Each classroom typically is staffed with a teacher, a teacher assistant or program assistant (sometimes described as associate teacher or teaching assistant in the record), an aide, and a bus driver. Each classroom generally has a common area, a learning center, and a place where the children can eat. The class size ranges from fifteen to twenty-four children. Staffing and work schedules vary at the different facilities, depending on the number of classrooms and whether the program is offered two days or four days a week. Most classrooms have a morning and an afternoon session.

According to their job descriptions, teachers are responsible primarily for: ensuring the development and implementation of the curriculum and education plans to insure compliance with Head Start Performance Standards, Michigan Child Care Licensing Regulations and all program standards and policies; supervising the assistants and aides; developing and implementing appropriate and individualized lesson plans, including field trips; maintaining a safe and inviting classroom for children and adults; reporting and documenting home visits, child screenings and assessments, classroom plans and all other assigned responsibilities, and providing guidance, support, and training of children and their families.⁵

⁵ According to their job descriptions, the assistant teachers report to the teachers and are responsible primarily for: working cooperatively and/or independently in a variety of Early Childhood program settings, providing and helping to maintain safe, healthy and developmentally appropriate services that comply with Head Start Performance Standards, Michigan Child Care Regulations, and program standards and policies; assisting the teacher in planning and implementation of curriculum and education plans; completing documentation and recordkeeping assignments as designated by supervisor(s); developing and maintaining competency in the use of a variety of technology systems as directed by supervisor; encouraging and guiding parent and volunteer participation in the classroom; and maintaining ongoing communication with supervisors. At the hearing, the term “supervisor” was defined to mean the teacher.

According to their job descriptions, the aides report to the teachers and are responsible primarily for: assisting in the classroom and/or on playground as needed; assisting in maintaining the kitchen area; to working with the center staff and volunteers to help make meals and/or snack times go smoothly; riding the bus and serving as a bus aide when needed; maintaining open communication with center staff; and assisting in family involvement activities as requested by center staff.

Assignment and Direction of Work

The teachers are the highest level employee in the classroom and are responsible for directing the instruction and care of the children. They design and implement individualized lesson plans in accordance with the Employer's curriculum design and state and federal regulations, which are extremely broad. And while teachers may involve their assistants and/or aides in preparing these lesson plans, they are ultimately the teachers' responsibility. The teacher then assigns or directs the assistant and the aide in how they are to implement the lesson plan. Although the general job tasks required for assisting in the classroom are, for the most part, constant and repetitive, the teacher nevertheless guides and instructs the assistant and aide based on the lesson plan. However, because the individual needs of the children are primary, and those needs can change from moment to moment, teachers frequently must deviate from their lesson plans, directing their assistants and aides to assist in responding to situations or problems as they arise to make sure the individual needs of the children are met. For example, if a child arrives at the facility distraught, or begins acting out once he or she is at the facility, the teacher will need to take steps to deal with the situation, regardless of the lesson plan.

It appears from the evidence that a teacher will make assignments based on the skills and experience of the staff members in the classroom, and, in certain circumstances, based on the relationships the staff members have with the children. For instance, Cathy Nelson, a teacher, testified that she will determine if one of the staff members has an established, close relationship working with a particular child, and assign that staff member to work with that particular child if a problem arises. The teacher also may make assignments based on the stated interests or preferences of the staff members. Nelson testified that the Employer does not have detailed

guidelines on how to deal with each situation, and she has to make snap decisions using her best judgment in handling the situation, including involving or directing the other staff members.

Ultimately, the teacher will make the assignments, and the assistant and the aide are expected to abide by the decisions. If the teaching assistant or aide refuses an assignment, the teacher would approach him/her at an appropriate time for an explanation. If there is no explanation, or the teacher is not satisfied with the explanation, the teacher has the authority to counsel the individual or issue him/her a verbal warning.

One of the witnesses, Mary Barnhart, testified that she has worked for the Employer as both a teacher and an assistant. She confirmed that the teacher has the final decisional authority in the classroom, and the assistant and the aide must do as the teacher directs or assigns.

Evaluation

Teachers are responsible for monitoring the performance of the assistants and aides in their classroom. If there are issues regarding how an assistant or aide is performing, it is the teacher's responsibility to counsel him/her on those issues. This counseling may involve informal discussions with the individual, recommending that the individual obtain additional training, or more formal steps, such as placing or recommending that the assistant or aide be placed on a performance improvement plan.⁶

In addition to any periodic, informal counseling or evaluations that may occur, the teacher is responsible for completing an annual written evaluation for each staff member in his/her classroom. The teacher will rate the staff member on his/her attitude, attendance/punctuality,

⁶ How a teacher "supervises" the staff in their classroom is a factor in the teacher's own evaluation. In fact, one of the witnesses who testified talked about receiving a below average evaluation regarding her ability as a teacher to properly and effectively supervise the staff in her classroom, and that she then received additional training to help her improve in those areas. Another witness testified about giving another teacher a poor evaluation based on her supervisory skills.

professionalism, responsibility/organization, drive, initiative, and job knowledge as highly effective, proficient, inconsistent, unsatisfactory, or new. The teacher will also use the same rating system to evaluate how the staff member is (or is not) fulfilling the responsibilities of his/her position based on the job description for the individual's position. After completing the evaluation, the teacher then will meet directly with the staff member and go through the evaluation. The teacher and the staff member then will sign the performance evaluation. The teacher will then submit the evaluation to the Child Development Program Manager, who will submit it to the Early Childhood Program Director. The teacher is not required to submit the evaluation to anyone before presenting the evaluation to the staff member. This evaluation by the teacher is the only evaluation conducted for the staff member.

There is no evidence that these evaluations directly affect an employee's employment (i.e., an employee's pay is not tied to his/her performance evaluation). However, at the hearing, there were several witnesses, including the Early Childhood Program Director, who testified that a poor performance evaluation can result in the employee being placed on a performance improvement plan, the employee could be asked not to return, or the employee could be disciplined up to and including discharge.⁷

Conversely, a positive evaluation also could play a role in situations where, for example, the employee is vying for the same position as another employee. All other things being equal, that employee's positive evaluation would be the determining factor in the employee receiving the position.

⁷ For example, there is evidence of a teaching assistant who in 2003 received a poor evaluation from her teacher and who elected to resign rather than have her probationary period extended and be placed on a performance improvement plan.

The Early Childhood Program Director testified about a situation in which a teacher completed an evaluation for the equivalent of a teaching assistant in July 2005 who was, in the teacher's opinion, performing at an unsatisfactory level. The teacher, in her conversations with her Program Manager, recommended that the teaching assistant not remain in her current position based on her performance. The teacher's recommendation was then passed on to the Early Childhood Program Director, and then on to the Executive Director, who terminated the teaching assistant's employment shortly after her evaluation. There was no separate, independent investigation conducted regarding this teaching assistant, and the Early Childhood Program Director testified that the only investigation she would conduct in a situation where an employee is being terminated or not recalled would be to ensure the basis for the decision is properly documented in the employee's personnel file.

Discipline/Discharge

Several of the witnesses testified that teachers have the authority and have exercised their authority to counsel and issue verbal warnings to staff members in their class rooms if there are issues regarding their performance. These counseling sessions and verbal warnings can be, but are not always, memorialized in the employees' personnel files. In the event counseling or a verbal warning does not adequately remedy the problem, the testimony indicates that the teachers, with the involvement of their Child Development Program Manager, can recommend written warnings or suspensions. However, there is no evidence that a written warning has been issued. The teachers also have the authority to place the assistant or aide on a performance improvement plan. As for discharge, a teacher can and has recommended that an employee be discharged, and it would be "absolutely unusual" for that recommendation not to be followed, but the Executive Director is the only individual who can discharge an employee.

Additionally, if a staff member arrives at the facility blatantly disregarding an established personnel policy, such as being under the influence of drugs or alcohol, wearing inappropriate clothing, being emotionally unstable, etc., the teacher has the authority to send the employee home.

As for independent judgment, Cathy Nelson, a teacher, testified about how she handled a particular aide working in her classroom who was young and this was her first job. Nelson discussed how she took these factors into account when she counseled the aide about conduct that she was engaged in that was not appropriate at the workplace. Nelson handled the matter informally, and did not follow any established disciplinary policy.

Hiring

The Employer typically makes its hiring decisions on teachers, assistants and aides through the use of three-person panels. The panel usually will include a manager, a coordinator, and a teacher. It also may include a community member. Each panel member is given a set of questions to ask the applicant, and each rates the applicant on his or her responses to those questions. The scores from the three panelists are added together, and the applicant with the highest score is offered the position. There normally is a discussion among the panel members about the applicants, and the panelists, including the teacher, can offer their view of the applicant.

Cathy Nelson, a teacher, testified about how she was on a hiring panel in which there was a candidate she thought was better than the one who was hired, even though another one of the panel members preferred the other candidate. Another teacher, Shirley McDonough, also testified about being on hiring panels. She testified that if there was a tie among the candidates for an assistant position or a bus driver, and the teacher highly recommended one of the

applicants, that individual usually would be the person chosen for the position. Also, in close cases, where the applicant is being considered for a position in the same classroom as the teacher on the panel, that teachers' preference likely would carry more weight.

Other Supervisory Indicia

Teachers do not have the authority to permanently transfer other staff members. However, in the event a staff member calls in the morning and informs the teacher that he/she is not going to be able to come in, and the staff member is unable to find a substitute, the teacher can call one of the staff members scheduled to come in during the afternoon and have them come in cover the morning session. Also, if the facility has multiple classrooms, the teacher can go to one of the other classrooms and ask the teacher if he/she could spare someone, and the teacher for that class can assign or temporarily transfer one of his/her staff members to go work in the other class.

As stated above, if a staff member is unable to come into work, he/she usually would need to inform the teacher. If a teacher is unable to come into work, and he/she could not find a substitute, the teaching assistant would perform the duties of the teacher for that time. Requests for leave or vacation are submitted to the teachers for their approval. There is some dispute as to whether the teachers simply approve requests where the employee has accrued the leave, or if there are factors that the teacher will consider before approving the leave. There is no evidence that a teacher has refused a request for leave. Finally, as for grievances, the teachers have the authority to resolve issues that arise in the classroom, but are not involved in other issues arising out of employment, such as wages and benefits.

DISCUSSION

As previously stated, the Employer contends that the teachers are supervisors within the meaning of Section 2(11) of the Act. Section 2(11) of the Act defines a supervisor as one who possesses “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 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.” The possession of any one of these primary indicia of supervisory authority, as specified in Section 2(11) of the Act, regardless of the frequency of their use, is sufficient to establish supervisory status, provided that such authority is exercised in the employer's interest, and requires independent judgment in a manner that is more than routine or clerical. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000); *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981); *Queen Mary*, 317 NLRB 1303 (1995). The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 121 S.Ct. 1861 (2001); *Bennett Industries, Inc.*, 313 NLRB 1363 (1994); *Tucson Gas and Electric Co.*, 241 NLRB 181 (1979). To meet this burden the party asserting supervisory status must provide sufficient detailed evidence of the circumstances surrounding the alleged supervisor’s decision making process in order to demonstrate that the alleged supervisor was exercising the degree of discretion or independent judgment that is necessary to establish supervisory status. Designation of an individual as a supervisor by title in a job description or other documents is insufficient in and of itself to confer supervisory status. *Western Union Telegraph Company*, 242 NLRB 825 (1979). On the other hand, possession of authority consistent with any of the indicia of Section 2(11) is

sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 819 at n.10 (2003); *Pepsi Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 648 n. 8 (2001). It is the possession of a power, rather than its actual exercise, that is determinative of supervisory status. See *Formco, Inc.*, 245 NLRB 127, 128 n.7 (1979); *Redlands Christian Migrant Assn.*, 250 NLRB 134, 138 (1980).

In applying these standards to the facts in this case, I conclude that the Employer has met its burden of establishing that the teachers are statutory supervisors. As stated above, the teachers are responsible for their classrooms, and they make, on a daily basis, assignments regarding the care of the children. This requires that the teacher use his/her independent judgment to ensure that the requirements of the program and the law are met, as well as the individual needs of the children. The witnesses each testified that the teachers are responsible for making these decisions and ensuring that they are being implemented by the staff members, and that the assistants and the aides turn to the teachers for this direction. Additionally, the teachers are responsible for monitoring and evaluating the performance of the staff members in their classrooms, and they have the ability to effectively recommend personnel action as a result of that performance. There is evidence that these recommendations generally are followed, and are followed without any independent investigation, such as the case where the teacher recommended that her assistant not be allowed to remain in her position and that recommendation was followed without any additional investigation. See *Delta Carbonate, Inc.*, 307 NLRB 118, 119-120 (1992). The teachers' evaluations clearly can and do impact decisions regarding discipline and retention. Finally, the evidence also establishes that the teachers have

the authority, and some have exercised the authority, to recommend the hiring of employees. See *id.*; see also *Fred Meyer Alaska, Inc.*, supra at 4.

ORDER

Based on the foregoing, I conclude that the teachers are statutory supervisors and, therefore, I am dismissing the petition.

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, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by October 5, 2006.

OTHER ELECTRONIC FILINGS

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

Signed at Milwaukee, Wisconsin on September 21, 2006.

/s/ Irving E. Gottshalk
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MDS Community Action Agency, Inc.
Case 30-RC-6645

Copies of the Decision and Order Dismissing Petition have been sent on September 21, 2006, by regular mail, to the following parties of record:

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