UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

Sustainable South Bronx
Employer

- and - **Case No. 2-RC-23386**

SSBx Employee Representative Committee
Petitioner

DECISION AND DIRECTION OF ELECTION

Sustainable South Bronx ("the Employer") develops environmental projects in the Bronx. The SSBx Employee Representative Committee, an independent Union ("Petitioner"), filed the instant petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, as amended ("the Act"), seeking to represent all full-time and regular part-time employees employed at the Employer's facility located at 890 Garrison Avenue, Bronx, NY, excluding all other employees, including, the executive director, the development director, the director of operations and administration, the director of BEST academy, and guards, professional employees, and supervisors, as defined in the Act.

Upon a petition filed under Section 9(b) of the Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Based upon the entire record in this matter[1] 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 parties stipulated, and I find, that the Employer is a New York corporation with a principal office and place of business located at 890 Garrison Avenue, Bronx, New York, the only facility involved herein. The Employer is a not-for-profit organization that provides job training, outreach programs, educational

[1] The briefs filed by the parties have been duly considered.

opportunities and advocacy regarding local environmental problems. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of $500,000, and purchases and receives goods and supplies in excess of $5,000, from suppliers located outside the State of New York.

Accordingly, I find that 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 parties stipulated and I find that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

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

5. In its petition, as amended at the hearing, Petitioner seeks to represent all full-time and regular part-time employees at the Employer's facility, excluding stipulated managers, including the executive director, the development director, the director of operations and administration, the director of BEST academy.[2] As evidenced at the hearing and in the briefs, the parties disagree on the eligibility of three positions: the director of SmartRoofs; the field manager; and the administrative assistant.

The Employer contends that the SmartRoofs director, Jesusa Ludan, is a managerial employee who should be excluded from the Unit because she is responsible for operating and managing the SmartRoofs business. Her duties include marketing, generating clients, and negotiating contracts with vendors and construction contractors for the material and labor required for the installation and maintenance of "green" roofs. The Employer argues that Ludan is the sole employee charged with the duty of growing the business into a profitable company and, therefore, she should be excluded from the Unit as a manager. In the alternative, the Employer claims that the SmartRoofs director must be excluded from the Unit as a supervisor, within the meaning of § 2(11) of the Act, based on her authority to direct the work of those working under her, and, when funding permits, to hire employees in the future.

With respect to the field manager, Dwaine Lee, the Employer argues that this position possesses some of the indicia of statutory supervisor because the field manager assigns work and responsibly directs the greenway stewards in the field. The Employer further contends that the field manager effectively recommends discipline of the greenway stewards and hires employees for the SmartRoofs projects. Finally, the Employer contends that the administrative assistant, Maria Ramos, should be excluded from the Unit as a confidential

[2] At the hearing, the parties stipulated that the director of sustainable policy and research, Rob Craudereuff, is also excluded from the Unit.

employee because she attends and types the notes of the Board of Directors' meetings and has access to confidential personnel information. The Employer argues that if the Union becomes the exclusive representative of the employees, the administrative assistant would handle documents regarding bargaining strategy and other labor relations matters.

In contrast, the Union asserts that the Employer has failed to meet its burden to prove that the SmartRoofs director has the managerial authority to make Employer policy. The Union claims that, instead, the SmartRoofs director is heavily supervised and has been disciplined for deviating from Employer policy. The Union also notes that the SmartRoofs director is paid within the range of the Unit employees and well-below the salaries of stipulated managers. Regarding supervisory status, the Union notes that SmartRoofs does not have any other employees and none of the Employer's employees report to the SmartRoofs director. With respect to the field manager, the Union contends that the Employer failed to meet its burden to prove supervisory status. The Union argues that he is a leadman and should be included in the Unit. Finally, the Union claims that the Employer has failed to meet its burden to establish that the administrative assistant is a confidential employee. Her work largely entails bookkeeping and paperwork, such as, processing purchase order forms for the staff. The Union notes that her attendance at Board meetings is sparse and she has never attended a meeting that dealt with Union matters.

I have considered the evidence and the arguments presented by the parties on these related issues. As discussed below, I find that the SmartRoofs director and the field manager are properly included in the Unit and eligible to vote; however, the administrative assistant is a confidential employee excluded from the Unit and, therefore, she is ineligible to vote.

To provide a context for my discussion of those issues, I first will provide an overview of the Employer's operations and the record evidence concerning each of the eligibility issues raised in this hearing. Then, I will present in detail the facts and reasoning that supports each of my conclusions on the issues.

I. Facts

A. Overview

The Employer is a small, not-for-profit organization that began operations in 2001 to seek "environmental justice" through innovative and sustainable projects that respond to the needs of the local community. It has launched a variety of projects, sometimes in coordination with partner organizations, to address land-use, water and waste policy on a local level. One of its most successful job training programs, known as the "Best Academy," offers vocational skills and certifications in ecological restoration, hazardous waste

cleanup, landscaping and other related areas. The Employer also designs and manufactures new, environmentally advantageous products.

With respect to the management structure, executive director, Miquela Craytor, is responsible for the day-to-day operations and she is the sole liaison to the Board of Directors.[3] Craytor and the director of operations and administration, Janett Florindo, comprise the senior management team and are responsible for the operations and administration of all program areas, including budget oversight. They handle all of the Employer's human resources issues. The employee handbook, which was created in conjunction with services provided by ADP, applies to all of the employees.

Four stipulated managers report directly to Claytor: director of operations and administration, Janett Florindo; development director, Laura Johnson; director of sustainable policy and research, Rob Craudereuff; and, the director of the "BEST Academy," Annette Williams. The salary range for the managers is between $65,000 and $90,000, per year.

Six employees are not in dispute. The titles that were stipulated as included in the Unit are: environmental policy analyst; greenway and green building coordinator; fablab coordinator; job developer and two greenway stewards. As stated above, three titles are in dispute. Accordingly, the largest possible Unit consists of nine people. The average annual salary of the employees that are included in the Unit by agreement of the parties is $46,692.

B. The SmartRoofs Project

SmartRoofs is a recently incorporated, for-profit, arm of the Employer, which was separately incorporated to provide a revenue stream for the Employer through sales of environmentally sound roofs, and to protect it from potential liability that may ensue from faulty installations. In that regard, SmartRoofs sells different types of "green roof" systems which are designed to capture storm water. This is environmentally beneficial because it reduces the burden on the sewage treatment facilities. Moreover, the roof is capable of supporting plants through the configuration of different layers of trays constructed on top of the existing roof. In addition to the environmental benefits to the community, SmartRoofs' projects provide employment opportunities for local residents who were certified through the Employer's job training program.

While a separate legal entity, SmartRoofs is located within the Employer's facility and the bookkeeping aspects of the SmartRoofs projects are carried out by the Employer. All check writing authority for SmartRoofs rests with executive director Craytor and the Employer's Chairman of the Board. While it appears from the record that at some future point, SmartRoofs may stand on its own as

[3] The evidence that was adduced regarding the composition or level of control the Board of Directors asserts on the operations of the Employer was vague.

an independent enterprise, it currently falls within the close control of Claytor and the Employer's Board of Directors. In this regard, Craytor is the CEO and sole officer of SmartRoofs. In the event SmartRoofs becomes a profit-making entity, the budget allocation is to be determined by Claytor and the Employer's Board of Directors. Presently, Craytor sets the minimum profit margin that must be included in every proposal proffered by SmartRoofs. The Employer's Board of Directors established a Program Committee to explore whether SmartRoofs would hire employees directly or whether additional employees would be hired as employees of the Employer. The Committee is also considering whether SmartRoofs would form its own human resources system and payroll in the event that it becomes a profitable enterprise with its own staff; however, the Committee has not made any recommendations and the Board has not made any determinations in this regard.

C. The SmartRoofs Director

SmartRoofs director, Jesusa Ludan, testified that she does not set policy for the Employer or for SmartRoofs. She claimed that she was told at her job interview that her job at SmartRoofs was to create jobs and a revenue stream for the Employer. She maintained that she is closely supervised by Claytor and that she does not have final authority on any decisions. In that regard, Ludan described her job as primarily a project coordinator, who schedules volunteers, vendors, consultants and contractors. For prospective clients, she obtains bids from specialists, such as, landscape architects or horticulturalists, and researches nurseries and soil suppliers for prices on plant material.

The record demonstrates that the role of the director is to develop an overall marketing strategy and identify potential clients for SmartRoofs projects. The record also demonstrates that Ludan does not have financial control of the business. The job description notes that the project director "will lead all aspects of the business, including day- to-day operations and management." The qualifications for the newly created director position emphasized a background in gardening, urban farming, agriculture or construction. The director's annual salary is $45,000, plus the benefits that apply to all of the Unit employees.[4]

With respect to marketing, Ludan has overseen the logo design, edited brochures, and proposed a new website design. In order to generate business, Ludan follows up on website inquiries, attends conferences, gives outreach presentations and engages in other networking events.

When Ludan came onboard in January 2009, two projects were already underway. Ludan was responsible for the completion of an installation called the East Bay "green" wall and the maintenance work associated with a "green" roof at the Bronx County Courthouse. The master contract for the green wall installation was in effect at the time that Ludan was hired. She claims that she

[4] The director's salary is paid out of the Employer's overall budget.

did not negotiate the terms with the client and the contract is signed by the client and the executive director, Claytor. Ludan negotiated with specific vendors to obtain price adjustments on their original quotes because the project had gone over-budget.

Regarding the "green" roof maintenance contract, Ludan submitted a maintenance list, which was referred to the director of the training programs, Annette Williams, and the field manager, Dwaine Lee, for staffing. The maintenance contracts use hourly workers who are hired to perform work for a specific project. As an example, the maintenance crew for the "green" roof on the Bronx County Courthouse is comprised of trainees who have graduated from the Employer's environmental stewardship program. Williams and Lee recommended the most competent trainees and Ludan's selection from that group was based on the trainees' availability. To the extent Ludan needs additional assistance in the field, she must obtain approval from Williams before assigning any work to Lee.

In her brief tenure, Ludan drafted four proposals which may become income-generating projects. Ludan drafts proposals based on the specific requirements of the space and the type of system to be installed. She determines the labor, materials and can set a profit margin above the minimum required by the Employer. All SmartRoofs proposals are reviewed by and approved by Claytor prior to submission to the client. Ludan has some discretion regarding the selection of vendors, but all of her choices are subject to Claytor's approval. To the extent that proposals are rejected, Craytor meets with Ludan to discuss alternative options, such as, modified systems at a lower price point to present to the client.

The record demonstrates that Sheila Somashekhar, the greenway and green building coordinator (a stipulated Unit position), has the discretion to interface with partners and other non-profit groups, and conduct research without obtaining prior approval from management. Claytor testified that Somashekhar was hired to develop the BEST curriculum for the buildings training program and coordinate aspects of the greenway project. Somashekhar has tried to develop a potential venture focused on retro-fitting buildings by drafting a business plan and working with interns and volunteers. The only distinction between her work and Ludan's appears to be that Somashekhar researches and interfaces with contractors instead of vendors.

According to Ludan, SmartRoofs does not directly employ any employees and she has not been involved in the hiring or firing process of any of the Employer's employees or the independent contractors used by SmartRoofs. As mentioned above, Ludan testified that the independent contractors hired to perform maintenance work were Best graduates who were actually selected by Williams and Lee.

According to Claytor, however, Ludan interviewed and hired the two unpaid interns who researched vendors and assisted her in drafting proposals. The director of policy, Rob Craudereuff, also sat in the interviews. It does not appear that any interns are currently working at SmartRoofs. No evidence was adduced regarding the number of hours that the unpaid interns worked per week or specifically how the interns assisted Ludan.

Claytor further claimed that Ludan was involved in the hiring process for a "greenway steward" position with the Employer, which was ultimately filled by Amilar Laboy. Ludan interviewed candidates along with Craudereuff. Claytor further testified that the staff "job developer," Bennetta Wadington, Dwaine Lee, and Annette Williams all had input on the new hire. Finally, Claytor claimed that to the extent SmartRoofs hires personnel, Ludan would be involved in the hiring process. The record is vague and conclusionary regarding the hiring process and Ludan's role in it.

While Claytor claimed that Ludan interviewed and assessed different independent contractors for hire, the record shows that Ludan chose candidates from a list of recent BEST graduates that was compiled by Williams, Lee and Wadington. It appears that the Employer's contract with the City required that the workers be paid prevailing wage. Further, no evidence was adduced regarding Ludan's discretion regarding the number of independent contractors that were hired, the total hours worked, the work performed, or whether these workers have a reasonable expectation of rehire. Ludan claimed that she relied exclusively on the recommendations of Williams because she has no knowledge of the relative abilities of the BEST graduates.

Craytor testified that Ludan can recommend discharge, however, the testimony in this regard was mostly speculative. The only example of a termination was of a part-time college student who was paid as an independent contractor to work on a project. Craytor made the decision to terminate her because when the funding for the project ended, the Employer did not have additional resources to fund the position.

D. The Field Manager

The Employer employs two greenway stewards, Amilar Laboy and James Wells, to provide the maintenance work on various projects. As an example, the "greenway" project refers to the development of a stretch of park land in the South Bronx that provides the neighborhood with bike and pedestrian routes, comparable to the greenway that lines the Westside highway in Manhattan. The "greenway" project, undertaken in conjunction with the City, is maintained by the greenway stewards. The greenway stewards are also the horticultural caretakers of the canopy in the Hunts Point area. They maintain, prune, clean and aerate the trees. They also engage in community outreach, such as the "adopt a camp" program and a partnership with the sanitation department to empty trash cans.

Lee testified that, as the field manager, he engages in all of this work, alongside the stewards. In that regard, Lee and the stewards work as a team in the field and the relationship between them is collaborative. He has a leadership role because he is more experienced. As an example, a client complained that birds were picking at the seams of a "green" roof installation. Craudereuuf, Williams, Lee and the greenway stewards met to discuss possible solutions. They came up with a few different ideas on how to tackle the problem. When it came to implementation, the stewards performed specific tasks based on their respective skills.

The record demonstrates that Williams oversees the field manager and the greenway stewards, who report directly to her. She orders supplies, makes their vacation schedules and approves sick days. The stewards' schedules are set: Mondays and Tuesday at Hunts Point; Wednesday and Thursday on green roof maintenance; and, Friday, the tree network.

Lee has never recommended discipline of any stewards, although he is expected to report misconduct.[5] Lee does not play a role in investigation of policy infractions. If Lee were to direct greenway steward, Amilar Laboy, to do a specific task and he refused, Lee would merely report that to Williams. The record also demonstrates that Williams recently temporarily "promoted" greenway steward, James Wells, to an assistant to the field manager position and she asked Lee to report on his work performance. Lee reported to Williams that Wells was a "no show" for the second week of his three week trial period. The record does not disclose what, if any, action was taken by Williams as a result of this report.

The Employer also runs a training program, called the "Bronx Environmental Stewardship Training ('BEST') Academy," which provides job training for field work, such as that performed by the greenway stewards. Williams oversees the program. Lee assists Williams "with supervision and motivation of BEST trainees in the field and in classroom trainings." He is specifically responsible for maintaining accurate trainee records, and for tracking assignments and materials, such as, time and attendance sheets, lunch and transportation forms, field evaluations and daily field assignments.

According to Lee, his primary duties are facilitating and supervising the trainees who are undergoing a 15 to 17-week vocational training course for "green" collar work: ecological restoration, environmental remediation, retro-fitting and construction training. Lee works beside the trainees in the field and helps to guide them on how to perform the work based on his experience.

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[5] Williams' testimony on Lee's authority to discipline was inconsistent. She claimed that Lee has never recommended discipline, but she also claimed that they have discussed progressive discipline in the context of determining whether he should issue a verbal or written warning. It appears that with respect to the stewards, Lee has no disciplinary authority, however, with respect to students, Lee may issue warnings.

Until about mid-2008, Lee prepared weekly reports that quantified the field work, such as, the number of trees that had been pruned. The reports did not include reporting on the job performance of the stewards. According to Lee, the stewards now prepare these reports themselves.[6] Lee has never recommended discipline of the stewards. Williams described Lee as a training liaison who is able to oversee the field and bring back any concerns. Lee could not recall an occasion when the stewards did not perform their work.

Williams might ask Lee about how a trainee is doing in the field, but Williams prepares the evaluations. According to Craytor, Lee "oversees" the students' field work and informs Williams of any incidents, including disciplinary issues. She maintained that Lee is the timekeeper for the students. He "communicates" incidents to Williams and together, they decide how to address any issues with the trainees.[7] The record does not disclose exactly what role Lee performs or what issues are addressed with respect to disciplinary actions taken against students.

Lee has made recommendations regarding the hiring of BEST graduates as independent contractors for certain projects. Lee believes that his recommendations were followed. No further evidence was adduced regarding the hiring process for independent contractors. With respect to the hiring of the Employer's employees, the record demonstrates that Lee did not participate in hiring the job developer, Bennetta Wadlington, who also reports to Williams. According to Lee, the hiring process for the job developer consisted of Williams making a recommendation to Craytor.

E. The Administrative Assistant Position

Since 2004, Maria Ramos has worked for the Employer as the executive director's assistant. Although her job title has changed through the years, her duties have not. Currently, the Employer uses "office manager" and "administrative assistant" interchangeably to refer to Ramos' position.

Her job description lists the daily responsibilities of this position as: assist and direct visitors, and resolve administrative problems and inquiries; serve as office manager; answer and screen phone calls; assist with scheduling and database management; compose, edit, and proofread correspondence and reports; provide billing assistance; light management of bookkeeping entries; prepare a range of administrative documents and administrative support for

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[6] Williams testified that Lee still submits a weekly report on the work performed by the greenway stewards, and together, they evaluate the trainees' performance. She also claimed that the trainees evaluate Lee and the program.

[7] The trainees are unpaid, except that they receive a Metro card and a lunch stipend up to $600.

special events. This position also involves some personal assistant activities for the executive director.

The record demonstrates that Ramos spends most of her time engaged in bookkeeping, payroll and benefits, such as, tracking vacation requests and social security deductions. She provides general office administrative support, including buying supplies and processing reimbursement requests from the staff. Ramos estimated that with respect to general office work, about 75% of her time is devoted to tasks for the executive director, and 25% of her time is doing work for the staff.

Ramos sometimes attends Board of Director meetings for the purpose of taking notes. For those meetings that she did not attend, Claytor gives Ramos her notes to type and finalize as the official notes of Board meetings. The record demonstrates that confidential matters are discussed at these meetings. As an example, Ramos typed the notes of a Board meeting regarding the processing of the petition and the representation hearing in the instant matter. Craytor maintained that if a union represented the employees, Ramos would type the notes of strategy meetings in preparation for bargaining. Ramos has access to all personnel records, including job performance reviews and grievance processing. She deals with ADP on personnel matters, including typing and filing grievances. Her understanding is that this information is confidential and she does not discuss the contents with other employees. She claims that there are about four or five grievances every year.

II. Analysis

A. Managerial Employees

Managerial employees, who are excluded from the protection of the Act, are defined as employees who have authority to formulate, determine, or effectuate employer 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 policies. *Tops Club, Inc*., 238 NLRB 929 fn. 2 (1978). In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court described managerial employees:

> as those who "formulate and effectuate management policies by expressing and making operative the decision of their employer." These 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 thought necessary." Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as

> managerial only if he represents management interest by taking or recommending discretionary actions that effectively control or implement employer policy.

The Board has recognized that employees whose decision-making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management. *Id*. The party asserting managerial status bears the burden of proof. *Allstate Insurance Co.,* 332 NLRB 759, 759 n.2 (2000).

In the instant case, the record is insufficient to determine that the alleged manager is so aligned with management as to be excluded from the petitioned-for Unit. The record does not establish that Ludan has formulated any policies or practices regarding the strategic goals of the Employer or SmartRoofs. She has no control over budgetary matters and lacks hiring authority to expand the business. To the contrary, the record demonstrates that the Board of Directors has not determined whether SmartRoofs will hire additional employees directly or whether new hires would be treated as employees of the Employer, as opposed to SmartRoofs. Similarly, the Board of Directors has not decided whether SmartRoofs should administer its own labor relations policies and payroll matters.

Further, the record shows that Ludan's salary is more in line with the Unit employees than with the stipulated managers. The evidence suggests that her role in drafting proposals is not significantly different from the other coordinators who are included in the Unit. Further, the proposals for new projects are drafted in accordance with the needs of the project and follow the standard protocol established prior to her hire. No record evidence supports that Ludan substantially changed any of the established practices or that she implemented any new policy-level initiatives. See *Holly Sugar Corp*., 193 NLRB 1024 (1971)(an employee does not acquire managerial status by making some decisions or exercising some judgment within established limits set by higher management). With respect to her work on the brochures and website, the record is unclear regarding how much of the information was culled from existing marketing materials and the record does not indicate whether the publication was vetted by Claytor prior to release. See *University of Great Falls*, 325 NLRB 83 (1997) (testimony was too vague to permit a meaningful assessment of the employees' actions and the evidence was insufficient to find that recommendations were generally followed). In this case, the limited authority and discretion of the SmartRoofs director regarding the selection of vendors demonstrates that she does not formulate or determine Employer policies and therefore, based on the record evidence as discussed above, I find that Ludan is not a manager.

B. *Supervisory Employees*

Before analyzing the specific duties and authority of the employees in issue, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

> Any 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.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only 1 of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v.* NLRB*,* 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.,* 330 NLRB 1334 (2000). Thus, the exercise of "supervisory authority" in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp*., 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America,* 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) of the Act is sufficient to establish supervisory status, even in this authority has not yet been exercised. *See, e.g*., *Pepsi-Cola Co.,* 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska,* 334 NLRB 646, 649 at n.8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home,* 332 NLRB 1409, 1410 (2000); *Chevron U.S.A*., 308 NLRB 59, 61 (1992).

In considering whether the individuals at issue here possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section 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." *Chicago Metallic Corp., 273* NLRB 1677, 1688 (1985). Thus, the ability to give "some instructions or minor orders to other employees" does not confer supervisory status. *Id. a*t 1689. Indeed, such "minor supervisory duties" should not be used to deprive such individual of the benefits of the Act. *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 280-281 (1974) (quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4). In this regard, it is noted that the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act.

See, e.g., *Vencor Hospital – Los Angeles,* 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital,* 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.,* 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply,* 339 NLRB 817 (2003); *Dean & Deluca New York, Inc.,* 338 NLRB 1046, 1047 (2003). As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by "a preponderance of the credible evidence." *Dean & Deluca,* supra at 1047; *Star Trek: the Experience,* 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact "to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact's existence." *In re Winship,* 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. *See*, *Williamette Industries, Inc.,* 336 NLRB 743 (2001); *Michigan Masonic Home,* supra at 1409. Moreover, "[w]henever the evidence is in conflict or otherwise inconclusive on a 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). Consequently, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.,* 304 NLRB 193 (1991).

The Board recently revisited the issue of supervisory status in *Oakwood Healthcare, Inc.,* 348 NLRB 686 (2006) and two companion cases, *Croft Metals, Inc.,* 348 NLRB 717 (2006) and *Goldencrest Healthcare Center,* 348 NLRB 727 (2006). In these decisions, the Board refined its analysis in assessing supervisory status in light of the Supreme Court's decision in *Kentucky River*, *supra*. In *Oakwood*, the Board addressed the Supreme Court's rejection of the Board's definition of Section 2(11) in the healthcare industry as being overly narrow by adopting "definitions for the term 'assign,' 'responsibly to direct,' and 'independent judgment' as those terms are used in Section 2(11) of the Act." *Oakwood,* supra, at *688*.

With regard to the Section 2(11) "assign" criterion, the Board considered that this term shares with other Section 2(11) criteria the "common trait of affecting a term or condition of employment" and determined to construe the term "assign" "to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee." *Id*. at 689. The Board reasoned that, "It follows that the decision or effective recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function." *Id*. The Board clarified that, "…choosing the order in which the employee will perform discrete tasks within those assignments

(e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to 'assign.'" *Id*.

The Board defined the parameters of the term "responsibly to direct" by adopting the definition established by the Fifth Circuit in *NLRB v. KDFW-TV, Inc.,* 790 F.2d 1273, 1278 (5th Cir. 1986). In this regard, the Board quoted the following language from in *NLRB v. KDFW-TV, Inc., supra* at 1278:

> To be responsible is to be answering for the discharge of a duty or obligation…In determining whether direction in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs…Thus in *NLRB v. Adam [&]Eve Cosmetics, Inc.,* 567 F.2d 723, 727 (7th Cir. 1977), for example, the court reversed a Board finding that an employee lacked supervisory status after finding that the employee had been reprimanded for the performance of others in his Department." *Oakwood,* at 691.

In agreeing with the circuit courts that have considered the issue, the Board found that "for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly." In clarifying the accountability element for "responsibly to direct" the Board noted that, "to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id*, at 692.

In *Kentucky River,* the Supreme Court rejected the Board's interpretation of "independent judgment" to exclude the exercise of "ordinary professional or technical judgment in directing less skilled employees to deliver services." *NLRB v. Kentucky River Community Care, Inc., supra* at 713. Following the admonitions of the Supreme Court, the Board in *Oakwood* adopted a definition of the term "independent judgment" that "applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise….professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." *Oakwood*, *supra,* at 692. The Board noted that the term "independent judgment" must be interpreted in contrast with the statutory language, "not of a merely routine or clerical nature." *Id*. 8. Consistent with the view of the Supreme Court, the Board

held that, "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Id*. (citation omitted) However, "…the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." *Id*.

In applying the above-mentioned case law, and based on the record evidence, I conclude that the evidence is insufficient to establish that either Ludan or Lee are supervisors, as defined by Section 2(11) of the Act.

With respect to Ludan, the record indicates that the selection of the independent contractors to work on the maintenance contracts falls within the authority and discretion of Williams, with input from Lee and the job developer, Benetta Wadington. Ludan merely contacted individuals from the eligible pool of candidates because she has no knowledge of the quality or ranking of the BEST graduates. However, even if Ludan was responsible for hiring independent contractors, these employees who were hired for a specific and discrete project, are not "employees" within the meaning of the Act. *Fleet Transport Co*., 196 NLRB 436, 438 at fn.6 (1972) (driver-trainer who effectively recommended the hiring of drivers who were all either independent contractors or the employees of independent contractors found not a supervisor); *Westinghouse Electric Corp.*, 163 NLRB 723, 726 (1967) (steam engineers had authority over workmen employed by Employer's customers found not to be supervisors); and *El Mundo, Inc*., 167 NLRB 760, 761 (1967) (newspaper dealers who hired their own carrier boys who were not employees within the meaning of the Act found not to be supervisors).

The record was sparse and vague regarding the hiring process for unpaid interns and Ludan's participation in that process. However, to the extent that Ludan hired unpaid interns, it appears that they are not "employees" within the meaning of the Act. *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999) (Board held that individuals must be paid in order to satisfy the definition of employee).

While Ludan may be involved in hiring additional SmartRoofs employees at some future date, the evidence does not suggest that funding for additional personnel is imminent and any future authority is purely speculative at this time.

To the extent that Ludan interviewed candidates for the greenway steward position - a paid employee of the Employer - the record does not disclose what her input was or whether her recommendations were followed. Accordingly, the record evidence is insufficient to establish that Ludan has hiring authority or that she can effectively recommend hiring.

With respect to Lee, the record indicates that Lee performs the same work as the greenway stewards and is the leadman in the field because he is more

experienced. Regarding the trainees, his role is to guide the students in the field and he acts as a liaison to Williams regarding their abilities to apply the classroom instruction. The Board, in *First Western Building Services*, 309 NLRB 591, 601 (1992), held that instructions given by a more experienced employee to a less experienced employee is not "responsible direction of employees" within the meaning of § 2(11) because the use of independent judgment is not involved; rather, it is the authority of a skilled employee over an unskilled employee. While some evidence suggests that Lee is evaluated on the progress of the trainees in the field, this is an assessment of his teaching skills, not an evaluation of his supervisory performance. Accordingly, the record is insufficient to determine that Lee's authority requires the exercise of independent judgment, necessary for finding that the employee is excluded from coverage of the Act as a supervisor. *Beverly Health & Rehab. Servs., Inc.*, 335 NLRB 635 (2001).

Further, while Lee is expected to report incidents in the field, the evidence does not establish that Lee is involved in the disciplinary process for the stewards. *Pepsi-Cola Bottling Co.*, 154 NLRB 490, 493-494 (1965). Finally, the record demonstrates that Lee has input into the selection of BEST graduates who were hired as independent contractors; however, independent contractors are not "employees" within the meaning of the Act. As set forth above, the Board has found that an individual must exercise supervisory authority over the employees of the employer, in order to qualify as a supervisor under Section 2(11) of the Act.

C. Confidential Employees

The Board applies a narrow test in making determinations as to whether an employee is confidential and should, therefore, be excluded from a bargaining unit. Employees are excluded as confidential employees only if they act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations, or if, in the course of their duties, the employee regularly has access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations. *NLRB v. Hendricks County Rural Electric Membership Corp.,* 454 U.S. 170, 190 (1981); *Erica, Inc.*, 344 NLRB No. 96 (2005); *In re EC Waste, Inc.*, 339 NLRB 262 (2003); *Inland Steel Co.*, 308 NLRB 868, 872 (1992). The party asserting confidential status, here, the Employer, has the burden of proving that the position is a confidential one. *Erica, Inc.*, *supra* (citing *Crest Mark Packing Co.*, 283 NLRB 999, 999 (1987)).

The record demonstrates that Ramos assists and acts in a confidential capacity to Claytor and that Claytor is a managerial employee who formulates, determines and effectuates management policies with respect to labor relations. Ramos assists in the preparation of and has access to confidential labor relations information, such as grievance investigation reports. She is the sole employee who works in an administrative capacity for the Employer and would necessarily

be privy to confidential information regarding labor negotiations should the Employer become unionized. Accordingly, I find that Ramos is a confidential employee and therefore, excluded from the Unit.

Accordingly, I therefore find that the following constitutes a Unit that is appropriate for the purposes of collective bargaining:

> Included: All full-time and regular part-time employees employed at the Employer's facility at 890 Garrison Avenue, Bronx, NY.
>
> Excluded: All other employees, including: the executive director; the development director; the director of operations and administration; the director of BEST academy; the director of sustainable policy and research; confidential employees; and, guards, professional employees, and supervisors as defined in the Act.

Direction of Election

An election by secret ballot shall be conducted by the Regional Director, Region 2, 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.[8] Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of the Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated eligibility 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.[9] Those eligible shall vote on whether or not

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[8] Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(1) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules. requires that the Employer notify the Regional Office at least five 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).

[9] In order to assure 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 that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *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 days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible

they desire to be represented for collective-bargaining purposes by SSBx Employee Representative Committee.[10]

Dated at New York, New York
this September 25, 2009

/s/_____
Karen P. Fernbach
Acting Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

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voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **October 2, 2009**. No extension of time to file this 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.

[10] 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, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **October 9, 2009.** The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with this Supplemental Decision for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the web site, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.