

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:)	
)	
SOUTH METRO HUMAN SERVICES,)	Case No. 18-RC-17754
)	
Employer)	
)	
and)	
)	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 5,)	
)	
Petitioner.)	

**AFSCME COUNCIL 5'S EXCEPTIONS TO HEARING OFFICER'S REPORT ON
CHALLENGED BALLOTS AND BRIEF**

INTRODUCTION

On April 28, 2011, an election was conducted in the professional bargaining unit of employees at South Metro Human Services ("SMHS"). Out of 153 ballots cast, nine ballots were challenged. In addition, both the Employer and AFSCME Council 5 ("the Union") filed timely objections to conduct affecting the results of the election. On May 11, 2011 the Regional Director issued a Report on Challenged Ballots and Objections to Conduct Affecting the Results of the Election, Order Directing Hearing and Notice of Hearing (hereafter, "the Regional Director's Report") ordering a hearing as to the issues raised by the challenged ballots and objections. A hearing was held on May 16, 19, 23 and 24 before Hearing Officer Joseph H. Bornong. The parties filed post-hearing briefs. On June 17, 2011, the Hearing Officer issued his

Report and Recommendations to the Board on Challenged Ballots and Objections (hereafter, “the Hearing Officer’s Report”).

The Hearing Officer recommended that seven ballot challenges be sustained and that the remaining two challenges be overruled. He further recommended that all of the Union and Employer’s objections be overruled.

The Union hereby submits exceptions to the Hearing Officer’s Report with respect to five of the ballot challenges the Hearing Officer sustained. These five ballots were cast by employees in an on-call status: Sara Stamschror, Abiodum Shay Adeboye, Robin Nadeau, Jennifer Olson, and Lindsay Paetznick. Because these employees should have been found eligible to vote, the Union submits the following exceptions:

1. The Hearing Officer’s factual finding that the Employer and Union agreed that Stamschror was ineligible to vote is incorrect and unsupported by the record.
2. The Hearing Officer misapplied Board law regarding the exclusion of on-call employees from a stipulated bargaining unit.
3. The Hearing Officer failed to give effect to his finding that based on the community of interest standard, the challenged on-call employees were eligible to vote in the election.

BACKGROUND

The parties stipulated to the following bargaining unit description:

All full-time and regular part-time Professional Employees employed by South Metro Human Services; excluding all Service and Maintenance employees, M.D.’s, psychiatrists, licensed psychologists, technical employees, business office clericals, skilled maintenance employees and guards as defined by the Act.

The parties did not stipulate to exclude all other employees, nor did they stipulate to a list of job titles that would be included in the bargaining unit.

At the hearing, the parties introduced evidence regarding the job duties, hours and employment status of Sara Stamschror, Abiodum Shay Adeboye, Robin Nadeau, Jennifer Olson,

and Lindsay Paetznick, as well as the other employees whose ballots were challenged. Adeboye and Olson are classified as mental health counselors and work in the Adult Foster Care (“AFC”) level II group homes.¹ Nadeau, Paetznick and Stamschror are classified as mental health practitioners and work in the Community Foundations (“CF”) program. The record showed that regardless of any designation as “on-call,” Adeboye and Olson perform all the same duties as mental health counselors in level II AFC homes (hereafter, “MHC II”) who are not designated “on-call.” Similarly, Stamschror, Nadeau and Paetznick perform all the same duties as mental health practitioners in CF who are not designated “on-call.”

The record also contains evidence regarding the number of hours these employees work. Adeboye worked an average of 19.66 hours per week from September 16, 2010 until February 28, 2011. (Ex. E-43.) From September 16, 2010 until March 15, Nadeau worked an average of 18.17 hours per week, Olson 29.23 hours per week, and Paetznick 13.89 hours per week. (Ex. E-43.) From November 1, 2010 until April 30, 2011, Stamschror averaged 31.04 hours per week. (Exs. E-37, E-42.)

Adeboye and Olson worked many of these hours during regularly scheduled eight-hour shifts. The Employer’s phone lists demonstrated that Adeboye and Olson are consistently expected to work specific shifts on weekends at specified facilities. (Exs. P2-P6, P14-P17.) Olson testified that she had applied for her weekend shift, and was granted that shift on a permanent basis. (Tr. 375:5-6, 393:6-9.)

In the CF facility, Stamschror, Nadeau and Paetznick are regularly scheduled for shifts. (Ex. P-17.) While these shifts may vary week to week, all three employees worked throughout

¹ Mental Health Counselors in level I homes (“MHC I”) are in the non-professional bargaining unit. The Hearing Officer sustained the Union’s challenge to the ballots of two employees classified as MHC IIs, but declined to consider whether MHC IIs generally were non-professional employees.

the eligibility period. In fact, Stamschorr did not transfer from full-time status to on-call status until after the March 15 eligibility date. (Ex. E-6.) If on-call employees in CF fail to work a minimum of one shift per month, they receive a letter threatening termination of the on-call employment. (Tr. 648:10-14; Ex. P-24.)

The record did not show that the Union and the Employer ever discussed whether on-call employees would be included in the bargaining unit. There is no evidence that the Union was even aware that some employees were designated “on-call” employees. Two human resources employees were involved in putting together the eligibility list: Katie Shea and Melissa Kluge. (Tr. 80:3, 492.) These two employees determined that on-call employees were not eligible to vote based on their interpretation of the bargaining unit description. (Tr. 500:5-12.) They did not discuss the eligibility of on-call employees with any Union representative. (Tr. 640:20-641:4.)

ARGUMENT

Exception 1: The Hearing Officer’s Factual Finding that the Employer and Union Agreed that Stamschorr Was Ineligible to Vote Is Incorrect and Unsupported by the Record.

The Hearing Officer erroneously found that the Employer and Union agreed that Stamschorr was excluded from the bargaining unit. The Board Agent challenged Stamschorr’s ballot because her name did not appear on the eligibility list. The Regional Director’s Report accurately reflected the Employer and Union’s positions: “The Employer contends that [Stamschorr is] an on-call employee[], not [a] regular part time employee[]. . . . Petitioner contends that . . . Stamschorr work[s] enough hours to qualify as [a] regular part-time [employee].” The Regional Director concluded that Stamschorr’s ballot, along with the other

challenged ballots and objections, “raise[d] substantial and material issues of fact which can best be resolved upon record testimony received in a formal hearing.”

At the hearing, there was no evidence or testimony regarding any agreement between the Employer and Union regarding Stamschor. The only evidence introduced regarding Stamschor pertained to her duties, hours, and employment status. There is no evidence anywhere in the record that the Employer and Union reached any type of agreement with respect to Stamschor.

If the Union had agreed that she was ineligible, there would have been no need to hear any evidence regarding Stamschor’s duties, hours or employment status. The Employer asked that the challenge to Stamschor’s ballot be sustained and if such an agreement existed, would presumably have raised the alleged agreement. But at no point has the Employer raised this argument. The Regional Director’s Report on Challenged Ballots accurately summarized the facts with respect to Stamschor: the Board agent challenged her ballot, and the Employer and Union took different positions regarding her eligibility. The Hearing Officer accepted all evidence offered regarding Stamschor’s duties, hours and employment status.

Then, despite the lack of evidence or argument from either party regarding the alleged stipulation, the Hearing Officer found a stipulation existed based solely on initials on an eligibility list. When other documents were accepted into evidence, the Hearing Officer ruled that no handwriting or highlighting on the documents would be part of the record without testimony on the handwriting or highlighting:

This is true of any document, and I guess I’ll say it now, and this applies to any that have been offered so far and any in the future too: if there’s handwriting or highlighting in the margins, things like that that don’t look like the printing on the document, those are not admitted as part of the exhibits unless somebody testifies about the handwriting or the highlights.

(Tr. 380:10-17; *See also* Tr. 57, 334: 1-8.) Based on that ruling, the Hearing Officer should not have considered the meaning of any handwriting without testimony on the handwriting.

Exception 2: The Hearing Officer Misapplied Board Law Regarding the Exclusion of On-Call Employees from a Stipulated Bargaining Unit.

The Hearing Officer misapplied Board law with respect to the exclusion of on-call employees from a stipulated bargaining unit. The Board has previously explained the test that applies in these cases:

[T]he Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

Caesar's Tahoe, 337 NLRB 1096, 1097 (2002). The Hearing Officer's Report stated that applying this general rule "would result in a finding that the stipulation is not clear inasmuch as 'on-call' employees are not explicitly included in the unit description, nor are they explicitly excluded." (Hr'g. Officer's Rep. 7.)

The Hearing Officer based his decision not to apply this test in this matter on two legal errors. First, the Hearing Officer wrongly found that this test does not apply with regards to "on-call" employees. Second, the Hearing Officer wrongly found that the community of interest analysis does not apply after the election. The Employer and Union agreed that the community of interest analysis does apply to the on-call employees. (*See* Employer's Post-Hr'g. Br. Regarding Election Challenges and Objections.) And the Hearing Officer stated that the community of interest factor would have been "the only determinative factor" if this issue had been raised before the election; that statement contradicts the Hearing Officer's rejection of the community

of factor test when the dispute concerns on-call employees. Because the Hearing Officer erred by not applying the normal analysis regarding challenged ballots involving stipulated units, including the community of interest factors, the Board should reverse the Hearing Officer's conclusion that the on-call employees were ineligible to vote.

The Board has not “developed a specific rule regarding ‘on-call’ employees.” (Hr’g. Officer’s Rep. 7.) The Hearing Officer erred in determining that such a rule existed, and defining it thus: “When an employer’s use of the on-call term as a job classification descriptor is well established, and on-calls are not explicitly included in the stipulation, the on-call employees are excluded.” (*Id.* 7-8) Neither *Inter Continental Hotels Corp.*, 237 NLRB 906 (1978), nor any other Board case establishes such a rule.

In *Inter Continental Hotels*, the case the Hearing Officer principally relied on, the Board addressed a very different situation than the one at hand. In that case, the Board found that “a careful examination of the stipulation of herein would have revealed the parties’ intention to exclude these oncall employees from the unit.” 237 NLRB at 907. In contrast, in this case, the Hearing Officer did not conclude that the parties intended to exclude on-call employees, identifying “no evidence in this case that [the Union] consciously excluded or even knew about on-call employees’ designation as such.” (Hr’g. Officer’s Rep. 8.) Further, the nature of the on-call employees in *Inter Continental Hotels* was different from that of the on-call employees in this case. In *Inter Continental Hotels*, there were regular employees who were guaranteed 20 to 30 hours per week, and on-call employees who were “periodically called to substitute for absent and vacationing employees and [were] offered employment when there [was] occupancy at the hotel.” *Id.* But in this case, there was no evidence that the part-time employees have any guaranteed minimum number of hours, and both Adeboye and Olson actually have regular shifts

that they are expected to work every week. Other on-call employees regularly work a significant number of hours each month. That is, there was no evidence that the SMHS employees designated “part-time” are actually any different from the challenged “on-call” employees with respect to the number of hours they worked. In sum, *Inter Continental Hotels* does not stand for the proposition that an employer’s designation of certain employees as “on-call” is dispositive, but that it may elucidate the parties’ understanding about what employees would be included in the stipulated bargaining unit.

The lack of any evidence that the Union even knew about the “on-call” designation precludes finding that the Union agreed to exclude on-call employees from the stipulated bargaining unit. The Board has consistently applied the three-part test explained in *Casesar’s Tahoe* in order to determine the parties’ intent, including by considering extrinsic evidence. *E.g.*, *USF Reddaway, Inc.*, 349 NLRB 329 (2007). But here, the Hearing Officer erred by failing to consider whether the Union was aware of the “on-call” designation. Despite acknowledging that the Board found such evidence relevant in *Northwest Community Hospital*, 331 NLRB 307 (2000), the Hearing Officer rejected it. In *Northwest Community Hospital*, the Union had petitioned for a unit that included on-call employees, but the stipulated unit did not include the on-call employees. Based on that difference, which showed that the Union was aware of and abandoned the on-call designation, and on the “distinct nature of part-time employment versus hourly on-call employment,” the Board concluded that the parties intended to exclude the on-call employees. 331 NLRB at 308. The Board stated:

The Petitioner’s knowledge of the Employer’s well-established distinction between part-time and hourly on-call employees vitiates any significance potentially attributable to the omission, from the instant stipulation, of language explicitly excluding all other employees, and underscores the unambiguous nature of the stipulation at issue.

Id. n. 5. Because there is no evidence that the Union knew that the Employer distinguished between part-time and on-call employees, the stipulation must be found to be ambiguous.

The language in *National Public Radio* that the Hearing Officer relied on to disregard the lack of evidence that the Union knew about the on-call designation does not apply in this case.

That language states in full:

We note that the express intent of the parties concerning the definition of job *classifications* sought to be included in the stipulated unit may be determined by reference to the employer's regular use of the *classifications* in a manner known to its employees, industry practice, and the Board's established definitions of the *classifications*.

Id. at fn. 2 (emphasis added). The term "classifications" in *National Public Radio* referred not to the employees' status as full-time, part-time or on-call, but to the job titles. The Board made this distinction clear when it stated: "By specifically agreeing to include only full-time and regular part-time employees *in certain classifications* and to exclude all other employees, the parties must have intended the exclusion of temporary broadcast/recording technicians." *Id.* (emphasis added). The classification that was excluded refers to the job titles, not to whether the employees held these titles in a full-time, part-time or on-call capacity. Only when the term "classification" is understood to refer to job title does the Board's reference to "industry practice, and the Board's established definition of the classifications" make sense. Some job titles such as "nurse," have a specific meaning in the industry. But there is no industry-wide or Board definition of "on-call," and employers may apply the term in divergent ways. Some employers may apply the term to employees who only cover shifts on an as-needed basis, *Saratoga County Chapters NYSARC, Inc.*, 314 NLRB 609 (1994), while the Employer applies the term to employees with regular shifts, and who may work as much as regular part-time employees. Without reference to industry practice or a Board definition of "on-call," and without evidence that the Union was aware of the

“on-call” designation, the parties’ intent with regard to the inclusion of on-call employees cannot be determined from the stipulation.

Even if the term “classification” did apply to the “on-call” designation, the express intent of the parties may not be determined solely by reference to the Employer’s designations in this case. In *National Public Radio*, the Board could make that determination based on the Employer’s designation because the stipulation expressly included regular full-time and part-time employees, and excluded specific employee classifications *and* “all other employees.” 328 NLRB at 75. In contrast, in this case, the parties excluded only specific classifications, such as M.D.’s and guards. They did not exclude “all other employees,” as the parties in *National Public Radio* did. “If the classification is not included, *and* there is an exclusion for ‘all other employees,’ the stipulation will be read to clearly exclude that classification.” *Halsted Comme’ns*, 347 NLRB 225, 225 (2006) (emphasis added) citing *Bell Convalescent Hosp.*, 337 NLRB 191 (2001). Conversely, where there is no exclusion for “all other employees,” the stipulation may be read to include that classification.

There is also no legal support for the Hearing Officer’s finding that the procedural posture of this case determines whether the community of interest analysis applies. The Hearing Officer stated that if the eligibility of on-calls “had been raised and disputed prior to the election, on-call employees (at least those who average four or more hours a week) would almost certainly have been included because in that posture, community of interest would have been the only determinative factor.” (Hr’g. Officer’s Rep. 8.) But the Board has applied the community of interest analysis when disputes regarding the eligibility of on-call employees arise after the election, and should do so here too. *E.g.*, *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990)

(applying *Davison-Paxon* to determine whether on-call registered nurses were eligible to vote, and overruling challenges to on-call nurses' ballots).

At best, the evidence was ambiguous as to the parties' intent. Accordingly, the Hearing Officer should have applied the community of interest standard, which he acknowledged would result in the on-call employees being found eligible to vote in the bargaining unit.

Exception 3: The Hearing Officer Failed to Give Effect to His Finding that Based on the Community of Interest Standard, the Challenged On-Call Employees Were Eligible to Vote in the Election.

To determine whether unit employees possess a community of interest, the Board examines factors such as functional integration, interchange with other employees, and shared supervision. *Publix Super Mkts., Inc.*, 343 NLRB 1023 (2004). More specifically, to determine whether on-call employees should be included in a bargaining unit, the Board considers the similarity of the work performed and the regularity and continuity of employment. *S.S. Joachim and Anne Residence*, 314 NLRB 1191, 1193 (1994) citing *Trump Taj Mahal Casino*, 306 NLRB 294, 295 (1992), *enfd.* 2 F.3d 35 (3rd Cir. 1993). In this case, the on-call employees perform the same work as the other MHC IIs or mental health practitioners. They perform the same duties, and work with the same populations at the same facilities, following the same treatment protocols. On-call employees meet the regularity requirement when they work a substantial number of hours within the period of employment before the eligibility date. *Id.* The Board normally applies the *Davison-Paxon* test: if employees average four or more hours per week for the last quarter prior to the eligibility date, the employees are considered to have worked a substantial number of hours and meet the regularity requirement. *Davison-Paxon Co.*, 185 NLRB 21 (1970). Under this test, the Board has counted as eligible employees who did not share

in benefits that were available to full-time employees such as sick pay or pension benefits. *Nat'l Posters, Inc.*, 282 NLRB 997, 1003 (1987). The Board applies the *Davison-Paxon* formula unless there is a showing of special circumstances. *Saratoga Cnty. Chapters NYSARC*, 314 NLRB 609.

No special circumstances justify applying any formula other than the *Davison-Paxon* formula in this case. The Employer argued that the *Davison-Paxon* formula should not be used because there was a “diversity of interest between the on-call employees and others in that unit,” and because it alleged that the on-call employees were not professionals. But there is no evidence in the record to show that the on-call employees are not professional employees, and the differences in benefits and the right to reject work are insufficient to overcome the other, more significant factors: the similarity of the work performed and the regularity and continuity of employment. The Employer offered no evidence to show that the on-call employees performed different work from other employees, or that they had not been regularly and continuously employed at SMHS.

The Hearing Officer’s Report found that under the community of interest analysis, the on-call employees “would almost certainly have been included.” (Hr’g. Officer’s Rep. 7, (citing *Davison-Paxon*, 135 NLRB 21).) Because the Hearing Officer should have applied the community of interest analysis, the challenged on-call employees should be found eligible to vote in the bargaining unit.

CONCLUSION

Based on the foregoing, the Union respectfully requests that the Board reverse the Hearing Officer’s recommendation with respect to the ballots of the five on-call employees. There was no evidence of an agreement between the Employer and Union regarding Sara

Stamschror, and the Hearing Officer erred by finding one. Further, because the unit stipulation was ambiguous as to the inclusion of the on-call employees, the Hearing Officer should have applied the community of interest standard and found that the on-call employees were eligible to vote in the election.

Dated: June 30, 2011

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CERTIFICATE OF SERVICE

I, Cristina Parra Herrera, certify that on June 30, 2011, I caused AFSCME Council 5's Exceptions to Hearing Officer's Report on Challenged Ballots and Brief to be served on the following named individuals via electronic mail and also putting same in the United States mail with proper postage affixed there to:

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