

BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

Franklinton Preparatory Academy	:	
Educators Association,	:	Case 09-RC-144924
	:	
Petitioner,	:	
	:	
and	:	
	:	
Franklinton Preparatory Academy,	:	
	:	
Employer.	:	

**ANSWERING BRIEF OF RESPONDENT-EMPLOYER TO PETITIONER’S
EXCEPTIONS TO HEARING OFFICER’S REPORT**

I. STATEMENT OF THE CASE.

Pursuant to the Rules and Regulations of the National Labor Relations Board, as amended, Respondent Franklinton Preparatory Academy (“FPA” or the “School”), by its counsel, hereby submits the following objections to Petitioner’s exceptions to the Hearing Officer’s Report on the Challenged Ballots and Objections and Recommendations to the Board dated May 14, 2015 (“Report”).

On January 23, 2015, members of the FPA staff filed a petition for representation by the Franklinton Preparatory Academy Educators Association (“FPAEA” or the “Union”) with the NLRB. (Ex. Bd. 1(a)). The parties entered into a Stipulated Election Agreement approved February 5, 2015, in which the Parties defined the bargaining unit as follows:

All full-time and regular part-time professional employees who regularly work at least ten (10) hours per week during the school year, including teachers, behavioral intervention specialists, counselors, tutors, academic workforce liaisons and hybrid learning coordinators, but excluding all non-professional employees, casual employees, substitute employees, confidential employees, managerial employees, and all office clerical employees, guards and supervisors as defined by the Act.

(Ex. Bd. 1(b)).

Pursuant to the Stipulated Election Agreement, FPA provided a list of thirteen eligible voters (*Excelsior* List), and a representation election was held on March 5, 2015. (Jt-4).¹ All thirteen individuals named on the *Excelsior* List submitted ballots. The result of the Election was five yes votes, four no votes, one blank ballot, and three ballots that the Union challenged. These challenges will determine the outcome of the Election.

Hearing Officer Naima R. Clarke presided over a hearing on April 16, 17, and 20, 2015 to address the Union's challenges to the ballots of two voters and its three objections. On May 14, Hearing Officer Clarke issued a Report recommending sustaining Petitioner's challenge to the ballot of Beth DeWitt and overruling Petitioner's challenge to the ballot of Anne Hyland. The Report also recommended sustaining the Petitioner's two objections and, if the revised Tally of Ballots does not favor the Petitioner, setting aside the March 5, 2015 and holding a new election.

Petitioner FPAEA seeks to restrain bargaining unit member Anne Hyland's right to vote in the representation election by improperly classifying her as a managerial employee. As the Hearing Officer concluded in her May 14, 2015 Report, the facts support her inclusion in the bargaining unit, and her vote should be opened and counted.

II. STATEMENT OF FACTS.

FPA is a community school (commonly known as a "charter" school) located in the low income neighborhood of Franklinton in Columbus, Ohio. (Tr. 551). FPA opened its doors for operation as a school in the fall of 2013. (*Id.*). In January 2015, three employees of FPA—Gerald Leka, Julie Pfeiffer, and Ryan Marchese—publicly announced their support for unionization at

¹ References to hearing exhibits will be cited as "Jt-__" for joint exhibits, "ER-__" for employer exhibits, and "P-__" for Petitioner/Union exhibits. References to the Report will be cited as "R. [page]."

the School. (Tr. 118-119). Subsequently, a petition for representation election was filed with the NLRB on January 23, 2015. (Ex. Bd. 1(a)). Employer submitted its *Excelsior* List, which included thirteen non-managerial employees. (Jt-4). An election was held on March 5, 2015 in which all employees listed on the *Excelsior* List voted; Petitioner challenged the ballots of three employees.

A hearing was held to resolve this and all other challenges and objections on April 16, 17, and 20. After considering three days of testimony from School employees, the Hearing Officer concluded that Hyland is not a managerial employee and falls within the bargaining unit. (R. 8). The Union has excepted to this finding and continues to seek to restrain Hyland's ability to vote in this election. In support of its exception, the Union provides general references to alleged managerial activity that often misconstrue testimony and exhibits.

Anne Hyland became a Franklinton Preparatory Academy employee on December 1, 2014. (Jt-7). Prior to December 1, 2014, Hyland worked at FPA as an uncompensated volunteer. She brings with her extensive experience and qualifications in the field of education. (R. 6; P-5). She works twenty-five hours per week, and her wages and benefits are proportionally comparable to those of other bargaining unit members. (See Jt. Exs). Many of Hyland's job duties overlap with those of other teachers or members of the bargaining unit. (*Id.*). She attends the same meetings as other unit members. (ER-6; Tr. 742). During these meetings, she contributes her thoughts and guidance in a collaborative manner based on her experiences as they align with incidents affecting the classroom teachers and sometimes provides suggestions for best practices. (Tr. 180; 426-27; 454; 741). Like other bargaining unit members, she takes time to address student issues throughout the school. (Tr. 67-68). She assists with the resident educator program. (Tr. 179). Like other teachers, she helps draft grants for the School. (Tr.

630–31). She performs lunch duty and participates in the Claim a Kid program along with the other unit members. (ER-14; ER-16).

Meanwhile, her job duties do not align with those of management. Martin Griffith and Michael Reidelbach, Chief Operations Officer and Chief Executive Officer, respectively, are the only administrators in the School. (Tr. 578). When Reidelbach is not present, which is often, Griffith is the sole administrator and assumes all of the duties and responsibilities of Reidelbach. (Tr. 578–80). Griffith and Reidelbach are responsible for submitting all policies to the Governing Authority for approval. (Tr. 585–86). Hyland has no authority to draft or effectuate management-level policies. (Tr. 585–86). Though Hyland, along with several other bargaining unit members, sits in on interviews of prospective employees, Hyland has no control or authority regarding hiring decisions. (Tr. 581). She does not evaluate teachers or staff. (Tr. 453; 583–84). She is not responsible for ensuring the School’s regulatory compliance, though she does assist teachers and staff when asked based on her knowledge of state and federal requirements. (Tr. 498).

Hyland does not determine curriculum, set academic policies, or control hiring. (Tr. 179; 499; 580–81; 585–86; 623). She does not manage professional development, but she does participate in the same manner as some other bargaining unit members. (Tr. 581). Along with fellow bargaining unit member Deborah Miller, Hyland has presented topics during professional development sessions. (Tr. 497). In preparation for such sessions, she works with Miller to assist Griffith in developing the agendas (Tr. 519), though ultimately Griffith selects the topics for professional development. (Tr. 520). She does not develop curriculum—in fact, the School already has an official curriculum, Grad Point, in place. (Tr. 623).

Based on the available evidence, as recounted herein, the Hearing Officer properly and reasonably concluded Hyland is not a manager. As such, Hyland falls within the scope of the bargaining unit, and her ballot should be opened and counted.

III. LAW AND ARGUMENT.

A. THE HEARING OFFICER PROPERLY CONCLUDED THAT ANNE HYLAND SHARES A COMMUNITY OF INTEREST WITH THE BARGAINING UNIT AS A NON-MANAGERIAL EMPLOYEE.

The Union excepts to this finding for several reasons, none of which are sufficient to overturn this decision. The Union incorrectly alleges that Hyland does not share a community of interest with the bargaining unit. However, the record establishes many similarities between her and the rest of the unit: she attends the same meetings (ER-6; Tr. 742); she has comparable salary and benefits (Jt. Exhibits); she takes time to address student issues throughout the school (Tr. 67–68); she, like other teachers, helps in drafting grants for the school (Tr. 630–31); she participates in group interviews of prospective employees (Tr. 580–82); she performs lunch duty (ER-14); she is supervised by Griffith, Reidelbach, and overseen by the Governing Authority (Jt. 8; Tr. 578–80); and she participates in the Claim a Kid program along with the other unit members (ER-16). Meanwhile, she lacks the managerial authority held by Griffith and Reidelbach: she has no authority to draft or effectuate management-level policies (Tr. 585–86); like other employees, she contributes during interviews but has no control or authority regarding hiring decisions (Tr. 581); and, she does not evaluate teachers or staff (Tr. 453; 583–84).

The Union's attempts to differentiate Hyland are insufficient, particularly when considering the rest of the record. For instance, the Union asserts that Hyland was not on the School's staff lunch schedule until after the election for representation. This assertion is unsupported by the evidence. Contrary to the Union's assertion, the revised lunch schedule

became effective prior to the election for representation, and Hyland was included in this schedule. (Tr. 136, “Maybe two to three weeks, [*sic*] three weeks after we filed for election.”).

The Union further alleges that Hyland’s role of wandering around the School and encountering students who are not in class is a function of management. The record evidence does not support that this allegation either. (Tr. 67–68). Rather, this role is consistent with the duties of other members of the bargaining unit. In fact, prior to her injury, another bargaining unit member, Camille Ward, also testified that she was regularly outside of her designated office space and instead was often “in motion” around the School. (*Id.*).

B. THE HEARING OFFICER PROPERLY INCLUDED ANNE HYLAND IN THE BARGAINING UNIT BECAUSE HYLAND IS NOT A MANAGERIAL EMPLOYEE.

Generally, the test for managerial status focuses on whether the employee formulates and effectuates policies or has independent discretion in performing his or her job duties. *NLRB v. Case Corp.*, 995 F.2d 700 (7th Cir. 1993). A managerial employee effectuates employer policy by making operative decisions. *Tops Club, Inc.*, 238 NLRB 928 fn.2. Faculty members who participate in the governance of the institution in a meaningful way are managers excluded by the Act. *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).

The Supreme Court has established that “employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned” are not managers under the Act. *Id.* at 690. Specifically, in *Yeshiva*, the faculty members at issue were deemed to be managerial primarily because of the significance and breadth of their responsibilities:

They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will

be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school.

Id. at 686. In short, the faculty members rose to the level of management because they determined “the product to be produced, the terms upon which it will be offered, and the customers who will be served.” *Id.*

Further, the Board has explicitly refused to equate professional discretion in the performance of duties with managerial status—even if such duties are directly tied to the function of the employer. *Evergreen America Corp. v. NLRB*, 362 F.3d 827, 839–40 (D.D.C. 2004). Specifically, in *General Dynamics Corp.*, 213 NLRB 851, 857–58 (1974), the Board held:

Work which is based on professional competence necessarily involves a consistent exercise of discretion and judgment, else professionalism would not be involved. Nevertheless, professional employees plainly are not the same as management employees either by definition or in authority, and managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction. Likewise, technical expertise in administrative functions which may involve the exercise of judgment and discretion does not confer executive-type status upon the performer. A lawyer or a certified public accountant working for, or retained by, a company may well cause a change in company direction, or even policy, based on his professional advice alone, which, by itself, would not make him managerial.

General Dynamics Corp., 213 N.L.R.B. 851, 857–58 (1974). As such, discretion within the scope of one’s position, without a clear connection to effectuation of or deviation from management-level policy, is insufficient to exclude an employee as management.

The Hearing Officer found that Hyland is not a managerial employee. (R. 8). Specifically, she noted that the record is “void of any examples” of Hyland formulating management-level policies. (R. 7). The Report states that Hyland’s advising of teachers is a product of her experience and background—not any granted managerial authority. (*Id.*).

Further, with regard to standardized testing, the record established that Hyland shares this responsibility with another teacher—Samantha Shaffner—and provides information in accordance with existing state regulations. (*Id.*). Because the record failed to show that Hyland’s responsibilities rose to the level of managerial authority (*e.g.*, determining curriculum, setting academic policies, and controlling hiring and tenure), the Hearing Officer concluded that Hyland is not a managerial employee. *Ithaca College*, 251 NLRB 577 (1982).

The Union’s reliance upon the fact that Hyland has identified herself as being in “educational administration” on LinkedIn fails to establish her managerial authority. The School already has a digital curriculum in place, so the Union’s allegation that Hyland’s outdated LinkedIn profile is dispositive of her role in developing curriculum and policies as an employee of FPA is misguided. (Tr. 623). Even assuming for the sake of argument that LinkedIn data were somehow determinative, Hyland stated that she entered this information before ever taking her position of employment with the School and does not regularly use the website. (Tr. 480).

In addition, the Union excepts to the finding that Hyland’s use of discretion in her position does not differentiate her from her fellow professional colleagues. Often, she provides guidance and identifies resources at her discretion based on questions or other issues raised during collaborative planning. (Tr. 426–27; 180). However, the teachers have just as much discretion to utilize, or disregard, any resources Hyland provides. (Tr. 454). No teacher is bound by the insights or suggestions made by Hyland, nor are they required to utilize any of the additional resources Hyland supplies. In no case does this discretion exceed that of their professional capacity and therefore give rise to managerial authority. *General Dynamics Corp.*, 213 N.L.R.B. 851, 857-58 (1974).

The Union also excepts to the discretion shown by Hyland regarding standardized testing. Hyland did not formulate policies with regard to testing. The School developed its standardized testing practices, including scheduling in two ways: (1) rehashing of state requirements (Tr. 487, “That is verbatim from the Ohio Department of Education documents.”), or, (2) collaboratively (see Ex. 8, “decisions *we* need to make”; comments from Pfeifer). (See, generally, Tr. 438–50). Though Hyland and others were involved in the coordination, the record is clear that Hyland never established management-level testing policies.

The Union alleges that Hyland’s distribution of testing materials and information needed to administer standardized tests is indicative of her role in directing fellow bargaining unit members and formulation of policies. Pursuant to Ohio’s requirements for standardized testing, Hyland safeguarded testing materials in her office and only distributed these materials when necessary for testing security purposes. (Tr. 488). Hyland also provided each staff member with the required warnings provided by the State of Ohio prior to testing, consistent with state law. (Tr. 487). These procedures are consistent with and often required by state law, and Hyland’s compliance does not indicate that she is directing fellow teachers or formulating any policies in a manner inconsistent with her membership in the bargaining unit.

The Union also points to Employer’s Exhibit 8 as an example of creating policy. This document deals with standardized testing responsibilities, a delegated teacher duty, which Hyland specifically shares with Shaffner, Miller, and in part with the entire FPA staff. (Tr. 627). The document itself was created through a collaborative process. In Employer’s Exhibit 8, Hyland explicitly identifies “[d]ecisions we [not I] need to make.” (ER-8). Shaffner’s response that she was “digging in” appears to refer merely to reading of the document, which was extensive and time consuming to digest. (*Id.*). As further evidence, in this same email chain,

Griffith directs the entire staff to “feel free to reply with you thoughts/suggestions,” noting that the staff would also discuss any issues contained in the email as a group. (*Id.* Pfeifer understood this email to be collaborative and provided “some responses to the material you gave us.”). The Union also cites to Employer’s Exhibit 9 as evidence of Hyland’s development and effectuation of policy. In that email chain, Hyland states, “Per [Marchese’s] experience...he thought it better to have [testing] in the afternoon.” (ER-9).² Based on Marchese’s contribution, the schedule was later revised to reflect his suggestion. (Tr. 470). As a result of the collaborative process, testing coordination varied from day-to-day through trial and error. (Tr. 439–40, 470).

In addition, the Union argues that Hyland has exclusive control over all testing despite significant evidence to the contrary. (Tr. 438 – 50). The record establishes that Hyland shares all designated responsibilities relating to the Ohio Graduation Test (“OGT”) and PARCC test with Shaffner, who was assigned the responsibility to organize standardized testing for the School alongside Hyland. (Tr. 627; ER-17). In fact, this is the second year in which Shaffner has held this responsibility. (Tr. 627). Hyland also has no authority over the “Alternative Assessment Program,” which is a separate state testing requirement overseen by bargaining unit member, Deborah Miller. (Tr. 447).

The Union excepts to the finding that Hyland’s use of discretion in preparing presentations for professional development does not differentiate her from her fellow professional colleagues in the unit. Since the start of Hyland’s employment at FPA, only two days of professional development have occurred. (ER-19). Griffith determined the topics for professional development sessions, and a number of employees prepared the agendas and presentations as directed by Griffith. (Tr. 520). At the January professional development

² The Board does not determine voter eligibility based on events occurring after the election. *See, e.g., Dean & Deluca New York, Inc.*, 338 NLRB 159 (2003). Employer’s Exhibit 9 was sent on March 7, 2015—2 days after the representation election on March 5, 2015. (ER-9).

session, Griffith, Miller, and Hyland all presented information to the teaching staff. (Tr. 497, 521).

Finally, the Union incorrectly excepts to the finding that the record is void of examples of formulating policy. The Hearing Officer correctly determined that Hyland is not responsible for formulating and effectuating any policies at FPA. Hyland's role during collaborative planning meetings is not unlike any other teacher's role: she brings forward topics of discussion, she contributes ideas based on her classroom experience, and she participates like any other teacher in the decisionmaking. (Tr. 101, 215–16, 434–35, 741). Consistent with their title, these meetings are collaborative³ and geared toward developing the ideas of the entire teaching staff. Given her vast experience in the field of education, it is not unsurprising that Hyland has a greater breadth of knowledge regarding "best practices." Reliance upon advice from Hyland is neither suggested nor required, however, and the teaching staff and bargaining unit members may ignore any insights provided by Hyland at their discretion.

Additionally, the Union relies on Employer's Exhibits 8 and 9 to further establish that Hyland formulated policies unilaterally without the input of other bargaining unit members. Neither Exhibit supports this assertion. Throughout both Exhibit 8 and 9, Hyland outlines her ideas while requesting *and receiving* feedback from fellow employees. (ER-8, ER-9). In one instance, Shaffner also presents a topic of concern to be discussed and decided upon. (ER-8). As described herein, Hyland did not formulate or effectuate policies with regards to standardizes testing.

³ The Union suggests that the repeated use of the term "collaborative" is somehow indicative of the credibility that should be afforded to the testimony of Griffith, DeWitt and Hyland. The Union's argument on this point is not well founded. The term "collaborative," as well as synonymous terms and descriptions meeting the definition of collaboration were used frequently throughout the April hearing to discuss staff meetings. (Tr. 198,426–27, 434–35, 454, 499, 101, 559–60, 741).

The Union asserts that the Hearing Officer erred in determining that Hyland’s managerial functions of releasing teachers early and permitting a substitute teacher for Marchese was isolated and attendant to Hyland’s role in coordinating standardized testing. However, contrary to the Union’s assertion, the record confirms that each of these instances occurred during the week immediately preceding or the week of OGT administration—in other words, the weeks of March 9 and March 16—after the Election period. (Tr. 107–08, 117, 149, 466–67). The Board does not determine voter eligibility based on events occurring after the election. *See, e.g., Dean & Deluca New York, Inc.*, 338 NLRB 159 (2003). As such, these instances are not relevant to the analysis of whether Hyland is a bargaining unit member or if she formulates or effectuates policies.

IV. CONCLUSION.

The Hearing Officer properly determined that Anne Hyland is not a managerial employee excluded from the bargaining unit. The Union has failed to meet its heavy burden of establishing that Hyland is a manager, and her ballot from the March 5, 2015 election should therefore be opened and counted.

Respectfully submitted,

Date: June 4, 2015

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Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via e-mail this day of the 4th day of June, 2015, upon Kristin Watson, KWatson@cloppertlaw.com, and, via electronic filing, upon Garey Lindsay, Regional Director, National Labor Relations Board, Region 9.

/s/ Adam J. Schira
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