

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

PERSPECTA ENTERPRISE SOLUTIONS LLC

Employer

and

STRATEGIC DATA SYSTEM, INC.

Employer

and

GCORP CONSULTING INC.

Employer

and

STRATASCOR, LLC

Employer

and

FREEDOM STAFFING, LLC

Employer

and

APEX SYSTEM, LLC

Employer

and

**INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
AFL-CIO, LOCAL LODGE SC310**

Petitioner

Case 28-RC-261225

DECISION AND ORDER

International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge SC310 (the Petitioner) seeks to represent a single unit of full-time and regular part-time leads, information specialists I, II, & III, network operators I, II, & III, and office administrator clerks¹ employed by Perspecta Enterprise Solutions LLC (Perspecta); Strategic Data System, Inc. (SDS); GCorp Consulting Inc. (GCorp); Stratascor, LLC (Stratascor); Freedom Staffing, LLC (Freedom); and, Apex System, LLC (Apex) (collectively, the Employers) for Marine Corps Air Station located at 4339 South O’Neill Street, Building 1250, Yuma, Arizona (MCAS Yuma).

The Petitioner maintains the Employers are joint employers under the National Labor Relations Act (the Act). Specifically, it argues Perspecta controls the hiring of all petitioned-for employees, which are provided to the United States Marine Corps (USMC) at MCAS Yuma by Perspecta, SDS, GCorp, Stratascor, Freedom, and Apex.² The Employers contend they are not joint employers as defined in the Rules and Regulations of the National Labor Relations Board (the Board); and, therefore, the petitioned-for unit is not appropriate.

A hearing officer of the Board held a hearing in this matter, and the parties orally argued their respective positions prior to the close of the hearing. As explained below, based on the record and relevant legal precedent, I find the Petitioner failed to meet its burden to show the Employers are joint employers; thus, the instant petition must be dismissed.

I. THE EMPLOYERS’ OPERATIONS

The Employers provide information technology (IT) services and staffing solutions to entities throughout the United States, including the USMC. The USMC outsources some of its IT functions under Next Generation Enterprise Networks contracts (NGEN). Perspecta is the prime NGEN contractor for seven USMC locations in the Western United States, including MCAS Yuma, and responsible for providing various IT functions, such as networking, cybersecurity, and end-user services, and some non-IT tasks (e.g., asset program management and technical writing).

As the prime NGEN contractor, Perspecta fills vacant positions with its own direct employees or, more often, by subcontracting with other vendors. Under NGEN, Perspecta must maintain a 95% fill rate for approximately 250 positions across the seven USMC locations, which includes 24 positions at MCAS Yuma where it has only two direct employees—one IT Specialist Mid and one IT Specialist Senior. The remaining positions are filled by SDS, GCorp, Stratascor, Freedom, Apex, ACI Federal (ACI), and Premier

¹ In the record, these positions are identified as IT Specialist Junior, IT Specialist Mid, IT Specialist Senior, Cyber Security Specialist Junior, NetOps Specialist Junior, NetOps Specialist Mid, NetOps Lead Mid, and Administrative Assistant Junior. The parties did not reach a stipulation on an appropriate unit.

² The initial petition also included Render Security Engineering, LLC (Render); however, the Petitioner amended the petition to exclude Render at the hearing because it provides IT workers to the United States Navy at MCAS Yuma and not USMC.

Management Group (Premier) (collectively, Vendors).³ The labor categories and job classifications are specified by USMC in NGEN and are not determined by any of the Employers.

The USMC Lead for NGEN is Perspecta's point of contact at MCAS Yuma. Perspecta's Client Manager for MCAS Yuma deals primarily with the USMC Lead for NGEN, while Perspecta's Resource Manager oversees MCAS Yuma and deals primarily with Perspecta's Vendors—the other Employers.

Building 1250 at MCAS Yuma houses most USMC networking and communications functions. All of the Employers' employees work out of Building 1250, along with an unknown number of government and military personnel. There are physically separate sections in the building for each area of IT (i.e., networking, cybersecurity, end-user services).

According to Perspecta's Client Manager and Resource Manager, Perspecta fills the overwhelming majority of its NGEN vacancies at MCAS Yuma by sending an open billet e-mail to its current Vendors at the site and posting the vacancy on Beeline, an electronic vendor management system.⁴ The open billet lists the location (in this case, MCAS Yuma), labor category, job description, and Perspecta's contract rate—the “fully loaded rate” Perspecta will pay a Vendor for the position. Each Vendor determines how much of the contract rate goes to an employee's wages and benefits, or its own revenue. The open billet may also contain other job requirements such as certifications and security clearances.

Vendors recruit individuals for open positions through online sites such as Crash, Indeed, Insight, LinkedIn, and Monster. An IT Specialist Junior testified that he was referred to an open position by someone already working at MCAS Yuma. Each Vendor interviews potential applicants. If the applicant meets the requirements of the position, the Vendor determines what it is willing to offer as far as their wages and benefits (medical coverage, disability, retirement, etc.). Perspecta plays no role in determining the wages or benefits of an applicant, and Perspecta's Client Manager and Resource Manager both testified that they did not know the payrate or benefits of any of the Vendor's employees.

A Vendor may also offer training so applicants can qualify for more advanced positions. For example, GCorp provided the IT Specialist Junior with training and testing for the CompTIA Security+ certification, which enabled him to qualify for his current position.

³ The record indicates Premier and ACI provide IT workers under NGEN to the USMC at MCAS Yuma; however, the Petitioner did not name Premier or ACI as employers or joint employers in the instant petition.

⁴ The record is silent on when and how Perspecta fills NGEN vacancies at MCAS Yuma with its own direct employees.

Once an applicant accepts a Vendor's offer, the Vendor submits the applicant as a candidate through Beeline.⁵ Perspecta's Resource Manager said Vendors race to fill vacancies, and GCorp's Chief Operating Officer described Perspecta's Beeline postings as "an auction-type event" and testified that GCorp checks Beeline daily for vacancies and tries to match the best candidates already in its queue with any open job postings.

Next, Perspecta's Resource Manager speaks with the candidate about working for the USMC in Yuma, Arizona. Perspecta's Client Manager and Resource Manager testified that Perspecta wants candidates to understand the physical and work environment, particularly those without military experience. Perspecta's Resource Manager gave the example of a candidate who drove from Kentucky to Yuma, and then did not take the position because he was not prepared for desert heat. Perspecta's Client Manager and Resource Manager also testified they may ask a couple questions about a candidate's background to confirm they are qualified for the position. A NetOps Specialist Mid testified that he spoke briefly with Perspecta's Resource Manager but did not consider this conversation to be an interview. If the candidate appears prepared for the physical and work environment, the Vendor sends them an offer letter for the position; however, the NetOps Specialist Mid said that he received his offer letter before speaking with Perspecta's Resource Manager.

After the candidate signs an employment contract with a Vendor, each Vendor provides them with their Vendor-specific policies and rules. For example, Apex and GCorp each have employee handbooks that apply to their employees, respectively. Perspecta then sends the employee and the Vendor an onboarding e-mail containing directions to MCAS Yuma, the contact information of the USMC Lead for NGEN, the employee's specific point of contact, and links for required USMC training and registration (MarineNet). The e-mail lists the "appropriate business casual" dress code (which may be further restricted by an Employer's Vendor-specific rules) and lists the employee's SMO code, which is needed for clearance into MCAS Yuma and USMC computer systems.

Once an employee is at MCAS Yuma the Perspecta IT Specialist Mid provides the employee with a contractor computer to perform their work. Employees perform a variety of IT functions. For example, an IT Specialist Junior testified that he reimaged USMC computers, built network objects, and provided local support through the Enterprise Service Desk (ESD). Computer users at MCAS Yuma report their IT issues in ESD, which creates a ticket that is assigned to an employee by a government worker. None of the Employers plays a role in assigning work to employees. In fact, none of the Employers have onsite supervisors. Employees' day-to-day activities are supervised by USMC personnel.

Performance or other issues with an employee are typically brought to Perspecta's attention by USMC. Perspecta then notifies the employee's Employer about the issue and

⁵ Although not explicit in the record, the evidence suggests companies other than the Vendors could submit a candidate through Beeline.

any USMC request. Perspecta's Client Manager and Resource Manager both gave examples of USMC specifically telling Perspecta they did not want a particular employee back at MCAS Yuma. Perspecta passed this information to the employee's Employer, which terminated the employee. According to Perspecta's Resource Manager, USMC has requested the removal of three employees in the past five years, but this does not necessitate an Employer terminate the employee; rather, the Employer could choose to reassign the employee to another location or another contract depending on the issue. Perspecta's Client Manager and Resource Manager both testified that a Vendor has never failed to follow a USMC removal request and they do not know what, if any, action Perspecta would take if a Vendor refused to remove an employee. Perspecta cannot discipline or discharge other Employers' employees. All feedback regarding employees is passed along to their specific Employer by Perspecta, as Vendors are not allowed to have direct contact with USMC. The only exception is when an employee chooses to send feedback directly to their Employer.

All of the employees at issue in the instant petition work five 8-hour days per week, which is set by USMC. The normal schedule is 8:00 a.m. to 5:00 p.m. with a 1-hour break; however, an employee may be able to adjust their start time by 30 to 60 minutes with approval from USMC. Under NGEN, employees are not allowed to work any overtime. Employees earn paid time off in accordance with their Vendor-specific policies, which vary among the Employers. Similarly, requests for time off are made to their specific Employer usually via e-mail or calendar invite in Outlook, with copies to Perspecta and USMC. Perspecta plays no part in approving or denying the request of a Vendor's employee.

Each employee records worktime in two different systems. The first system, called Deltek, is a time and expense management system compliant with the Federal Acquisition Regulation (FAR) used by Perspecta to bill USMC on a monthly basis. As such, it only records an employee's actual hours worked. The second system varies by Vendor. For example, Apex uses MyApex and GCorp uses TSheets. Employees record their worktime and compensable nonwork time (e.g., paid time off, sick leave, vacation) in their Vendor's timekeeping system. Then, Vendors bill Perspecta on a weekly basis for their employees' actual hours worked and potentially mileage driven on base at MCAS Yuma or personal protective equipment (e.g., hard hats).

Employees are paid by their specific Employer, which covers paid time off including holidays and deducts and remits taxes, FICA, FUTA and Medicare. Vendors only receive the all-encompassing contract rate for the position from Perspecta for the actual time worked by the employee.

II. LEGAL ANALYSIS

In *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016), the Board set forth a two-part test for Regional Directors to use in determining whether employees of multiple entities constitute an appropriate unit for collective bargaining. First, the Regional Director must determine whether the entities are joint employers of the employees at issue, and, if so, whether those employees

share a community of interest. *Id.*, slip op. at 19 fn. 40. Therefore, I must first analyze whether the Employers are joint employers.

On April 27, 2020, the Board's Final Rule on Joint Employer Status under the National Labor Relations Act (Final Rule) took effect. Under the Final Rule:

To establish that an entity shares or codetermines the essential terms and conditions of another employer's employees, the entity must possess and exercise such *substantial direct and immediate control* over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees. [Emphasis added.]

Sec. 103.40(a) of the Board's Rules and Regulations. The Final Rule defines "essential terms and conditions of employment" as "wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction." Sec. 103.40(b). The burden for proving joint-employer status rests with the party asserting it. Sec. 103.40(a).

In the instant case, the Petitioner's only contention is that Perspecta is the gatekeeper for hiring the petitioned-for employees at MCAS Yuma⁶ and bears the burden to prove it is a joint employer with its Vendors. According to the Final Rule:

An entity exercises direct and immediate control over hiring if it actually determines which particular employees will be hired and which employees will not. An entity does not exercise direct and immediate control over hiring by requesting changes in staffing levels to accomplish tasks or by setting minimal hiring standards such as those required by government regulation.

Sec. 103.40(c)(4). Regarding the latter, the record shows USMC establishes the labor categories, job classifications, descriptions, and requirements through NGEN. Even if Perspecta was involved, it would not be enough to establish direct and immediate control under the Final Rule.

The Board's Notice of Proposed Rulemaking for the Final Rule sets forth an example of direct and immediate control in hiring, where a hospital manager reviews resumes and interviews candidates identified by a temporary staffing agency and, together with the agency manager

⁶ The Petitioner does not argue, and I do not find the record evidence shows, Perspecta exercises direct and immediate control over any other essential terms and conditions of employment. Each Employer sets its own employees' wages and benefits and determines appropriate discipline, including discharge. Employees' supervision and direction are handled exclusively by USMC. As the Final Rule directs, policing a contract is not sufficient to confer joint-employer status.

selects the candidates to be hired.⁷ Unlike this example, Perspecta's managers do not interview or select who an Employer employs. The fact Perspecta can reject an Employer's selection—although the record shows it rarely does—is different than interviewing and jointly selecting an employee. Despite Perspecta's potential control over who works at MCAS Yuma, the evidence shows it does not control whether an Employer employs a particular employee. In fact, the record reveals an Employer offered an applicant employment before he spoke with Perspecta.

Based on the record as a whole, the Petitioner has failed to carry its burden to establish Perspecta possesses and exercises substantial direct and immediate control over hiring.

III. CONCLUSION

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

1. The rulings at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employers are engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The petition must be dismissed because the Employers are not joint employers under the Rules and Regulations of the National Labor Relations Board.

IV. RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board at any time following the issuance of this Decision until 10 business days after this final disposition of the proceeding by the Regional Director. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a

⁷ *Example 8 to § 103.40.* Temporary Staffing Agency supplies 8 nurses to Hospital to cover for temporary shortfall in staffing. Hospital manager reviewed resumes submitted by 12 candidates identified by Agency, participated in interviews of those candidates, and together with Agency manager selected for hire the best 8 candidates based on their experience and skills. Hospital has exercised direct and immediate control over temporary nurses' essential terms and conditions of employment.

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copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated at Phoenix, Arizona, this 7th day of July 2020.

/s/ Cornele A. Overstreet

Cornele A. Overstreet, Regional Director
National Labor Relations Board, Region 28