

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

PHOENIX NEW TIMES, LLC)	
)	
and)	Case 28-RC-254936
)	
THE NEWSGUILD-CWA)	
)	

**REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR’S DECISION AND
DIRECTION OF ELECTION**

Phoenix New Times, LLC (the “Employer”), by counsel, pursuant to NLRB Rules and Regulations 102.67 (29 C.F.R. § 102.67), submits the following Request for Review of the Regional Director’s Decision and Direction of Election in this matter dated April 15, 2020.

The National Labor Relations Act was enacted to provide a mechanism of redress for massive workforces in roles of traditional labor, steel mills and heavy construction being the quintessential examples. The Editorial Department of the Phoenix New Times is the *opposite* of that traditional labor model in virtually every way: a lean, scrappy staff of independent thinkers, the *majority* of whom are entrusted by company leadership to exercise nearly-exclusive managerial control of their respective areas of expertise within the online and print aspects of the PNT production. Thus the classic “newsroom” examined by NLRB cases from the 1980s and earlier, with respect to publications employing *dozens* of editors at various levels, is simply inapplicable. *See, e.g., The Washington Post Co.*, 254 NLRB 168 (1981). The decades-old journalistic world where most people wrote their articles on *typewriters* simply cannot relate to the demands placed on the 11-regular-employee staff of a digital media publication.

To that end, the Employer submits that strict adherence to this antiquated precedent as setting any kind of “rule” regarding editorial staff falling within the bargaining unit, as the Regional Director determined here, is sheer folly. And for precisely this reason, the most

recent precedent from the Board on this topic unequivocally supports the managerial capacity of the editorial employees of the Employer, including the *sole* editor included in the bargaining unit by the Regional Director, Lauren Cusimano. This decision is thus contrary to officially reported Board precedent, and thus the Board should grant review pursuant to Rule 102.67(d)(1)(ii).

Moreover, including Cusimano within the unit is clearly erroneous on the record, and as Cusimano cast the decisive vote in the subsequent election, such error prejudicially affects the rights of the Employer, and thus the Board should grant review pursuant to Rule 102.67(d)(2).

Likewise, the Regional Director did not even *address*, much less distinguish, the Employer's cited authority with respect to supervising a "one-man department," and then denied supervisory status to Cusimano after erroneously failing to consider Employer's proffered evidence regarding the historical supervisory role of the Food Editor with respect to a specific category of employee, the Food Critic. For this reason as well, Board review pursuant to Rules 102.67(d)(1)(ii) and (d)(2) is warranted.

In addition, the Regional Director found that the "Fellows" should be included in the bargaining unit, relying upon an analogy to the completely inapposite field of medical school graduates in residency, which was raised by neither the Union nor the Employer during the pre-election hearing. Absolutely no evidence submitted at the pre-election hearing supports this viewpoint, as the Employer submitted uncontroverted evidence that the Fellows are temporary employees with no expectation of permanent employment, and *each and every fellow* testified to precisely that fact: that they "hoped" to be offered a full-time position following the completion of their fellowship, but had no such actual expectation. Accordingly, the Regional Director has decided a substantial question of law with respect to temporary employees of a digital media organization for which there is an absence of factually-applicable Board precedent, and in doing

so has made clearly erroneous findings of fact forcing the inclusion of the Fellows into the bargaining unit, and the Board should thus grant review pursuant to Rules 102.67(d)(1)(i1) and (d)(2).

GENERAL FACTUAL BACKGROUND

Voice Media Group is a digital media company that own and operates six daily websites nationwide. [Tr. 17] The Employer, Phoenix New Times, is one of the six publishing companies owned and operated by the Voice Media Group. [Tr. 18] The Phoenix New Times was founded in 1970 and originally was very print-focused. [Tr. 18-19] During the last twenty years, it has transitioned to a web-based publishing company. [Tr. 19-20] The Employer publishes original reported content on news, food, arts, and music daily on its own website at www.phoenixnewtimes.com. [Tr. 19-20] It also has a legacy print newspaper that is printed weekly. [Id.]

The Employer's editorial staff is composed of an Editor-in-Chief, Editorial Operations Manager, News Editor, Food Editor, Culture Editor, Social Media Editor, Creative Director of Print, and Staff Writers. [Tr. 22; Er. Ex. 1] Each editor manages a section or vertical, and is responsible for the content of that section. [Tr. 41- 42]

The Phoenix New Times is a very lean organization, and so is its editorial department. [Tr. 24] Each editor determines the direction and substance of his or her vertical. [Tr. 50] The editors use their own judgment to give their section their own personal taste, viewpoints, preferences, and passions. [Tr. 50, 77] Editors may write their own articles but mostly the vertical's content is generated by staff writers and freelancers. [Tr. 46]

Staff writers and freelancers pitch ideas to the editors. [Tr. 46] Editors decide whether the idea is greenlighted, and then provide the writers with direction on their piece. [Id.] Editors also assign articles to staff writers or freelancers. [Tr. 77] After an article is written, editors review it for structural logic, comprehensiveness, language used, and determine if a piece needs further research or legal review. [Tr. 47] Editors are also responsible for developing an engaging headline for the article, analyzing the metadata in order that online searchability is maximized, reviewing photographs and captions on photographs, and identifying any related stories. [Tr. 48]

Each editor is responsible for a budget to pay freelancers. [Tr. 58] Editors use their independent judgement to choose which freelancers to engage, pay them a reasonable amount for their work, and ensure that the vertical engages a diversity of voices. [Tr. 57-58, 77]

Voice Media Group has a fellowship program that started about twenty years ago. [Tr. 99] The fellowship program provides an opportunity for recent college graduates interested in the newspaper industry to be assigned for a six-month term to one of their six publishing companies. [Tr. 99-100; Er. Ex. 20] The program's objective is to provide fellows with real life writing experience in the industry. [Id.] It is a corporate program managed by Voice Media Group. [Tr. 101] The application and hiring process, including the location assignment, is performed at the corporate level. [Tr. 101-102]

ARGUMENT

(1) Food Editor (Lauren Cusimano): Supervisor and Manager

A. The Food Editor Role Contains Inherent Authority To Supervise New Times Employees

With respect to obtaining supervisor status and being excluded from the bargaining unit under Section 2(11) of the National Labor Relations Act, the Supreme Court has directly ruled on the process to be employed: “Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,’ and (3) their authority is held ‘in the interest of the employer.’” N.L.R.B. v. Kentucky River Cmty. Care, Inc., 532 U.S. 706, 713 (2001) (quoting N.L.R.B. v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573–574 (1994)). The most recent decisions of the National Labor Relations Board adhere to this tripartite test for supervisory status under the Act. *See, e.g., The Arc of South Norfolk*, 368 NLRB No. 32, slip no. 1 (July 31, 2019) (employing this test to reverse the Regional Director, and finding program coordinators to be supervisors under Section 2(11) of the Act because they assigned caseloads using independent judgment, finding it unnecessary to reach any other of the 12 enumerated factors).

The Regional Director found that Lauren Cusimano was not a statutory supervisor (the only vertical editor denied such status) on the following grounds: (1) “[T]he Food Editor does not have any direct reports, but instead relies on freelancers to provide content for the Food Vertical”; (2) “[N]either party presented any evidence to show that the Food Editor was ever told that she could hire a direct report generally, or a full time Food Critic”; and (3) “Neither party presented any evidence to show that anyone employed in the Food Editor position has ever had a direct report.” [DDE at 3]. All of these factual findings are highly selective in their verbiage, to the exclusion of the Employer’s actual evidence regarding the Food Editor’s *historical* supervisory status of a specific position: the Food Critic, Chris Malloy

Specifically, VMG executive Christine Brennan testified that Chris Malloy used to be a fulltime Food Critic employed by the Phoenix New Times, who reported directly to the Food Editor. [Tr. 30:25-31:7; 154:20-155:5; 202:21-204:1]. However, over time, that position was transitioned into being an independent contractor, or “freelancer,” who nevertheless still reports to the Food Editor [*Id.*]. Indeed, Cusimano herself noted that Chris Malloy remains on the masthead of the paper as “Food Critic,” despite being on freelance status. [Tr. 304:24-305:1]. Moreover, Christine Brennan further testified, under direct examination by the Hearing Officer, that in the event that Chris Malloy quit, Cusimano would have authority with respect to the hiring of a new Food Critic *as an employee*, and would be involved in his or her training [Tr. 173:23-174:9; 184:19-185:3]. And it was unequivocally established by both Brennan and Cusimano that Chris Malloy reports to Cusimano, and Cusimano has editorial control over his content. [See, e.g., Tr. 76:13-77:9; 154:1-11; 297:2-7; 300:17-19 (Cusimano: “If I were unhappy with Chris’ work, I could certainly stop him from contributing to my vertical.”)].

In other words, although the Food Editor *currently* has no employees as a direct report, the evidence unequivocally establishes that the Food Editor has, until recently, had a Food Critic as a direct employee within the Food Editor’s capacity to hire, fire, and otherwise control their writing, and that that same employee is now performing the same function as an independent contractor. This is a relatively unique fact pattern, which to date has only been addressed by the Board once, and the Board accorded the employee in the equivalent of Cusimano’s role supervisory status.

Specifically, Henry Colder Co. is the only NLRB decision of which the Employer is aware that addresses the following set of facts: (1) a department which originally contained two employees, a manager and a subordinate; (2) the subordinate leaves employment with the

company to *become* an independent contractor of the employer, fulfilling precisely the same duties as before; and (3) the manager is left as a “one-man” department. 163 NLRB 105, 112 (1967). Under these circumstances, the Board found that the manager was the supervisor of the *department*, and excluded him from the bargaining unit. *Id.* at 112-113. The Regional Director made no mention of Henry Colder Co. in his Decision and Direction of Election, despite the Employer’s specific citation to it and explanation of its applicability in its Points and Authorities. Moreover, as the only precedent on point addressing this highly particular fact-pattern, it was clearly erroneous for the Regional Director to so ignore this precedent.

Moreover, as a sheer function of practicality, this ruling is clearly erroneous on its face because Lauren Cusimano is the sole vertical editor who was included in the bargaining unit based on *lack* of supervisory status. Indeed, the Regional Director accorded supervisory status to the Culture Editor based on his “active role in hiring the Intern,” which is a part-time position. [DDE at 8]. The Regional Director’s basis for excluding Cusimano, that there was no evidence she could hire a “*full time* Food Critic” [DDE at 3 (emphasis added)], thus draws a difference without distinction, and should be reversed. Moreover, Brennan testified unequivocally that Cusimano had the *same* authority to hire and fire such an intern as the Culture Editor. [Tr. 173:3-16]. Thus the Regional Director denied Cusimano supervisory status merely because she is not *currently* exercising the same supervisory authority as the Culture Editor, not because she lacks the same *actual* supervisory authority. The Culture Editor’s exercise of that authority constitutes a “tangible example” of its existence, sufficient to credit Brennan’s testimony and confer supervisory status upon his identical peer, the Food Editor, Lauren Cusimano. *See Alois Box Co. v. N.L.R.B.*, 216 F.3d 69, 74 (D.C. Cir. 2000) (finding challenged employee constituted a statutory supervisor: “[T]he Board has ruled that it is the possession of supervisory authority and

not its exercise that is critical . . . [I]n the absence of the exercise of supervisory authority . . . there [must] be tangible examples demonstrating the existence of such authority.”)

In short, given that the Food Editor has historically exercised supervisory authority over a company employee, and given her recognized authority to hire and fire on equal terms as another vertical editor, who *was* accorded supervisor status by the Regional Director, the Food Editor should be excluded from the bargaining unit, and the Decision and Direction of Election should be reversed.

B. Lauren Cusimano Manages the Food Vertical of the Phoenix New Times.

Even excluding Cusimano’s supervisory functions, she still qualifies as a “managerial” employee , i.e., someone who “formulate[s] and effectuate[s] management policies by expressing and making operative the decisions of their employer,” and should be excluded from the bargaining unit accordingly. Health Care, 511 U.S. at 576 (quoting N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267, 288 (1974)). And as to the topic of journalistic editors positions specifically, the NLRB’s most recent precedent is dramatically on point, and establishes that Cusimano’s effective control over the Food vertical in her role as Food Editor renders her a “manager,” because she is empowered to utilize her independent voice in formulating this vertical and speaking to Phoenix New Times readers.

The decisive precedent on this topic is The Republican Co., 361 NLRB 93 (2014). The Republican is a newspaper in Springfield, Massachusetts, and asked the NRLB to review whether the Editorial Page Editor, Steve Smith, qualified as a managerial employee to be excluded from the unit. *Id.* at 93. While the Board noted that other editors reported to him, it did not address Smith’s status as a “supervisor” under Section 2(11) of the Act. *Id.* Rather it focused on the authority and responsibility vested in the position – describing facts virtually

identical to those of all three of the vertical editors at Phoenix New Times (two of which have been excluded from the unit). Specifically:

- “Smith is generally responsible for the content of the editorial pages”;
- Smith considers “pitches” as to topics to include in the editorial section, and “Smith has the authority to veto a topic at this stage if he determines that it is ‘not worthy of an editorial.’”;
- “A few times a year,” the publisher of the paper, Larry McDermott, “rejects Smith’s proposed editorials”;
- As to editorial columns and cartoons, “Smith selects from among the submissions, only occasionally consulting McDermott, and makes an effort to offer a range of political opinion”;
- As to the “Viewpoint” column, which contains statements that are “submitted, unsolicited, by members of the community. Smith decides, without input from McDermott, which columns to publish”; and
- As to the editorial page, which “publishes 30 to 40 letters to the editor on a daily basis. One of the other editorial editors decides which letters to publish and shows them to Smith, who approves them. McDermott does not review Smith’s choices.”

Id. at 93-94. The Board took all of this information into account, and determined that Smith was a managerial employee “in light of his role in formulating, determining, and effectuating the newspaper’s editorial policies.” *Id.* at 96. Specifically, the Board noted that Smith was entrusted to select the editorial topics, make assignments as to writers (including writing some content himself), veto pitches made by people under his authority, and McDermott, with whom *ultimate* authority lay, approved Smith’s editorial page in full “on all but rare occasions.” *Id.* On this

basis the Board also distinguished prior cases from the 1970s involving newspaper editors, Suburban Newspaper Publications, Inc., 226 NLRB 154, 156-157 (1976), and Bulletin Co., 226 NLRB 345, 356-358 (1976), finding that: “Smith is responsible for the content of the entire editorial page, including selecting editorial topics and positions, and he usually does so without any affirmative approval from McDermott. Although McDermott can veto Smith's decisions, he has rarely done so. Thus, in practical terms, Smith’s authority to determine the topic and content of editorials far exceeds that of the putative managers in Suburban Newspapers and Bulletin.” *Id.* at 96. Finally, the Board determined that Smith’s adherence to The Republican’s “general philosophy” of publication “involves the exercise of sufficient independent discretion, in our view, to confer managerial status.” *Id.* at 96.

Absolutely *all* of these facts are present with respect to Cusimano’s role as Food Editor. As was established through extensive testimony during the pre-election hearing from both Brennan and Cusimano herself, Cusimano has near-total authority in the selection of pieces to run in the Food vertical, including allocation of her budget among freelance authors, whom she also selects. [*See, e.g.*, Tr. 49:21-50:18; 58:15-23; 76:13-77:9; 86:22-89:6; 154:1-11; 177:3-25; 185:19-22; 297:2-7; 300:17-19; 321:4-323:12; *see also* Er. Exs. 10; 11; 14]. Indeed, even on those occasions when staff writers contribute to the Food vertical (such as, for instance, the story referenced by Steven Hsieh and Cusimano regarding a raw chicken sandwich at Burger King), Cusimano retained effectively total editorial control over the content. [Tr. 310:8-22; 409:10-16]. Cusimano herself had such expectations for the role; in her cover letter, she highlighted numerous changes she intended to implement to the Food vertical upon her hire. [Er. Ex. 12]. And Cusimano in fact took charge of her vertical upon her arrival, instituting a “best practices [policy] for food slide shows” [Tr. 83:10-22; Er. Ex. 13 at 1], and actively soliciting new

freelancers in her discretion. [Tr. 84:4-10; Er. Ex. 13 at 2]. Cusimano also has direct publication authority over her vertical *without* seeking approval of the editor-in-chief, as evidenced by the numerous exemplar articles Employer noted in the record. [See Er. Ex. 14]. Brennan confirmed this, testifying that any preemptive veto of Cusimano's work by the editor-in-chief would be rarely if ever exercised. [Tr. 52:5-20].

But most importantly, Cusimano, Brennan and Hudnall all testified that Cusimano exercises discretion with respect to the "vision" of the Food vertical. [Tr. 109:6-9; 316:16-317:7; 473:2-9]. Specifically, Cusimano herself draws an editorial distinction between the more "professional" tone she believes the Food vertical should have in general, and her *own* "op ed" column called Table Scraps, in which she utilizes "much more of [her] personal voice" in commenting on the *political* issue of food waste. [See Tr. 318:5; 339:13-341:9]. Accordingly, not only is Cusimano determining the content to include in the fields under her charge as Food Editor, but she is also exercising independent judgment as to the opinions and positions her Food vertical should present. This is the essence of an editor to be accorded managerial status under the NLRA, as described in The Republican Co, because Cusimano "'regularly writes and directs editorials on topics that reside outside of the paper's institutional positions.'" 361 NLRB at 96.

The Regional Director considered virtually *none* of this evidence in refusing to accord Cusimano managerial status, instead focusing exclusively on the vertical editors as a *group* and what occurs during their weekly editorial group meetings. [DDE at 5, 9]. In point of fact, the Regional Director included only two categories of facts with respect to Cusimano's managerial responsibility: (1) having to get approval from the Editor-in-Chief in order to *exceed* her budget (which is facially immaterial, as virtually *every* employee of any company is subject to budgetary limitations); and (2) Cusimano has access to and control over the Food Vertical's

Twitter account. [DDE at 5-6]. This extreme paucity of evidence considered, and the total *absence* of any of the evidence identified above from the Decision and Direction of Election, collectively demonstrates that the Regional Director’s decision with respect to Cusimano’s managerial status was clearly erroneous on the record, and should be reversed pursuant to Rule 102.67(d)(2).

Moreover, the Regional Director improperly narrowed the applicability of The Republican Co. to editors who publish “unsigned editorials” [DDE at 9], even though the Board never explicitly listed this as critical for managerial status. Instead, the Regional Director relied almost exclusively on The Washington Post Co., 254 NLRB 168 (1981) and like precedent examining editor positions at huge print newspapers with national audiences, lumping the Phoenix New Times in with these dinosaurs under the umbrella “news media.” [DDE at 8-9]. But The Washington Post Co. should not be found controlling here, for several reasons.

First and most importantly, it is well-settled that the *title* of a position is not conclusive as to inclusion in the bargaining unit, but rather the *function* that position fulfills. To that end, it is critically important to compare the actual composition of the Food vertical (one full-time editor freely publishing daily content, with either one or no employees under their direct supervision, and a team of freelancers) and its most-analogous counterpart within this precedent, namely, the “Style” section of the Washington Post:

In addition to the daily Style section, the newspaper produces a Thursday Food subsection, as well as Arts, Travel, Living, and Show subsections on Sunday. The Style desk, as with other departments, is headed by an [Assistant Managing Editor, or] AME. Under the AME are various editors whom the Employer seeks to exclude: deputy editors for culture and feature stories, projects editor, night editor, copy chief editor, two assistant editors, and editors for Travel, Living, and two for Food. There are approximately 30 reporters who work for the Style section, and 14 copy editors.

254 NLRB at 206. As these figures and descriptions indicate, there was **extensive** layering of editorial staff in the Washington Post Style section in the early 1980s, for whom the “culture” and “travel” and “food” editors are expressly characterized as “deputy.” *Id.* Not so at the Phoenix New Times. Lauren Cusimano is the **only** editor of the Food vertical apart from the Editor in Chief, David Hudnall, who testified quite articulately as to authority vested in Cusimano to manage her section with significant autonomy. [Tr. 473:2-9]. As such, The Washington Post Co. is entirely distinguishable from the circumstances under consideration here.

Second, if the Board felt compelled to fit the Phoenix New Times within the editorial framework of The Washington Post Co. Style section, the *closest* analogy as to the editorial positions at issue would be to the Assistant Managing Editor of the Style section, as the senior-most figure still assigned to a specific section of the paper. *See id.* at 199 (“[A]ssistant managing editors (AMEs) [] are in charge of the various departments within the Employer’s newsroom structure.”). However, The Washington Post Co. decision then expressly noted that: “It is undisputed that the AMEs are supervisors or managerial employees, and, that they have never been included in the bargaining unit represented by the Guild.” *Id.* at 199. Accordingly, despite the clear factual differences between the two publications, any analogy to The Washington Post Co. supports that Cusimano should be excluded from the unit.

Third, even assuming *arguendo* that the Regional Director’s reliance on The Washington Post Co. was *not* misplaced as to specific powers falling within or outside of managerial authority (hiring of freelancers, compensation, selection of content, etc.), it appears clear that The Republican Co. reached a different evaluation in finding those factors supported managerial authority. As such, to the extent there is any conflict between The Republican Co. and The Washington Post Co., it is axiomatic that “the controlling precedent [is] the most recent

Board decision in this area,” i.e. the 2014 decision in The Republican Co. See generally Cps Chem. Co., Inc., 324 NLRB 1018, 1029 (1997).

Fourth and finally, implicit in the Regional Director’s decision not to apply The Republican Co. to Cusimano’s position is that the particular section at issue there (the editorial page) cannot be analogized to the Phoenix New Times Food vertical because an editorial page is meant to represent the opinion of the publisher. [See DDE at 8-9]. Putting aside the obvious factual parallels between The Republican Co. and the Phoenix New Times which clearly do not exist with respect to The Washington Post Co., this position ignores completely that Cusimano *did* publish editorial positions within the Food vertical, with full knowledge that its messaging was inconsistent with the anticipated tone of the Food vertical writ large. [See Tr. 318:5; 339:13-341:9]. Indeed, placing Cusimano within the bargaining unit is almost certainly the most direct method available to *stifle* the voice of the Phoenix New Times Food vertical, as it will strip that section of its managerial stylistic discretion.

Accordingly, the Board should grant review, because the Regional Director’s Decision and Direction of Election constitutes a substantial departure from reported Board precedent, pursuant to Rule 102.67(d)(1)(ii).

(2) Fellows, As Temporary Employees, Cannot Be Included In The Bargaining Unit

Finally, “[i]t is established Board policy that a temporary employee is ineligible to be included in the bargaining unit.” In Re Catholic Healthcare W. S. California, 339 NLRB 127, 128 (2003) (quoting Pen Mar Packaging Corp., 261 NLRB 874 (1971)). To determine if an employee is “temporary” or not, the Board has alternately considered two different criteria: (1) “whether the employee’s tenure of employment remains uncertain,” also referred to as the “date certain” test (*see id.* at 128); and (2) whether the temporary employees have a “substantial

expectancy of continued employment” with the company upon conclusion of their temporary position. Northwestern University, 362 NLRB 1350, 1366 (2015). Neither of these exceptions to the rule are applicable here.

To begin, the Fellowship program is managed through Voice Media Group’s corporate offices, and the description of the program appearing online expressly states *in the first sentence*: “Writing fellowships are six-month jobs.” [Er. Ex. 20 at 2]. And if that weren’t enough, it goes on to give statistics regarding regular employment, stating that only 64% of fellows since 1999 obtained positions as staff writers. *Id.* at p. 3. Indeed, looking only from 2013 forward, only 11 out of 27 fellows, or just 41%, obtained a staff writer position. *See* Er. Ex. 21.

This precisely correlates to the experiences of the actual Phoenix New Times fellows, as provided in their testimony. Specifically, Ali Swenson’s understanding of the fellowship program was she did not have an “expectation” of a full-time position, simply a “reason to be hopeful.” [Tr: 622:23-623:1; 637:11-16]. Swenson also admitted that the only person to give Swenson such hope (New Editor, Ray Stern) did not have the authority to actually extend her fellowship beyond the end date. [Tr. 638:1-4]. Likewise, Hannah Critchfield stated that she understood there was a “chance” or a “possibility” of regular employment as a staff writer, but no guarantee or expectation. [Tr. 644:16-20; 646:24-647:3]. And both Critchfield and Swenson indicated that the only document to this effect (reimbursement for moving expenses) noted this was a six-month fellowship. [*See* Tr. 658:4-19]. Moreover, there was extensive testimony adduced from Christine Brennan and Ray Stern that fellows understand from the get-go that there are no guarantees: they are only *eligible* for hire if there is a vacant staff writer position available at one of the VMG publications, and even then, the Editor-in-Chief for that publication has to *want* that fellow to come on full-time. [Tr. 99:18- 102:21; 221:9-25; *see*

also Er. Ex. 20]. In short, regular employment post-fellowship is not automatic, and VMG will not force an unwanted fellow upon a publication.

And lastly, it is also highly significant that this is a *corporate* program of VMG, not a local program of the Phoenix New Times. Indeed, both the current fellows at Phoenix New Times (Ali Swenson and Hannah Critchfield) did not even use the word “Phoenix” in their cover letters, and were instead each applying generally for a “Voice Media Group Fellowship.” [See Er. Exs. 22 & 23]. Moreover, even though these fellows do end up working in a particular location such as Phoenix, Miami or Denver, the statistics on obtaining regular employment in the *same* location are even lower. Of the 27 VMG fellows in the last seven years, only 4, or just 15%, transitioned from being a Phoenix New Times fellow to a Phoenix New Times staff writer [see Er. Ex. 21], which is at bottom the pertinent metric as to whether the Phoenix New Times staff writers should be included within a Phoenix New Times bargaining unit.

In stark contrast to this uncontroverted evidence, the Regional Director determined that: “The evidence shows that more than 60 percent of the Fellows hired by the Employer are ultimately hired on as full time Staff Writers.” [DDE at 10-11]. On the basis of this patently erroneous finding, the Regional Director determined that these Fellows should properly be categorized as “apprentices” in “training . . . from whom the Employer plans to hire.” [DDE at 10]. Apart from a passing reference to “seasonal” workers (a specialized area of Board law which has no application here whatsoever), the Regional Director supported this conclusion with reference to two Board decisions, which on their face are inapplicable.

First, Boston Medical Center Corp., 330 NLRB 152, 166 (1999) considered at length whether students in medical residency constituted “temporary” employees, and acknowledged that such residents met previously-established Board criteria for temporary employees ineligible for inclusion in a bargaining unit. The Board in Boston Medical nevertheless declined to apply its

temporary employee exclusion to medical residents on the *specific and exclusive grounds* that such residence programs last from between 3 years on the low side and 7 years on the high side, and “the Board has never applied the term ‘temporary’ to employees whose employment, albeit of finite duration, might last from 3 to 7 or more years, and we will not do so here.” *Id.* To the contrary, the unequivocal evidence in this matter is that fellowships last just six months, which falls well within the Board definition of a “temporary” employee to be excluded from the bargaining unit. See, e.g., F W D Corp., 138 NLRB 386, 390 (1962) (excluding from bargaining unit worker employed for a “6-month training period” on the grounds that they were an ineligible temporary employee) (cited with approval in Catholic Healthcare, 339 NLRB at 128).

Second, in General Electric Co., 131 NLRB 100, 103-04 (1961), the Board did not address the concept of temporary employment *at all*; rather, it considered a specific training program with the stated *purpose* of hiring graduates of the apprentice program as full-time employees. Moreover, for the actual class of apprentices at issue in General Electric, 133 of 151 received a diploma upon graduation attesting to their completion of the program, which could be represented as such in seeking employment elsewhere within the tool-and-die industry. *Id.* Phoenix New Times Fellows receive no such official certificate or accreditation upon completing their respective fellowships. Finally, and most importantly, in General Electric “[a] majority of the apprentice graduates have been assigned upon graduation to the various tool and die shops where the employees *who comprise the unit represented by Petitioner work.*” *Id.* (emphasis added). As discussed above, a mere 15% of Phoenix New Times Fellows have gone on to be staff writers at Phoenix New Times specifically, which is the limited scope of the bargaining unit at issue. The Regional Director’s attempt to credit the bargaining unit with future non-unit employees is thus unsupported by his proffered authority, and should be rejected.

Accordingly, no exception to the general rule applies: the Phoenix New Times Fellows are temporary employees of a fixed duration, with no significant expectation of regular employment upon the conclusion of their fellowships. The Regional Director should therefore have excluded them from the unit, and his failure to do so is proper grounds for review under Rules 102.67(d)(1)(ii) and (d)(2).

CONCLUSION

For the foregoing reasons, the Employer respectfully requests that the Board grant its Request for Review of the Regional Director's Decision and Direction of Election in this matter, dated April 15, 2020, find that Lauren Cusimano and the Pheonix New Times Fellows should have been excluded from the bargaining unit. Moreover, as Cusimano's vote in the election was determinative (and her absence results in a tie), the Employer further requests that the Board instruct the Regional Director to issue a Revised Tally of Ballots and a Certification of Results accordingly with respect to the Union's representation petition and election in this matter.

Respectfully submitted,

FAEGRE DRINKER BIDDLE & REATH, LLP



By: _____
Rebekah Ramirez
Alexander Preller

Counsel for Phoenix New Times, LLC
300 N. Meridian, Suite 2500
Indianapolis, Indiana 46204
Telephone: 317/237-0300
FAX: 317/237-1000

CERTIFICATE OF SERVICE

I certify that, on August 4, 2020, a copy of the foregoing was e-filed through the Agency's website, and served via electronic mail upon the following:

Jacqueline Soto - Jacqueline@TheTorresFirm.com

Mike Melick - mmelick@barrcamens.com

Kristine Bui - kristina@mediaguildwest.org

Stephanie Basile - sbasile@cwa-union.org

Region 28 Regional Director Cornele A. Overstreet –

Cornele.Overstreet@nlrb.gov



Rebekah Ramirez
Counsel for Phoenix New Times, LLC