

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

PHOENIX NEW TIMES, LLC

and

Case 28-RC-254936

THE NEWSGUILD-CWA

**UNION'S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF THE
REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

Pursuant to Section 102.67(f) of the Board's Rules and Regulations, the NewsGuild-CWA (the "Union"), files this Opposition to Phoenix New Times, LLC's (the "Employer") Request for Review of the Regional Director's Decision and Direction of Election issued on April 15, 2020 (the "Decision").

Presuming without agreeing that the Employer's Request for Review was timely e-filed with the Board, the Employer's Request for Review is without merit and should be denied in its entirety.

In support of its Opposition, the Union states as follows:

Introduction

The Employer sought to exclude all employees with the title "editor" from the bargaining unit, on the basis they were supervisors or managerial employees. They included the Culture Editor, Food Editor, and Social Media Editor. In addition, the Employer sought to exclude the Creative Director of Print as a managerial employee. Nothing in the record supported that these individuals were supervisors or managers. Indeed, the Regional Director properly included all of them in the unit, with the exception of the Culture Editor. The Regional Director found that the Culture Editor was a supervisor because he oversaw an internship program. The Employer also

sought to exclude the Fellows on the basis that they were temporary employees. The record was clear, however, that the Fellows met the requirements to constitute being a part of the bargaining unit.

I. The Food Editor (Lauren Cusimano)

The Employer challenges the Regional Director's inclusion of the Food Editor, Lauren Cusimano ("Cusimano"), in the bargaining unit but does not seek to challenge the Regional Director's inclusion of other alleged supervisor and/or managerial employees it sought to exclude from the bargaining unit. The Employer relies on unsupported and conclusory claims to support its position that the Food Editor must be a supervisor. Notably, with respect to managerial status, the Employer raised the same basis for excluding the Social Media Editor and the Creative Director of Print from the bargaining unit as it did with the Food Editor. The fact that the Employer does not seek to challenge the inclusion of the other alleged managerial employees is telling of the fact that the Employer lacks the evidence to support a managerial finding. The Employer, again, produces no evidence that would remotely indicate the Food Editor is a managerial employee.

A. The Food Editor Does Not Exercise Any Supervisory Duties

The Regional Director found there was no evidence that the Food Editor, either in the past or present, had any direct reports, nor was there evidence that the Food Editor was notified of being granted any such authority. (Decision at 8). The Employer would have the Board disregard the Regional Director's factual findings based on the record as a whole and instead credit the testimony of its representative, Christine Brennan, who only made conclusory, unsupported statements about the Food Editor's alleged supervisory status.

Contrary to the Employer's assertion, the record does not support a finding that the Food Editor had any supervisory authority over the Food Critic, Chris Malloy. To the contrary, the

record supports that Cusimano did not exercise any authority over Malloy or any other employee; Cusimano has no authority over Malloy's work and position as a restaurant critic (Tr. Tr. 300:10-23, 304:20-23), and she does not have the authority to hire or fire anyone (Tr. 305:11-22). Specifically, as to Malloy, he is more of a fixture as a food critic with the Employer, and neither Cusimano nor the freelancers are allowed to enter his domain. (Tr. 305:3-10). Even the Employer's own organization chart, which was admittedly created for use at the representation hearing, thus conceivably rendering the chart unreliable, shows that the Food Editor only worked with freelancers. *See* Employer's Request for Review, Ex. 1. These facts make *Henry Colder Co.*, as relied on by the Employer, inapplicable to this matter. 163 NLRB 105 (1967).

Moreover, the record testimony of its own witnesses makes clear that it was the Employer's choice to change its operations and use freelancers instead of full-time employees. (Tr. 155, 173, 203-4). In fact, the editor in chief testified that the hiring of freelancers is very necessary to the operations, and every penny should be spent on employing freelancers so there is diversity of voice, and editors are not doing all the writing. (Tr. 57:9-25, 58:1-2). Cusimano testified she did not have the authority to hire employees, and the speculative and conclusory contradictory statements from the Employer that she could hire an employee should freelancer Food Critic Malloy leave is not consistent with the Employer's admitted choice to operate with freelancers, nor is it sufficient for a finding of supervisory status. (Tr. 303-5); *Volair Contractors*, 341 NLRB 673 (2004); *Sears, Roebuck & Co.*, 304 NLRB 193 (1991) (conclusory evidence not sufficient). Notably, Cusimano's testimony that Food Critic Malloy's role as a restaurant reviewer comes from a different budget than hers, and thus she does not have the authority to remove him, was undisputed. (Tr. 303-5)

Therefore, the Employer's claims that the Regional Director did not address its cited precedent regarding supervising a one-man department and the historical supervisory role of the Food Critic is unpersuasive; such evidence does not exist in the record. Nonetheless, the Regional Director specifically considered both issues when determining there was a lack of evidence to establish that any previous Food Editor had a direct report, was authorized to hire a direct report, or sought to hire a direct report. As correctly noted by the Regional Director, the lack of evidence is construed against the party asserting supervisory status, in this case, the Employer. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999).

B. The Food Editor is Not a Managerial Employee

The Employer wrongly claims that the Regional Director did not assess the NLRB's most recent precedent in *The Republican Co.*, 361 NLRB 93 (2014), to determine the managerial status of the Food Editor. The Employer is wrong. The Regional Director specifically analyzed the managerial status of the employees at issue under the Board's review of news media organizations, including *The Republican Co.* (Decision 8-9).

The evidence simply does not exist that the Food Editor exercises any managerial duties. Cusimano does not formulate or effectuate management policies, and there is no evidence she has discretion in the performance of her job independent of the Employer's established policy. *See General Dynamics Corp.*, 213 NLRB 851, 857 (1974). Simply issuing Cusimano the title of "editor" does not designate her a managerial employee.

1. Independent Judgment

The Employer's reasoning that the Food Editor is a managerial employee radically departs from existing NLRB precedent on managerial status in the news industry, including that of *The Republican Co.*, as more fully set forth below. The Employer attempts to force managerial status

on the Food Editor on the belief that she exercises independent judgment in “managing” the food vertical. For decades the NLRB has recognized that “a purely journalistic judgment as to the probable importance of a particular story to the paper’s readership and a technical judgment as to the best placement of the story in the news section so as to insure that the story comes to the reader’s attention” does not make one a managerial employee. *Bulletin Company*, 226 NLRB 345, 359 (1976); *see also The Washington Post Co.*, 254 NLRB 168, 209 (1981) (“Choosing stories for placement in the newspaper is not a managerial decision, but rather a journalistic and technical judgment as to the importance of the story to the paper’s readers and the manner in which to bring that story to the reader’s attention.”).

The Food Editor does not exercise independent judgment any more than any other member of the staff writers. Indeed, staff writers even testified to having “filled in” for section editors when they were out. All editors and staff writers testified that they choose what stories they will write and they all “pitch” their story to their respective editor and to each other. Stories are rarely, if ever, turned down by the vertical editor.

Journalists, by the nature of their role in generating original content, are always engaged in a creative and autonomous process. The Employer argues that the Food Editor is a managerial employee because she decides which “pitches” to accept from freelancers. The Employer also cites to conclusory statements made by its representative, Brennan, that Cusimano exercises “discretion” with respect to the “vision” of the Food vertical. However, the evidence supports that all of the Employer’s editorial employees, including staff writers, use independent judgment to decide what stories to write about, what facts to use, and what sources to rely on. All of these tasks rely on independent thought and autonomy. Vesting an editorial employee with autonomy does not make them a manager. *See Bakersfield Californian*, 316 NLRB 1211, 1216 (1995).

2. *Policies*

There is no evidence that the Food Editor creates policy of any kind. In fact, all witnesses who were asked about policies had a difficult time coming up with an example of an employer policy. The two policy examples that were provided were created by “corporate”. These policies are:

(1) Policy to Inform Corporate and Legal of Stories Involving Sexual Misconduct: Christine Brennan, Executive Director of Voice Media Group, testified that she created a policy that all reporting of sexual misconduct must be submitted to corporate and its counsel before publishing; and

(2) Style Policy: Writers, including the vertical editors, are required to follow a certain writing style, the AP Style. Should they deviate from this style, they will “hear” from the Editorial Operations Manager, Jennifer Goldberg, who will either correct the writing or instruct them to correct it.

3. *Selection of Freelance Stories*

The fact that the Food Editor receives stories from freelancers does not make her a manager or supervisor. There is no evidence that the Food Editor created or contributed in any way to the contract signed by the freelancers; the vertical editor merely provides the contract to the freelancer for signing. Christine Brennan testified that she ordered the vertical editors to hire freelancers, yet another example of the vertical editors not exercising independent judgment. Moreover, the rates the vertical editors pay the freelancers are the rates traditionally paid by the Employer. Knowledge of rates has been handed down to them by their predecessors. The vertical editors do not contribute to the formulation of the freelance budget and how much will be allocated to each editor. They receive their budget from corporate and are ordered to use it. Having the responsibility to select

freelance writers and being under “corporate” order to hire and pay freelance writers does not make vertical editors managers. *See Bakersfield California*, 316 NLRB at 1216.

The Board long ago noted that the authority to purchase freelance material does not prove managerial status. *See The Washington Post Co.*, 254 NLRB 168, 209 (1981). Nor is there managerial authority because an employee has limited discretion on what to pay a freelancer, where the employee has no authority to set the overall budget for his department. *Id.* at 202. As the Board noted in *The Washington Post*, an editor’s selection of stringers, i.e., independent contractors, to write stories from amongst a group of choices and their payment from within a “limited amount of funds” does not make one a managerial employee. *Id.* at 202.

The Employer is also completely misplaced in trying to make the jobs of the Food Editor in this matter appear exceptional and unique compared with section editors at large national publications, such as the Washington Post, who are consistently found by the Board to be part of large newsroom bargaining units with other journalists, including staff writers and reporters.

In fact, the Board long ago dismissed the arguments raised by the Employer here. In *The Washington Post*, the Board rejected the Employer’s argument that the editor of the paper’s Travel section, which had no other employees within it, was a manager. As with the editors here, the Post’s Travel editor was “responsible for selecting material to be placed in the Travel section”, most of which was “procured from freelancers.” *Id.* at 209. The editor’s duties included “selecting and paying for freelance material” and included “utilize[ing] a budget to travel for investigatory trips. The budget for the Travel section...is determined before each fiscal year.” Furthermore, the Travel editor had “discretion to pay freelancers a fee usually amounting to between \$25 and \$100, with an average fee of approximately \$75.” *Id.*

Based on these facts, which are strikingly similar to the editors here, the Board determined that the Travel editor was not a managerial employee, explaining that “the Travel editor is limited to a predetermined number of pages and a budget determined by superiors...The exercise of judgment in purchasing freelance material and deciding what trips to embark on does not amount to the use of discretionary judgment in implementing or determining employer policy” and held that the editor should be included in an editorial unit including staff writers. *Id.*

Under similar reasoning, the Board in *The Washington Post* decision likewise concluded that neither the Living Editor, the Executive Food Editor, or the Food Editor were managerial. Regarding the Living Editor position, the Board concluded that the authority to purchase freelance material does not prove managerial status, and explained further that “[a]lthough the editor has some discretion in making payments for freelance material, it is clear that such payments are made within set parameters.” *Id.* Finally, the Board explained that “the editor’s participation in planning what will appear in the section does not demonstrate managerial status. Choosing stories for placement in the newspaper is not a managerial decision, but rather a journalistic and technical judgment as to the importance of the story to the paper’s readers and the manner in which to bring that story to the reader’s attention.” *Id.*

In the case of the two Food editors, again the Board in *The Washington Post* case was quite clear in rejecting the strikingly similar arguments raised by the Employer here. The Board noted that “the Food editors prepare their subsection for publication, write their own articles, procure freelance work and read submitted manuscripts for publication.” Further, the Executive Food editor had discretion to pay freelancers in the “range between \$40 and \$100.” The Board again emphasized that “we do not find the authority to use freelancers to be managerial in nature.” *Id.*

C. Under *The Republican Co.*, The Food Editor is Not a Managerial Employee

The Employer is wrong in its belief that *The Republican Co.* sets new precedent. In that case, the Board analyzed the duties of an editorial page editor under the Board's longstanding precedent on managerial status. Simply, the Board found sufficient facts that the editorial page editor was a manger. The editorial page editor exercised considerable discretion within the employer's policies when assigning political pieces to editorial staff writers and determining what stance the newspaper should take on new issues. *Id.* at 96. No such facts exist in this case.

In *The Republican Co.*, the editorial page editor had institutional knowledge of the employer given his longevity with the company, and for that reason, his input was solicited by the less senior publisher as to which political candidates the employer should endorse. *Id.* at 94. He was responsible for the content of the editorial page that expressed the opinion of the newspaper. *Id.* at 96. He selected the editorial topics of the day and assigned an editorial staff writer who reported to him to write on what he had selected. *Id.* at 96. The editorial page editor also had final say over which "letters to the editor" would be published from those selected by co-editors. The facts in *The Republican Co.* are clearly distinguishable from the facts related to the Food Editor in this case.

The Employer reads conclusions into *The Republican Co.* that are simply not present. In *The Republican Co.*, the Board did not undo precedent related to the managerial status of editorial employees. Rather, the Board reviewed the case under its longstanding precedent of whether the editorial page editor formulated, determined, and effectuated the newspaper's editorial policies. *Id.* at 96. The Board disapproved of the regional director basing the decision of whether the editorial page editor was a managerial employee based upon who had final authority to approve his selections. *Id.* As stated by the Board, a finding of managerial status does not depend on a finding of "final authority" because "the relevant consideration is effective recommendation or

control.” *Id.* (citing *NLRB v. Yeshiva University*, 444 U.S. 672, 684 fn. 17). Thus, not only is the Employer’s analysis of *The Republican Co.* misplaced, but it is also completely wrong.

In this case, none of the criteria to classify someone as a managerial employee are present. For this reason, the Regional Director did not err in his decision.

II. Fellows

The Employer further contends that the Regional Director erred by including Fellows in the bargaining unit. It claims that they are temporary employees with no expectation of full employment beyond their fellowship. To support this claim, it alleges that the Regional Director erred by treating them akin to medical school graduates and by finding that a majority of them became employees after their fellowship ended. As to the former, the Regional Director used the appropriate legal standard based upon relevant Board precedent to determine whether a majority of fellows ultimately obtain permanent employment. See, *Boston Medical Center Corp.*, 330 NLRB 152 (1999); *General Electric Co.*, 131 NLRB 100 (1961).

As to the latter, there is no dispute with the Regional Director’s finding that while there is no guarantee of future employment, Fellows are notified that they will get first priority for hiring, and that their six-month term is extended when the Employer anticipates an openings for a staff writer position in order to retain the fellow as a staff writer. In fact, Employer’s Exhibit 20, which is a solicitation for Fellow applications, touts the fact that, since 1999, 87 employees completed the fellowship and 64% have been hired. Thus, the Regional Director’s finding that a majority successfully completed the time limited training positions and retained permanent employment is factually accurate based upon the Employer’s own public-facing document.

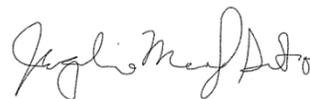
The Employer contends that some fellows are hired to work at another Employer’s outlet, and that since 2013, only 11 of 27 fellows have gotten permanent employment and of those 27,

only four went to the Phoenix New Times. However, the record evidence, which includes its own documents, confirms, rather than disputes, the Regional Director's finding that a majority of fellows obtained permanent employment at Phoenix New Times. Specifically, Employer's Exhibit 21 is a spreadsheet that shows nine individuals who worked as fellows at Phoenix New Times. Of those, four were hired to work permanently at Phoenix New Times, one was extended with the current status unclear (marked N/A), and one was still in the fellowship program. Subtracting those two from the equation, four of seven fellows working at the Phoenix New Times were hired on permanently for the Phoenix New Times and none were hired for another Employer outlet. Thus, a majority of fellows working at Phoenix New Times became permanent hires.¹

Conclusion

In conclusion, there is no basis to grant the Request for Review as the Regional Director did not depart from officially reported Board precedent, nor is his decision on a substantive factual issue in the record clearly erroneous. Based on the record evidence and relevant Board precedent, the Regional Director appropriately found that Food Editor and the Fellows should be included in the bargaining unit. Therefore, the Employer's Request for Review should be denied.

Respectfully submitted,



TORRES LAW GROUP, PLLC
Jacqueline Mendez Soto
Counsel for Petitioner/Union

¹ One additional fellow from Broward was hired on permanently at the Phoenix New Times.

CERTIFICATE OF SERVICE

I certify that, on August 11, 2020, a copy of the foregoing was e-filed to the Board via the Executive Secretary's Office, and was served electronically upon the following:

Rebekah Ramirez
Alexander Preller
FaegreDrinker
300 N. Meridian, Suite 2500
Indianapolis, Indiana 46204
Rebekah.Ramirez@FaegreBD.com
Alex.Preller@Faegredrinker.com

Michael Melick
mmelick@barrcamens.com

Kristine Bui
Kristina@mediaguildwest.org

Stephanie Basile
sbasile@cwa-union.org

Cornele A. Overstreet
Region 28
Cornele.Overstreet@nlrb.gov

/s/Monse Vejar